

CAPTURING ACCOUNTABILITY, THE WAY FORWARD

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Abstract

Accountability requires a constitutionalism of human rights and the empowerment of judiciaries to enforce and protect the human rights. Human rights have been constitutionalised and the court was granted specific powers of judicial review to enforce the value of these rights by policing the actions of legislature and executive branches of government. Safeguarding the people from being oppress thus contributes to fairness. This paper attempted to discuss the principles under Judicial Review and how it works to regulate the government towards accountability. How these misconducts are controlled to instill fairness and accountability? The discussion will focus on the principles under Judicial Review such as natural justice and ultra vires that have a profound effect on accountability. The emerging pattern shown in USA and Malaysia and the capitalization of judicial review to breed civility. These will elucidate the level of accountability in the given society whether high or moderate.

Keywords: *accountability, judicial review, natural justice, ultra vires*

Introduction

The idea of judicial review is to control actions of legislature and executive branches of government by protecting the human right against arbitrary power. Generally the courts need to enforce the law of the legislature. Under the separation of power, the role of the court is to administer the law made by the legislature. But the law is sometimes repressive. At the other spectrum, the court need to reinforce their principles and standard. The law in fact must be in harmony with constitutional values. Absence of which will limit the ability of the court to foster accountability standard. It is in rules like natural justice and ultra vires etc. that the courts adopt to transform the accountably standards in the administration. Below are cases that show the court's struggle in applying judicial review to capture accountability.

Overview of judicial review

Constitutional democracy requires a constitutionalism of human rights and the empowerment of judiciaries to enforce and protect the human rights. Human rights have been constitutionalised and the court was granted specific powers of judicial review to enforce the value of these rights by policing the actions of legislature and executive branches of government. As a result, the judiciary had been protecting the human right through the application of judicial review.

USA was taken to demonstrate the idea. The USA has a distinctive way of transforming the standard. This is depicted in the case of *Marbury v Madison* 5 U.S. (1 Cranch) 137 (1803). In *Marbury v Madison*, debate about the legitimacy of the power of judicial review was portrayed. The case highlighted that judicial review is a process under which executive and legislatures' actions are subject to review by the judiciary (Kevin YL Tan et al, 2010). It is a form of court proceeding, which the judge reviews the lawfulness of a decision or action, or a failure to act, by a public body exercising a public function. Whether the law has been correctly applied, or the right procedures followed. It also refers to the power to pronounce the constitutionality of a statute. Judicial review is about the supervision of administrative decision making. When there is the ultra vires of legislative and executive, the power of the judiciary will rectify it (John Hart Ely, 2002). The constitution provides for judicial power to be vested in the judiciary which is to be found inherent in the court.

The main purpose of judicial review is to ensure that the public authorities do not act in ultra vires. In addition to the principle of constitutionality and the doctrine of ultra vires, principle of natural justice were applied by the court to keep the administration accountable (Shad Saleem, 2008). The court are given authority or power to promote good administration and to protect human rights and freedom. One of the effective ways by which the court operate is thus assumed under judicial review.

Judicial review is carried out by determining the compatibility of an Act of Parliament or executive action to a written Constitution. The statutes or executive actions are examined for their conformity with the Constitution, and the court are required to supervise any of the executive instrument that violate the individual rights. In the case of *Marbury v Madison* 5 U.S. (1 Cranch) 137 (1803), Chief Justice John Marshall reasoned that since it is the duty of a court in a lawsuit to declare the law by which the Constitution is part of it, so any statutory rules that conflicts with the Constitution, will render the law void (Luc Tremblay B. 2004). Moreover the written constitution were the supreme law of the land, which the courts must uphold against all inconsistent governmental actions.

Judicial review and the constitution

Human rights is an individual's needs and part of natural law that no harm shall beget their life, health, property, or liberties. The existence of this natural law also established the basis for securing these rights. The government owe a duty to protect these rights. It means the State must not violate human rights without legal reason and should take necessary steps to protect such rights. One example is the ratification or signing of a convention to indicate the state commitment towards protection of citizens' right. Condemnation against genocide on Bush's Administration dealing with the Guantanamo unlawful detainees evoke the need to have limitation, control and supervision over the power of the government. Actualizing the moral rights through legalistic manner can hence fortify the supervision upon these authorities.

As an important legal system, judicial review provides significant means in decreasing the unlawful administrative action. Judicial review has been widely established in modern democratic countries, involving an independent examination of the courts, corrective measures over violation of standards, and making compensation to the individual or citizen whose legal rights have been infringed or damaged. Judicial review has been proven as an operative way to monitor state authorities and protecting the individual rights.

It is noteworthy to mention that human right is impossible of safeguard if the court is weak. The landmark case in USA of *Marbury vs Madison* 5 U.S. (1 Cranch) 137 (1803) signifies that. Marbury case was significant due to the court's perseverance in supporting its inherent power. The case of *Marbury v Madison* 5 U.S. (1 Cranch) 137 (1803) took place in the United States's Supreme Court. It was the first case in which judicial review was being exercised in the Supreme Court of the United States. The case was initiated as a result of the petition submitted by William Marbury to the United States's Supreme Court. When Thomas Jefferson took over John Adam, the commission that was supposed to be given to William Marbury was not delivered to him. William Marbury submitted a petition to Supreme Court to force James Madison, the new secretary of State to deliver the premium to him.

Here the court interpret the law to highlight the inherent power of the court. The court acknowledges that even though Marbury was entitled for the commission but the original jurisdiction of the court cannot be tampered around. The issue surrounds the conflict between the Judiciary Act 1789 and the Constitution and the Supreme Court's original jurisdiction and its appellate jurisdiction. If the Court has original jurisdiction over a case, it means that the case can go directly to the Supreme Court. If the Court has appellate jurisdiction, however, the case must first be argued and decided by judges in the lower courts. Thereafter justifying appeal to the Supreme Court. Marbury brought his lawsuit under the Court's original jurisdiction, but the judge ruled that it would be an improper exercise of the Court's original jurisdiction to issue the writ of mandamus not sanctioned by the constitution.

The Judiciary Act of 1789 authorized the Supreme Court to "issue writs of mandamus ... to persons holding office under the authority of the United States." A writ of mandamus is a command by a superior

court to a public official or lower court to perform a special duty. Whilst Article III, section 2, clause 2 of the Constitution, authorizes the Supreme Court to exercise original jurisdiction involving only “ambassadors, other public ministers and consuls, and those cases in which a state shall be a party. The dispute between Marbury and Madison did not involve ambassadors, public ministers, consuls, or states. Therefore, according to the Constitution, the Supreme Court did not have the authority to exercise its original jurisdiction. Thus the Judiciary Act of 1789 and the Constitution were in conflict with each other. Marshall said that Congress does not have power to make modification on the original jurisdiction of Supreme Court. Declaring the Constitution “superior, paramount law,” the Supreme Court ruled that when ordinary laws conflict with the Constitution, the law must be struck down.

Furthermore, it is the job of Supreme court to interpret laws and determine when it conflict with the Constitution. According to the Court, the Constitution gives the judicial branch the power to strike down laws passed by Congress, the legislative branch. This is the principle of judicial review.

Through this decision, Chief Justice Marshall established the judicial branch as an equal partner with the executive and legislative branches within the developing system of government.

And, by declaring the Court’s power through the principle of judicial review, he made it clear that the judges did not make their decision out of fear. Instead, he announced that the Constitution is the supreme law of the land, and emphasised that the Supreme Court as the final authority for interpreting it.

Principle of Natural Justice

After the above triumph, the court continued to manifest itself through judicial review. Through principles of natural justice, the crux is transformed. It is inferred as a procedural safeguard against improper exercise of power by a public authority in a democratic system.

The principles of judicial review includes rules of procedural fairness. The term “Principles of Natural Justice” derived from the expression “Jus Natural” of the Roman law. It is encouraging to know that even though it may not form part of the statute and does not have force of law, it ought to be followed. Adherence to principles of natural justice, are pertinent when dealing with disputes between the parties or any administrative or disciplinary action in question. Principles of natural justice have been established by the courts as being the minimum protection of the individual rights against the arbitrary conduct. These principles are intended to prevent such authority from being capricious. As provided by Article 135(2) of Federal Constitution which states that “No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard”. Furthermore, natural justice is the essence of fair ruling, which were deeply rooted in tradition and conscience. The purpose of following the principles of natural justice is to prevent miscarriage of justice. Natural Justice recognizes three principles namely *Nemo debet esse iudex in propria causa* and *Audi alterem partem*, and reasoned decisions (C.P. Goyal, 2015).

The first principle “*Nemo debet esse iudex in propria causa*” means no person can be a judge in his own cause. This principle is more popularly known as Doctrine against Bias. Whoever holding the authority in judgement should be impartial and act without bias. It must not be interested in or related with the cause which is being decided by him. Bias can be categorized in three categories namely pecuniary, personal and official. In pecuniary bias, it is obvious that decision of the judge would be affected if he has a pecuniary interest in the subject matter. Probability of bias is sufficient to invalidate the right to sit in judgment and there is no need to have the proof of actual bias. For individual bias, it may arise from friendship, relationship, professional grievance or even enmity. Here again likelihood of bias is to be given more trust than for the actual bias. Whilst, for official bias, it may arise in cases where an administrator who carried out an official policy, was entrusted with the duty of hearing objections from the concerned persons over the policy he made. The bias may likely arise if the adjudicator has an interest in the subject matter. (Shad Saleem, 2008)

The second principle is “*Audi alterem partem*”, which means to hear the other side. This is essential for providing a fair hearing. When it is said to hear the other side, it means that hearing should not be reduced to mere formality and it does not only confine to hearing of a single party. It should be effective

hearing. Departmental enquiries relating to the misconduct of individuals should conform to certain standard which means the aggrieved should be given a fair and reasonable opportunity to defend himself. It means that no man should be condemned unheard and he has the right to know the accusations made against him. He has the right to know the premise on which such accusation is based and a reasonable chance to adduce all relevant evidence in his defence.

The third principle is “reasoned decisions”. Giving reasons for a certain decision is one of the main key of good administration and a safeguard against arbitrariness. The findings should be supported by reasons because it facilitates judicial review over findings of public officials. Findings offer assurance to the parties that the decision is the result of rationality based on evidence as well as the records of the cases and it is a guarantee against arbitrary or hasty action on the part of deciding authority. The refusal to give reasons may evoke doubt which probably means no good reasons are put forth in support of the decision. Thus, reasons of decision are important and useful as they may reveal an error of law and may establish grounds of appeal for the inflicted right. The requirement of giving reasons would be necessary when it is appealed against.

So, it can be said that principles of natural justice play a very important role to an exercise of judicial review and in keeping the administration subject to the law. As the judicial review is one of the checks and balances in the separation of powers, thus the courts should exercise their duty by following the principles of natural justice and act without bias in order to reach sound decisions.

Principle of Ultra Vires

Ultra vires is Latin word for “beyond power”. Ultra vires refers to public authorities acting beyond their legal powers. All public authorities have limited powers. There can be no legal basis for acts or decision taken beyond their powers *Secretary of State for the Foreign and Commonwealth Affairs v Bancoult, Regina (on the Application of): CA 23 May [2007] EWCA Civ 498*. Such acts or decision would be ultra vires and unlawful. There is some debate about whether ultra vires is the unifying basis for judicial review as it is the principle that enables the courts to keep the executive acting within the confines of the law.

The classic format for ultra vires determine first the extent of a body’s legal powers, which is often an issue of statutory interpretation and secondly establish whether the body acted beyond those power as construed.

There are 3 main sources of power namely statutory and prerogatives powers and third source of powers are administrative powers. Statutory powers are derived from pieces of primary and secondary legislation the application of which is often subject to policy or guidance. Prerogative powers are those powers that still reside with the monarch but are mainly exercised by the government. And the third source power include general administrative power that carries the ordinary business of government which are exercises of the royal prerogative and do not require statutory authority. Third source powers are controversial and their extent is unclear, although it has been said that they cannot be coercive and inconsistent with statute or breach the public law standard.

Once the relevant power has been located and construed, the next step is to see whether the public authority has acted beyond the power. This is an important question of fact that is to be answered in light of evidence before the court.

Some statutes declare that discretion is absolute or that a decision is final and conclusive. Some statutory powers are conferred in broad and subjective terms. To statutory formulae of this sort, contrasting judicial responses are possible. The court may interpret them literally and give judicial sanction to absolute powers. Alternatively, the court may read into the enabling law implied limits and constitutional presumption of a rule of law. This will restrict the scope of otherwise unlimited powers. Subjective powers may be viewed objectively. Purposive interpretation may be preferred over literal interpretation (Richard Mallunjam FCJ in *Pendakwa Raya v Kok Wah Kuan [2007] 5 MLJ 174*)

In addition to classic ultra vires agreements, there are two further concepts that come within the overall heading of whether a public authority has acted beyond its power.

The case of *Marbury v Madison* stated that when there is ultra vires of legislation and executive, the power of the judiciary will oversee it. The constitution provides that the court has the authority to make pronouncements on the constitutionality of statutes passed by the legislature.

A principle issue in judicial review cases was whether a body had acted within or outside its jurisdiction. Traditionally in cases which a body has acted within its jurisdiction, a judicial review remedy would not be available even if the body had made an error of law or made a wrong decision. An error of law is an error with regard of the law being applied in a case. However, this position changed in light of the House of Lords decision in *Anisminic Ltd v Foreign Compensation Commission* (1969) 2 AC 147, 174A-D.

Jurisdictional error is error done outside power or unauthorized power while error of law is error relating with error of laws and facts, done within power. The divide was removed in that if inferior tribunal or authorities concerned, make an error, then he or she actually acted beyond his or her jurisdiction. So whether or not error of law committed within or outside jurisdiction, it is still amendable to review.¹

Now judicial review are not concerned with the issue of whether an error of law was within or without the jurisdiction of a tribunal. This does not mean that a body's jurisdiction is not relevant starting point for considering the extent of its powers. Indeed, a decision taken without jurisdiction is simply a form of ultra vires. However, the complication of jurisdictional error no longer trouble modern public law in the way it used to be.

Grounds of Judicial Review

Generally, judicial review by the court is meant to protect the interest of the people from being trespass by the authority or executive body. It is concerned with the review on the legality of decision making process of the government. Judicial review is different from appeal; it is reviewing the conduct of the authority to identify whether such conduct is lawful or not. The court will not substitute the authorities' decision; it will only review on legality of the conduct. An appeal is an as of right whereas certain conditions must be fulfilled for one to seek remedy under judicial review. Judicial review can be established in the following ground.

Natural Justice

Natural justice principle was historically demonstrated in the case of *Thomas Bonham v College of Physicians* (1610) 8 Co Rep 114 (Dr Bonham's Case). Bonham, a trained medical doctor, petitioned to join the College of Physicians but was rejected. A short time later he applied for membership again; this time his rejection was accompanied by a fine and a threat of imprisonment should he continue his practice. As Bonham continued his medical practice, he was arrested. Bonham told the College that he would continue working as a doctor and claimed that the College had no power over Oxford and Cambridge graduates. As a consequence Bonham was imprisoned. The College sued Bonham for a fine for maintaining an illicit practice at the King's Bench, to which he responded by claiming trespass to the person and wrongful imprisonment.

The issue lies in what the College claimed to have statutory basis for its allegation that it was free to decide who could practice medicine and to punish those without a licence, including by way of imprisonment. Bonham argued that the statutes aimed to prevent malpractice but did not relate practice without a license.

The two-judge minority sided with the College based on its position as a valid licensing authority. They held that the statutes conferred powers on the College that were to be exercised on behalf of the King (as it was the King's duty to care for the sick). However, the majority found for Bonham. Sir Edward

¹ *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 174A-D

Coke, delivering the majority judgment, claimed that the power to impose fines on those involved in illicit practice and the power to imprison practitioners for malpractice were separate. Thus, working without a licence did not amount malpractice and the College did not have the power to put Bonham in prison. He found that the statutes allowing the College to act as both a party and a judge were absurd, so “in many cases, the common law will control Acts of Parliament” and could render them void.

Illegality

Whilst in *Congreve v Home Office*[1976] QB 629 illegality under the natural justice principle continued to be expanded. In this case the appellant had bought his television licence when the charge was £12 although the minister had already announced that it would later be increased to £18. The Home Office wrote to those who had purchased their licence before the new charge came into effect demanding the payment of the extra and £6 failing which their licence would be revoked.

The court held that it was an abuse of the Minister’s undoubted discretionary power to revoke TV licences validly issued as a means of taxing money which Parliament had given the executive no power to demand. The courts will invalidate the exercise of a discretion which contains no express limitations in such a way as to run counter to the policy of the legislation by which it was conferred.

Lord Denning highlighted that there is another reason for holding that the demands for £6 to be unlawful. They were made contrary to the Bill of Rights. They were an attempt to levy money for use of the Crown without the authority of Parliament: and that is quite enough to condemn them. If the licence is to be revoked – and his money forfeited – the Minister would have to give good reasons to justify it. Unless the cheque was dishonored and what not, the licensee has done nothing wrong at all, the Minister cannot lawfully revoke the licence, at any rate, not without offering him his money back except for a good cause. If he should revoke it without giving reasons, or for no good reason, the courts can set aside his revocation and restore the licence.

Unreasonableness

Unreasonableness in the natural justice principle was also depicted. This was portrayed in the landmark case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*: CA 10 Nov 1947 where Lord Greene asserted that “the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word ‘unreasonable’ in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting ‘unreasonably.’ Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.’ and ‘The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them.”

Proportionality

Malaysia was also not detached from want of natural justice. In *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 (COA) proportionality concept was demonstrated compellingly. In this case the appellant was a senior assistant of a primary school in Johor. He was consigned by the Johor Education Department with a sum of RM 3,179 which constituted the unpaid salary of the school's gardener who had not been present for work for several months. When the department asked for the return of the money the appellant told that it had been sent to the gardener. Actually he had kept it but eventually send the money to the department. The appellant was then charged with two counts of criminal breach of trust by a public servant under s 409 of the Penal Code. The appellant being convicted under session court and sentenced to six months' imprisonment. On appeal, the Muar High Court affirmed the finding of guilt and thereafter the department wrote to the Education Service Commission recommending that the appellant be reduced in rank and decided to dismiss the appellant. Dissatisfied, the appellant instituted proceedings in the Johor Bahru High Court, and sought declarations that his dismissal was null and void. The appellant argued that there was no ground for his dismissal under the General Orders because he had not been convicted of a criminal offence and the first respondent was in breach of the rules of natural justice for not affording the appellant a reasonable opportunity of being heard according to art 135(2) of the Federal Constitution. However, the Johor Bahru High Court upheld the dismissal and the appellant appealed to the Court of Appeal.

The Court of Appeal made the momentous decision when it held that Articles 5 of the Constitution, which protect personal liberty under the law, must be read in liberal and not literal manner to make sure that a fair procedure is adopted. Since Tan was deprived of gainful employment without a fair hearing, under this broad interpretation of Article 5, his dismissal was wrongful and unconstitutional. Thus, it can be said that proportionality is an important element in the judicial review to ensure the administrative power are not wrongly exercised and abused. A tool used by the court for the resolution of conflicts between competing rights or interest, where punishment must be proportionate with the severity of the offence committed. This at the core is the essence of natural justice.

Conclusion

In conclusion, judicial review is an important principle because it helps to protect people's right against unnecessary violation. Despite the shortcoming associated with technicalities, Judicial review is a good form of check and balance between the government bodies, the executive and legislature. It can ensure the fundamental right of citizens are not easily trespass by the authority and serve as a platform to regulate the conduct of authorities, that ought to be exercised on Constitutional basis. The case of *Marbury vs Marbury* provides the basis of court's power equal to that of executive and legislature. The whole idea is no more than to provide the bulwark against any unnecessary breach of justice affecting the public. If the court is made subordinate and the executive is made superior than the constitution, abuse of power knows no bound. Capitalizing on principles like natural justice, proportionality and reasonableness etc. would undoubtedly bolster accountability standards, norms that cannot be overlooked in this challenging world today. For the saying goes, law without justice is the wound without cure.

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