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The Reflection on Interplay of Judicial Review and Rule of Law

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ABSTRACT

A public body's choices, actions, and even inaction might be subject to judicial review if they violate the law. In the Upper Tribunal, it is a court procedure brought before the Administrative Court, a division of the High Court. As far as this guidance is concerned, all courts' fundamental facts of judicial review are identical. Central and municipal governments must follow the law while making decisions or acting. If they don't, then they've broken the rule. "The rule of law" refers to the body of law that governs the actions of government entities. Principles of public law guarantee that government entities carry out their legal obligations do not misuse their authority and operate in a manner that respects the human rights of the people they influence. Those harmed by an illegal act or decision by a government agency might take action in many ways. An effective constitution relies heavily on the "rule of law," which serves to restrain the government's efforts. When it comes to defining the rule of law, there is a lot of debate. Dicey saw that government officials had a lot of leeways when making decisions. A special administrative court was established to resolve disputes between government officials and private citizens. This was not a typical law case; instead, the administrative court created the applied law.

Keywords: *Rule of law, Judicial Review, administrative constraints*.

I. INTRODUCTION

In Judicial review challenges a public body's decisions, acts (and sometimes the failure to act because it has not been conducted lawfully. It is a court procedure, brought in a branch of the High Court known as the Administrative Court, or about specific types of cases,1 in the Upper Tribunal. For this guide, the essential facts about judicial review in the Administrative Court and the Upper Tribunal are the same. For simplicity, we will refer only to the Administrative Court in the rest of this guide and mention the Upper Tribunal only where there is a significant difference. Under the judicial review procedure, judges examine (or "review") the decision being challenged in the claim and consider whether the public body has correctly followed the

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law. As well as the claimant (who seeks to change the decision) and the defendant (who has made the decision), other parties who want to be involved in the case – because they are concerned that they will be affected by the outcome – may be able to intervene.

Public bodies such as central and local governments have to obey the law in making decisions and acting. Where they don't, they can be said to have acted unlawfully. The type of law governing the conduct of public bodies is known as 'public law'. Public law principles ensure that public bodies discharge their legal duties, do not abuse their powers, and act compatibly with the human rights of those affected by their actions. Where a public body works unlawfully, there are several ways that those affected can challenge that behaviour or decision. The most common of these are complaining using public bodies' complaints procedures and exercising rights of appeal to a tribunal (if such rights exist about the particular decision to be challenged, such as in welfare benefits cases). Suppose a person can make a further complaint to or about the public body, or they can appeal the decision. In that case, it is usually not necessary (or appropriate) to use judicial review.

II. GROUNDS FOR JUDICIAL REVIEW

Acting outside their powers, public bodies are generally only free to do what the law says they can do. With some exceptions, the law is set out in Acts of Parliament and secondary legislation (specific things like regulations, rules, and orders) made by government ministers. So, with some exceptions, every decision a public body takes must be authorised by a piece of legislation, which will define any limits on the public body's powers. Public bodies must correctly understand and apply the law regulating and limiting their decision-making powers. If they do not follow the law perfectly, any resulting decision, act, or failure to act will be unlawful.

(A) Discretion by Public Authorities:

Use of Discretion by Public Authorities As well as the limits placed on public bodies' powers in legislation, the judges have developed public law rules over many years that impose further restrictions on what public bodies can do. For example, where the law gives a public body the 'discretion' to decide as it sees fit, public law regulates the public body's power in several ways, including by requiring it: z to take into account only relevant information and to disregard all irrelevant information; to address the right question, and take reasonable steps to obtain the information necessary to make a properly informed decision; and, z to make sure they have not limited, or 'fettered', their discretion by applying a very rigid policy as if it were the law.

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(B) Irrationality and proportionality:

The courts[3] may intervene to quash a decision where they consider it so unreasonable to be "irrational" or "perverse". The test is whether a conclusion "is so unreasonable that no reasonable authority could ever have come to it". This isn't easy to show in practice, and it is usually argued alongside other grounds. In some cases, mainly where European law or human rights law regulates the public body's powers, a public body is required to act proportionately. The concept of proportionality involves a balancing exercise between the legitimate aims of the state on the one hand and the protection of the individual's rights and interests on the other. The test is whether the means employed to achieve the aim correspond to the importance of the purpose and are no more intrusive on the rights of the individual affected than is necessary to achieve the goal. By way of example, to use a sledgehammer to crack a nut (when a nutcracker would do) would not be acting proportionately.

(C) Fairness of Procedure

A public body must never abuse its power by acting unfairly. If you are affected by a decision that a public body (including courts and tribunals) will take, you must be treated fairly. That means, among other things, that you are entitled to know the case against you if there is one and have an excellent opportunity to put your case. A public body must be – and be seen to be – impartial; that is, it must not give the appearance of being biased (whether or not it is narrow). It must not allow decisions by people who have a financial interest in the outcome or a personal relationship with one of the parties that could give the appearance of bias. If there are express procedures laid down by law that a public body must follow to reach a decision, it must follow them. For example, a public body may be under a duty to consult people who it believes may be affected by a decision before the decision is made, perhaps because the law says there is such a duty, or perhaps because people have been consulted on similar proposals in the past and so have a reasonable expectation that they will be consulted again.

III. ALTERNATIVES TO JUDICIAL REVIEW

Suppose there are other effective ways of challenging a decision, act or failure to act. In that case, you will be expected to use them or justify why you have applied for judicial review when you could have used a different procedure. Judicial review is generally a remedy of last resort.

[3] Council of Civil Service Union and others v Minister for the Civil Service [1984] 3 All ER 935 (HL) 727 per Lord Diplock

(A) Tribunals:

An example of an alternative remedy that will almost always be considered adequate (and so which will make judicial review impossible) is having a right of appeal to another court or tribunal. For example, if you apply for Job Seekers' Allowance, and your application is refused, there will be a right of appeal to the First-Tier Tribunal, which you will be expected to exercise rather than applying for judicial review – unless you can show that appealing to the Tribunal is not an adequate remedy in your case. An appeal can be more effective than an application for judicial review because an appeal tribunal may be quicker and more expert. And if you win a request, the tribunal will usually substitute its own decision for the decision appealed against.

(B) Complaints:

If there is no right of appeal, you could consider making a complaint under the public body's complaints or dispute resolution procedure. This may be adequate where the complaint concerns disputed facts and where you can afford to wait some time for resolution

(C) Ombudsman Schemes:

Using the complaints procedure does not result in a satisfactory resolution. You can often complain to an ombudsperson (for example, the Parliamentary and Health Service Ombudsman) if your complaint concerns the central Government or the NHS or the Local Government Ombudsman if your complaint concerns a local authority). Ombudspersons will generally investigate complaints of maladministration.

IV. FOX-HUNTING CASE: PAVING THE WAY FOR THE FUTURE

Jackson and others v Attorney General[4] can be said to be a case of constitutional significance in recent times. It did not just bring into question the Hunting Act of 2004 but also the 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 this Article and care of the sovereignty of the Parliament is, strictly speaking, obiter dictum but worth analysing as they delve into the changing mindset of their Lordships regarding core constitutional issues.

Furthermore, Lord Hope reiterated almost the same point of view in the following words: "The sovereignty of Parliament dominates our constitution. But Parliamentary Sovereignty is no longer, if it ever was, absolute…It is no longer right to say that its freedom to legislate admits no qualification whatever. Step by step, gradually but surely, the English principle of the

[4] [2006] 1 AC 262

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absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified."

V. RULE OF LAW

(A) Introduction

The 'rule of law' is widely accepted as a critical part of an effective constitution; its principal function is to constrain government action. There is a significant disagreement initially on defining the rule of law. The law practice has been referred to as a 'wrapper' placed around a bundle of constitutional principles. At one extreme, the rule of law is merely a rhetorical device or a political philosophy, and its content is unimportant (the content-free view). At the other extreme, the rule of law determines the validity of the law, so laws that conflict with its principles are invalid (content-rich statement). In the UK, the rule of law functions in two ways: firstly, courts should interpret legislation to give effect to the rule of law; secondly, the rule of law determines the validity of government action and some legislation. This is how the rule of law functions, but opinions vary on the concept known as the rule of law.

(B) Historical Background: Rule of Law

In the late Roman period, the view was established that royalty was above the law and subject only to the law of God and not to other men. The path to the institutionalism of the rule of law advanced and weakened at times. The Magna Carta 1215 enshrined the principle that the King was not above the law. Barons demanded that King John accept the Charter after a period of domestic unrest due to the King's focus on foreign war and his raising of taxes to finance the war with France.

In Prohibitions del Roy (1607, published 1656 (1572-1616 12 Co Rep 63), Sir Edward Cooke asserted that the King could not act as a judge using his reason to reach decisions but should be tried by judges who applied the law to the facts. Petition of Rights 1628 was a petition from the Barons to the King to remind him of the principles of the rule of law established in the Magna Carta. The Petition of Rights extended the power of law and due process to encompass some implied terms of the Magna Carta.

The right of Habeas Corpus is an essential feature of the rule of law and is not explicitly mentioned in the Magna Carta but is subject to much future legislation. It matured in legal terms in the Petition of Right. It requires a detainee to be brought before the court, so the legality of their detention can be determined, and if not, the prisoner must be released.

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The Habeas Corpus Act 1679[5] legislated explicitly that a detainee was entitled to be brought before a court to subject their detention to judicial and hence legal scrutiny. The Bill of Rights 1689 stated that law could not be made, repealed or suspended without the will of Parliament. The Crown could not manipulate the court system, and subjects were now able to bring action against the Monarch. The Monarch and courts could not subvert the requirements of habeas corpus. The Bill also sets out the basic principles that determine the operation of the rule of law. The scope of the rule of law remained vaguely defined during this period.

(C) Defining the Rule of Law

Throughout the 20th century, the rule of law has become a term of widespread academic debate, court judgments and parliamentary debates. It is referred to in section 1 of the Constitutional Reform Act 2005[6], the preamble to the European Convention on Human Rights 1950 and the preamble to the Treaty on European Union.

Lord Bingham, in 'The Rule of Law' (2007)[7], argued that

'The core of the existing principle is … that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of publicly and prospectively promulgated and publicly administered in the courts.

Lord Bingham subsequently defined eight sub-rules:

1. Law should be accessible, transparent and predictable;
2. The application of the law should decide questions of legal right and liability;
3. The law of the land should apply equally to all, except when objective difference requires differentiation;
4. Public officials should exercise their powers in good faith and not exceed their powers;
5. The law must protect fundamental rights;
6. A method should be provided, at a reasonable cost, to resolve civil disputes;
7. The state must provide adjudicative procedures should be fair;
8. The rule of law requires the state to comply with its obligations in international law.

[5] Habeas Corpus Act 1679, https://www.legislation.gov.uk/aep/Cha2/31/2/contents
[6] The rule of law
This Act does not adversely affect—
(a) the existing constitutional principle of the rule of law, or
(b) the Lord Chancellor's existing constitutional role in relation to that principle.
[7] 66 CLJ 67-69

The European Commission adopted this list on Democracy Through Law in 2011.

1. The Great Charter: Magna Carta

On June 15, 1215, in the meadows of Runnymede, King John and his rebellious barons agreed to the great charter known as Magna Carta. The great charter was the first significant written instrument limiting the king's power and confining him to what the barons regarded as good governance. These promises were a bargain between the king and the feudal lords dictated by the force of arms.[8]

2. Dicey's Concept of Rule of Law

Dicey developed the contents of his thesis by peeping from a foggy England into a sunny France. In France, Dicey observed that the government officials exercised broad discretionary powers. If there was any dispute between a government official and a private individual, it was tried not by an ordinary court but by a special administrative court. The law applicable in that case was not common law but a special law developed by the administrative court. From this, Dicey concluded that this system spelt the negation of the concept of the rule of law, which is the secret of an Englishman's liberty. Therefore, dicey concluded that there was no administrative law in England.[9] Dicey's formulation of the concept of the rule of law, which according to him, forms the basis of the English constitutional law, contains three principles.

(a) Absence of discretionary power in the hands of the governmental officials:

By this, Dicey implies that justice must be done through known principles. Discretion means an absence of rules; hence, there is room for arbitrariness in every exercise of discretion.

(b) No person should be made to suffer in body or deprived of his property except for a breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense, the rule of law implies:

- Absence of special privileges for a government official or any other person
- All persons, irrespective of status, must be subjected to the ordinary courts of the land.
- Everyone should be governed by the law passed by the ordinary legislative organs of the state.

(c) The rights of the people must flow from the customs and traditions of the people recognised by the courts in the administration of justice. Dicey's thesis has its advantage and merits. The doctrine of the rule of law proved to be an effective and powerful weapon in

[8] https://www.bl.uk/magna-carta/articles/magna-carta-an-introduction
[9] https://publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15115.htm

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keeping administrative authorities within their limits. It served as a touchstone to test all executive actions. Almost all legal systems accepted the broad principle of the rule of law as a constitutional safeguard.

- The **first principle**[10] (Supremacy of law) recognises a cardinal rule of democracy that every government must be subject to regulation and not law subject to the government. It rightly opposed arbitrary and unfettered discretion to the governmental authorities, interfering with citizens' rights.
- The **second principle**[11] (equality of law) is equally essential in a system wedded to a democratic polity. It is based on the well-known maxim "however high you may be, the law is above you" and "all are equal before the law".
- The **third principle**[12] emphasises the judiciary's role in enforcing individual rights and personal freedoms irrespective of their inclusion in a written constitution. Dicey feared that mere declaration of such rights in any statute would be futile if they could not be enforced. He was right when he said that a law could be amended and fundamental freedoms could be abolished. We have witnessed such a situation during an emergency in 1975 and realised that a written constitution is meaningless without a solid and robust judiciary.

Dicey's antagonism was based on his supposition that law meant fixed rules and involved administration exercise of discretion not controlled or guided by regulations. His dislike of exercise of discretionary authority, if understood, may appear illogical, for, in every decision, judicial or administrative, there is a vast field of discretion. Administration of justice is not a mechanical process inevitably leading to a set result from facts. It involves a large area of choice. It would be a perversion of the actual quality of justice to attribute to the adjudicator or judge a mechanical approach. Again, there is no reason to suppose that an administrative authority exercising power vested by law does not do justice merely because it has discretion in formulating its line of action.[13]

VI. JUDICIAL INTERPRETATION OF THE RULE OF LAW

The courts have interpreted the rule of law through a selection of cases that have examined the legality, the irrationality or the procedural impropriety of the actions of the executive or public

[10] https://plato.stanford.edu/entries/rule-of-law/
[11] https://blog.ipleaders.in/rule-of-law/
[12] Barro, R., 2000, "Democracy and the Rule of Law", in Governing for Prosperity, B. de Mesquita and H. Root (eds.), New Haven: Yale University Press.
[13] Bentham, J., 1970 [1782], Of Laws in General, H.L.A. Hart (ed.), London: Athlone Press.

bodies or whether their activities conform to the Human Rights Act 1998. The main principles of the rule of law and judicial interpretation are considered here.

(A) No one must be punished by the state except for a breach of the law:

- Punishment without trial has been brought back into focus due to anti-terrorism legislation, including Section 1 of the Anti-Terrorism, Crime and Security Act 2001[14] (now repealed).
- In A and others v Secretary of State for the Home Department[15], it was held indefinite detention without trial was always illegal; its justification had to be utterly exceptional.

(B) Government under the law; equality before the law:

- In Entick v Carrington[16], Lord Camden CJ held: 'By the laws of England, every invasion of private property, be it ever so minute, is a trespass.'
- In M v Home Office and another[17], the executive's principle is subject to complete judicial oversight was upheld.

(C) Individuals' rights are protected through the ordinary law and the ordinary court system:

- The judicial review process allows an individual to challenge a decision of the executive through the courts.
- In R (on the application of G) v IAT and another; R (on the application of M) v IAT and another[18], the CA found that an alternative statutory regime, although not as extensive as judicial review, did provide access to judicial scrutiny and oversight of judicial action. It was not found to breach Article 6 (the right to a fair trial) of the ECHR.

(D) Legal certainty and non-retrospectivity:

- The rule against the retrospectivity of criminal law was upheld in the joint cases of R v Rimmington; R v Goldstein[19].

(E) Fair hearing by an independent judiciary

- In Matthews v Ministry of Defence[20], the HL held that a section of a statute did not

[14] https://www.legislation.gov.uk/ukpga/2001/24
[15] [2004] UKHL 56
[16] (1765) 19 St Tr 1029
[17] [1994] 1 AC 337 HL
[18] [2005] 2 All ER 165
[19] [2006] 2 All ER 257, HL
[20] [2003] 1 All ER 689, HL

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offend against the right to a fair trial under Article 6 ECHR[21], because it did not bar the courts from considering the case.

- In R (on the application of Anderson) v Secretary of State for the Home Department[22], the mandatory murder tariff was left in the hands of the Home Secretary, but this was subject to review by the courts as to whether the executive had breached Article 6 in affording the tariff.

VII. CONCLUSION

All of this leads to limited conclusions. The values of a democratic society can only be furthered by including judicial review alongside political and bureaucratic processes in democratic constitutions. For as long as it adheres to those principles, judicial review does not represent a threat to democracy. Most of its responsibilities could not be accomplished in any other manner. Make sure that its practitioners are aware of their role and keep within the parameters of their mandate. There are many ways to do this, including a written constitution that includes a justiciable bill of rights that provides specific protection for Section 1's "higher-order democratic rights." If that is not possible, the judges must find an explanation for their viewpoint in their democratic philosophy to justify their position. They are not operating in an undemocratic manner; instead, they are attempting to establish democracy independently, without the assistance of the democratic movement. For an independent inquiry, reform of judicial review could appropriately define the terms of reference to discuss possible and likely constitutional consequences. All three options are available. To begin with, the government or Parliament may opt to do nothing at all or both. Following a study of how best to implement reforms by the rule of law, efficiency measures may be implemented. Thirdly, judicial review reform may include steps that could destabilise current constitutional arrangements and understandings and perhaps cause a constitutional crisis.

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[21] https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf
[22] [2002] 4 All ER 1089, HL

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