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A.R. Brewer-Carías



JUDICIAL REVIEW IN COMPARATIVE LAW

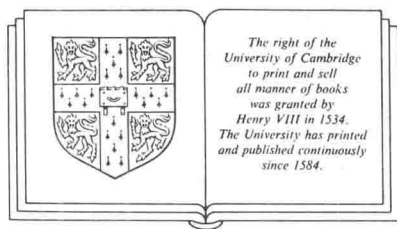
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FOREWORD

When he accepted appointment as Simón Bolívar Professor of Latin American Studies at Cambridge for the year 1985–86, Professor Allan R. Brewer-Carías also accepted assignment to the University's Faculty of Law and agreed to deliver a course of lectures in the Faculty's LL.M. programme for that year. The subject he chose was 'Judicial Review in Comparative Law', and this book contains the substance of his lectures, corrected and revised for publication.

The good fortune of the Faculty in having Professor Brewer-Carías as one of its members for the year will be apparent to all who read this book. The lectures themselves were prepared by the author in English, which is not even his second but his third language, and though some linguistic correction was necessary before publication, the book is not a translation from the author's native Spanish. The effort that this cost him can only be imagined, but there can be no doubt of the value to the reader that no translator is interposed between the author and himself. What is more, while the constitutionalisation of the '*Etat de droit*' – a phrase for which there is no adequate English translation – is a central theme and is a process which has only been discussed but never undertaken in this country, Professor Brewer-Carías is, or made himself, more than well enough informed about the peculiarities of English law to be able not only to deal fully with its relevant aspects at an early stage, but to present the whole of his material in a way calculated to make it readily understood by an English lawyer with little or no prior knowledge of other systems.

This does not mean that this is one of those comparative works which starts from a basis of English law. On the contrary, although 'judicial review' has come into the language of English law thanks to Order 53 of the Rules of the Supreme Court, and although Professor Brewer certainly could have written a book about administrative law, he has not done so here. His principal, if not his exclusive, concern in this book is judicial review of legislation and that, of course, we do not have.

Foreword

Most lawyers in the United Kingdom have by now become accustomed to discussion of the question whether we should introduce a 'Bill of Rights' or otherwise subject parliamentary legislation to judicial control of some kind within our own domestic legal systems. Nevertheless, most of them still seem to believe that the time-hallowed and still prevailing rule in this country about the supremacy of Parliament is in some sense 'natural': the legislation of Parliament can only be interpreted by the judges, never held to be without effect, still less formally annulled. To this elementary principle of democracy, it still seems to be thought by many, only the United States and perhaps some other federal countries with more than one legislature, need create an exception because otherwise they could not maintain the federal division of legislative competence dictated by the Constitution. The fact is, however, that in continuing to exclude judicial control of parliamentary legislation in any form, the United Kingdom finds itself in a tiny minority of developed countries outside the socialist part of the world. Even France, which formerly rejected such control notwithstanding the existence of a written Constitution, and which may be thought therefore to have made even more of Parliamentary supremacy than we do, has now developed through the *Conseil Constitutionnel* its own kind of *a priori* judicial review and two of the socialist countries – Czechoslovakia and Yugoslavia – have actually established constitutional courts. This book should, at least, provide an invaluable corrective to the insularity of our thinking.

It is no part of the business of a Foreword to summarise the contents of the book which follows. It must be said, however, that there is gathered here, probably for the first time and certainly for the first time in English, a wealth of information about the theoretical background and the variety of methods adopted in numerous different countries throughout the world for implementing the subjection of the state, including its legislative arm, to the law. It must also be said that it would be difficult to find anyone better qualified than Professor Brewer-Carías to undertake the mammoth task which the preparation of the original lectures and then this book required. Some of his work, it is true, has been devoted exclusively to the law and its administration in his own country Venezuela, where he has been a Substitute Senator, an Alternate Magistrate of the Supreme Court and President of a Presidential Commission on Public Administration as well as a practising and prolific academic lawyer. His interest in comparative public law, his research and his writings have, however, taken him far beyond the limits of Latin America into North America, Continental Europe and elsewhere. His reputation in those countries which English

Foreword

lawyers tend to lump together as countries of the 'civil law' has for many years been well established. His period as Simón Bolívar Professor in Cambridge and the publication of this book will guarantee that his international renown extends to this country as well. It is not only comparative lawyers but all those who care for the future of law and liberty in this country who owe him a debt of gratitude for the production of this book.

November 1987

J.A. Jolowicz

PREFACE

This book is an abridged and revised version of a course of lectures I wrote and gave during my tenure as Simón Bolívar Professor of the University of Cambridge, in the academic year 1985–86. The original version, written between September 1985 and May 1986, was the result of the progressive preparation of the forty-hour course of lectures which I gave, as Paper No. 20, on Judicial Review in Comparative Law, in the Degree of Master of Law (LL.M.) course at the Faculty of Law.

Of course, for its publication, the original version of the work needed to be revised, reduced and simplified, not only because of its original lecturing purpose, but mainly because it was written directly in English, which is not even my second language. To carry out this work, the Press suggested Mr Donald F. Bur, a graduate student in Cambridge, who did an excellent job.

I wish to thank Mr Derick Holmes, of the Studio Language Course in Cambridge, for his patient assistance in reviewing with me the original manuscript of my lectures, day by day, before they were delivered. Also, my thanks are due to Mrs Ana Gray, Secretary to the Simón Bolívar professors, who bore the brunt of typing the original version of my lectures and on whose skill I have greatly relied.

My love and appreciation to my wife, Beatriz, whose permanent support allowed me to cope with the intensive work of preparing and writing the lectures.

Finally, my gratitude to the Master and Fellows of Trinity College for the welcome and hospitality I received as a Fellow of the College, and particularly to my friend of many years, Professor J.A. Jolowicz who asked me to give the course of lectures on Judicial Review in Comparative Law that made this book possible. I remain most grateful for his foreword.

A.R.B.C.

CONTENTS

Foreword by Professor J.A. Jolowicz	xiii
Preface	xvii
Introduction	1
PART I: THE MODERN STATE SUBMITTED TO THE RULE OF LAW (<i>ÉTAT DE DROIT</i>)	
1 The modern <i>état de droit</i>	7
2 The limitation of power as a guarantee of liberty	9
(a) Theoretical background	10
(b) The American and French Revolutions	14
(c) The sovereignty of Parliament	16
(d) The distribution of power	19
3 The submission of the state to the law	21
(a) The sovereign and the law	21
(b) The law and the legal order	25
(c) The hierarchical or graduated legal system and the confines of the principle of legality	28
(d) The principle of legality and the executive	33
(e) The rule of law and Dicey's concepts	36
4 The declaration of fundamental rights and liberties	43
(a) Theoretical background and historical antecedents	43
(b) The American and French Declarations and their influence	47
(c) The situation of fundamental rights in the British constitutional system	50

Contents

PART II: THE PROCESS OF CONSTITUTIONALIZATION OF THE <i>ÉTAT DE DROIT</i>	55
5 The written constitutional process	57
(a) Historical origins	58
(b) The American Constitution 1787	60
(c) The French Constitution 1791	64
(d) The inspiration of France and America and Latin American constitutionalism	67
6 General trends of contemporary constitutionalism	71
(a) Constitutionalism	72
(b) Democracy and the people's sovereignty	73
(c) The vertical distribution of state powers: Federal States, decentralization and local government	75
(d) Separation of powers and the presidential system of government	77
(e) The role of the judiciary	77
(f) The entrenched declaration of fundamental rights and liberties	79
7 The <i>état de droit</i> and judicial review	80
(a) The judicial control of the conformity of state acts with the rule of law	81
(b) Judicial guarantees of fundamental rights and liberties	84
PART III: THE FOUNDATION OF JUDICIAL REVIEW OF THE CONSTITUTIONALITY OF LEGISLATION	87
8 The limited state organs and judicial review	89
(a) The relationship of state acts to the Constitution and their control	90
(b) The variety of judicial review	91
(c) The controlled and limited legislator	93
9 The Constitution and its supremacy	95
(a) The Constitution as a higher and effective law	95

Contents

(b) The English background to the concept of constitutional supremacy and American constitutionalism	97
(c) Supremacy and rigidity of the Constitution	103
(d) Supremacy and the unwritten constitutional principles	106
(e) The adaptation of the Constitution and its interpretation	109
10 The judicial guarantee of the Constitution	112
(a) Judicial review and the end of parliamentary absolutism	112
(b) Judicial review and its legitimacy	116
PART IV: THE DIFFUSE SYSTEMS OF JUDICIAL REVIEW	125
11 General characteristics of the diffuse system	127
(a) The logic of the system	127
(b) The compatibility of the system with all legal systems	128
(c) The rationality of the system	131
(d) Conclusion	134
12 The American system of judicial review	136
(a) Judicial review and judicial supremacy	136
(b) Judicial review as a power of all courts	138
(c) The mandatory or discretionary power of the Supreme Court	140
(d) The incidental character of judicial review	144
(e) The decision upon the constitutionality of the statutes	148
13 The diffuse system of judicial review in Latin America	156
(a) The Argentinian system	156
(b) The Mexican system of judicial review of constitutionality of legislation	163
14 The diffuse system of judicial review in Europe and other civil law countries	168
(a) The diffuse system of judicial review in Greece	168
(b) Judicial review in some of the Scandinavian countries	172
(c) The diffuse system of judicial review in Japan	174
15 Some aspects of the diffuse system of judicial review in Commonwealth countries	177

Contents

PART V: THE CONCENTRATED SYSTEMS OF JUDICIAL REVIEW	183
16 General characteristics of the concentrated system	185
(a) The logic of the system	185
(b) The compatibility of the system with all legal systems	186
(c) The rationality of the system	188
17 The origin of the European model of judicial review and the Austrian system of the Constitutional Tribunal	195
(a) The European antecedents	195
(b) The Austrian Constitutional Tribunal	196
(c) The Constitutional Tribunal and the judicial review	198
(d) The methods of control and the <i>ex officio</i> powers of the Constitutional Tribunal	199
(e) The effects of judicial review	201
18 Judicial review in the Federal Republic of Germany: the Federal Constitutional Tribunal	203
(a) The Weimar antecedents	203
(b) The concentrated system of judicial review in West Germany and its co-existence with a limited diffuse system of review	204
(c) The Federal Constitutional Tribunal as a constitutional jurisdiction	205
(d) The constitutional control of normative state acts through direct requests or complaints	209
(e) The incidental method of judicial review	211
(f) The indirect method of judicial review	212
(g) The effects of the decisions of the Federal Constitutional Tribunal on judicial review and its <i>ex officio</i> powers	213
19 Judicial review in Italy: the Constitutional Court	215
(a) The constitutional compromise and the Constitutional Court as its guarantor	215
(b) The jurisdiction of the Constitutional Court	217
(c) The scope of judicial review in the Italian system	219
(d) The incidental method of judicial review	220

Contents

(e) The direct method of judicial review and its regional scope	222
(f) The preventive method of judicial review of regional legislation	222
(g) The effects of the Constitutional Court decisions	223
20 Judicial review in Spain: the Constitutional Tribunal	225
(a) The Second Spanish Republic antecedents: the Constitutional Guarantees Tribunal	225
(b) The Constitutional Tribunal as a European model	226
(c) The direct control of the constitutionality of legislation	229
(d) The incidental method of judicial review of legislation	230
(e) The indirect means of judicial review of legislation	231
(f) The preventive judicial review system of legislation	232
(g) The effects of the decision of the Constitutional Tribunal on judicial review	233
21 Constitutional justice in the socialist European countries	236
(a) Judicial review in Yugoslavia: the Constitutional Court	237
(b) The control of constitutionality in Czechoslovakia: the Federal Constitutional Court	242
22 The concentrated system of judicial review in Latin America	243
(a) The Supreme Court as a concentrated organ for judicial review: Panama, Uruguay, Paraguay	243
(b) The parallel concentrated system of judicial review: Chile and Ecuador	244
23 Preventive judicial review in France: the Constitutional Council	251
(a) Historical background	251
(b) The Constitutional Council and its jurisdiction	252
(c) The preventive control of the constitutionality of non-promulgated legislation	255
(d) The preventive control of the distribution of normative competences	257
(e) The substantive control of constitutionality of legislation and the principle of constitutionality	259

Contents

24	The limited concentrated system of judicial review in Belgium: the Arbitration Court	261
PART VI: THE MIXED SYSTEMS OF JUDICIAL REVIEW		263
25	The control of the constitutionality of legislation in the Portuguese Republic	265
	(a) The principle of constitutional supremacy and its consequences	265
	(b) The diffuse system of judicial review and the direct appeal before the Constitutional Court	266
	(c) The concentrated system of judicial review and the powers of the Constitutional Court	267
	(d) The unconstitutionality by omission	269
26	The limited mixed system of constitutional judicial review in Switzerland	271
	(a) The absence of judicial review over federal legislation	271
	(b) The limited diffuse system of judicial review	272
	(c) The limited concentrated system of judicial review	272
27	The mixed system of judicial review in Venezuela	275
	(a) Constitutional supremacy and judicial review	275
	(b) The diffuse system of judicial review	277
	(c) The concentrated system of judicial review	279
	(d) Effects of concentrated control decisions	287
	(e) The question of the temporal effects of concentrated constitutional review	290
	(f) Judicial review and the fundamental right to constitutional protection (<i>derecho de amparo</i>)	299
28	The mixed system of judicial review in Colombia	310
	(a) The diffuse system of judicial review through the 'exception of unconstitutionality'	310
	(b) The direct control of constitutionality of legislation through a popular action	311
	(c) The preventive judicial review of legislation	314

Contents

29	The mixed system of judicial review in Brazil	315
	(a) Historical background	315
	(b) The diffuse system of judicial review	316
	(c) The concentrated system of judicial review	317
	(d) The indirect means for judicial review of legislation	319
30	The mixed system of judicial review in Guatemala and Peru	321
	(a) The Guatemalan system	321
	(b) The Peruvian system	324
	Notes	327
	<i>Index</i>	395

INTRODUCTION

Judicial review, in its original North American sense, is the power of courts to decide upon the constitutionality of legislative acts; in other words, the judicial control of the constitutionality of legislation.

It has been said that judicial review is the most distinctive feature of the constitutional system of the United States of America,¹ and it must be added that it is, in fact, the most distinctive feature of almost all constitutional systems in the world today. All over the world, with or without similarities to the North American system of judicial review, special constitutional courts or ordinary courts have the power to declare a law unconstitutional by declaring it null and void or by annulling it, and as a result refusing to enforce it.

This judicial review of the constitutionality of legislation, in other words of laws and other legislative acts, requires at least three conditions for it to function in a given constitutional system: in the first place, it requires the existence of a written Constitution, conceived as a superior and fundamental law with clear supremacy over all other laws; secondly, such a Constitution must be of a rigid character, which implies that the amendments or reforms that may be introduced can only be put into practice by means of a particular and special process, preventing the ordinary legislator from doing so; and thirdly, the establishment in that same written and rigid Constitution of the judicial means for guaranteeing the supremacy of the Constitution over legislative acts.

By contrast, the system in the United Kingdom is quite different as the main feature that distinguishes the British constitutional system is precisely the lack of judicial review of legislation. Thus, Professor D.G.T. Williams has said that 'most British judges and the vast majority of British lawyers must have had little or no contact with the problems and workings of judicial review'.² This substantial difference between the constitutional system of the United Kingdom and, in general, the other constitutional systems in the world, derives from a feature unique to the