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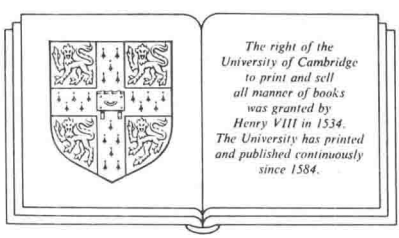
Judicial review in comparative law

A.R.Brewer-Carías

JUDICIAL REVIEW IN COMPARATIVE LAW

ALLAN R. BREWER-CARÍAS
Professor in the Central University of Venezuela
Simón Bolívar Professor in the University of Cambridge, 1985/6
Past Fellow of Trinity College, Cambridge

with editorial assistance of D.F. Bur



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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.

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

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.

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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