CHAPTER- X

CONSTITUTIONAL TRANSFORMATION IN ENGLISH LEGAL SYSTEM

'Constitutionalism' denotes principle that a Constitution enshrines within itself to prevent arbitrary governance. According to Don E. Fehrenbacher constitutionalism refers to a complex of ideas, attitudes and pattern of behaviour elaborating the principle that governmental authority is derived from and is limited by a body of fundamental law.

Halsbury's Laws of England described the Constitution of United Kingdom as an incomplete system consisting of piecemeal legislation, ancient common law doctrines, and constitutional conventions which are binding more in a political sense rather than a legal sense. Thus, the Constitution of United Kingdom, according to Halsbury's Laws of England, lacks coherence of a comprehensive written Constitution.[1]

In this backdrop following are the objectives of this chapter-

a. To find out the transcendental and metaphysical principle in the unwritten Constitution of the United Kingdom,
b. To locate the institution or the convention or the law limiting the authorities of the government for prevention of arbitrary governance,
c. To locate Sovereign under the Constitutional scheme of the United Kingdom.

These exercises are important for a country like United Kingdom which has witnessed several foreign invasions, several instances of coronation and abdication of Kings and Queens, several revolutions etc. therefore, the country was bound to witness different form of governance during the tenure of different government. United Kingdom did not only witness suppression of religious institution by the State but also witness overthrowing of the King and rise of the Parliament in the Country. The separation of church and state took place here. Therefore, a country which has undergone so many changes requires a detailed discussion about the transformation of the legal and political institutions in the Country.

[1] Lord. Hailsham, *HALSBURY'S LAWS OF ENGLAND,* 7, Vol 8 (2), (Butterworths, London,1996).

India has been a British Colony for over three centuries. During the colonial rule, the British legal system was established in India during this time. The Constitution of India and the Indian judiciary are in many ways rooted in the British system. To understand the paradigm shifts in India, the shifts in Britain too must be noted.

DEVELOPMENTS IN THE COURSE OF BRITISH HISTORY

The oldest inhabitants came to Britain probably 250000 years ago and connected British Isles with the Europe. The Iberians reached Britain between 3500-3000 B.C. from Iberian Peninsula and settled in the south of England. The same was with the Beaker people[2] who were supposed to be migrated from Iberia and changed the history of Britain for ever[3].

Not long after 700 B.C., Celtic clans started to attack Britain. Among cca.700 and 100 B.C., they settled the entire of Britain. They shaped innate realms that were every now and again at war with one another.

Julius Caeser started taking interest in Britain and also attempted to invade the same twice once was in 54 B.C. and again was in 55 B.C. The main reason of invading Britain was to prevent Britons[4] from providing military aid to France. However, the actual invasion by Romans took place in 43 A.D. by Claudius. By the 80 A.D. Romans conquered places today known as England, Wales and Southern Scotland. However, the Roman army had to face lot of challenges in protecting this vast land of Britain. Thus, Roman emperor built a wall, known as Hadrian's Wall, to protect the conquered land. Roman rule in Britain declined towards the end of 4th Century and completely fell apart in 5th Century.

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[2] The individuals who were a piece of the Measuring utensil culture can be distinguished as they were covered with unmistakable ancient rarities, for example, their stoneware. The specialists thought about the DNA from skeletons covered around Europe from two unique periods: before the Container culture showed up there and a short time later.
The investigation shows that the Measuring utensil culture spread into focal Europe from Iberia without a noteworthy development of individuals. Skeletons from measuring utensil internments in Iberia are not hereditarily near focal European Container skeletons. Available at Amos Dean LL.D., British Constitution, 7 (Rochester, New York, 1893)

[3] There are several examples, found through research, that Beaker folk brought their culture along with them to Britain and sped up transmission of different cultures.

[4] Britons were also known as people of Celtic tribe who were living in Britain from at least British Iron age into the Middle ages. Available at Amos Dean LL.D., British Constitution, 7 (Rochester, New York, 1893).

Anglo Saxons tribe who kept their eye on invading Britain since 3rd Century finally conquered it in 5th Century and settled there. That was the period of starting of Germanic tribes settling down in Britain. They destroyed the Romano-British civilization and established their own culture.[5]

Institutions established by Hengist and Horsa, brothers who led Angles, Saxons and Jutes in their invasion of Britain, were developed later on and eventually brought the modified existing institutions in Britain.[6] In the system built by Anglo-Saxons aristocracy was not by birth but by the acquisition of land and property. The lowest political division for them was *township* which had both the reeve and elective chief officer along with four good and lawmen. Each township had its own local court and regulatory authority. The local courts were subordinate to Hundred Court[7]. The Hundred Court was subordinate to shire court or Country Court. The Shire Court was presided over either by Sheriff or Earl. The history of Jury Trial can be attributed to Saxon jurisprudence.[8] At the head of the State was the King who was elected and the coronation was done accordingly by the necessary people. However, there was no rule to elect as to who would succeed the king. Along with the king, if not anterior, there was *Witenagemote*, the great council of Barons. This group of wise men met on the summons of the King and was presided over by the King himself. The difference between *Witenagemote* and modern day Parliament is that in *Witengemote* members derived their power from individual membership and not by representing anyone else in the Council.[9]

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[5] Stella Nangonova, British History and Culture, (2008).

[6] Amos Dean LL.D., British Constitution, 7 (Rochester, New York, 1893)

[7] A hundred is an authoritative division that is geologically part of a bigger area. It was some time ago utilized in England, Wales, a few pieces of the United States, Denmark, Southern Schleswig, Sweden, Finland, Estonia, and Norway. It is as yet utilized in different spots, including South Australia and the Northern Territory. Different expressions for the hundred in English and different dialects incorporate wapentake, herred (Danish and Bokmål Norwegian), herad (Nynorsk Norwegian), hérað (Icelandic), härad or hundare (Swedish), Harde (German), Satakunta or kihlakunta (Finnish), kihelkond (Estonian), and cantref (Welsh). In Ireland, a comparative development of provinces is alluded to as a barony, and a hundred is a region of an especially huge townland (most townlands are not separated into hundreds). Available at Stella Nangonova, British History and Culture, (2008).

[8] The right to a trial by jury is a tradition embedded in the British legal system. The tradition of being "tried by a jury of ones peers" probably has its origins in Anglo Saxon custom, which dictated that an accused man could be acquitted if enough people came forward to swear his innocence.

[9] Amos Dean LL.D., British Constitution, 8 (Rochester, New York, 1893)

Christianity entered England in 6th Century. With the entry of this religion the role of Church became significant in establishing feudal kingdoms and gave the kingship a sacred character. It also had a significant role in developing statehood in the English society.[10]

England ultimately united under the kings of Wessex in the 10th century. Danish Vikings had conquered a huge a part of northern part of England and created a confederation of Scandinavian communities known as Dane law (878-975) there. Alfred the Great of Wessex (871-c.900) defeated the Danes and his successors re-conquered the Dane law in the tenth century. However, a new Danish invasion shattered England in 978 to 1016, Canute (1016-1035), the King of Denmark and Norway, became the king of a fully united England. His Scandinavian Empire, however, broke up due to his incompetent successors and the Saxon heir, Edward the Confessor (1042-1066), was restored to the throne of England. Edward unknowingly and unwittingly prepared England for Norman conquest. He appointed Norman noblemen to high state offices. After the death of Edward, Harold, son of an English noble man was chosen to be the king. However, the Duke of Normandy and Norway opposed to it and claimed their right over English throne. Almost at the same time in 1066 both the Duke of Normandy and Norsemen attacked the English kingdom. Harold defeated Norsemen but was defeated by the Duke of Normandy in the battle of Hastings[11].

Therefore, Norman conquest of England was the fourth foreign element on the English soil post Roman, Anglo Saxon and Dane conquest of the same. Norman conquest had far reaching consequence in the development of England. England was cut off from Scandinavia. The country was brought under the influence of French Culture. Three languages were used for three different purposes, Norman-French for aristocratic ruling class and law courts, Latin for education purpose and English for common Englishmen for speaking purpose.[12]

[10] Stella Nangonova, British History and Culture, (2008).

[11] Normandy was a province of France bordering the English Channel. Normans under the leadership of Rollo conquered this province of France and obtained the same by treaty. This province was named after Normans as Normandy. Available at Stella Nangova, British History and Culture (2008).

[12] Stella Nangonova, British History and Culture, (2008).

Gradually William the Conqueror (1066-1087) with the help of the Church established a strong centralized political system in England. Building of feudal kingdom was completed with the establishment of centralized political system in England. There was a very little difference between the system established by the Norman and Anglo Saxons. William the Conqueror seemed to bring back the shire system introduced by the Anglo Saxons in English society. The English throne was then inherited by Henry I, born to William the Conqueror and Matilda of Flanders, who was in throne from 1100 to 1135. From amongst many claiments of the English throne Henry II (1154-1189) inherited the throne who was grandson of Henry I.[13]

Henry II was the father of two great monarchs one was Richard the Lion Heart and another one was King John. Charters of Rights were granted by both the Henry I and Henry II. However, these Charters were often found to be violated by the authorities. King John attracted a lot of criticism and hatred due to various claims that he might have killed Arthus, the Son of Richard the Lion Heart, to inherit the English Throne. His treachery and weaknesses forced him to grant a Charter named as Magna Carta in 1215. Magna carta seemes to have been the very first document distinguishing between greater and lesser barons, higher and lower clergy. This Charter distinguished between the two houses of the Parliament and also fixed their functions. It also modified existing laws.[14]

However, the foundation of the modern Parliament was introduced by Edward I (1272-1307) through Model Parliament in 1295. This Parliament had representatives of Barons, Clergy and English common man. The Parliament embodying principle of representation having found its origin during the reign of John and Henry III became thoroughly formed and consolidated during the reign of Edward I. There were two houses of the parliament one was of lay representatives and another one was ecclesiastical. Edward I granted Magna Carta 1297 whereby freedom of the Church was accepted. The Magna Carta 1297 also guaranteed right to freedom from arbitrary

[13] Destined to Count Geoffrey of Anjou and Empress Matilda in 1133, Henry II acquired his dad's duchy and became Duke of Normandy by the age of 18. At 21 he prevailing to the English seat and by 1172, the British Isles and Ireland had recognized him as their overlord and he controlled a greater amount of France than any ruler since the fall of the Carolingian administration in 891. It was Henry who put England on a way to getting one of the world's most predominant countries. Available at Historic UK in Henry King II by Chris Oehring.

[14] Amos Dean LL.D., British Constitution, 28 (Rochester, New York, 1893)

arrest and detention by the administration contrary to law and guaranteed to Justice to common man of the realm.[15] Apparently this was the first seed of constitutionalism in Britain.

Towards the middle of fourteenth century the two houses of parliament were restructured and the house known as House of Lords summoned barons to be its members where the House of Commons consisted of representatives of people. The barons House of Lords functioned in independent capacity and the House of Lords became the Chief Counsel of the Crown. The House of Lords also took part in public affairs in a permanent manner by reason of their individual importance. However, the House of Commons, which comprised of people's representatives, acquired it sown right from the Crown to interfere with public affairs from time to time and in particular cases to exert its influence. The House of Commons, however was not in controlling position, but with its united action definitely brought a check and balance in the administration of the government. The Parliament system changed the destiny of England forever. In 1322 a Statute was passed that henceforth law relating to estate of the Crown or the realm of common people must be treated, accorded and established by the King in the Parliament.[16]

Introduction of Parliament in England changed the concept of Sovereignty. Sovereignty is the authority of the State to govern itself free from external control. The Parliament was introduced by King Henry III which was later on institutionalized by Edward I in 1272. The Parliament of England existed from 13th Century to 1707. Post 1707 the Parliament of England united with the Parliament of Scotland following the conquest of Scotland by the Edward III. Union of both the Parliaments was renamed as Parliament of Great Britain. The Parliament of Great Britain was dissolved in 1800 and formed the Parliament of United Kingdom when Kingdom of Great Britain (England and Scotland) was united with Kingdom of Ireland and became known as United Kingdom of Great Britain and Ireland[17].

[15] CONSTITUTE, United Kingdom's Constitution of 1215 with Amendments through 2013, accessed from legislation.gov.uk

[16] Amos Dean LL.D., British Constitution, 48-51 (Rochester, New York, 1893)

[17] The History of Parliament and Evolution of Parliamentary Procedure,
verbatim transcript of two lectures given by Maurice Bond, OBE, FSA, Clerk of the Records, delivered in the Grand Committee Room, Westminster Hall, before Members of the House of Commons under the Chairmanship on 21st June 1966 of the Right Honourable the Speaker of the House, Dr. Horace

Prior to 1272 the authority to govern rested with the King. However, with the introduction of representative system in the Parliament the individual Sovereignty of the King was restricted to some an extent. The History of England is the history of invasion and conquest thereafter, the sovereignty always lay with the Conqueror until 1272. However, with the passage of time and as the vision of uniting Great Britain became stronger there was a need for a specific system which could bring political stability to England.

Parliament was introduced as a measure of checks on the arbitrary power of the King. The Magna Carta 1215 was secured from King John whereby the King agreed to bring itself under the law and it was also agreed that no decision would be imposed without the consent of Royal Council. This system of consent by the Royal Council was later on developed to Parliamentary system in England. Thus, Parliamentary system was a restriction upon the arbitrary power of Kings.

However, it was not until 1688 that England was introduced to parliamentary Supremacy. The Glorious Revolution in 1688 paved the way for Parliamentary Sovereignty in England. This revolution involved both political and religious reasons which led to overthrow of King James II. King James II was succeeded by his protestant daughter Mary and her Dutch husband William of Orange. This revolution is significant in the history of England as it ushered England into the era of political democracy. Parliament was given more power than the Monarch to govern England. The new Parliament met in 1689 and the Crown accepted restrictions from the Parliament causing an unprecedented shift in power distribution in the realm of Britain. The Parliament passed the English Bill of Charter in 1689 to which the King and the Queen assented. Thus, the Parliamentary Sovereignty became one of the significant principles of Britain's unwritten Constitution.[18]

It may be worth recalling that the British came to India as a trading company, namely East India Company in 1600. One of the reasons for colonization was saturation of British market. Since further investment was not possible in the United Kingdom the policy for establishing colony was taken. The other reason for colonization was the

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King, Ph.D., M.P., and on 28th June 1966 of Mr. Sydney Irving, M.P., Deputy Chairman of Committees, Published by the House of Lords Office, 1966.

[18] Glorious Revolution, available at https://www.history.com/topics/british-history/glorious-revolution (visited on 29.06.2020)

'white man's burden' to civilize the non-Christian world. Hence the British legal system was established wherever colonization took place, Indian being no exception. In 1612 the English victory at Swally Hole over Portuguese took place. The Mughal Farman (order) for trading was granted to Sir Thomas Roe in 1615- 1618. Peaceful trading took place almost till 1651. However, post 1651 witnessed several wars between the Company and Indian Princely States. The company had many difficulties in England. There was mercantilist disapproval and jealousy of company's monopoly. Moreover, government's instability threatened company's privilege. King Charles I encouraged rival Courteen association (1635) and Oliver Cromwell allowed virtual free trade until 1657. Company further suffered a setback by was in India and by the Whig's Glorious Revolution in 1688-1689. The Whig promoted new company in 1698. In 1702 both the companies merged. The company was engaged in war from 1686-1690. The Presidencies were established in 1696. Anglo-French struggle in India took place in 1740-1763. Parliamentary interference commenced in 1694 and became active after 1765. Stable Parliamentary system came to Britain in 1688. The company became very powerful politically and the House of Commons in 1691 resolved that trade monopoly could be granted only by Statute of Parliament. This was the first experience in India of Parliamentary resolution. In 1795 the Company was granted Diwanee, thereby introducing some English norms in the justice delivery system in India. It was further resolved that the company did not hold territory of its own. The territory belonged to the Crown. Thus English jurisprudence and principles of governance became a part of Indian colonial administration. The Regulating Act, 1773 was the first important Statute passed by the British Parliament to re-organize Company's system of government. It provided that a Director would hold office for 4 years instead of one. In India the Presidency of Bengal was placed under a Governor General, 4 Councilors and deciding matters by vote of majority and had a higher status than Presidencies of Bombay and Madras regarding making wars and negotiating treaties. A Supreme Court was set up in Fort William with wide jurisdiction. Laws made by the Governor General and Councilors were required to be registered with Supreme Court. With this the entry of English system and jurisprudence in India was complete.[19]

[19] C.L. Anand, Constitutional Law and History of Government of India, 1 (Universal Publishing House, Chennai, 10th edition, 2008).

CONSTITUTIONALISM UNDER BRITISH CONSTITUTION

Until the reign of King John in England and grant of Magna Carta 1215 in England there was neither Constitution nor Constitutionalism. It may be considered to be the seed of constitutionalism. Consent of Royal Council system was introduced by King John as a measure of check on arbitrary power of the King. This Royal Council later on developed to Parliament in England. This was the second indication of constitutionalism in England.

Therefore, for a very long time Parliamentary Supremacy was one of the principles of Constitutionalism in United Kingdom. Parliamentary Supremacy governed the legitimacy of government's action by imposing checks on arbitrary action of the Crown. Constitutionalism embraces limitation of powers through various factors like parliamentary sovereignty, separation of power, rule of law, respect for individual rights etc. This chapter will analyze the principles embraced by the unwritten Constitution of the United Kingdom.[20]

I. PARLIAMENTARY SOVEREIGNTY

Parliamentary Sovereignty has a medieval origin. It was Henry de Bracton[21] who for the first time distinguished between sphere of the power of control which was entrusted with the Monarch and the sphere of administration of justice of which the Monarch was a part. To check the absolutism by the Monarch the concept of Royal Council was introduced. It must be understood in Britain the Constitution was not deliberated upon. Rather, the Constitution evolved. Therefore, in Britain the Constitution was not a result of focused deliberation, rather it was in the form of evolving Constitutional principles. However, in the backdrop of unwritten Constitution of the United Kingdom the question remained that which factor would

[20]Maru Bazezew, Constitutionalism, 3 (2), *Mizan Law Review*, 358-360 (September, 2009).

[21] Henry of Bracton, likewise Henry de Bracton, additionally Henricus Bracton, or Henry Bratton additionally Henry Bretton (1210 – 1268) was an English minister and legal adviser. He is acclaimed now for his works on law, especially De Legibuset Consuetudinibus Angliae ("On the Laws and Customs of England") and his thoughts on mens rea (criminal plan). As per Bracton, it was distinctly through the assessment of a blend of activity and expectation that the commission of a criminal demonstration could be set up. He additionally composed on sovereignty, contending that a ruler ought to be called lord just in the event that he got and practiced force in a legitimate way. In his compositions, Bracton figures out how to set out rationally the law of the illustrious courts through his utilization of classes drawn from Roman law, in this way joining into English law a few advancements of medieval Roman law.

administer whether the Parliament is exercising its power according to the law. English jurists like William Blackstone and A.V. Dicey have discussed in detail the limited legislative power based upon natural law and democratic conception of the public good.

- **William Blackstone (1723-1780) on Parliamentary Sovereignty**

William Blackstone stated that for fair administration legislative and executive powers must not be vested with the same individual or same body of individuals. Therefore, in United Kingdom the legislative power was entrusted with the Parliament consisting of the King, Lords and Commons. The executive power was vested with the King. The total union of the legislative and the executive, according to Blackstone, would be productive of Tyranny. According to him the Parliament is the Sovereign and has uncontrollable authority to make, confirm, enlarge, restrain, abrogate, repeal, revive and expound the laws regarding matter of every possible denominations.[22]Thus, an Act by the Parliament is binding throughout the realm and is alterable only by another Act of the Parliament. Blackstone has vested this wider legislative power upon the Parliament basing upon two factors which also underlay Blackstone's Constitutional model. The first factor is that the wider legislative power of the Parliament would be limited through proper representation of competing political and social forces in the Parliament and secondly he acknowledged that the Parliament would limit its legislative power on moral grounds because of the existence of common law in connection with natural law in the United Kingdom.[23]According to him no human law would be valid if it was contrary to the tenets of natural law and these human laws derive authority mediately or immediately from the original law (which Blackstone described as natural law). Blackstone also prescribed statutory time limits for the life of Parliament to make it responsive to relevant issues. In mixed structure of governance in United Kingdom Blackstone introduced election of representatives in the Parliament as a check on arbitrary power of the Parliament.

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[22] Sir William Blackstone, *Commentaries on the laws of England*, Vol 1, 115 (J.B. Lippincott Company, 1983)

[23] David Jenkins, From Unwritten to Written: Transformation in the British Common-Law Constitution, 36 (863), *Vanderbilt Journal of Transnational Law*, 868 (May, 2003).

- **John Austin (1790-1859) on Parliamentary Sovereignty**

Austin tried to describe law in positivist tradition. According to Austin law is a command from the illimitable, identifiable, indivisible sovereign body. Irrespective of the existence or non-existence of moral undertone in the law, according to Austin, such law was binding. Therefore, Austin accepted absolute legislative power of the Parliament. However, the structure of government in the United Kingdom was such that Austin was found to be confused between *de Jure* and *de Facto* sovereign. *De Jure* sovereign was the Parliament as the law enacted by the Parliament was beyond any review by any other authority. *De facto* sovereign was the Monarch as the law was implemented in the name of the Monarch. However, there was a difference between the Parliament and the Monarch even though Monarch was a member of the Parliament.

- **A.V. Dicey (1835-1922) on Parliamentary Sovereignty**

A.V. Dicey distinguished between political sovereignty and legal sovereignty in the United Kingdom. According to Dicey the Parliament of the United Kingdom was absolute and could legislate on any matter within the territory of the United Kingdom. This sovereignty was what Dicey called legal sovereignty. Both Blackstone and Dicey accepted Parliament's absolute legislative power. However, while Blackstone resorted to natural law for the restriction upon Parliament's absolute legislative power, Dicey propounded a theory of political sovereignty. According to Dicey political sovereignty was lying with the common people who elected their representatives to the Parliament. Dicey built his theory on the factors like social forces and past practices in United Kingdom. Dicey maintained that in a political structure of the society electors are the sovereign and under the Constitution of a country their will must receive ultimate obedience. Blackstone imagined the power of Constitutional authorities and the administration of justice properly balanced under the Constitution of the United Kingdom. However, Dicey could not trust the Parliament with such vast power and therefore propounded the theory of legal and political sovereignty as a measure of check and balance upon the exercise of powers by authorities.[24] However, at certain point Dicey seemed to trust the parliament with such vast legislative power

[24] David Jenkins, From Unwritten to Written: Transformation in the British Common-Law Constitution, 36 (863), *Vanderbilt Journal of Transnational Law*, 870-873 (May, 2003).

when he observed that even though the Parliament was the legal sovereign of the United Kingdom, it would never act against certain fundamental principles embedded in the unwritten Constitution of the United Kingdom. Thus, both Dicey and Blackstone presented a similar conception of Parliament's moral obligation to limit its legislative power.

II. SEPARATION OF POWER

Separation of power is an idea where major institutions of the government work independently of each other in a coordinated manner. There was hardly any separation of power followed under the constitutional arrangement of the United Kingdom. Blackstone, Austin, Dicey have recognized parliamentary supremacy. Blackstone and Dicey accepted moral obligation of Parliament to not enact laws contrary to natural law or fundamental principles. John Austin did not recognize any such limitations. However, no jurist suggested judicial review as a measure of check and balance between the legislature, executive and judiciary. This was probably because the arrangement of division of power amongst three organs of the government. Prior to the Constitutional Reform Act, 2005 the highest appellate court of the United Kingdom was the House of Lords which also was the upper house of the Parliament. Therefore, separation of power was not one of the principles of the unwritten Constitution of the United Kingdom until it was introduced through the Constitutional Reform Act, 2005.

III. JUDICIAL REVIEW

The unwritten Constitution of the United Kingdom is misunderstood of not upholding the independence of judiciary because of the following reasons-

a. Absence of written text defining the areas of the organs of the government, and
b. The Apex Court of the country was the Upper House of the Parliament i.e. the House of Lords.

Thus there was an assumption in favour of subordination of judiciary to the legislature in the United Kingdom. Even though United Kingdom followed Parliamentary supremacy Blackstone and Dicey have always propounded that the right of the Parliament is not absolute. A.V. Dicey rejected judicial subordination in the United

Kingdom because judges in the United Kingdom hold office by a permanent tenure which definitely raise them above the direct influence of the Crown and the Parliament[25]. However, Dicey seemed to overlook the fact that the Apex court of the country was the Upper House of the Parliament. The members of the Upper Chamber of the Parliament i.e. Lords were to hear appeal cases from Court of Appeal of England and Wales, Court of Appeal in Northern Ireland and Scottish Court of Session. However, the Law Lords did not have power to review the Acts enacted by the Parliament.

Despite this situation the origin of judicial review can be traced back to England because of Sir Edward Coke (1552-1634) whose existence was before Blackstone (1723-1780). He was the Chief Justice of the Court of Common Please[26]. Sir Edward Coke asserted the supremacy of common law in England. In *Dr. Bonham's* case[27](1610) Sir Edward Coke declared an Act enacted by the Parliament as void on the ground of being contradictory to the common law of England. Sir Coke in this case observed that the restriction of absolute legislative power of the Parliament was not unknown to the British Legal system. Sometimes Acts enacted by the Parliament could be in contradiction with the common right and reason. Therefore, those Acts must be adjudged repugnant if found to be contrary to the common law principles. He claimed supremacy of the Natural Law which in turn meant existence of judicial review in some form. Lord Chief Justice Henry Hobart[28], Sir Edward Coke's successor, further continued the precedent in favour of judicial review. In *Day* v. *Savadge*[29] Lord Chief Justice Hobart observed that principle of equity overrode Acts enacted by Parliament. He also observed that the principle of equity was violated by

[25]A.V. Dicey, *Introduction to the Study of Law of the Constitution*, 156 (The MacMillan Press Ltd., London, 1959).

[26]Court of Common Pleas, English court docket of regulation that originated from Henry II's task in 1178 of five participants of his council to pay attention pleas (civil disputes among individuals), as outstanding from litigation to which the crown was a party. This organization of councilors did now not immediately become a body wonderful and become independent from the Curia Regis (King's Court). It remained part of that court and traveled with it till Magna Carta required that civil jurisdiction be assigned to a frame convening at a designated place, at which time it settled in Westminster Hall. In 1223 the court docket started out to keep separate rolls, and in 1272 it obtained a chief justice.

[27]*Dr. Bonham's* case [1610] 8 Co. Rep. 107, 114 (CP)

[28] Following Sir Edward Coke's elevation to the King's Bench as Chief Justice in 1613 Henry Hobart was appointed as the Chief Justice of the Court of Common Pleas in 1613. He was in the office till 1625 and died while in office.

[29]*Day* v. *Savadge* (1614) Hob. 84 (CP)

the Act of Parliament where the Act empowered an individual to be a judge in his own case. In *Sheffield* v. *Ratcliff*[30]Justice Hobart reiterated that judicial review was derived from the liberty and authority of judges to interpret the Law according to reason and best convenience to mould out the truest best use. Hence, judicial review has been a part of principles of unwritten Constitution of the United Kingdom and the same has been developed through various judicial pronouncements.

IV. RULE OF LAW

Rule of law connotes subordination of arbitrary powers of authorities to well-defined established law. In Britain this subordination of absolute power of the Monarch was introduced by Henry de Bracton (1210-1268) who proposed for the Royal Council. After establishment of the Parliamentary system in the United Kingdom Blackstone and A.V. Dicey subjected Parliament's absolute power to legislate to natural law (as Blackstone called it) and/ or fundamental principles (as Dicey called it). In the wake of struggle between the Monarch and the Parliament the 'Divine Right' of the Monarch was rejected. Sir Edward Coke (1551-1634) advocated for the supremacy of common law and codification for the same for ensuring primary condition of freedom constituting limitation of the power of the Monarch. Notwithstanding anything the English Rule of Law was first introduced in 1867 by W.E. Hearn (1828-1888).[31] This concept of English Rule of Law was later on developed by A.V. Dicey. According to Dicey, since the Norman conquest two characteristics of the political institutions of the England have become apparent, these are-

a. The first feature is the undisputed supremacy of the Central government through out the whole country. The royal supremacy was transferred to the sovereignty of the Parliament.
b. The second feature is supremacy of the rule of law.[32]

Dicey gave three meanings to the rule of law, these are-

[30]*Sheffield* v. *Ratcliff* (1615) Hob. 338 (CP)

[31] William Edward Hearn (21 April 1826 – 23 April 1888)[1] was an Irish college teacher and lawmaker. He was one of the four unique teachers at the University of Melbourne and turned into the main Dean of the University's Law School.

[32]A.V. Dicey, *Introduction to the Study of Law of the Constitution*, 183-184 (The MacMillan Press Ltd., London, Tenth Edition, 1959).

a. Absolute supremacy or predominance of regular law as opposed to arbitrary power,
b. Equality before the law or equal subjection of all classes before the law,
c. Paramontcy of the law over the Government. Therefore, Constitution is the consequence of the predominance of the legal spirit of any country.[33]

There, Dicey's rule of law was closely tied to the idea that the Parliament and the Court were closely associated to uphold the rule of law principle in the unwritten Constitution of the United Kingdom.[34]

Nevertheless, there was no written text proposing restrictions for legislature and executive until 4th November, 1950 when United Kingdom signed and entered into the European Convention on Human Rights. This convention is an international instrument signed by all the countries of European Union regarding protection of basic human rights of citizens of member countries.[35] The United Kingdom made these human rights part of its domestic laws in 1998 by enacting the Human Rights Act, 1998. Therefore, the principle of Rule of Law has been embedded in the unwritten Constitution of the United Kingdom. Lord Nueberger, President of the Supreme Court of the United Kingdom, in 2013 reiterated that the U.K. judiciary devoted to uphold the rule of law by ensuring protection to the rights of citizens. He also mentioned that '*the standard of law necessitates that any people with a true blue sensible lawful case must have a powerful methods for having that case considered, and, on the off chance that it is supported, being fulfilled, and that any people confronting a case must have a viable methods for safeguarding themselves. What's more, the standard of law likewise requires that, spare to the degree that it would include a disavowal of equity, the assurance of any such case is completed in broad*

[33]Rocardo Gosalbo Bono, The Significance of the Rule of Law and its Implications upon the European Union and the United States, 72 (229), *University of Pittsburgh Law Review*, 254

[34] Martin Loughlin, *Foundations of Public Law*, 315 (Oxford University Press, New York, 2010)

[35] The Council of Europe was established after the Second World War to ensure human rights and the standard of law, and to advance majority rule government. The Member States' first undertaking was to attract up an arrangement to make sure about fundamental rights for anybody inside their fringes, including their own residents and individuals of different nationalities. Initially proposed by Winston Churchill and drafted chiefly by British legal advisors, the Convention depended on the United Nations' Universal Declaration of Human Rights. It was marked in Rome in 1950 and came into power in 1953.

daylight. So residents must approach the courts to have their cases, and their resistances, dictated by decided openly as indicated by the law'.[36]

V. UNITARY GOVERNMENT

The government of the United Kingdom is unitary in nature even though all the local authorities are elected and also independent to execute policies but within the limit of the Constitution. Scotland, Northern Ireland, have their own legal systems and administration of the Northern Ireland, Scotland and to some an extent the Wales differ from the administration of England. However, all these four countries are subject to the power of the European Community, under the direct operation of the Central Government and the Parliament of the United Kingdom. Institutions, other than the Parliament of the United Kingdom, possessing legislative power acquire such right through either Royal Prerogative or may have been granted the same by the Parliament of the United Kingdom which can be amended or repealed by the Parliament.[37]

In the arrangement of unwritten Constitution of the United Kingdom there are several rules and practices which have not found any expression under formal source of law. However, these rules and practices are habitually obeyed. These rules and practices under the Constitution of United Kingdom are known as Constitutional Conventions. These conventions were initially thought to be limited to regulation of the residual legal power of the Crown but in practice these conventions regulated (and also are regulating till date) the conduct of holders of many public offices.[38]

The Constitution of the United Kingdom is unique because it has not been reduced to writing and is existing as a matter of customary law. Various documents indicating principles of the unwritten Constitution of the United Kingdom are known as Constitutional Conventions in the British legal system. Sir William Blackstone predicted that when the independence of any of the three i.e. the Monarch, Lords and Commons would be subsurvient to each other there would soon be an end of British Constitution. Thus, despite being unwritten the Constitution of the United Kingdom is

[36] Lord Nueberger's Speech in 2013.

[37] Lord. Hailsham, HALSBURY'S LAWS OF ENGLAND, 13, Vol 8 (2), (Butterworths, London, Fourth Edition, 1996)

[38] Lord. Hailsham, HALSBURY'S LAWS OF ENGLAND, 29, Vol 8 (2), (Butterworths, London, Fourth Edition, 1996).

existing because of its unique arrangement of power-sharing between the Monarch, Lords, Commons and the Judiciary.

CONSTITUTIONAL TRANSFORMATION IN UNITED KINGDOM

It can not be denied that the unwritten Constitution of the United Kingdom has upheld the Parliamentary Supremacy in the United Kingdom. However, over the period of time the United Kingdom has witnessed Constitutional changes, but in orderly fashion. The Glorious Revolution in 1688 transferred sovereignty from Monarch to the parliament. In 1610 Sir Edward Coke in *Re Bonham's* case posited 'Sovereignty' in the Judiciary where he attributed sovereignty to the Court of the King's Bench in the Judicial hierarchy.[39] Thus, there has been enough confusion to locate sovereignty in the British legal system. However, United Kingdom also witnessed transformation of the system based on Parliamentary Supremacy into a system based on the supremacy of the Constitution. The British legal system has also witnessed the rising of the judicial review between 1970 to 2000.

Therefore, in this backdrop it is significant to make a detailed study of the transformation that has taken place in the British legal system. United Kingdom is made up of England, Wales, Scotland, and Northern Ireland. The structure of the judicial system of the United Kingdom is hierarchical but fragmented since different nations within the United Kingdom has separate judiciary. The U.K. Supreme Court, previously known as House of Lords, is the Apex Court of the United Kingdom (i.e. for England, Wales, Scotland, and Northern Ireland). England and Wales, Scotland and Northern Ireland have separate judiciary within its State. Thus, within each nation, different courts are located at different levels based on their hierarchy and subject matters of dispute. However, the unifying factor in the hierarchy and separate judicial system in the United Kingdom is the Supreme Court (previously known as House of Lords). The Supreme Court of the United Kingdom, except Scottish Criminal cases, stands a6t the top of the hierarchical judicial system.

[39] Roy Stone de Montpensier, 'The British Doctrine of Parliamentary Sovereignty: A Critical Enquiry', 26 (4), *Louisiana Law Review*, 757 (1996).

In this backdrop, it is important to mention that for this chapter the researcher focuses on the judgments issued by the following courts,

a. The Supreme Court of United Kingdom, previously known as House of Lords.
b. Court of Appeal of England and Wales,
c. King's/ Queen's Bench Division of the High Court of England and Wales.

Post Constitutional Reform Act 2005 the House of Lords was substituted with the Supreme Court of the United Kingdom as an Apex Court.[40] Thus the focus of the Chapter is judgments delivered by the Judiciary of England and Wales.

The researcher confines the case study from 1950 to 2020. The study in the Indian context is also during the same time frame. This study focuses on Constitutional transformation that took place through english case laws. Pre 1950 cases are considered to the extent their relevance to understand the arrangement of separation of power in the British legal system.

The contribution of case laws in English legal system is immense as these shaped the legal system of the United Kingdom because it is largely based on unwritten conventions. *Rylands* v. *Fletcher*[41] is significant because this case did not fit into the existing English Tort Law. In this case the Rylands stored huge amount of water in a

[40] Judgment of House of Lords, now the U.K. Supreme Court is cited in the series known as 'AC' (Appeal Cases). 'AC' series also includes

a. Judgments from the Privy Council and occasionally from the Court of Justice of European Union.
b. Judgment issued by the Court of Appeal as well as appellate decisions issued by the High Court of Justice. Series of EWCA denoted appeal level decisions issued by Court of Appeal of the England and Wales.

The series of 'QB/ KB' (Queen's Bench/ King's Bench) reports all trial level decisions issued by the Queen's Bench/ King's Bench (based on the female/male Monarch) of the High Court of Justice, England and Wales. QB/ KB reports judgments in civil matters and in matters which have not been assigned to Chancery Division and/or Family Division of the High Court of Justice.

The series of 'Ch' reports trial level decisions issued by the Chancery Division of the High Court of Justice, England and Wales. This Division hears matters related to governance of business entity, trust law, insolvency and matters of equity.

The series of 'Fam D' (Family Law Report) reports trial level decisions issued by the Family Division of the High Court of Justice, England and Wales involving matters related to marriage, children, medical treatment, wills and probate matters.

UKSC stands for United Kingdom Supreme Court formerly known as UKHL i.e. United Kingdom House of Lords. EWHC stands for the High Court of Justice of England and Wales.

If a judgment is reported in *Official Law Reports* (LR) then that citation must be preferred over *All England Law Reports* (ER) and *Weekly Law Reports* (WLR).

[41] *Rylands* v. *Fletcher* [1868] UKHL 1/ (1868) LR 3 HL 330

shaft made underground. The water broke the shaft and flooded the active mine of Fletcher. The case was filed by the Fletcher, the plaintiff, in 1865 before the trial court. The Court decided in favour of the defendant, Rylands, contending that the defendant was ignorant about the mine, thus, the defendant could not be held liable for negligence. The plaintiff filed an appeal before the Court of Exchequer Chamber[42] where Justice Colin Blackburn held Rylands guilty of tresspass[43]. Justice Colin Blackburn observed that there was no negligence as the premises of the plaintiff and the defendant did not adjoin, there was no nuisance and no damage of continuous or recurring nature. However, Justice Blackburn compared this situation with tresspass and declared that the true Rule of Law was

that if any person brought or collect any product in his land which may likely cause mischied if escaped then it became the liability of the person to keep it at his peril. If he did not do so then prima facie he became answerable if it escaped.

On the basis of this observation the Court of Exchequer Chamber reversed the decision of the lower court and held the defendant guilty. The defendant filed an appeal before the House of Lords[44] where the case was presided over by Lord Justice Cairns and Lord Justice Robert Rolfe. The House of Lords upheld the decision of the Court of the Exchequer Chamber. Lord Justice Cairns further limited Justice Blackburn's observation and distinguished between non-natural use of the land and any purpose for which the land could be used. Thus, Lord Justice Cairns emphasied upon abnormal and inappropriate character of the reservoir of the defandant and imposed strict liability upon the defendant. According to Lord Justice Cairns Strict Liability was a miscarriage of lawful activity, considering its place and manner, the activity became unusual. Therefore, water collected in tanks or pipes was not unusual but in this specific case storage of water in such large amount in that land made it

[42] The Court of Exchequer Chamber was an English court for common law civil actions before the reforms of the Judicature Acts of 1873–1875. It originated within the fourteenth century, established in its final form by a statute of 1585.
The Court heard references from the King's Bench, the Court of Exchequer and, from 1830, directly instead of indirectly from the Court of Common Pleas. It had been constituted from four judges belonging to the two courts that had been uninvolved initially instance. Though further appeal to the House of Lords was possible, this was rare before the nineteenth century. As a rule, a judgment of the Exchequer Chamber was considered the definitive statement of the law. It had been superseded by the Court of Appeal of England and Wales.

[43] *Rylands* v. *Fletcher* [1865] LR 1 EX 265

[44] *Rylands* v. *Fletcher* [1868] LR 3 HL 330.

non-natural use of the land. A water reservoir in a land adjoining a coal mine was definitely inappropriate use of the land.

In *Balfour* v. *Balfour*[45] the issue at hand was whether an agreement made between a husband and wife was legally binding. In this case the husband Mr. Balfour promised to pay a sum of money every month before leaving for Ceylone. Mrs. Balfour, the wife, remained in England because of her health issues. After a certain period the husband refused to pay the agreed amount which led to an institution of the suit by the wife against the husband. This case was presided over by Warrington L.J., Duke L.J., Atkin L.J. The Coram unanimously observed that there was no intention to enforce the domestic agreement as legally binding. However, three judges deliver different reason for such observation. Lord Justice Warrington observed that in the present case the two people never intended to enforce the agreement. There was never a bargain. The husband had made an agreement and he was supposed to honour the same as long as he was in a position to do so. However, the refusal to do so would not make him liable as there was no bargain between the parties. Lord Justice Duke emphasized upon the consideration in the contract. According to him there was no consideration on the part of the wife, thus, the domestic agreement was not legally binding upon the husband. Lord Justice Atkin in the present case held that there were some agreements which did not constitute Contract. According to him agreement between husband and wife was the type of agreement which did not constitute Contract irrespective of the consideration by the either of the spouses. He also observed that had such cases been allowed then there would be instances of husband suing the wife for not performing her obligations, express or implied, undertaken by her.

- **ENGLISH LAW ON TORT OF NEGLIGENCE**

Donoghue v. *Stevenson*[46] is significant because this case has shaped the English law on Tort of negligence. Mrs. Donoghue filed this case against Stevenson which reached the House of Lords for final solution. Mrs. Donoghue bought a ginger beer from Wellmeadow café in Paisley. After consuming half of the beer she noticed decomposed remains of snail in the beer bottle. Mrs. Donoghue could not claim compensation from the seller through breach of warranty contract. Thus, Mrs.

[45] *Balfour* v. *Balfour* [1919] 2 KB 571.
[46] *Donoghue* v. *Stevenson* [1932] UKHL 100.

Donoghue sued the manufacturer, Stevenson contending that the manufacturer owed duty of care towards the consumer even though there was direct contract between the manufactiurer and Mrs. Donoghue. In the House of Lords this case was presided over by five Lord Justices and they were Buckmaster L.J., Atkin L.J., Tomlin L.J., Thankerton L.J., Macmillan L.J. The Judgment was delivered by Lord Justice Atkin with 3:2 majority with Lord Justice Buckmaster and Lord Justice Tomlin dissenting. Lord Justice Atkin raised the question whether the manufacturer for any article of drink to a distributor, in a circumstance which prevented both the distributor or purchaser or the consumer from inspecting the quality of the drink before buying, was liable to the consumer for any defect found in the drink. Atkin L.J., observed that the manufacturer of an article owed duty of care to the consumer in a circumstance where the manufacturer intended the article to reach the consumer as left by the manufacturer without any reasonable possibility of intermediate intervention in between. In such a situation absence of reasonable care in preparation or putting up the product might result in injury to the property or the person of the consumer. Thankerton L.J. and Macmillan L.J. also, in two concurrent judgments, observed that the manufacturer owed duty to the appellant, Mrs. Donoghue. Lord Justice Buckmaster dissented on the ground, agreeing with Lord Anderson in *Mullen* v. *Barr & Co*.,[47] that the manufacturer of ginger-beer was responsible for distribution of the same to a vast area of the United Kingdom. Therefore, it was outrageous for making them responsible to the public at large for condition of each and every bottle distributed from their work. Had this responsibility been attached to the respondent then they would be in a position to deal with claims of damages which they could not possibly investigate or answer. Lord Justice Tomlin concurred with Lord Justice Buckmaster and delivered a separate dissenting judgment.

Regarding Tort of Negligence *Candler* v. *Crane, Christmas & Co*.[48] is a significant case as it expressed a contrary view of Donoghue v. stevenson case on tort of negligence. In this case an accountant of a company prepared a negligent report. The company showed that report to a third party and the third party invested money basing upon that report. Subsequently the third party lost money. The plaintiff in this case contended that the accountant of the company owed duty to care to the plaintiff. This

[47] *Mullen* v. *Barr & Co.* 1929 SLT 341.
[48] *Candler* v. *Crane, Christmas & Co* [1951] 2 KB 164.

case was presided over by Cohen LJ, Asquith LJ and Denning LJ.[49] Lord Justice Asquith and Lord Justice Cohen in majority judgment declared that the accountant did not owe any duty of care to a third party in the absence of a contractual obligation. In the majority judgment it was mentioned that regarding tort of negligence English law was still divided and *Donoghue* v. *Stevenson* could not abolish this differences. However, Lord Justice Denning gave dissenting judgment and based his reasoning on two very important cases, these are- *Derry* v. *Peek* and *Donoghue* v. *Stevenson*[50] Denning LJ observed that the judgment in *Derry* v. *Peek* was erroneous because the House of Lords held that a person could not be held liable for statement which he/she made in goof faith and with the belief that it was true.[51] According to Denning LJ *Donoghue* v. *Stevenson* exploded an error of law that was existed till 1932. This case held that absence of a contract did not defeat the claim of third party provided the circumstances disclosed the duty by the contracting parties to the claimant. Therefore, Denning LJ based his ratio on the principle of 'duty of care' in tort of negligence and held the accountant of the company guilty of tort of negligence.

Hedley Byrne & Co. Ltd. v. *Heller & Partners Ltd*.[52] is significant because the dissent of Lord Justice Denning became the rule of English law through this case. This case was presided over by Lord Reid, Lord Morris of Borth-Y-Gest, Lord Hodson, Lord Devlin & Lord Pearce in the House of Lords.

Hedley Byrne & Co. Ltd., an advertising agency, received a bulk order from customar, Easipower Ltd. the Hedley Byrne asked its bank, National provincial Bank, to get a report from Easipower's bank, Heller & partner regarding the financial position and creditworthiness of Easipower Ltd. Heller & Partner through a letter informed about the stable financial position of Easipower Ltd. However, after-a-while the Easipower Ltd. went into liquidation. The appellant, Hedley Byrne claimed that Heller & partner acted negligently in issuing the letter and provided misstatement regarding the financial position of Easipower Ltd. the respondent, Heller & Partner,

[49] LJ- Lord Justice of Appeal.

[50] *Derry* v. *Peek* [1889] 14 App Cas 337.
Donoghue v. *Stevenson* [1932] UKHL 100

[51] In *Derry* v. *Peek* [1889] 14 App Cas 337 the House of Lords rejected the claim of the Plaintiff against the defendant company for deceit. The House of Lords observed that the statement, even though eventually found out to be misrepresentation, was made in good faith and with the belief that it was true.

[52] *Hedley Byrne & Co. Ltd*. v. *Heller & Partners Ltd*. [1964] AC 465.

relying on the decision of *Candler* v. *Crane, Christmas & Co*[53], stated that it did not owe any duty of care to Hedley Byrne.

Five judges in the House of Lords observed that the relation between Hedley Byrne and Heller & Partner was proximate enough to create a contractual obligation between them. Hedley Byrne relied upon the information provided by Heller & Partner which was the bank of the liquidated company. The Heller & partner disclaimed any assumption of duty of care. However, in the judgment it was observed that when Heller & Partner received the query and accepted to acted upon to provide information then it could not disclaim any assumption of duty of care to the appellant. Thus, the english law on tort of negligence was finally changed in 1964 through the judgment in this case.

Doreen Ann Letang v. *Frank Anthony Cooper*[54] is another case of law of Torts. In this case the defendant, Mr. Cooper ran over Mrs. Letang's leg while she was sunbathing. After almost three years i.e. in 1961 the plaintiff filed a suit contending against the defendant for damages for loss and injury caused by-

a. Negligent driving by the defendant, and
b. Trespass in person by the defendant.

The question in this case was whether the action of the plaintiff was time barred. It was accepted by the plaintiff that the action for negligence was time barred after three years, but the action for trespass in person was valid. The plaintiff referred section 2(1) of the Limitation Act 1939 which laid down that the period of limitation for instituting any action for damages for negligence, nuisance or breach of duty was initially six years. However, the Parliament in 1954 reduced this limitation period from six years to three years. The plaintiff pointed out that section 2 (1) of the Limitation Act, 1939, after the amendment in 1954, prescribed limitation period for action for damages for negligence, nuisance and breach of duty. It did not include action for damages for trespass. Thus, the plaintiff contended that the old provision of limitation pf six years was applicable to this action. This case wa spresided over by Lord Denning M.R., Lord Justice Diplock, and Lord Justice Danckwerts in the Court of Appeal.

[53] *Candler* v. *Crane, Christmas & Co* [1951] 2 KB 164.
[54] *Doreen Ann Letang* v. *Frank Anthony Cooper* [1965] 1 QB 238

Lord Denning M.R. observed that the cause of action for damage for trespass called for judicial interpretation of section 2 (1) of the Limitation Act, 1939. The plaintiff distinguished between injury due to negligence and injury due to trespass in person. However, the distinction between trespass and the case was obsolet and Lord Denning suggested to not divide the case between direct injury i.e. trespass and the consequential injury as was happened in the case. thus, Lord Denning divided the injury either intentional or unintentional. If the injury was unintentional then it was negligence on the part of the defendant. The injury became 'breach of duty' if it was intentional and trespass in person where the defendant owed a duty (either through contract or independent of contract) to take care to the plaintiff. Thus, rejecting the contention of the plaintiff, Lord Denning observed that the action was time barred under the Limitation Act, 1939. Lord Danckwerts agreed with Lord Denning M.R.

Lord Diplock also agreed with the reasoning given by Lord Denning M.R. and observed that an injury when unintended became negligence and if intended constituted action for damage for breach of duty. Therefore, the Court allowed appeal to the House of Lords and held that the present action for damage was time barred.

- **ENGLISH TORT LAW ON DAMAGES**

Lord Denning stated that until 1964 the established rule of english law regarding Tort for wrongdoing was that exemplary damages would be inflicted. However, this settled principle was declared to be erroneous by Lord Devlin in House of Lords in 1964. Damage for tort, according to Lord Devlin, should be confined to compensation in money for the wrong done while the punishment should be left to the criminal law to decide.[55] Lord Denning opined that most of the wrongdoings are actionable as tort in civil courts while the same could be treated as crime under the criminal law. Libel is a good instance where the injured person is to receive compensation in money. The wrongdoer is to be punished by a fine. Lord Denning was of the opinion that why not settle the whole thing in one procedding where the

[55] Lord Denning, What Next in the Law, 196, (Aditya Books Pvt. Ltd. New Delhi, First Indian Reprint, 1993).

fine paid by the wrongdoer would be given to the injured person instead of depositing the same to the State.[56]

Luodon v. *Ryder*[57] triggered the court to decide between exemplary damage and punitive damage. Mrs. Luodon, the plaintiff, filed the suit against Mr. Ryder claiming damages for trespass and damages for assault and battery. Mrs. Luodon claimed that Mr. Ryder entered her property through a window pane and when the plaintiff tried to stop the defendant he started beating the plaintiff. The defendant, Mr. Ryder did not result in any physical harm, but his act amounted to mental shock to the plaintiff. This case was first heard by Mr. Justice Devlin (as he was then) and a jury before the High Court of England and Wales. The Jury awarded an exemplary damage to be paid by the defendant. The defendant, Mr. Ryder, filed an appeal before the Court of Appeal, England and Wales. In this court it was presided over by Lord Justice Singleton, Lord Justice Denning and Lord Justice Hodson. Three judges Bench considered that in this situation exemplary damage should be appropriate for wrong done by the defendant because of the nature of offence and dismissed the appeal. The reason for this decision was that defendant entered the home forcefully and used his force upon the plaintiff as well. Therefore, the defendant was guilty of crime as well. This principle was later on changed in *Rookes* v. *Barnard* in 1964.[58]

Douglas Rookes was employed by British Overseas Airways Corporation (BOAC). He was also a member of the Association of Engineering and Shipbuilding Draughtsman (AESD). Mr. Rookes left the AESD after a disagreement. The BOAC and AESC had a *closed-shop* agreement.[59] Following his leaving the AESD the BOAC suspended Mr. Rookes and after some months fired him without proper notice and with one week salary. This case reached the House of Lords (United Kingdom) where it was heard by Lord Reid, Lord Evershed, Lord Hodson, Lord Devlin and Lord Pearce. Lord Devlin observed that damages would be allowed to be punitive in

[56] Lord Denning, What Next in the Law, 196, (Aditya Books Pvt. Ltd. New Delhi, First Indian Reprint, 1993).
[57] *Luodon* v. *Ryder* [1953] 2 QB 202.
[58] *Rookes* v. *Barnard* [1964] UKHL 1.
[59] A pre-entry closed shop (or simply closed shop) is a form of union security agreement under which the employer agrees to hire union members only, and employees must remain members of the union at all times in order to remain employed. This is different from a post-entry closed shop (US: union shop), which is an agreement requiring all employees to join the union if they are not already members. In a union shop, the union must accept as a member any person hired by the employer.

nature i.e. damage with the aim of punishing the bwrongdoer rather than simply compensating the claimant, in following circumstances-

i. Oppressive, arbitrary, unconsttitutional action by the servant of the government,
ii. Where the defendant's conduct was 'calculated' to make a profit for himself,
iii. Where the statue expressly authorised for the same.

Therefore, in this case exemplary damage was not imposed. Lord Devlin wanted to limit the scope of exemplary damges. However, this decision was criticised by lord Denning in *Broome* v. *Cassell & Co. Ltd*.[60] In this case Lord Denning criticised Lord Devlin's observation in *Rookes* v. *Barnard* as decided '*per incurium'* and 'unworkabkle' because according to Lord Denning, servants of governments were not the only people to be guilty of oppressive, arbitrary and unconstitutional action. A common man could also commit the same offence as we could see in *Luodon* v. *Ryder*. However, Lord Hailsham of Marylebone, L.C.[61] crticised Lord Denning when *Broome* v. *Cassell & Co. Ltd*. reached the House of Lords by stating that *there was no scope open to the Court of Appeal to gratuitous advice to judges of first instance to ignore the decision of House of Lords. When it was said that the judgment was declared per incurium and unworkable it meant that the lower court was not in agreement with the higher court. By doing this they only put the higher court in embarrassing situation.* Therefore, the stand of the House of Lords on punitive/ exemplary damage was the one which was declared in *Rookes* v. *Barnard* (1964) by Lord Devlin.

● *LOCUS STANDI* & BRITISH LEGAL SYSTEM

Lord Denning has stated that during 19th century English Courts were quite reluctant to allow anyone to institute a suit unless he had a grievance of his own. In Sidebotham[62] case Lord Justice James reiterated the rule of *locus standi* that the Court would hear an individual only when it could be proved that he had suffered any loss. However, this stand of the Court has been changed during 20th century and an

[60] *Broome* v. *Cassell & Co. Ltd* [1972] AC 1027
[61] L.C. stands for Lord Chancellor.
[62] [1880] 14 Ch D 458

individual was heard if he could prove 'sufficient interest' in the litigation. The common law Courts hasthree Writs by which they restarin abuse or misuse of power, and these are Certiorari, Mandamus and Prohibition. These Writs are available to remedy for any wrong done by any public auhtority while fulfilling its statutory duties. These remedies are not available against non-public authorities and non-statutory duties. The shift in application of *locus standi* rule was that, according to Lord Denning, the Court relaxed the rule and reserved it for their discretion as to whom it shall hear.[63] The first case where the rule of locus standi was relaxed is *R.* v. *Thames Magistrates' Court*[64] Lord Parker and Lord Denning both relaxed the rule of *locus standi*. The question in this case was whether anybody who is not directly affected by a wrong can seek the Court to grant the Writ of Certiorari. It was observed by Lord Justice Parker and Lord Justice Denning that *anybody can apply for the Writ of Certiorari- a member of the public who has been inconvenienced or a person who has a particular grievence of his own. However, the remedy is purely discretionary.*

In *R* v. *Paddington Valuation Officer,* Ex.p. *Peachy Property Corpn Ltd*[65] the question was whether Peachy Property Corporation was 'aggrieved person' to seek remedy. It was contended that the valuation of property in an area was assessed erroneously by the authority, however, the peachy Property Corporation's property was not wrongly valued. The House of Lords in this case observed that a ratepayer would qualify as an aggrieved person to challenge assessment of rate of property by the authority even if the complainant had not sustained any financial damage or legal injury. The purpose of this relaxation of *locus standi* rule was to remedy the wrong committed by public authority while doing his/her duty.

The relaxation of *locus standi* rule was introduced by Lord Parker and Lord Denning back in 1957 in *R* v. *Thames Magistrates' Court* case. Lord Justice Denning later on went ahead to incorporate this in the English Common Law through several judicial pronouncements. A very limited judicial pronouncements is found regarding relaxation of *locus standi* rule in English legal system. However, the catalyst behind increasing the number of litigations instituted in the interest of common people was

[63] Lord Denning, The Discipline of Law, 115-117, (Aditya Books Pvt. Ltd., New Delhi, First Indian Reprint, 1993).
[64] *R.* v. *Thames Magistrates' Court* [1957] 5 LGR 129.
[65] *R* v. *Paddington Valuation Officer,* Ex. p *Peachy Property Corpn Ltd* [1966] 1 QB 380.
Ex. p. means *Ex Parte*.

Mr. raymond Blackburn.[66] He came before the Court of appeal on many occassions always in person regarding some matters of public concern. His intervention in matters of public concern has contributed to further widening of the *locus standi* rule in English legal system.[67]

R. v. *Commissioner of Police of the Metropolice*, Ex. p. *Blackburn*[68] is a significant case as it deals with both *locus standi* and police power. In 1966 Mr. Blackburn approached the Commissioner of the Police of the Metropolice about the way big London Clubs were operating in London. He also informed the police about illegal gaming in almost all the casinos in London. Mr. Blackburn was assured that appropriate steps would be taken. But nothing apperaed to happen. Thereafter, a policy decisionb dated 22nd April, 1966 was issued to senior police officers of Metropolitan Police regarding to take no action against clubs for breaching gaming laws unless there was complaint of cheating or incidents of any criminal activity. The effect of this instruction was that the clubs, casinos in London were allowed to operate without police intervention unless it was required. When the case reached the Court of Appeal it was informed by Mr. Blackburn that initially there were two/three cases however, later on all the cases were dropped. Mr. Blackburn contended that the policy decision by Police Department was erroneous. This case was heard by Lord Denning M.R., Lord Justice Salmon and Lord Justice Edmund Davies before the Court of Appeal. In this case it was decided that the Commissioner of the Police of the Metropolitan had the duty to maintain peace and security within his jurisdiction and to detect crimes as early as possible. The question raised in this case was that whether the Court would be justified in issuing the Writ of Mandamus to impel the Commissioner to do his duty. Whether Mr. Blackburn could invoke the remedy of mandamus was also a question in this case. The Court decided that Mr. Blackburn had sufficient interest to be protected which also proved his *locus* to file the suit.

In *Blackburn* v. *Attorney General*[69] Mr. Raymond Blackburn showed his eternal vigilance in support of law. Mr. Blackburn in this case challenged the Crown for its

[66] Mr. Raymond Blackburn was a British Labour Party Politician and also was a Member of Parliament. He also served the British Army during World War II.

[67] Lord Denning, The Discipline of Law, 118, (Aditya Books Pvt. Ltd., New Delhi, First Indian Reprint, 1993)

[68] *R*. v. *Commissioner of Police of the Metropolice*, Ex. P. *Blackburn* [1968] 2 QB 118

[69] *Blackburn* v. *Attorney General* [1971] 2 All ER 1380.

decision to sign the Treaty of Rome and entering the European common market. Mr. Blackburn contended that by signing this treaty Her Majesty's Government would be surrendering its sovereignty, though in part, to the Parliament. This case was presided over by Lord Denning M.R., Lord Justice Salmon and Lord Justice Stamp. The Court dismissed this appeal. Lord Justice Salmon observed that he deprecated a litigation the purpose of which was to influence the Political Decision. Lord Justice Salmon also mentioned that Court had nothing to do with the political decisions of the. However, the Court would intervene only when there was any violation of rights because of implementation of such decisions. It was also stated that the power of the Court is to decide and enforce what is law and not what it should be. Lord Justice Stamp referred the division of power and stated that the arrangement of the division of power between the Crown, Parliament and the Court restricted the Court to interfere with the decision making which was political in nature. Lord denning M.R., observed that the *stand* of Mr. Blackburn would not be questioned on the ground that he was concerned about the Country and the Court appreciated that. However, the Court would not impugn the treaty making power of Her Majesty. Thus, the Court rejected the contention of Mr. Blackburn.

R. v. *Police Commissioner*, Ex. p. *Blackburn*[70] is another significant case instituted by Mr. Blackburn regarding non-implementation of laws against pornography in London. This suit led to complete overhaul of the Obscene Publications Squad of the Metropolitan Police and also led to prosecution in due course of several senior officers for corruption. Mr. Blackburn proved his *stand* by contending that his minor children and other children might see the publication of pornography which would be detrimental to their mental health. This case was presided over by Lord Denning M.R., Lord Justice Phillimore and Lord Justice Roskill before the Court of Appeal. The Court unanimously held that non-implementation of laws against pornography amounted to breach of duty on behalf of the Commissioner. The Court was to grant the writ of *mandamus* when the Court was informed that a new Commissioner, Sir Robert Mark, had been handed over the responsibilities. The Court later on did not issue *mandamus* and recorded the reason that Sir Robert Mark was a police officer of such outstanding quality that the Court was confident that he would strictly implement laws restricting pornography. the Court in this case made it clear that it would not

[70] *R*. v. *Police Commissioner*, Ex. p. *Blackburn* [1973] QB 241.

interfere with the discretionary powers of Police while enforcing law. The executive would work with the limited manpower it had. Nevertheless, the Court mentioned that availability of pornographic magazines both in soft and hard copies proved that the laws were not strictly implemented. There were also instances of tip-off to the shops selling the same before the arrival of the police. Thus, the court pointed out that ineffectiveness lied with the system which had to be cured and the provisions of the Obscene Publications Act, 1959 had to be implemented strictly.

Attorney General v. *Independent Broadcasting Authority*[71] again involved a question of locus standi of Mr. McWhirter who approached the court. Mr. McWhierter approached the court saying that a film was going to be broadcasted which was already been reviewed as outrageous, a shocker, the worst ever by reviewer. This case was presided over by Lord Denning M.R., Lord Justice Cairns, and Lord Justice Lawton. On watching the film judges found it boring, dull, dreary and far from being a shocker. The Attorney General approached the Court and informed that he did not consent to this suit to be heard, however, the Bench decided to hear the matter. On question of *locus standi* of Mr. McWhirter the Court observed that Mr. McWhirter had *locus standi* to approach the court because if an individual found his legal rights to be violated by act or omission of the public authority then the aggrieved had every right to at least seek declaration from the Court. Lord Denning M.R. observed that the common law principle was that if there was a good ground for supposing that public authority or the government was about to transgress the law, in a way which offends or injures thousands of Her Majesty's subjects, then as a last resort any aggrieved person could draw the attention of the Court to such transgression of law. However, this remedy was available as a last resort and when there was no other way to secure that the law was obeyed. Therefore, it was suggested that in this case the aggrieved person should approach-

a. Either the Minister so that he could give a notice under the appropriate enactment to ban the broadcasting of any show with undesirable contents,
b. Or, the member of Parliament so that a debate regarding that could be initiated in the House of the Parliament.

[71] *Attorney General* v. *Independent Broadcasting Authority* [1973] QB 629.

Nevertheless, Lord Denning mentioned that none of these above mentioned remedies seemed to be accessible nor was it speedy and independent. Therefore, the Court held that declaration or injunction could not be granted as sought by Mr. McWhirter.

Lord Denning later on in his book *The Discipline of Law*[72] mentioned that he regretted for this judgment as the then English law was at a confusing state during the case. Mr. McWhirter was able to get any of the prerogative writs (certiorari, mandamus or prohibition) to be issued against the Independent Broadcasting Authority, but was not able to get any injunction issues.[73]

In *R.* v. *Greater London Council* Ex. p *Blackburn and another*[74] the issue was whether Blackburn had any *locus standi* to file a suit seeking the Court to order for banning of exhibition of pornographic film. Obscene Publication Act, 1959 was enacted by the Parliament banning exhibition of any obscene element to the public. The provision of the Obscene Publication Act, 1959 expressly excluded cinematograph films shown in public. This exclusion gave rise to exhibition of pornographic film imported from Sweeden. The existing censorship of films was not even able to effectively stop exhibition of obscene element to the shame of common people. A film named 'More About the Language of Love' was refused by the British Board of Film Censors for issuance of Certificate. However, the exhibitors in London appealed to Greater London Council (hereinafter referred as GLC) which granted its consent to exhibit the same despite its obscene content. Mr. Blackburn approached the Court against the move of GLC contending that exhibition of obscene element through cinematograph film was against common law principle. The GLC contended that the petition was not maintainable because Mr. Blackburn did not have *locus standi* to move the court. At the trial court the Exhibitors were found guilty by Jury of showing indecent elements and were imposed fine. The case reached to the Court of Appeal wherethe case was presided over by Lord Denning M.R., Lord Justice Stephenson and Lord Justice Bridge. It was unanimously held in this case that Mr. Blackburn had *locus standi* because he was a citizen of London and his wife was ratepayer. He had children who would be effected because of exhibition of indecent

[72] Lord Denning, The Discipline of Law, 115-117, (Aditya Books Pvt. Ltd., New Delhi, First Indian Reprint, 1993).
[73] Lord Denning, *The Discipline of Law*, 132 (Aditya Books Pvt. Ltd., New Delhi, First Indian Reprint, 1993)
[74] *R.* v. *Greater London Council* Ex. p *Blackburn and another* [1976] 3 All ER 184.

and obscene element. The *locus standi* of Mr. Blackburn could not be refused on the ground that he was not directly aggrieved by the exhibition of the indecent element in the film. In this incident there was adequate proof that the government or the public authority transgressed the law which directly or indirectly effected a number of Her Majesty's subjects. Thus, anybody from them could bring the suit and had *locus standi* to move the court.

In India the rule of *locus standi* was relaxed post 1978 by Justice P.N. Bhagwati. In English Law Lord Justice Denning expanded the rule of *locus standi* back in 1951. With the relaxation of *locus standi* rule any individual could approach the Court on proving that the suit was instituted in larger interest. However, till 1968 there were very few cases instituted in the interest of common people. The initiative was taken by Mr. Raymond Blackburn who presented in person before the Court regarding issues in the larger interest. Thus, it is apt to say that the procedural innovation as introduced by Lord Justice Denning in 1951 became the common law principle by 1968. In this backdrop it is found that Justice Bhagwati, an Indian judge, subscribed to the school of judicial activism as introduced by Lord Justice Denning in English and Wales.

● JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

In *Associated Provincial Picture House Ltd*. v. *Wednesbury Corp*.[75] the question to what an extent the Court can intervene with the act of an executive? This case was presided over by Lord Greene MR, Somervell LJ[76] and Singleton J. In this case three judges unanimously laid down the principle of judicial review of administrative action which is known as Wednesbury Principle. Lord Greene MR observed that the *Court can intervene to find out whether the executive had acted according to the law so laid down by the Parliament. In a situation where the executive was found to act contrary to the law the court must not substitute itself for that authority. The Court must not extend its power and assume the power of the executive authority. When the Parliament had entrusted an executive authority with some discretionary power then it became the responsibility of that authority to act in a way to not look unreasonable*

[75] *Associated Provincial Picture House Ltd*. v. *Wednesbury Corp* [1948] 1 KB 223.
[76] MR- Master of Rolls
LJ- Lord Justice of Appeal

for any sane person. Therefore, Wednesbury Principle laid down that in following circumstances the Court can interfere with the administrative action-

a. When the executive authority has acted contrary to the law so laid down,
b. When the executive authority has acted beyond the power so delegated,
c. When the decision of the administrative authority is so unreasonable that no reasonable person could make it.

However, the Wednesbury Principle remained silent about judicial review of any other Act enacted by the Parliament. Wednesbury principle laid down guidelines for judicial review of administrative action.

Seaford Court Estates Ltd. v. *Asher*[77] was presided over by three judges i.e. Lord Greene MR, Asquith LJ and Denning LJ. In this case the landlord increased the rent amount on the ground that he would provide hot water to the tenant. Initially the tenant agreed to pay the rent at increased amount. However, later on the tenant tried to reduce the rent amount to the previously paid amount. The landlord contended that the tenant had no merits as the provision in the Rent Act, 1920 did not consider any contingent burden as a burden. However, the Court unanimously delivered a judgment, written by Denning LJ, extending liberal interpretation to the word 'burden' in the impugned Act. The Court observed that 'burden' under the Rent Act, 1920 included contingent burden. The word 'contingent' was not used because the Parliament did not foresee that this situation was coming. According to Denning LJ *judges would have been saved from trouble had all the Acts were enacted by the Parliament with divine prescience and perfect clarity. In an absence of it, when any defect appears judges could not fold their hands and blame the draftsman. The judge must find out the intention of the Parliament.* Therefore, the Court looked into the intention of the Parliament and gave the enactment a liberal interpretation.

However, this case went for an appeal to the House of Lords. In *Asher* v. *Seaford Court Estates Ltd*[78] the decision of the Court of Appeal was upheld by the majority decision. The dissenting opinion was delivered by Lord MacDermott on the ground that the liberal interpretation was used rather too widely.

[77] *Seaford Court Estates Ltd*. v. *Asher* [1949] 2 KB 481.
[78] *Asher* v. *Seaford Court Estates Ltd* [1950] 1 All ER 1018.

Lord Justice Denning in *Magor and St. Mellons Rural District Council* v. *Newport Corporation*[79] again dealt with the issue of interpretation of Statutes. In this case the Newport Corporation had expanded its boundary by taking some parts of Magor and St. Mellons District Council and the corporation had to pay compensation. Meanwhile the Minister made an order amalgamating these two districts. This order gave Newport Corporation an opportunity to reduce the amount of compensation and pay it to a newly constituted district instead of two districts as it was previously. Denning LJ in the Court of Appeal found it unjust if the Newport Corporation relied on the literal meaning of the Order. Therefore, he observed that as it had already been established in Seaford Court Estate Ltd. case that the Court had to find out the intention of the Parliament in case of ambiguity in the language of the Statute, the Court must do it better by filling the gaps and making sense of the enactment. He, therefore, ordered Newport Corporation to pay compensation to two separate districts. In an appeal to the House of Lords[80] Lord Simonds criticized the observation by Lord Justice Denning and confined the role of a Court to the mere interpretation of the words of the legislature. He further laid down that while interpreting if any gap is found in the legislation then the solution is an amendment and not the liberal interpretation by the Court. Any kind of interpretation by the Court which is beyond the written meaning of the legislation had been named as 'usurption of power by the Court' by Simonds LJ.

Thus, striking similarity can be found in the legal philosophy of both India and England & Wales during 1951. It is in 1951 when the Supreme Court of India refused to give a liberal meaning to the provisions of the Constitution of India in an infamous case *A.K. Gopalan* v. *State of Madras*.[81] Simultaneously in England and Wales the House of Lords refused to give liberal interpretation in *Magor and St. Mellons Rural District Council* v. *Newport Corporation.*[82] There was also striking similarity between the ratio of these two cases. In A.K. Gopalan case Justice Kania observed that 'Law' meant *law as enacted by the State*. Justice Kania restricted the role of the Court to declaring a provision void and left the rest upon the Parliament. In Newport Corporation case Lord Justice Simonds gave the similar ratio observing the Court was

[79] *Magor and St. Mellons Rural District Council* v. *Newport Corporation* [1950] 2 All ER 1226
[80] *Magor and St. Mellons Rural District Council* v. *Newport Corporation* [1951] 2 All ER 839.
[81] *A.K. Gopalan* v. *State of Madras* AIR 1950 SC 27.
[82] *Magor and St. Mellons Rural District Council* v. *Newport Corporation* [1951] 2 All ER 839.

to construe the meaning of an impugned legislation narrowly. Any attempt by the Court to fill up any gap so disclosed during interpretation meant naked usurption of the power of the Parliament. Therefore, it can easily be said that regarding the role of the judges and the Court both India and England & Wales were thinking on the same line during 1951. The philosophy of analytical positivism was dominating both India and England & Wales at that time.

The stand of the English court on the extent of judicial review of administrative discretion was definitely restricted by the law laid down by the Parliament. However, institution of various cases during 1970s seeking prerogative writs against administrative authorities disclosed negligent and unlawful act on the part of the administrative authorities. The extent of judicial review of administrative discretion was laid down by Lord Greene M.R. in *Associated Provincial Picture House Ltd*. v. *Wednesbury Corp* (1948) which was also known as Wednesbury principle. However, with the rise in suits seeking prerogative writs against administrative authorities there was a necessity to widen the scope and power of the english judiciary to review administrative action.

R v. *Criminal Injuries Compensation Board* Ex. p. *Lain*[83] involved judicial review of administrative action. The applicant was widow of deceased constable of police. The constable was shot while interrogating a suspect. The shot led to his blindness and the prognosis for recovery of his eyesight seemed uncertain. Due to his injury the constable was offered and accepted interim order of compensation. However, after a while he was found to be dead from a gun shot of his own gun and the reason was directly attributable to his original injury. After the death of the constable of the police the wife claimed that the interim order of payment of compensation must be continued for the interest of her children.

This case was appealed to the High Court of Justice (England and Wales) from the decision of the Queen's Bench Division (England and Wales). In the High Court of Justice this case was heard by chief Justice Lord Parker, Lord Justice Diplock and Justice Ashworth. Lord parker and Lord Diplock found that the decision in Queen's Bench Division was delivered on erroneous grounds. Thus, the applicant asked the High Court to issue writ of *certiorari* to quash the decision of the Queen's Bench

[83] *R* v. *Criminal Injuries Compensation Board* Ex. p. *Lain* [1967] 2 All ER 770

Division. Initially a Board was constituted through Prerogative in order to decide the compensation to the injured constable of the Police. The question in this case was whether the justiciability of the prerogative constituting the Board could be challenged. Lord Chief Justice Parker and Lord Justice Diplock observed that a Board constituted under the prerogative did not prevent it to be subject to Judicial review. Lord Chief Justice Parker further stated that parliamentary sovereignty meant that all the statutes and prerogatives were inferior and could be overruled by subsequent statute. This judgment is significant because it tried to expand the scope of judicial review of administrative action.

Regarding extent of judicial review *Council of Civil Service Union* v. *Minister for the Civil Service*[84] commonly known as GCHQ case is significant as in this case the Royal Prerogative was also held to be subject to judicial review. Grounds of judicial review of administrative actions were also laid down in this case. This case was presided over by five judges in the House of Lords comprising of Lord Fraser, Lord Scarman, Lord Diplock, Lord Roskill, Lord Brightman.

In 1984 the British Government under Margaret Thatcher declared that employee of Government Communications Headquarters (GCHQ) would not be allowed to join any trade union. This order was imposed through Order in Council, a Royal Prerogative. It was declared that such restriction was imposed in the interest of national security. The case was first filed in the High Court of Justice (England and Wales). In the High Court the issue was heard by Justice Glidwell. Glidwell J. observed that employees of Government Communication Headquarters had right to consult before taking any decision. Thus, no prerogative could take away the right of an employee to join a trade union. Post this decision an appeal was filed before the Court of Appeal (England and Wales) where it was heard by Chief Justice Lane, Lord Justice Watkins and Lord Justice May. The Bench found it inappropriate to intervene as to assess matters of national interest was not of judicial nature, rather an executive matter. Thus, judicial review challenging the Royal Prerogative was not a matter of the Court to intervene.

At last the appeal was filed before the House of Lords where the case was heard by five judges Bench. Lord Diplock, Lord Scarman and Lord Roskill observed that Royal

[84] *Council of Civil Service Union* v. *Minister for the Civil Service* [1985] AC 374.

Prerogative, by default, was subject to judicial review, in a similar fashion to a statutory action. Lord Diplock further observed that any prerogative effecting the private rights or legitimate expectations of common people had to be made subject to judicial review. Lord Diplock stated that any administrative action could be reviewed by the Judiciary on the following grounds-

a. Illegality- by illegality as a ground for judicial review Lord Diplock meant that the authority must understand the law that regulated his decision making power and must give effect to it.
b. Irrationality- by irrationality as a ground for judicial review Lord Diplock meant where the decision of the authority was found to be taken defying the logic and accepted moral standards. Whether any administrative decision fell within this category was supposed to be decided by the Judge through his experience and training.

Lord Fraser and Lord Brightman observed that Royal Prerogative could not be subjected to judicial review. Decision taken by virtue of delegated power from the Monarch could be subjected to judicial review.

R. v. *Secretary of State for the Environment Ex. p. Nottinghamshire County Council*[85] was presided over by five judges comprising of Lord Scarman, Lord Roskill, Lord Bridge of Harwich, Lord Templeman, Lord Griffiths in the House of Lords. In 1984 the Secretary of state for Environment laid before the House of Commons the Rate Support Grant Report (England) for the year of 1985-1986. The report also included the expenditure guidance for local authorities for the abovementioned year as well. The Secretary of State for the Environment was empowered to issue guidance to the local authorities by virtue of the Local Government Planning and Land Act, 1980 and Local Government Finance Act, 1982. However, the Nottinghamshire County Council and the City of Bradford Metropolitan Council contended that the issuance of guidance by the Secretary of State was not in accordance with the law. This contention of Nottinghamshire County Council and City of Bradford Metropolitan Council was rejected by Justice Kennedy in the Trial court, but the same was accepted by Lawton, Slade and Dillon L.JJ. of the Court of Appeal.

[85] *R.* v. *Secretary of State for the Environment Ex. p. Nottinghamshire County Council* [1985] UKHL 8

Finally the appeal reached the House of Lords for final verdict. This case received a 'low intensity' review by the court. The Court allowed the appeal and held that administrative decision involving political considerations did not constitute subject matter of judicial review. Lord Bridge of Harwich stated that the then economic consideration of the country was such that the Government could not encourage unlimited spending of money for governance at the local level. Thus, it became obvious for the Government to put a restraint on the expenditure of the local authorities. Lord Roskill agreeing with Justice Kennedy of the Trial Court observed that the plea seeking writ of *certiorari* to quash the guidance of expenditure issued by the Secretary of State held no ground and therefore be rejected. Lord Scarman observed that the Secretary of State for the Environment did not act beyond its authority and the issuance of guidance of expenditure for local authority was neither illegal nor irrational. Thus, the Bench unanimously upheld the guidance issued the Secretary of State limiting the expenditure for governance by the local authorities.

In English law *R* v. *Criminal Injuries Compensation Board* Ex. p. *Lain* in 1967 tried to expand the scope of judicial review of the administrative action. It was Lord Justice Parker and Lord Justice Diplock of of the High Court of Justice (England and Wales) who tried to make administrative decision and/or discretion subject matter of judicial review. Finally in *Council of Civil Service Union* v. *Minister for the Civil Service* in 1985 the House of Lords (the Apex court of the United Kingdom) accepted Royal Prerogative to be subjected to judicial review. In this case from amongst five judges Lord Scarman, Lord Diplock and Lord Roskill made observation which rejected Wednesbury principle and bring administrative discretion under judicial review to a great extent.

In India the significant case involving the issue of quasi-judicial function versus administrative function is *A.K. Kraipak* v. *Union of India*.[86] a notification of selection for Indian Forest Services was announced. A Selection Committee was constituted for interviewing the candidates. It was later on found out that the selected candidate was the Acting Chief Conservator of Forest of a State and was one of the members of the Selection Committee. The action of the Committee and the selection of the candidate was challenged on the ground that a candidate himself could not be judge of his own

[86] *A.K. Kraipak* v. *Union of India* AIR 1970 SC 150.

interview. It was contended by the appellant, A.K. Kraipak, that the selection was made unanimously and there were other members in the Selection Committee. This case was heard by five judges Bench of the Supreme Court of India comprising of M. Hidayatulla C.J., J.M. Shelat J., V. Bhargava J., K.S. Hegde J., and A.N. Grover J. The Bench observed that the selection was made by the Union Public service Commission (U.P.S.C.) and the Selection Committee only sent recommendations. Despite this arrangement the Bench stated that the possibility of bias could not be ruled out because the candidate was present in the Selection Committee and might have had influence upon other members. The Bench in this case brought administrative decision under judicial review. The presence of the appellant in the Selection Committee and as a Candidate vitiated the whole procedure. This case is significant because it marks development of Indian Administrative Law.

Therefore, it could easily be said that the expansion of judicial review of administrative action in India was in line with the same under english law. It was in 1967 when the High Court of Justice (England and Wales) expanded the scope of judicial review in order to bring administrative action under judicial review. Immediately after three years in 1970 the Supreme Court of India in A.K. Kraipak case expanded the scope of judicial review of administrative action. However, it took almost two decades for the english law principle of judicial review to be the legal principle of the whole United Kingdom when the same was recognised by the House of Lords in *Council of Civil Service Union* v. *Minister for the Civil Service.*

- **NATURAL JUSTICE AS UNDERSTOOD IN THE ENGLISH LAW**

R v. *Northumberland Compensation Appeal Tribunal, ex parte shaw*[87] is a significant case dealing with the issue of natural justice back in 1951. Mr. Thomas Shaw was formerly employed in the West Northumberland Joint Hospital Board. He lost his job owing to the passage of National Health Service Act, 1946. Mr. Shaw claimed compensation under Regulation 10 of National Health Service (Transfer of Officers and Compensation) Regulations, 1948. The Compensating Authority (Gosforth Urban District Council) did not award compensation on the scale which was rightfully

[87] *R* v. *Northumberland Compensation Appeal Tribunal, ex parte shaw* [1952] 1 KB 338.

claimed by Mr. Shaw. This led Mr. Shaw to refer the case to the Tribunal. The Tribunal upheld the decision of Compensating Authority. Mr. Shaw filed an appeal before the King's Bench Division seeking an order of Certiorari against the order of the Tribunal. The King's Bench Division ordered that the order of the Tribunal to be quashed. The Tribuanl appealed to the Court of Appeal of England and Wales where the Attorney General represented the Tribunal. The Contention of the counsel of the Tribunal was that Certiorari applied only when the Tribunal acted beyond its authority. There was no error on the face of the order and the King's Bench Division could not apply Certiorari unless there is an error on the face of the judgment.

This was case presided over by Lord Justice Denning, Lord Justice Singleton and Lord Justice Morris in the Court of Appeal of England and Wales. Singleton LJ expressed that the absence of law regulating provisions of appeal on the point of law made it difficult in this case whether Certiorari lies or not. Denning LJ observed that the question in this case is whether Certiorari would lie if the Tribunal exercised its power within its jurisdiction but decided a case where mistake of law was apparent. In this case the situation was that the Tribunal exercised its power well within its limit prescribed by the Parliament but the mistake of law was apparent in this case. Morris LJ observed that it was conceded before the Divisional Court that the Tribunal has delivered a 'speaking order'. The error was found in that 'speaking order' because of which the case went for an appeal to the King's Bench Division. Therefore, during the appeal the question was never regarding Tribunal acting in excess of its Jurisdiction, but an apparent mistake of law in the 'speaking order' of the Tribunal. Three Judges unanimously observed that the King's Bench Division did not correct the mistake of law found in the decision of the Tribunal. Certiorari was applied so that the previous decision could be quashed and the same could be revisited and reconsidered by the Tribunal. The appeal before the Court of Appeal, England and Wales was dismissed and the order of Certiorari by the King's Bench Division was upheld.

Abbott v. *Sullivan and others*[88] dealt with uncharted area of common law overlapping issues under contract and tort law. The plaintiff, Abbott, was a corn porter and was a member of Corn Porters' Committee. The Corn Porters' Committee controlled the body of corn porters in the Port of London. All the members of Corn Porters'

[88] *Abbott* v. *Sullivan and others* [1952] 1 KB 189.

Committee had to follow the Corn Porters' Working Rules. The Committee was also connected with the Transport and General Workers' Union. A meeting was convened by the Committee and the Union to discuss complaints against the plaintiff which the plaintiff attended, and where fine was imposed upon the plaintiff. Shortly after the meeting the plaintiff struck a union officer and again because of this another meeting was convened which was not attended by the plaintiff. The plaintiff wrote a apology letter but refused to attend the meeting stating that assumption of jurisdiction over anything unconnected to his work as a porter. The Port London Authority was informed about the decision and consequently the plaintiff was ceased to be the porter in the Port. Plaintiff's name was also removed from the Corn Porters' Registry.

The plaintiff filed a suit claiming that the Corn Porters' Committee did not have any jurisdiction to deal with the matter which had no connection with the work of porter. He also made Union Officer, Transport and General Workers' Union and London Port Authority parties to the suit. The trial judge found the resolution of the committee *ultra vires* on the following grounds-

a. The rules of the Committee expressly showed that the committee could not assume jurisdiction in matters related to disciplinary issues of the members,
b. The plaintiff was absent in the meeting. Therefore, any resolution, related to him, taken in his absence violates the principles of natural justice.

This case reached to the Court of Appeal where it was presided over by Lord Evershed M.R., Lord Justice Denning and Lord Justice Morris. The Court held that the Corn Porters' Committee acted beyond its jurisdiction and the Committee was ordered to reinstante the plaintiff on conditions suggested by the Committee. However, the reasons behind reaching this conclusion were different for three judges. Lord Evershed M.R. and Lord justice Morris conformed to the same view and reasoned that the Committee was found to be guilty because of the existence of 'privity of contract'. It was observed that there was a contractual relation between the plaintiff and the Corn Porters' Committee whereby the plaintiff submitted to the Committee's jurisdiction regarding porting of corns and the Committee confirmed its jurisdiction only to the work connected to corn porting.

However, Lord Justice Denning wanted to expand the common law principle of natural justice and observed that action of the Committee was *ultra vires* because the

principle of '*audi alteram partem'* was not followed and the decision was taken without having the plaintiff heard. Lord Evershed M.R. referred to natural justice but preferred to not give any concluding view on it and substantiate his reasoning with the help of the law of Contract.

Ridge v. *Baldwin*[89] is a significant case as it marks the shift in judicial attitude to ensure fairness in the sphere of administration. In this case Ridge, the appellant, was Chief Constable of County Borough of Brighton. He served the Brighton Police for thirty years. In 1957 Ridge was arrested for conspiring with two senior members of his force in order to obstructing the course of justice. In 1958 Watch Committee, the Police Authority, in a meeting resolved that Ridge should be dismissed from his duty. Ridge challenged this resolution on the ground that no notice of the same was given to Ridge and before dismissing him he was not heard by the appropriate authority. Donovan J. in the trial court acquitted Ridge but made a statement about Ridge which included misconduct on part of Ridge, the appellant. The appellant was then indicted on the ground of corruption but later on was acquitted.

This case reached the House of Lords where the case was presided over by Lord Reid, Lord Evershed, Lord Morris of Broth-y-Gest, Lord Hodson and Lord Devlin. The appellant maintained that the dismissal of the appellant was contrary to the regulations laid down by the Police Act, 1919. The respondent contended that the incident was not covered under the Police Act, 1919. The issue in this case was whether there was a breach of rules of fairness or natural justice? In the Court of Appeal it was observed that no principle of natural justice was violated as the matter was related to administrative authorities. However, the House of Lords observed that the decision of the Court of Appeal was erroneous and Lord Reid made the following observations-

The notion that definition of natural justice is broad is long outdate. Whenever, a body is in a position to effect rights of an individual it becomes the responsibility of that body to act judicially, and for this matter nobody can distinguish between what is administrative and judicial.

[89] *Ridge* v. *Baldwin* [1964] AC 40.

Lord Morris Broth-y-Gest stated that the *essential requirement of natural justice is that before someone is condemned he is to have an opportunity to defend himself. To do so he must be aware of the charges and allegations made against him.*

Significance of *Ridge* v. *Baldwin* case is that it marks the development of British administrative law in relation to the principles of natural justice. This essential requirement of natural justice was reiterated in the Court of Appeal, espacially by Lord Denning, in several cases. However, The decision of the House of Lords in this case acts as a precedent in matters related to principle of natural justice especially the rule requiring hearing.

- **PROTECTION TO CIVIL RIGHTS VIS-À-VIS HUMAN RIGHT PROTECTION**

Civil right is guaranteed to any individual by virtue of his/her citizenship of a particular country. Human right is supposed to be fundamental for human being to be alive and is guaranteed to everyone by birth. Guarantee of civil rights are confined within the domestic law while guarantee of the basic human rights can not be confined within such strict legal framework.

United Kingdom differs from other countries in that it does not have promulgated protection of human rights in a written text format. The human rights of British citizens were protected, until the enactment of Human Rights Act, 1998, by the provisions of European Convention on Human Rights where the United Kingdom was the first signatory on 4th November, 1950. The english courts also restricted themselves from creating any positive rights while dealing with issues related to human rights violation. The Human Rights act, 1998 brought the provisions of the european Convention on Human Rights into domestic legislations and ensured better protection of human rights of British citizens.

Util the enactment of the Human Rights Act, 1998 the rights of British Citizens were protected as negative liberty i.e. the rights of British Citizens were not a set of rights written in a ny text but the residue of liberties remained untouched by legislation enacted by the Parliament.[90]

[90] Chintan Chandrachud, balanced Constitutionalism, xxxi (OUP, New Delhi, 2017)

Prior to the enactment of the Human Rights Act, 1998 the court restricted itself from deciding any matter from the perspective of human rights violation. The case has to be decided strictly within the domestic legal regime. The domestic law decided on the issue of violation of civil rights. If the parties wanted to pursue with the issue of human rights violation then they had to approach the European Commission on Human Rights. The European Commission on Human Rights would file the matter before the European Court of Human Rights commonly known as Strasbourg court.

Lord Denning stated that although the decision of the Strasbourg court was not binding upon the United Kingdom, the country has recognized its jurisdiction to the extent that cases from United Kingdom could be referred to it. Therefore, there could be occassions where the decision of the strasbourg court would differ from the decision of domestic courts of the United Kingdom. The judgment of Strasbourg court would not change the domestic legislation of the United Kingdom. Nevertheless, the same could bring pressure on the Parliament to change the law violative of civil rights and/or human rights.[91]

Vine v. *National Dock Labour Board*[92] involved unjust dismissal of an employee by the employer. This case was presided over by Viscount Kilmuir Lord Chancellor (L.C.), Lord Morton of Henryton, Lord Cohen, Lord Keith of Avonholm and Lord Somervell of Harrow of the House of Lords. Lord Justice Jenkins of the Court of Appeal (when the case was before the Court of Appeal) observed that when the master wrongfully dismissed a servant that put an end to the contract. However, the wrongful dismissal gave rise to claim for damage. However, Lord Chancellor Viscount of the House of Lords observed that dismissal of the servant/ employee by the master/ employer from employment without any notice still effectively terminated the employment although amounted to 'breach of contract'. A declaration that such dismissal was null and void would not be granted in this case and in any other case ordinary contract of employment. Lord Keith observed that the instant case did not involve any straightforward relation of master and servant but some administrative procedures. Neither Court of Appeal nor the House of Lords considered wrongful dismissal from employment as violation of human rights of the servant/ employee.

[91] Lord Denning, What Next in the Law, 287, (Aditya Books Pvt. Ltd. New Delhi, First Indian Reprint, 1993).
[92] *Vine* v. *National Dock Labour Board* [1956] 3 All ER 939

Golder v. *United Kingdom*[93] has its origin in an application filed against the government of United Kingdom of Great Kingdom before the European Commission of Human Rights. In 1965 Golder was convicted of rbbery with violence. He was imprisoned for fifteen years. In 1969 he was shifted to Parkhurst prison of Isle of Wight. On 24th October, 1969 a violent disturbance broke out in the recreation area of the prison. Prison officer, Mr. Laird got injured while quelling the disturbance. Later on Golder was declared guilty of assaulting prison officer in an interrogation conducted by police officers and was segregated from rest of the prisoners. However, Golder denied the allegation of assaulting the prison officer and sought to consult his counsel. Golder was refused permission by the Home Secretary to consult his counsel with a view to bringing the proceeding of libel against the prison authority, Mr. Laird. This case was presided over by chamber twelve member of the European Court of Human Rigfhts or Strasbourg Court, and they are Mr. G. Balladore Pallieri, President, Mr. H. Mosler, Mr. A. Verdross, Mr. E. Rodenbourg, Mr. M. Zekia, Mr. J. Cremona, Mrs. I. H. Pedersen, Mr. T. Vilhjálmsson, Mr. R. Ryssdal, Mr. A. Bozer, Mr. W. J. Ganshof van der Meersch, Sir Gerald Fitzmaurice. Mr. M.-A Eissen, Registrar and Mr. H. Petzold, Deputy Registrar were also present during the hearing along with twelve members of the Chamber. The Court in this case decided that denial of consultation with the counsel amounted to violation of right to fair trial guaranteed under Article 6, Cl. 1 of the European Convention on Human Rights. Clause 1 of the Article 6 ensured right to fair hearing to in order to ensure fair trial. Right to consult the counsel of someone's choice was regarded as a significant factor of right to access to justice. It was also observed that everyone had right to fair trial until the countries were not abolishing the court system.

Campbell and Fell v. *United Kingdom*[94] is a significant case involving the issue of right to access the court to ensure fair administration of justice. Campbell was a United Kingdom Citizen born in Northern Ireland and resident of England. In 1973 he was convicted of various offences including conspiracy to rob, possession of firearms, robbery etc. During his ten years of imprisonment he was kept in several prisons. Father Patrick Fell was a United Kingdom citizen born in England and was a Roman Catholic Priest. He was convicted of offences including conspiracy to cause damages

[93] *Golder* v. *United Kingdom* [1979] 1 EHRR 524.
[94] *Campbell and Fell* v. *United Kingdom* 7819/77; 7878/77.

and to take part in violent activities in order to achieve political end. He was sentenced to twelve years of imprisonment and during his imprisonment he was kept in different prisons. Both of them kept in Albany prison where they witnessed inhuman treatment by the prison authorities. Both of them along with other inmates protested and while such violent demonstration some of the inmates sustained injury. Following these injuries inflicted by the prison authority which was also a proof of inhuman treatment both Campbel and Father Fell wanted to seek legal advice regarding their claim for personal injury. However, the right to seek legal and medical advice were not available to them. Moreover, Campbell was convicted by the Board of Visitors, Albany prison, of disciplinary charges which according to Campbell involved 'criminal charges' and he was convicted without having been granted the right of being heard. Campbell and Father Fell submitted application to the European Commission of Human Rights in 4th and 31st Macrh, 1973 respectively. The European Commission filed this case before the Strabourg court where it was presided over by the chamber of seven judges Mr. G. WIARDA, *President*, Mr.J. CREMONA, Mr. Thór VILHJÁLMSSON, Mr. F. GÖLCÜKLÜ, Sir Vincent EVANS, Mr. R. MACDONALD, Mr. C. RUSSO. Mr. M.-A Eissen, Registrar and Mr. H. Petzold, Deputy Registrar were also present during the hearing. Article 6 of the European Convention on Human Rights[95] guarantees the right to fair trial. This Article laid down that nobody should be presumed to be guilty unless proved by the

[95]Article 6 of the European Convention on Human Rights Right to Fair Trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

law. The Chamber of seven judges unanimously declared that denial of hearing to Campbell amounted to violation of Article 6 Cl. (1) which guaranteed right to fair hearing. In case of denial to Father Fell meeting with his counsel in private amounted to violation of right to private and family life guaranteed under Article 8 of the European Convention on Human Rights.[96] However, Mr. Vincent Evans observed that in Campbell case disciplinary charge and criminal charge were being mixed up and the charge by the Board of Visitors, Albany prison, against Campbell was a disciplinary charge and not the criminal charge. The United Kingdom government contended before the commission that the application of Campbell must not be considered since he could have applied for judicial review seeking writ of *certiorari* against the decision of Board of Visitors, Albany Prison. However, the Chamber of seven members also declined the plea made by the United Kingdom government that Campbell failed to exhaust all the remedies.

Young, James and Webster v. *United Kingdom*[97] originated out of a 'closed shop' agreement between the British Railways Board and three Trade Unions that employment under the British Railways Board was made subjected to membership of one of these three Trade Unions. The applicants i.e. young, James and Webster failed to comply with this condition which led to their termination of job. These three employees submitted an application before the Commission of the Human Rights stating that the dismissal due to failure to have membership of one of these three Trade Unions amounted to violation of human rights. This case was presided over by Chamber of twenty one members of the Strasbourg Court. The members presiding over this case were Mr. G. WIARDA, *President,* Mr. R. RYSSDAL, Mr. M. ZEKIA, Mr. J. CREMONA, Mr. Thór VILHJÁLMSSON, Mr. W. GANSHOF VAN DER MEERSCH, Mrs. BINDSCHEDLER-ROBERT, Mr. D. EVRIGENIS, Mr. G. LAGERGREN, Mr. L. LIESCH, Mr. F. GÖLCÜKLÜ, Mr. F. MATSCHER, Mr. J. PINHEIRO FARINHA, Mr. E. GARCIA DE ENTERRIA, Mr. L.-E. PETTITI, Mr. B. WALSH, Mr. SØRENSEN, Sir Vincent EVANS, Mr. R. MACDONALD, Mr. C. RUSSO, Mr. R. BERNHARDT. Mr. M.-A Eissen, Registrar

[96] Article 8 of the European Convention on Human Rights Right to respect for private and family life
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[97] *Young, James and Webster* v. *United Kingdom* 7601/76; 7806/77.

and Mr. H. Petzold, Deputy Registrar were also present during the hearing besides twenty one members of the Chamber. The applicants submitted that the dismissal on the basis of the agreement amounted to violation of Article 9 of ECHR which guaranteed freedom of thought, conscience and religion, Article 10 which guaranteed freedom of expression and Article 11 which guaranteed freedom of assembly and association.[98] The eighteen members of the Chamber (with dissenting opinion by Mr. Thór VILHJÁLMSSON, Mr. G. LAGERGREN, Mr. SØRENSEN) observed that there was violation of rights guaranteed under Article 11 of the ECHR. Article 11 of the ECHR guaranteed freedom to join trade union and form associations and no restriction except under the prescribed Law would be placed unless necessary. The dissenting opinion in this case pointed out that these rights were guaranteed under the international conventions and the United Kingdom was a signatory. However, every country reserved the right to enact domestic laws in conformity with their political and social ambience. The dissenting opinion considered the plea by the Solicitor-General representing the Government that the 'Closed Shop' agreement in Britain was such that inclusion of this system within Article 11 of the ECHR would inevitably

[98] Article 9 of ECHR Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10 of ECHR Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11 of ECHR Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

require the United Kingdom government to make any reservation in regard to any of such right. Thus, the dissenting opinion in this case showed that the countries could enact their domestic laws in conformity with their political, social, religious policy despite being signatory of international instruments. This also expressed that the domestic courts were restricted from creating any positive right unless the right was provided by the United Kingdom Parliament.

Campbel And Cosans v. *United Kingdom*[99] was filed by the European Commission on Human Rights before the Strasbourg Court after the application filed by mothers of Campbel and Coasans challenging the corporeal punishment as a disciplinary measure. This case originated in Scotland and the application was filed in 1976 before the Commission of Human Rights. In the application it was mentioned that corporal punishment as disciplinary measure was against the rights guaranteed under the European Convention on Human Rights (here-in-after mentioned as ECHR).[100] This case was presided over by Mr. R. Ryssdal, the President, Mr. J. Cremona, Mr. Thor Vilhjalmsson, Mr. L. Liesch, Mr. L. -E Pettiti, Sir Vincent Evans, Mr. R. Macdonald. Mr. M.-A Eissen, Registrar and Mr. H. Petzold, Deputy Registrar were also present during the hearing. The ruling of the Strasbourg Court was delivered in 1982 which raised significant legal questions regarding rights of children, students and parents in relation education. The Court observed that there was no instance of corporal punishment in this instant case, but it maintained that in case of occurrence of such incident of corporal punishment the Court would consider it as violation of Article 3 of the ECHR. The Commission of Human Rights accepted a friendly settlement of dispute between the mother of the girl who was beaten in school and the government of the United Kingdom. The Chamber of seven members of the Strasbourg Court considered Article 2 of the ECHR which guaranteed right to education. Therefore, the court observed that every person must be guaranteed right to education in conformity with their religious and philosophical conviction.

Ahmad v. *Inner London Education Authority*[101] involved religious freedom of individual at workplace. The plaintiff was a devoted Muslim who found it difficult to

[99] *Campbel And Cosans* v. *United Kingdom* Application No: 7511/76; 7743/76.
[100] Article 3 of the European Convention on Human Rights
No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
[101] *Ahmad* v. *Inner London Education Authority* [1978] QB 36.

co-ordinate his friday prayer and his scheduled classes as he was a teacher at school. He changed many schools to find out whether any authority would grant him time off for offering his prayer when he is on duty. However, almost all his employers refused to grant him time off time for offering his prayer. This suit was instituted by the plaintiff contending that denial of grant of extra time for prayer amounted to violation of human rights guaranteed under Article 9 of the European Convention on Human Rights.[102] in the Court of Appeal of England and Wales this case was presided over by Lord Denning M.R., Lord Justice Alan Stewart Orr and Lord Justice Scarman. Lord Denning M.R. pointed out that the European Convention was not a part of the domestic law of England, under such circumstance the maximum the court could do was to see whether the decision was in conformity with the Convention provisions. However, Lord Denning M.R. also observed that the appellant, Ahmad before the Court of Appeal, knew about the school time before applying. Instead of taking a five days, from Monday to Friday, job and asking the employer Friday afternoon off for prayer, he could have taken up a job which would make him free for Friday afternoon prayer. Lord Denning also pointed out that any preferential treatment over the majority would not serve any good for minority community. Such preferential treatment on the basis of religion would effect the racial integration and might invoke discontent among the community with whom the minority community was working. Lord Justice Orr also opined that absence from school without leave during working hour would amount to breach of contract. Even though the headmaster could accommodate Mr. Ahmad's absence due to prayer or very little difficulties would arise due to Mr. Ahmad's absence due to prayer, but such preferential treatment would amount to an exception and was not part of the contract.

Lord Scarman, dissenting with Lord Denning M.R., and Lord Justice Orr, observed that refusal of time off for prayer amounted to discrimination on the basis of religion.

[102] Article 9 of the European Convention on Human Rights Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Such discrimination was definitely not in conformity with the United Kingdom's obligation with the European Convention on Human Rights.

The appellant then submitted an application against the government of United Kingdom before the European Commission of Human Rights which launched the case before the European Court of Human Rights, commonly known as Strasbourg court. In *Ahmad* v. *United Kingdom*[103] the Strasbourg court observed that the refusal by the employer to grant time off for prayer did not amount to violation of rights guaranteed under Article 9 of the Convention on Human Rights. The employee voluntarily accepted the job knowing about the time and its obligations and he also could easily oversaw that the job would prevent him from his Friday afternoon prayer. The right to freedom of religion guaranteed under Article 9(1) was not absolute and subjected to limitations mentioned under Article 9 (2) of the European Convention on the Human Rights.

Sunday Times v. *United Kingdom*[104] involved an issue of freedom of expression and access to information. Distillers Company marketed (1958-1961) a drug which was prescribed to pregnant women who later gave birth to deformed children. Suit was instituted around 1962 against Distillers Company for compensation claimed by seventy such parents who contended that deformities in their children were the direct effect of the drug sold by Distillers Company. The Sunday Times started a series of articles on this case in order to help parents to obtain more generous settlement. The Distillers Company filed a suit against the Sunday Times before the domestic court stating that the article published by the Sunday Times might adversely effect the outcome of the settlement process between the parents and the company. The company later on obtained an injunction issued by the House of Lords against the Sunday Times which refrained it from publishing any article on the settlement matter between parents and Distillers Company. The Sunday Times Publisher submitted an application before the Human Rights Commission contending that issuing of injunction against the news paper violated the right to freedom of expression guaranteed under European Convention on Human Rights. This case was presided over by chamber of twenty members before the Strasbourg court, and they are Mr. G. BALLADORE PALLIERI, *President*, Mr. G. WIARDA, Mr. H. MOSLER,

[103] *Ahmad* v. *United Kingdom* 4 EHRR 126.
[104] *Sunday Times* v. *United Kingdom* [1979-1980] 2 EHRR 245.

Mr. M. ZEKIA, Mr. J. CREMONA, Mr. P. O'DONOGHUE, Mrs. H. PEDERSEN, Mr. Thór VILHJÁLMSSON, Mr. R. RYSSDAL, Mr. W. GANSHOF VAN DER MEERSCH, Sir Gerald FITZMAURICE, Mrs. D. BINDSCHEDLER-ROBERT, Mr. D. EVRIGENIS, Mr. P.-H. TEITGEN, Mr. G. LAGERGREN, Mr. L. LIESCH, Mr. F. GÖLCÜKLÜ, Mr. F. MATSCHER, Mr. J. PINHEIRO FARINHA, Mr. E. GARCIA DE ENTERRIA. Mr. M.-A Eissen, Registrar and Mr. H. Petzold, Deputy Registrar were also present during the hearing. The court in majority judgment with 11: 9 decided that injunction issued by the House of Lords was against the right to freedom of expression guaranteed under Article 10 of the Human Rights Convention. The chamber unanimously observed that the contention that injunction was not granted against any other news paper expect the Sunday Times did not constitute discrimination on the part of the House of Lords.[105]

In *Taylor* v. *Co-operative Retail Services*[106], the employee, Tailor was subjected to some pressure to join Trade Union Association which was legal under the domestic law of United Kingdom but violated rights guaranteed under the European Convention on Human Rights. The plaintiff's complaint was dismissed in an action brought before the Employment Appeals Tribunal. The Court of Appeal upheld the decision of the Employment Appeals Tribunal and the plaintiff was wrongfully dismissed from his employment for not joining Trade Union Association. The Court of Appeal decided the case under the domestic law which justified the dismissal. However, the Court made an observation that *the pressure to join Trade Union Association and subsequent dismissal for failing to join such amounted to violation of rights guaranteed under the European Convention on Human Rights. Had the plaintiff gone to the European Commission on Human Rights, the plaintiff would have definitely won the case. However, this road to justice is long.*

In the area of human rights protection the trend until the enactment of Human Rights Act, 1998 in the United Kingdom shows that the Judiciary restricted itself from creating any positive right in favour of citizens. All most all the significant cases involving human rights violation was instituted before the Strasbourg Court through the European Commission of Human Rights. The domestic Courts try any case having

[105] Article 14 of the European Convention on Human Rights Prohibition of discrimination
The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
[106] *Taylor* v. *Co-operative Retail Services* 1982 Indus. Cas. R. 600.

any human rights violation angle within a very strict domestic law. The formal legal rule of the country decided the outcome of the case. In most of the cases it could be found that the Judiciary dealt with the case under a different law if it was possible and avoided the human rights violation perspective. This exhibits a trend of legal formalism where the court functions within a strict rule provided by the legislature. Formalists maintained that judging is a strictly rule-bound activity and non-legal rules have less significance in the outcome of the case. This kind of judgment may not be deductive or logical at times but rule-bound and predictable nonetheless.

This rule-bound judgment by the court especially in cases involving human rights violation gave rise to the demand of ratifying the European Convention on Human Rights and bringing the same into the domestic Law. However, the Human Rights Act, 1998 was not the first attempt to enact a bill of rights in the United Kingdom. The first bill regarding Human Rights was introduced by Sir Edward Gardner, Member of Parliament representing Conservative Party, in 1987. Two bills were introduced in 1994 and 1996 by Lord Lester, a Liberal Democrat MP. However, the fourth attempt that is the Human Rights Act, 1998 successfully brought the provisions of European Convention on Human Rights into domestic laws.[107]

In *Malone* v. *Metropolitan Police Commissioner*[108] involved the matter of lawfulness of telephone tapping of the plaintiff where the defendant accepted interception of accused's telephonic conversation under the order of the Secretary of State. This case was instituted before the Crown's court and reached to the Chancery division of the High Court where Sir Robert Megarry V.C.[109] Malone, the plaintiff before the High Court, contended that telephone tapping amounted to violation of his civil rights. Sir Megarry V.C. in this case observed that *any regulation of such matter was a matter of the Parliament to look into and not the subject matter of the court. This matter sought a definite legislation in this field and in the absence of any particular legislation the court could not determine the right of the plaintiff and therefore, the violation of the same. The court, for the justice and common sense, pointed out that the plaintiff must have such right, however, creating a new law was considered to be not a function of the court. It was obserevd that extension of the existing legislative provisons was*

[107] Chintan Chandrachud, Balanced Constitutionalism, xxxii-xxxiii, (OUP, New Delhi, 2017)
[108] *Malone* v. *Metropolitan Police Commissioner* [1979] EWHC 2 (Ch).
[109] V.C. means Vice Chancellor of Chancery Division of the High Court.

something and creation of new right was something else. Therefore, the court observed that no right of the plaintiff was violated by the government because there was no liability upon the government by way of legislation. This case later on was instituted before the european Court of Human Rights as *Malone* v. *United Kingdom.*[110]

Malone v. *United Kingdom* was presided over by Mr. G. WIARDA, *President*, Mr. R. RYSSDAL, Mr. J. CREMONA, Mr. Thór VILHJÁLMSSON, Mr. W. GANSHOF VAN DER MEERSCH, Mrs. D. BINDSCHEDLER-ROBERT, Mr. D. EVRIGENIS, Mr.G. LAGERGREN, Mr. F. GÖLCÜKLÜ, Mr. F. MATSCHER, Mr. J. PINHEIRO FARINHA, Mr. E. GARCÍA DE ENTERRÍA, Mr. L.-E. PETTITI, Mr. B. WALSH, Sir Vincent EVANS, Mr. R. MACDONALD, Mr. C. RUSSO, Mr. J. GERSING and Mr. M.-A Eissen, Registrar and Mr. H. Petzold, Deputy Registrar before the European Court of Human Rights. The court unanimously declared that there was violation of right to respect for private and family life as guaranteed under Article 8 of the Convention.[111] The applicant, Malone, has also contended before the Human Rights Court that there was violation of Article 13 of the Convention which guaranteed right to effective remedy. Article 13 of the Convention laid down that for violation of rights and freedoms guaranteed under the European Convention on Human Rights the victims could seek effective remedy before the national authority notwithstanding that the violation had been committed by individual in official capacity. The Court in 16:2 majority declared that the decision of the Chancery division of the High Court of England and Wales in *Malone* v. *Metropolitan Police Commissioner* amounted to violation of Article 13 of the Convention.

Her Majesty's Attorney General v. *Guardian Newspaper Ltd.*[112] is a significant case involving the common law principles. A retired secret service employee sought to publish his memoirs from his employment as secret service agent under the British Crown. The British Government sought to restrain such publication in Australia

[110] *Malone* v. *United Kingdom* [1984] 7 EHRR 14.

[111] Article 8 of the European Convention on Human Rights Right to respect for private and family life
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[112] *Her Majesty's Attorney General* v. *Guardian Newspaper Ltd* [1990] 1 AC 109.

where the ex-employee of secret service was residing. This case reached the House of Lords where the same was presided over by Lord Goff of Chieveley, Lord Hutton, Lord Hobhouse of Woodborough, Lord Griffith, Lord Jauncey.

The Bench in his case decided that the ex employee of secret service owed a duty to confidentiality to the Crown. Three principles for such right of confidentiality were devised by the House of Lords. These three principles were-

i. Principle of confidentiality applies only to information which is highly confidential. Once such information is accessible by common people the principle of confidentiality does not apply,
ii. Second limiting principle is that principle of confidentiality does not apply to useless information. Thus, there has to be something very serious when the memoir by the ex employee of secret service is sought to restrain from circulating information peculiar to his employment.
iii. The third principle of confidence is that there is a public interest that some information must be kept confidential. Disclosure of information could be done where the public interest favours such disclosure.

The court also observed that often the confidential information was exploited by a third party. Therefore, the ex-employee of secret service was under duty to keep some of the information confidential, however, the publishing house proposing to publish his memoir was under no obligation to adhere to such principle of confidentiality. The Bench restrained the publication of such book in the United Kingdom, however, the same was published in the United States of America. The Bench also observed that the publication of 'Spycatcher' (the name of the book written by Peter Wright, the ex-employee of secret service) was against public interest and was in breach of duty of confidence which Peter Wright owed to the British Crown. Therefore, under such circumstances if 'Spycatcher' still be published in the United Kingdom the court of the United Kingdom would not be able to provide any copyright protection to the publisher. This common law principle, as stated by the House of Lords, was well in compliance with the right of freedom of expression guaranteed under Article 10 of the Convention on Human Rights. Article 10 of the convention seeks to limit the freedom

of expression on the grounds which include confidentiality, national integrity, public interest, etc.[113]

A.D.T. v. *United Kingdom*[114] originated in an application against the United Kingdom government before the European Commission of Human Rights under the European Convention on Human Rights. The applicant was a practicing homosexual, who was arrested after his home was searched by the Police on 1st April, 1996. The police authority seized some photographs and video tapes which disclosed homosexual activity with some other men, and the same was penalized under the Sexual Offences Act, 1956 as gross indecency. The applicant was produced before the trial court which ordered for his conditional discharge and destruction of all the videotapes and photographs disclosing homosexual activities. The applicant instead of filing an appeal, as the domestic legislation was quite clear on this matter, preferred to file an application before the European Commission of Human Rights. The commission placed this case before the Strasbourg court where the same was presided over by Mr J.-P. COSTA, *President*, Mr W. FUHRMANN, Mr L. LOUCAIDES, Mr P. KūRIS, Sir Nicolas BRATZA, Mrs H.S. GREVE, Mr K. TRAJA, *judges*, and Mrs S. DOLLé, *Section Registrar*.

The applicant contended that his trial before the domestic court was gross violation of his convention right to privacy guaranteed under Article 8 of the European Convention on Human Rights.[115] The government of the United Kingdom contended

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[113] Article 10 of ECHR Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[114] *A.D.T.* v. *United Kingdom* (2001) 31 EHRR 33.

[115] Article 8, European Convention on Human Rights

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

that interference with the right of the applicant was reasonable to upheld morality and protection of rights and freedoms of others. The applicant emphasized that he undergone trial not because he video taped sexual activity but for the homosexual activity itself which was done within the closed door. The applicant also complained of violation of Article 14 of the Human Rights Convention which prohibited any discrimination on the ground of race, sex, colour, language, religion, political or any other opinion, national or social origin, association with national minority, property, birth or other status. The Grand Chamber of Strasbourg court declared that there was violation of rights guaranteed under Article 8 of the Convention. However, there was no need to bring Article 14 of the Convention. The Court, therefore, recognized that penalizing homosexuality was violative. This judgment is definitely a significant one in protection of rights of LGBTQ community. However, the roadmap of protection of rights of LGBTQ was laid down in *Dudgeon* v. *United Kingdom*.[116] Almost nineteen years before the judgment of *A.D.T.* v. *United Kingdom*[117] the Grand Chamber of Strasbourg court recognized rights of LGBTQ community and set a legal precedent for Council of Europe requiring that no member state could criminalize male and/or female homosexual behaviour.

In India the first case regarding the protection of rights of LGBT community was *Naz Foundation* v. *Government of NCT Delhi* in 2009.[118] The judgment delivered by the High Court of Delhi in this case was in line with the judgment of European Court of Human Rights (Strasbourg Court). The European Court of Human Rights recognized the conflicting interests in the European region and tried to resolve the conflicting interest with the help of law. This manifested the growth of Socialist school of jurisprudence which explained the purpose of law as a tool for balancing the conflicting interests in society. However, the domestic courts still dealt with a case under strict rule laid down by the Parliament. However, this trend of interpretation and dealing with a case was changed in the United Kingdom, especially in England and Wales, keeping pace with some changes brought about by United Kingdom's membership in the European Union and passage of the Human Rights Act, 1998.

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[116] *Dudgeon* v. *United Kingdom*, (Application No. 7525/ 76), This case was originated in Northern Ireland. The researcher is dealing with cases originating in England and Wales. Therefore, this case is not dealt in detail.

[117] *A.D.T.* v. *United Kingdom* (2001) 31 EHRR 33.

[118] *Naz Foundation* v. *Government of NCT Delhi* WP (C) No. 7455/2001.

1950-1973 is considered as 'Golden Age' for the Europe by historians because Europe was able to reconstruct post World War II. From 1945-1950 European countries witnessed bloody wars between neighbouring countries which definitely obstructed their political, social and economic growth. Therefore, European countries desired unification and integration. The Cold War between Soviet Russia and the United States further solidified the prospect of European integration. The protest against communist regime in Hungary was suppressed violently by the Soviet Russia in 1956. In the process of political and economic integration of European countries, six countries i.e. Belgium, France, Germany, Italy, Luxembourg and Netherlands were first to join and form the European Union in 1950.

The united Kingdom made its first application to join the European Union in 1961 during the tenure of Mr. Harold Macmillan, a member from Conservative party, as Prime Minister of the United Kingdom. However, this application was vetoed by France. In 1967 during the Prime Ministership of Harold Wilson, from Labour party, the application of the United Kingdom to join the European Union was vetoed again by France. However, in the third attempt again during the Prime Ministership of Harold Wilson of Labour Party ascent was given in 1969 from United Kingdom membership in the European Union.[119] Finally in 1973 the United Kingdom was included as the member of European Union.

The legal and political developments in the United Kingdom reshaped the concept of parliamentary sovereignty. The judicial review was also limited to review of only administrative action. Legislations enacted by the Parliament was mostly left untouched as the established principle did not allow judiciary to review the parliamentary enactments. Therefore, any right which was not acknowledged in any parliamentary legislation could not be given effect by the judiciary. In United Kingdom besides parliamentary enactments common law principle was also established acknowledging rights of citizens. United Kingdom was also a member of Council of Europe which was established in 1949 i.e. post World War II for ensuring protection of human rights and uphold rule of law in member states. The 47 members of Council of Europe entered into European Convention on Human Rights which guaranteed some significant human rights to citizens of member states. Post World

[119] Membership of United Kingdom to the European Union.

War II the establishment of Council of Europe was significant step in ensuring protection of human rights. The members states were obligated to guarantee the convention rights within their respective territory. However, in the United Kingdom the Convention on Human Rights was not ratified which meant that the convention rights were not brought into domestic legislation. This was one of the reasons for conflicted decisions between the domestic court of the United Kingdom and the European Court of Human Rights on issues related to violation of civil rights and human rights.

Post accession of the United Kingdom into the European Union in 1973[120] the courts in the United Kingdom started disapplying UK law that conflicted with EU law. Moreover, as a member of Council of Europe the United Kingdom was under international obligation to bring domestic law in compliance with the international conventions. This widened the scope of the UK judicial review of parliamentary enactment and UK judiciary started considering judgments of Strasbourg Court (European Court of Human Rights) for protection of rights of citizens. Following the devolution settlements[121] the Westminster Parliament, by convention, did not legislate on devolved subjects without the consent of the relevant devolved legislature.[122] Nonetheless, it was only after the enactment of the Human Rights Act, 1998 the UK judiciary widened its scope of scrutinizing the parliamentary enactments and the judgments were in compliance with the international obligations.

Professor Richard Gordon QC[123] observed that *the enactment of the Human Rights Act, 1998 provides for a constitutional basis for the court's function in judicial review. No longer the court is required to search for a solution to the fictional*

[120] The accession of the United Kingdom into the European Union was completed by virtue of the European Communities Act, 1972.

[121] In the United Kingdom, devolution is the Parliament of the United Kingdom statutory granting of a greater level of self-government to the Scottish Parliament, the Welsh Parliament, the Northern Ireland Assembly and the London Assembly and to their associated executive bodies the Scottish Government, the Welsh Government, the Northern Ireland Executive and in England, the Greater London Authority and combined authorities.
Devolution differs from federalism in that the devolved powers of the subnational authority ultimately reside in central government, thus the state remains, *de jure*, a unitary state. Legislation creating devolved parliaments or assemblies can be repealed or amended by central government in the same way as any statute.

[122] Chintan Chandrachud, Balanced Constitutionalism, xxxiv-xxxvi, (OUP, New Delhi, 2017).

[123] Richard Gordon is a leading Barrister in the field of administrative law, Constitutional law, EU law, Human Rights and Civil Liberties.

question of what parliament would consider in a given situation. The court will no longer be in dilemma while giving effect to convention rights within the territory of the United Kingdom.[124]

Section 3 of the Human Rights Act, 1998 requires the Act to be read, so far as possible, consistently with the convention rights. If there is any inconsistency between the provision of the legislation and the convention right section 4 of the Human Rights Act, 1998 empowers the court to make declaration of incompatibility.[125] The declaration of imcompatibility would not render the very section or the whole legislation void, rather, it would leave it to the Parliament and the government as to whether and how to address the inconsistency. The parliament or the government can response in two ways to any declaration of incompatibility (which has been called as

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[124] Alexander Horne, Judicial Review: A Short guide to Claim in the Administrative Court, Library, House of Commons (published on 28.09.2006)

[125] Section 3 of the Human Rights Act, 1998 Interpretation of legislation.

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section— (a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

Section 4 of the Human Rights act, 1998 Declaration of incompatibility.

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

(4) If the court is satisfied— (a) that the provision is incompatible with a Convention right, and

(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility, it may make a declaration of that incompatibility.

(5) In this section "court" means— (a) the Supreme Court;] (b) the Judicial Committee of the Privy Council;

(c) the Court Martial Appeal Court] ; (d) in Scotland, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session; (e) in England and Wales or Northern Ireland, the High Court or the Court of Appeal. (f) the Court of Protection, in any matter being dealt with by the President of the Family Division, the Chancellor of the High Court] or a puisne judge of the High Court.]

(6) A declaration under this section ("a declaration of incompatibility")— (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made.

'Space' by Chintan Chandrachud in his book 'Balanced Constitutionalism') and these are-

i. Decisional space which addresses whether the Parliament and/ or the government is obliged to accept the declaration of incompatibility. The several options available in the decisional space are-
   - Announcement that the declaration of incompatibility will be fully addressed,
   - Announcement that the declaration of incompatibility will not be addressed at all. Under this option there may two situation, firstly, where the Parliament informs that the primary legislation is in compliance with the convention right and the court is wrong in assessing the legislation. Secondly, the court is found to be correct in declaring the incompatibility but the Parliament refuses to address the same.
   - Announcement that the declaration of incompatibility will be addressed to some an extent,
   - The declaration of incompatibility is refused to be acknowledged or is ignored by the Parliament or the government.

ii. The other space is remedial space where the Parliament and/or the government focuses on the legal mode and substantive means by which such declaration of incompatibility will be addressed.[126]

The Supreme Court of India is empowered by the Constitution of India to strike down any legislation wholly or to the extent of its inconsistency with the provisions of the Constitution. However, the judiciary of the United Kingdom is empowered by the Human Rights Act, 1998 to make declaration of incompatibility. Whether and how such declaration of incompatibility will be addressed is left to the parliament or the government. In India the power to strike down the constitutionally inconsistent legislation is with the highest appellate court i.e. the Supreme Court of India. However, the declaration of incompatibility is not only reserved with the Supreme Court of the United Kingdom. The power of declaring a legislation incompatible is entrusted with the High Court of each nation within the United Kingdom, Court of

[126] Chintan Chandrachud, Balanced Constitutionalism, 64-65, (OUP, New Delhi, 2017).

Appeal of each nation within the United Kingdom and the Supreme Court of the United Kingdom. The Human Rights Act, 1998 has empowered the courts in the United Kingdom review the legislation which was previously restricted only to judicial review of administrative discretions. However, Lord Denning in his 'What Next In The Law' commented that the convention rights should not be incorporated in the English law. One of the principle reason for this observation was that, according to Denning, the convention rights are framed in a style which is quite contrary to anything the english legal system is accustomed with. Denning predicted that there would be situations when the decision of the domestic court of the United Kingdom would be overruled by the Strasbourg court, and this would be unfortunate. English judges would decide a matter in the light of the circumstances prevailing in England, and that should not be overruled by any judge who did not have any knowledge of the circumstances of England.[127] Therefore, he was of the opinion that let the Parliament have regard for decision of the Strasbourg court, but not so as to be subservient to it. Nevertheless, United Kingdom has incorporated the European Convention on Human Rights in n1998 by enacting the Human Rights Act, 1998.

Another step towards ensuring impartial review of legislation was separating the highest appellate court of the United Kingdom from the House of Lords by enacting the Constitutional Reform Act, 2005.

R. (Alconbury Developments) v. *Secretary of State for the environment, Transport and the Regions*[128] involved a significant question of administrative and judicial function of the executive authorities. In this case the Secretary of State refused planning permission to Alconbury Developments without giving Alconbury Developments an opportunity of being heard. The Alconbury Developments then demanded for judicial review of the administrative action. It was also contended by the appellant that the administrative action of the Secretary of State amounted to violation of the right to fair trial guaranteed by the Article 6 of the European Convention on Human Rights. The Divisional Court made declaration of incompatibility regarding the Town and Country Planning Act, 1990, the Transport

[127] Lord Denning, What Next in the Law, 291, (Aditya Books Pvt. Ltd. New Delhi, First Indian Reprint, 1993)

[128] *R. (Alconbury Developments* v. *Secretary of State for the Environment, Transport and the Regions* [2001] 2 AC 295.

and works Act, 1992, the Highways Act, 1980 and the Land Acquisition Act, 1981. Finally this case reached the House of Lords for resolution. In the House of Lords the case was presided over by Lord Slynn of Hadley, Lord Nolan, Lord Hoffmann, Lord Clyde, Lord Hutton. The Secretary of State argued that it had the authority to be the policy maker and decision maker while acting in its administrative authority. The House of Lords observed that the demand of judicial review of administrative action was quite irrelevant in this case as there was a clear distinction between the role of the judiciary and the role of the administrative authorities. Moreover, the idea of proportionality or disproportionality of administrative decision and the extent to which the factual areas of decision taken by the administrative authority could be penetrated by the judicial review was also a significant question. Therefore, the court rejected the plea of judicial review of the decision of the Secretary of State refusing the planning permission. Lord Hutton observed that prior to the enactment of Human Rights Act, 1998 the English law on the decision making power of the administrative authorities while formulating policies were clear and the same has been laid down by Lord Greene M.R. in *B. Johnson and Co. (Builders) Ltd.* v. *Minister of Health*[129] in 1947. In the B. Johnson case Lord Greene M.R. observed that

'the administrative character in which he acts reappears at a later stage because, after considering the objections, which may be regarded as the culminating point of his quasi-judicial functions, there follows something which again, in my view, is purely administrative, viz, the decision whether or not to confirm the order. That decision must be an administrative decision, because it is not to be based purely on the view that he forms of the objection vis-à-vis the desires of the local authority, but is to be guided by his view as to the policy which in the circumstances he ought to pursue.'

Lord Clyde mentioned the observation of the Human Rights Court in *Kaplan* v. *United Kingdom*[130] distinguishing between function of the administrative authority and judicial authority stating that

'a distinction must be drawn between the acts of a body which is engaged in the resolution of such a claim or dispute and the acts of an administrative or other body

[129] *B. Johnson and Co. (Builders) Ltd.* v. *Minister of Health* [1947] 2 All ER 395.
[130] *Kaplan* v. *United Kingdom* [1980] 4 EHRR 64.

purporting merely to exercise or apply a legal power vested in it and not to resolve a legal claim or dispute. Article 6(1) would not, in the Commission's opinion, apply to the acts of the latter even if they do affect 'civil rights'. It could not be considered as being engaged in a process of 'determination' of civil rights and obligations. Its function would not be to decide ('décidera') on a claim, dispute or 'contestation'. Its acts may, on the other hand, give rise to a claim, dispute or 'contestation' and article 6 may come into play in that way'

The House of Lords overturned the decision of the Divisional Court and invalidated the declaration of incompatibility.

R. (H). v. *London North and East Region Mental Health Review Tribunal*[131] highlighted the contradiction between the Conve4ntion nrights and the Mental Health Act, 1983. Under the Act of 1983 Mental Health Review Tribunal was established as an authority to look after the applications for admitting patients (including mentally disordered persons convicted of any crime) and take decisions regarding discharge of the same post treatment. In this case the appellant H was convicted of manslaughter in 1988. He was ordered to be detained in a hospital and was subjected to special restriction under section 37 and 41 of the Mental Health Act, 1983.[132] In 1999 the appellant filed an application before the Mental Health Review Tribunal regarding his discharge from the hospital. Section 72 and 73 of the Mental Health Act, 1983 placed burden upon the specially restricted patient to prove that he was not suffering from any mental disorder of such nature or degree which would render him detained.[133] The appellant contended that-

- The compulsory detention of the patient by the Mental Health Review Tribunal was subjected to be legally challenged,
- The shifting of burden of proof upon the appellant to prove that he was not suffering from mental disorder anymore was violative of his rights

[131] *R. (H).* v. *London North and East Region Mental Health Review Tribunal* [2002] QB 1

[132] Section 37 of the Mental Health Act, 1983 empowers the court to order for detention of any convict in a hospital for mental disorder proved before the court.
Section 41 of the Act of 1983 empowers the court to restrict the discharge of mentally disordered convict from the hospital.

[133] Section 72 of the Mental Health Act, 1983 empowers the Tribunal to discharge patients. This section also lays down that the discharge of the patient is subject to satisfaction of the Tribunal that the patients requires no more treatment.
Section 73 of the Act, 1983 empowers the Tribunal to discharge specially restricted patients.

guaranteed under Article 5 (1) and Article 5 (4) of the European Convention on Human Rights.[134]

Before the Court of Appeal, England and Wales the case was presided over by Lord Phillips M.R., Lord Justice Kennedy and Lord Justice Dyson. The Bench rejected the leave to appeal to the house of Lords and declared that section 72 and 73 of the Mental Health Act, 1983 were in contradiction with the Right to Liberty and Security guaranteed under Article 5 of the European Convention on Human Rights. therefore, the Court of Appeal made a declaration of incompatibility which was addressed by the Parliament by bringing the Mental Health Act, 1983 (Remedial) Order 2001. This Remedial Order 2001 amended section 72 and 73 of the Mental Health Act, 1983 by shifting the burden of proof from the patient or specially restrcited person to the hospital authority.

A. v. *Secretary of State for the Home Department*[135] raised a question related to the legality of detention order issued by the United Kingdom government under the Anti Terrorism, Crime and Security Act, 2001. This case was filed by nine foreign

[134] Article 5 of the Convention guarantees Right to liberty and security.

Section 5 (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Section 5 (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

[135] *A.* v. *Secretary of State for the Home Department* [2004] UKHL 56.

nationals in United Kingdom challenging their detention order by the U.K. government where eight foreign nationals were detained in December, 2001 and one foreign national was detained in February 2002. This detention order was made by the U.K. government on suspicion of the involvement of these nine foreign nationals in terrorist activities. However, no criminal charges were made against nine of them under the Anti Terrorism, Crime and Security Act, 2001. After being detained for a while two foreign nationals decided to go to their own country i.e. Morocco and France, while one of the December detainees was sent to a hospital on the ground of mental illness. One of the detainees was released on bail with strict conditions. Since no formal criminal charge was made and the detention was made only on the ground of suspicion, the detainees filed suit stating that such detention order was incompatible with the Article 5 and Article 14 of the European Convention on Human Rights.[136] This case finally reached before the House of Lords where the same was presided over by Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Hoffmann, Lord Hope of Craighead, Lord Scott of Foscote, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Baroness Hale of Richmond, Lord Carswell. Lord Bingham observed that the fact of this instant case was similar to the *Chahal* v. *United Kingdom*[137] where Mr. Chahal, an Indian Sikh, was detained by the U.K. government on the ground that his activities as Sikh separatist became threat to the national security. During the detention period of Mr. Chahal the U.K. government decided to deport Mr. Chahal to which he objected on the ground that he would be subjected to inhuman torture in his home country if he was deported. Thus, the question before the Human Rights Court was whether the decision of deportation was legal after detaining Mr. Chahal for considerable period of time. Following was the observation made by the Human Rights Court in *Chahal* v. *United Kingdom* case (1996)

Article 3 enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most

[136] Article 5 of the European Convention on Human Rights guarantees Right to Liberty and Security. Article 14 of the European Convention on Human Rights prohibits discrimination.
[137] *Chahal* v. *United Kingdom* [1996] 23 EHRR 413.

of the substantive clauses of the convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation. The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees.

Basing upon the decision of Chahal's case the House of Lords in the *A.* v. *Secretary of State for the Home Department* declared some of the provision of the Anti Terrorism, Crime and Security Act, 2001 to be incompatible with Article 5 and Article 14 of the European Convention on Human Rights, insofar that it permitted detention of sespected international terrorists in a way discriminatory on the grounds of nationality and immigration status. Post the decision by House of Lords the United Kingdom Parliament replaced the impugned provisions of the Act of 2001 with 'control order' regime under the Prevention of Terrorism Act, 2005.

R. (Hooper and others) v. *Secretary of State for Work and Pensions*[138] dealt with issues related to discrimination between men and women in the payment to widow's pension. This case also highlighted the discrimination in payment between widow's payment and widowed mother's allowance under the Social Security Contributions and Benefit Act, 1992. The four claimants were widower. The Social Security Contributions and Benefit Act, 1992 provides pension, payment or allowance both thw idow and widower. However, the State failed to make such payments after the deaths of the wives of claimants. It was contended by the claimants that failure to pay the correspondence amount by the Secretary State violated the Article 14 of the Convention on the Human Rights and section 6 (1) of the Human rights Act, 1998[139].

[138] *R. (Hooper and others)* v. *Secretary of State for Work and Pensions* [2005] UKHL 29.
[139] Article 14 of the European Convention on Human Rights guaranteed right against discrimination.

The claimant also contended that according to the Human Rights Convention everyone is entitled to the same amount of pension, payment and allowance. However, the Human Rights Act, 1998 distinguished while making payments under the heads og pension and allowance. The Secretary of State argued that the State could do so by virtue of section 6 (2) of the Human Rights Act, 1998 which clearly laid down that discrimination was allowed in following circumstances-

- when the primary legislation directs such distinction and the authority could not act differently,
- when the provision of the primary legislation could not be read in harmony with the provisions of the European Convention on Human Rights.

in 2003 the appeal was filed before the House of Lords from the decision of the Court of appeal and the suit was presided over by Lord Nicholls of Birkenhead, Lord Hoffmann, Lord Hope of Craighead, Lord Scott of Foscot, Lord Brown of Eaton-under-Heywood.

The Secretary State accepted that non-payment of pension or the payment to widower was violation of convention rights but the same could be done under the Human Rights Cat, 1992. Therefore, in the context of visible contradiction between the Convention and the domestic law the court had to decide whether the State had power to make categorization as per the domestic law. Lord Nicholls observed that the State could have paid the widow's payment and/or widow's pension but any deviation from that was permitted under section 6 (2) of the Human Rights Act, 1992.

Lord Hoffmann pointed out that the Welfare Reform and Pensions Act, 1999 repealed the provisions of life long pension for widow or widowers under the Act of 1992. Therefore, the State was not breaching the provision of the Act of 1992 for very long period. The new Act of 1997 substituted the Widow's payment by bereavement payment, the Widowed mother's allowance by widowed parents allowance and widow's pension by bereavement allowance payable for 52 weeks. Moreover, for the payment of any kind of allowance the preference was always given to the older and needier widows 'as a preferred class' than the younger one. The government also through various datas and surveys found out that many widows did not have children

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Section 6 (1) of the Human Rights Act, 1998 makes it unlawful for a public authority to act in contravention with the Convention on Human rights.

and also were employed. In this backdrop the government took the view that all the widows did not need support from the government for longer period of time. Moreover, bereavement payment was not allowed to men who 'as a class' did not satisfy to entitle the same. The European Court of Human Rights in *Belgian Linguistic* case[140] allowed the member state to exercise it s discretion while formulating and implementing its social and economic policy. Therefore, in this backdrop Lord Hoffmann allowed the State to classify claimants of pension and allowance owing to the obligation of the State to give effect to the domestic law.

A declaration of incompatibility was made by the Administrative Court at the first instance in this case on the aforementioned ground. However, the House of Lords observed that the sections contradicting the provisions of the European Convention on Human Rights were already amended by the Welfare Reforms and Pension Act, 1999. This amendment rendered the very issue irrelevant and therefore, the Parliament also did not respond to this declaration of incompatibility.

R. (MH) v. *Secretary of State for the Department of Health*[141] was instituted by mother of a patient, detained under the Mental Health Act, 1983. The patient was detained under the Act of 1983 for detailed assessment of mental condition. A dispute between the mother of the patient and the medical officer broke out over the treatment of the patient. Following this dispute an application was made by the hospital authority under section 29 of the Mental Health Act, 1983 before the country court seeking the court to appoint a social worker to act as a near relative during the period of treatment. Section 29 of the Mental Health Act, 1983 allowed the patient or any one on behalf of the patient to make an applicant regarding appointment of any individual to act as a near relative during the period of treatment.[142] Section 29 (4) of

[140] *Belgian Linguistic* case [1968] 1 EHRR 252.

[141] *R. (MH)* v. *Secretary of State for the Department of Health* [2006] 1 AC 441.

[142] 29 of the Mental Health Act, 1983 Appointment by court of acting nearest relative.

(1) The county court may, upon application made in accordance with the provisions of this section in respect of a patient, by order direct that the functions of the nearest relative of the patient under this Part of this Act and sections 66 and 69 below shall, during the continuance in force of the order, be exercisable by the applicant, or by any other person specified in the application, being a person who, in the opinion of the court, is a proper person to act as the patient's nearest relative and is willing to do so.

(2) An order under this section may be made on the application of- (a) any relative of the patient ; (b) any other person with whom the patient is residing (or, if the patient is then an in-patient in a hospital, was last residing before he was admitted) ; or (c) an approved social worker ; but in relation to an

the Mental Health Act, 1983 laid down that if any application was made under section 29 (2) of this Act, 1983 then the period of detention would be extended till the final disposal of the application. Therefore, the mother of the patient requested that new application by the hospital seeking new appointment of any individual to act as near relative for the purpose of the treatment would unnecessarily extend the stay of her daughter at the hospital. The Court of Appeal declared that section 29 (4) of the Mental Health Act, 1983 was incompatible with Right to Liberty and Security guaranteed under Article 5 of the European Convention on Human Rights. An appeal was filed before the House of Lords against the declaration of incompatibility issued by the Court of Appeal. Before the House of Lords this case was presided over by Lord Bingham of Cornhill, Lord Hope of Craighead, Lord Rodger of Earlsferry, Baroness Hale of Richmond, Lord Brown of Eaton-under-Heywood. The House of Lords overturned the Court of Appeal's declaration of incompatibility on the ground that in this particular case the action of the hospital authority might be unnecessary. Section 29 (4) of the Act, 1983 could not be declared incompatible because a patient could not be discharged if any application related to her was pending for final disposal by the court. Therefore, it was observed by the House of Lords that the action or inaction of the administration of the hospital might be incompatible with the rights guaranteed under European Convention on Human Rights but not the Mental Health Act, 1983.

R. (Sylviane Pierrette Morris) v. *Westminster City Council and First Secretray of State*[143] highlighted discrimination of allocation of housing. Mrs. Morris came from Mauritus and had British origin. Mrs. Morris had UK Passport and she entered the United Kingdom in 2002 as a lawful visitor. However, her daughter did not have UK citizenship and therefore, subjected to immigration control within the meaning of Asylum and Immigration Act, 1996. Later on her daughter was given UK citizenship, but in 2002 for a while Mrs. Morris had to face homelessness because of her daughter's legal status in United Kingdom. The Westminster Council had a housing scheme which Mrs. Morris tried to avail seeking the government to provide her

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application made by such a social worker, subsection (1) above shall have effect as if for the words " the applicant " there were substituted the words " the local social services authority ".

[143] *R. (Sylviane Pierrette Morris)* v. *Westminster City Council and First Secretray of State* [2006] 1 WLR 505.

daughter with accommodation until the problem resolved. However, the Westminster Council informed that her daughter's legal status precluded the Council and her daughter would have had a priority had she been a British citizen. Mrs. Morris filed a suit stating such scheme discriminating and the Administrative Court declared the provision of the Housing Act, 1996 that required prioritisation of child with British citizenship for accommodation as violative of Article 14 of the European Convention on Human Rights. Article 14 of the Convention prohibited discrimination on the ground of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. An appeal was filed before the Court of Appeal where Lord Justice Keith observed that when a dependant child became subject to immigration control while her parents was not the Housing Act, 1996 could not establish a priority need for housing. The Westminster Council could refuse to provide housing assistance to the applicant on different grounds but could not prioritize on the basis of the citizenship of the child in need of accommodation. Therefore, the Court of Appeal also upheld the decision of Administrative Court and declared some of the provisions of the Housing Act, 1996 incompatible with Convention rights. This declaration of incompatibility was addressed by the United Kingdom Parliament and the incompatible provision was substituted by the Housing and Regeneration Act, 2008.

R. (Baiai) v. *Secretary of State for the Home Department*[144] highlighted contradiction between the convention right to marry and the provision of Asylum and Immigration (Treatment of Claimants) Act, 2004 which required the person subjecting to immigration control to secure permission of Secretary of State before marriage. In order to prevent marriages of convenience the UK Secretary of State introduced a scheme under which some persons who were subjected to immigration control required permission before getting married. This scheme was introduced by virtue of Section 19 of the Asylum and Immigration (Treatment of Claimants) Act, 2004. The case was filed challenging this scheme of the UK government on the ground that it was violative of convention right to marry guaranteed under Article 12.[145] Mr. Baiai and Ms. Trzcinska met in England and Wales in 2004 and started their relationship.

[144] *R. (Baiai)* v. *Secretary of State for the Home Department* [2009] 1 AC 287.

[145] Article 12 of the European Convention on Human Rights- Right to Marry
Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Mr. Baiai an Algerian citizen entered England and Wales illegally in 2002. He was given temporary admission by the immigration officer in 2005. Ms. Trzcinska was a Polish national who in 2004 came to work in the England and Wales following Poland's accession in the European Union. The dispute arose when Mr. Baiai and Ms. Trzcinska wanted to marry and Mr. Baiai had to secure permission from the Secretary of State to marry.

The Administrative Court declared section 19 (3) of the Asylum and Immigration (Treatment of Claimants) Act, 2004[146] violative and incompatible with Article 12 (Right to marry) and Article 14 (prohibition of discrimination) of the Human Rights Convention. This case was presided over by Lord Bingham of Cornhill, Lord Rodger of Earlsferry, Baroness Hale of Richmond, Lord Brown of Eaton-under-Heywood, Lord Neuberger of Abbotsbury in the House of Lords. The House of Lords agreed with the observation made by the lower courts, however, further added that all marriages celebrated by immigrants under control could not be termed as sham marriage. Undoubtedly, there were marriages of that kind where parties entered into marriage for convenience but this conclusion could not be drawn for all kind of marriages. Baroness Hale of Richmond observed that Section 19 (1) of the Asylum and Immigration (Treatment of Claimants) Act, 2004 applied to all marriages which were to be solemnized on the authority of a Superintendent Registrar's Certificate under the Marriage Act, 1949 where either of the party was subjected to immigration control.[147] However, the same provision did not apply to marriages solemnized before the Church of England and Ecclesiastical Preliminaries. Therefore, the House of Lords observed that this provision discriminated between civil marriage and Anglican marriage. The House of Lords upheld the declaration of incompatibility. The United Kingdom Parliament addressed this declaration of incompatibility by bringing the

[146] Section 19 (3) of the Asylum and Immigration (treatment of Claimants) Act, 2004
The superintendent registrar shall not enter in the marriage notice book notice of a marriage to which this section applies unless satisfied, by the provision of specified evidence, that the party subject to immigration control— (a) has an entry clearance granted expressly for the purpose of enabling him to marry in the United Kingdom, (b) has the written permission of the Secretary of State to marry in the United Kingdom, or (c) falls within a class specified for the purpose of this paragraph by regulations made by the Secretary of State.

[147] Section 19 (1) of the Asylum and Immigration (Treatment of Claimants) Act, 2004- Procedure for marriage
This section applies to a marriage— (a) which is to be solemnised on the authority of certificates issued by a superintendent registrar under Part III of the Marriage Act 1949 (c. 76), and (b) a party to which is subject to immigration control.

Asylum and Immigration (treatment of Claimants) Act, 2004 (Remedial) Order, 2011. The Remedial order, 2011 removed the Certificate of Approval Scheme under the Act.

In *R. (Wright and Others)* v. *Secretary of State for Health*[148] the claimants filed this suit challenging the list of people, prepared by the Secretary of State, who were considered to be unsuitable to take care of vulnerable adults. The UK governments sought to protect children not only within their homes and educational institutions but also in places where they work. It was also recognized that adults who received special care at home or had been in care homes also required the similar kind of protection and treatment. The UK government had a system of listing names of such care giver. A separate list could also be made for people who were unsuitable to be a care giver. Listing of a person in unsuitable care giver meant that he/she could no longer work as care giver. The claimant pointed out that such listing of person unsuitable for care giving was done without any judicial hearing. The Administrative Court declared relevant provisions of Care Standards Act, 2000 incompatible with Article 6 guaranteeing Right to Fair Trial and Article 8 guaranteeing Right to respect for Private and Family life of the Human Rights Convention. The Court of Appeal overturned this declaration of incompatibility and finally the case reached the House of Lords. Before the House of Lords this case was heard by Lord Phillips of Worth Matravers, Lord Hoffmann, Lord Hope of Craighead, Baroness Hale of Richmond, Lord Brown of Eaton-under-Heywood. The House of Lords upheld the decision of the Administrative Court and declared section 82 (4) of the Care Standards Act, 2000 incompatible with Convention rights. The United Kingdom Parliament addressed this declaration of incompatibility prior to the hearing before the House of Lords and enacted a new legislation the Safeguarding Vulnerable Groups Act, 2006 which did not include the system of provisional listing. Section 80- 89 of the Care Standards Act, 2000 were repealed by the Safeguarding Vulnerable Groups Act, 2006.

R (Clift) v. *Secretary of State for Home Department; R (Hindawi)* v. *Secretary of State for Home Department; R (Headley)* v. *Secretary of State for Home Department*[149] (three appeals) arose out of three somewhat different facts but

[148] *R. (Wright and Others)* v. *Secretary of State for Health* [2009] UKHL 3.

[149] *R (Clift)* v. *Secretary of State for Home Department; R (Hindawi)* v. *Secretary of State for Home Department; R (Headley)* v. *Secretary of State for Home Department* [2007] 1 AC 484

presented a common question. The appellants were former or serving prisoners. It was alleged that there was discrimination against these appellants in case of early release of them. It was also informed that in their case the decision of early release was vested with the Secretary of State for Home Department and not with the court. Against this the appellants filed separate suits which were clubbed together and finally reached the House of Lords. In this case the respondent i.e. the Secretary of State was involved for early release of foreign nationals was violative and discriminatory. Section 46 and 50 (now repealed) of the Criminal Justice Act, 1991 were challenged on discriminatory ground. Section 46 of the Act of 1991 categorized early release of foreign prisoners as special cases which could be transferred to Board under Section 50 of the Act of 1991 for any further decision regarding their release. This case presided over by Lord Bingham of Cornhill, Lord Hope of Craighead, Lord Hale of Richmond, Lord Carswell, Lord Brown of Eaton-under-Heywood. The House of Lords observed that any distinction between national and non-national prisoners regarding early release amounted to violation of Article 14 of the Human Rights Convention which prohibited unnecessary discrimination. Therefore the impugned provisions of the Criminal Justice Act, 1991 were declared incompatible. The UK Parliament addressed this declaration of incompatibility by repealing the impugned provisions but applied on a transitional basis to offences committed before 4th April, 2005. Later on the UK Parliament enacted the Criminal Justice and Immigration Act, 2008 which removed the incompatibility in these transitional cases as well.

R (Black) v. *Secretary of State for Justice*[150] challenged the discretionary power of the Secretary of state for Justice to reject the Parole Board recommendation regarding release of a prisoner on license. This judicial power of the administrative authority was challenged on the ground that when such recommendation was refused there had to be scope of hearing the reasons of refusal by the judiciary. Despite the declaration of incompatibility of section 35 of the Criminal Justice Act, 1991 with the Convention rights issued by the Court of Appeal the House of Lords held that the Secretary of State for Justice reserved the power to accept or refuse the Parole Board's recommendation regarding release of prisoner on license.

[150] *R (Black)* v. *Secretary of State for Justice* [2009] UKHL 1.

R. (Nasseri) v. *Secretary of State for Home Department*[151] challenged the provision of 'removal of assylum seeker to safe country' mentioned in Schedule 3 of the Asylum and Immigration (treatment of Claimants) Act, 2004. The applicant after fleeing Afghanistan to Greece came to United Kingdom and sought asylum after a while. On failure of his application the United Kingdom government would deport the applicant to Greece from where he further would be deported to Afghanistan where the applicant would be subjected to inhuman torture. The Administrative Court declared the impugned provision of Schedule 3 of the Act of 2004 incompatible with Article 3 of the Human Rights Convention which prohibited inhuman torture and degraded punishment. However, on appeal to the Court of Appeal the decision of the Administrative Court was overturned which then came before the House of Lords. Before the House of Lords the case was presided over by Lord Hope of Craighed, Lord Hoffmann, Lord Scott of Foscote, Lord Brown of Eaton-under-Heywood and Lord Neuberger of Abbotsbury. The House of Lords observed that when there was an complaint of human rights violation by an asylum seeker the complaint had to be examined judicially and not by the administrative authorities. It was also observed that Schedule 3 had provided list of safe countries for removal of individuals seeking asylum before the United Kingdom government. Greece had been mentioned in the list of safe countries, however, the United Kingdom government did not guarantee any protection of human rights once the asylum seeker was deported to Greece. Therefore, the procedure in Greece for asylum seekers might be an international concern. Lord Hoffmann observed that a statutory provision was either incompatible with the Convention right or was compatible. The compatibility of the statute with the Convention right could not be depended on the how Greece would treat the asylum seeker after he was removed from the United Kingdom. Therefore, the House of Lords upheld the impugned provision of Schedule 3 of the Asylum and Immigration (treatment of Claimants) Act, 2004 and agreed with the Court of Appeal in overturning the declaration of incompatibility issued by the Administartive Court.

R (F & Thompson) v. *Secretary of State for Home Department*[152] highlighted an inconsistency between the Sexual offences Act, 2003 and the Article 8 of the European Convention on Human Rights. the Westminster Parliament enacted the

[151] *R. (Nasseri)* v. *Secretary of State for Home Department* [2010] 1 AC 1.
[152] *R (F & Thompson)* v. *Secretary of State for Home Department* [2010] UKSC 17.

Sexual Offences Act, 2003 with an objective of preventing and punishing the range of sexual offence. This Act contained detailed information in advance about change in address or foreign travel plans made by sexual offenders. In this instant case the two claimants, previously convicted and sentenced under the sexual offences under the Act of 2003, were subject to indefinite requirement of notification of foreign travel plans under section 82 (1) of the Act of 2003. The claimants contended that indefinite requirement of notification was violative of Article 8 of the Human Rights Convention guaranteeing right to respect for private and family life. The Divisional Court made a declaration of incompatibility in this case which was further upheld by the Court of Appeal on the ground that lifelong requirement of notification without review process was disproportionate and breached the Convention rights. finally the case reached the Supreme Court of United Kingdom[153] where the same was presided over by Lord Phillips, Lord Hope, Lord Rodger, Lady Hale and Lord Clarke. Lord Phillips (speaking for the majority) observed that *if some of those who are subjected to lifetime notification does not pose any more threat then it is pointless in subjecting them to supervision or management or to the interference with their rights guaranteed in Article 8 of the Human Right Convention. Indeed subjecting them to such requirements can only impose unnecessary and unproductive burden upon the authorities.* Thus, the House of Lords also upheld the declaration of incompatibility. The UK Parliament issued a remedial order i.e. the Sexual Offences Act, 2003 (Remedial) Order, 2012. This remedial Order had been given retrospective effect which enabled existing offenders under indefinite notification requirements to make application for review.

In *T.* v. *Secretary of State for Justice*[154] the primary question before the Court of Appeal was whether the statutory scheme under the Police Act, 1997 which required enhanced Criminal Record Certificates issued by the Criminal Records Bureau for those working with people under 18 was compliant to Convention rights. The Court found the scheme disproportionate and made a declaration of incompatibility. The observation made by the Court of Appeal was that all kinds of crimes did not require

[153] The Constitutional Reform Act, 2005 formally established the Supreme Court of United Kingdom as the highest appellate court of the United Kingdom. The Supreme Court of United Kingdom assumed its function from 1st October, 2009 onwards. By virtue of the Constitutional Reform Act, 2005 the judicial function of the House of Lords was transferred to the Supreme Court of the United Kingdom.
[154] *T.* v. *Secretary of State for Justice* [2014] 3 WLR 96.

detailed disclosure and for disclosure specific offences must filtered out. The Court of Appeal also stated that it would not provide any suggestion as to how to do, rather it left the decision upon the Parliament as to what amendments to make. The Supreme Court confirmed the declaration of incompatibility. This incompatibility was removed by executive order after the judgment by the Court of Appeal but before the judgment of the Supreme Court. The impugned provisions were substituted by Rehabilitation of Offenders Act, 1974 (exceptions) Order, 1975 (Amendment) (England and Wales) Order, 2013.

The abovementioned cases have shown that the enactment of Human Rights Act, 1998 has definitely widened the scope of Judicial Review by the English courts. Judicial review of administrative action was already in practice but the Act of 1998 introduced the judicial review of primary legislation. However, the English judiciary strictly followed the separation of power and while interpreting any legislation to find out whether the same was compliant to the European Convention on Human Rights and the court tried to not assume the role of law-making institution. In T.N. Godavarman case (1993) the role of the Supreme Court of India has turned out to be usurption of parliamentary authority. However, the English Court has restricted itself from taking any remedial measure after making any declaration of incompatibility and the remedial measure was left upon the Parliament to decide. Thus 1998 is the watershed year for the English legal system when the English Court was vested with the power of reviewing the primary legislations of the United Kingdom. However, this power was vested with the Supreme Court of India from the very inception of the adoption of the Constitution of India which was extensively used from post 1978 i.e. Maneka Gandhi case.[155]

The English judiciary deliberately restricted itself from providing judge made laws. It is true that with the enactment of the Human Rights Act, 1998 the role of judges has been transformed from mere interpretation of legislation to review of legislation on the basis of the European Convention on Human Rights. Chintan Chandrachud in 'Balanced Constitutionalism' has mentioned that there are three stages process of review. The first stage of reviewing legislation for compliance with rights entails an examination of whether the statutory provisions, according to ordinary principle of

[155] *Maneka Gandhi* v. *Union of India* AIR 1978 SC 597.

interpretation, are consistent with the rights in question. This stage involves a straightforward process of statutory interpretation based on settled common law principles. The second stage of interpretation arises when the court decides that the legislation, on ordinary principle of interpretation, is not compliant with fundamental rights. This is the stage where the Indian judiciary would bring the doctrine of 'reading down' and/ or 'severability in application' to find out whether the legislation is in compliance with the Constitution of India. In case of the United Kingdom once the legislation is *prima* facie found to be incompatible with the Convention rights then the court is tasked with deciding whether the legislation can be read compatibly with the Convention rights. Section 3 of the Human Rights Act, 1998 directs the court to read primary legislation and subordinate legislation in a manner that is compatible with the Human Rights Convention so far as possible.[156] Section 3 of the Act of 1998 enhances the influence of Convention rights in the process of interpretation. The third and final stage is if the legislation is found to be inconsistent with the Convention rights then the UK judiciary can make declaration of incompatibility. While in case inconsistency of legislation with the Constitutional provisions the Indian judiciary can strike down the whole legislation or the part of the legislation to the extent of its inconsistency.[157]

Most European countries have set up special Constitutional courts that are empowered to review and set aside legislations inconsistent with the Constitution. This model of review of legislation is against the American model which empowers several courts to entertain constitutional issues. The European model of Constitutional review of legislation is the centralized system of review of legislation which is followed in Austria, Belgium, France, Germany, Italy, Luxembourg, Portugal and Spain. European countries following American model of Constitutional review of legislation

156 3 of the European Convention on Human Rights. Interpretation of legislation.

(1)So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
(2)This section—
(a)applies to primary legislation and subordinate legislation whenever enacted;
(b)does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
(c)does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

[157] Chintan Chandrachud, *'Balanced Constitutionalism*, 124-144, (OUP, New Delhi, 2017).

are Denmark, Sweden and Finland. Netherlands and United Kingdom do not have any system of Constitutional review of legislation. The Constitution of Netherlands has restricted the judges from setting aside legislation on Constitutional grounds. In the United Kingdom the Human Rights Act, 1998 empowers judges to make declaration of incompatibility. However, such declaration of incompatibility does not invalidate the legislation. Hans Kelsen supported this centralized model of Constitutional review of legislation which he thought gave more certainty and stability. According to Kelsen empowering all courts to review legislation would lead to divergent opinion on single issue which would not bring certainty and stability. Therefore, the[158] Human Rights Act, 1998 empowered only the Supreme Court of the United Kingdom to make declaration of incompatibility.

Thus, judges in the United Kingdom have interpreted within a strict rule so laid down by the Parliament which is similar to that of legal formalism. Legal formalism explains the role of judge as an interpreter of the legislation in accordance with uncontroversial principles or following the straightforward interpretation. The role of judges in United Kingdom, especially in England and Wales, has been largely influenced by United Kingdom's membership of the Council of Europe in 1949 and in European Community in 1972. Council of Europe is an international organisation whose stated aim is to uphold human rights, democracy and rule of law in Europe. Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden and the United Kingdom formed the Council of Europe by signing the Treaty of London in 1949. The members of Council of Europe signed international human rights treaty known as European Convention on Human Rights. This international human rights treaty imposed obligation upon all its members. For example, the judiciary of United Kingdom had to consider the provisions of European Convention on Human Rights while dealing with human rights violation cases. Literal interpretation was followed by the English judiciary unless it created absurdity. Therefore, English Judiciary has, considerably, less scope of activism than the Indian judiciary. However, it would be completely wrong to say that there was no developments in English legal system attributed English judges. Lord Denning during his tenure as a Judge has given several judgments which have shaped the unchartered

[158] Victor Ferreres Comella, 'The European Model of Constitutional Review of Legislation: Toward Decentralization?', 2 (3), *I*Con*, 461-491 (2004).

area of common law. Lord Denning was the impetus behind the innovation of Public Interest Litigation concept from the *locus standi* principle which was later on adopted in India by Justice P.N. Bhagwati to ensure that technicalities of institution of suits do not restrict accessibility to justice. Simultaneously, because of clearly laid down domestic laws the decisions of UK judiciary have often been found to be contrary to the European Convention of Human Rights, especially in human rights violation cases. Thus, often applications used to be submitted before the European Commission of Human Rights by the aggrieved party against the decisions delivered by the domestic courts.

The Indian Judiciary, post 1978, emerged as one of the sources of laws in India. However, this was not the case for English judiciary, mostly, because the English judiciary has always maintained a distinction between the function of the judiciary and the parliament. This separation of power principle was reiterated in Wednesbury Principle where Lord Greene MR observed that judiciary *could review the administrative action only when the administrative authority did not act in accordance with the law laid down by the parliament*.[159]

The United Kingdom joined the European Community on 1st January, 1973 which later on is known as European Union[160]. This expansion of membership was completed after enactment of the European Communities Act, 1972. The European Community was essentially treaty-based and attempted to integrate various activities amongst the member states. One of the significant areas of integration under European Community was economic activities amongst members countries. The European Economic Community was set up in 1957 which facilitated international

[159] *Associated Provincial Picture House Ltd*. v. *Wednesbury Corp* [1948] 1 KB 223.

[160] The institutions of the European Union are the seven principal decision-making bodies of the European Union (EU). They are, as listed in Article 13 of the Treaty on European Union:

- the European Parliament,
- the European Council (of Heads of Government),
- the Council of the European Union (of national Ministers, a Council for each area of responsibility),
- the European Commission,
- the Court of Justice of the European Union,
- the European Central Bank and
- the Court of Auditors.

Institutions are distinct from advisory bodies to the European Union, and agencies of the European Union

trade amongst members countries of European Union. The Court of Justice of European Union was set up to ensure uniform application and interpretation of European Union Law, in cooperation with domestic courts of the member states of European Union. The European Union (EU) is distinct from the European Convention on Human Rights (ECHR). However, both these regional Convention overlap and the ECHR principles are accepted by the EU as well.

However, in 2016 through a referendum the United Kingdom decided to withdraw from the European Union membership. Prior to 2009 there was no scope for withdrawing membership from EU. However the Treaty of Lisbon in 2009 introduced this through Article 49 A which was later on incorporated in Article 50 of the Treaty of European Union.[161] The withdrawing member state is required to give a notice of withdrawal to the Union and only after that the Union would conclude an agreement setting out an arrangement for the withdrawal of the membe state. However, the decision of the United Kingdom Government to withdraw from the European Union led to institution of a significant case i.e. *R (Miller)* v *Secretary of State for Exiting the European Union.*[162] This case was instituted challenging UK government's decision of withdrawal from the European Union for following reasons-

[161] Article 50 – Treaty on European Union (TEU).

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218 (3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

[162] *R (Miller)* v *Secretary of State for Exiting the European Union* [2017] UKSC 5.

a. UK membership of this Union facilitated free movement of its citizens across the member states

b. It also facilitated free trade and

c. It generated employment opportunities for UK citizens.

In this case the issue was what were the steps required to be fulfilled as a part of UK domestic law before initiation of the process of leaving European Union. it also included the question whether a formal notice of withdrawal could be given without prior legislation by the UK Parliament and assented by Her Majesty the Queen to that effect. Under the Constitutional arrangements of the United Kingdom following questions were brought before the Court-

i. The extent of ministers' power to effect changes in domestic law through exercise of their prerogative powers at the international level, and

ii. Whether this withdrawal from Union would effect the relationship between the UK government and Parliament on the one hand and the devolved legislatures[163] and administrations of Scotland, Wales and Northern Ireland on the other.

The ministers of the UK Parliament enjoy power to enter into any treaty and also terminate the same without recourse to the Parliament. This is a prerogative utilized by the UK ministers while exiting from the European Union. However, ministers can not do anything which would otherwise effect the domestic law or would bring a change in the domestic law unless a Statute i.e. an Act of the Parliament empowers them to do so. This suit was instituted by Gina Miller and Deir De Santos before the Divisional Court of England and Wales against the Secretary of State for Exiting the European Union. The proceeding when came before the Court of Appeal was presided over by Lord Chief Justice Thomas, Lord Terence Etherton M.R. and Lord Justice Sales. The Court of Appeal delivered judgment against the Secretary of State's action of withdrawal from the European Union. The judgment of this court was based on the

[163] Devolution is about how parliaments and governments make decisions. In the UK it means that there are separate legislatures and executives in Scotland, Wales and Northern Ireland. They have many powers to make laws and deliver public services. These are often called devolved powers. There is also the UK Parliament and UK Government. They retain some powers across the whole of the UK. These are often called reserved powers.

ground that Article 50 of the Treaty of European Union (TEU) could not lawfully be triggered without a statutory enactment as ministers could not claim prerogative powers if such power intended to bring changes in the domestic law.[164] The court identified three types of rights and these are-

i. First type of rights can be replaced by domestic legislation, for example, worker's right,

ii. The second category could be replicated if other countries co-operate,

iii. The third category of rights could not survive exit from EU.

It was held that all these rights were intertwined and exit from the European Union would be bound to effect all these categories of rights.

This case came before the Supreme Court of the United Kingdom by way of an appeal by the Secretary of State for Exiting the European Union. Before the Supreme Court of the United Kingdom the case was presided over by eleven judges comprising of Lord Neuberger, President of UKSC, Lady Hale, Deputy President of UKSC, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Reed, Lord Carnwarth, Lord Hughes and Lord Hodge. The majority decisions as declared by

[164] Article 50 – Treaty on European Union (TEU).
1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218 (3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.
A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.
5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

eight judges along while judgments were delivered by Lord Carnwarth, Lord Hughes and Lord Reed separately.

In a joint judgment of the majority, eight judges of the Supreme Court of the United Kingdom held that an Act of Parliament was required to authorized ministers to give Notice of the United Kingdom withdrawing from the European Union. Following are the reasons for this decisions-

i. The European Communities Act, 1972 authorizes a dynamic process by which the European Union becomes the source of UK law and EU law takes precedence over the domestic law. Therefore, so long European Communities Act, 1972 is in force it will constitute EU law as an independent and overriding source of domestic law. It operates as partial transfer of law making power by the UK Parliament to EU institutions unless and until the Parliament decides otherwise.

ii. It is well understood that the exit from EU by the UK will effect its domestic law thus this decision has to be taken through enactment of Statute.

iii. The withdrawal from European Union means cutting off EU as a source of domestic law of UK. This will bring change in the Constitution of the United Kingdom. Therefore, the UK Constitution requires this change and Notice of Withdrawal to be initiated by Parliamentary legislation.

iv. The withdrawal from EU will also remove some of the rights enjoyed by UK citizens when UK was member of EU. Therefore, such change must also be brought through Parliamentary legislation.

v. The European Communities Act, 1972 empowers the ministers to take part in EU law making process. However, the Act does not empower the ministers to withdraw from EU Treaty. Therefore, such withdrawal has to be affected through Parliamentary legislation.

vi. Post 1972 i.e. after enactment of the European Communities Act, 1972 the introduction of Parliamentary controls in relation to decisions made by UK ministers at EU level relating to its competence or the law making process

are entirely consistent with the assumption that the United Kingdom can not withdraw from EU without having a Parliamentary legislation.

Lord Reed in dissenting judgment observed, with which Lord Carwath and Lord Hughes also agreed, that the effect UK Parliament has given to EU law following enactment of European Communities Act, 1972 is conditional to United Kingdom's membership of EU. EU does not impose any requirement or manifest any intention for UK"s membership of this Union. The decision of withdrawal from the Union is a prerogative power of the Crown which can be used unconditionally.

The majority opinion takes into consideration the political aspect of the decision of withdrawal from the Union and its implications thereafter. However, in the majority opinion, judges preferred to confined themselves to the issue whether the Notice of Withdrawal can be issued without having a Parliamentary legislation to that effect. Lord Carnwath in his dissenting opinion observed that service of notice under Article 50 (2) of the Treaty on European Union will only start a process of negotiation between the withdrawing country and the Union.[165] The government of withdrawing country will be accountable to the Parliament for such negotiations. This process can not be completed without Parliament legislating on this matter. Post this judgment the UK government introduced European Union (Withdrawal) Bill on 13th July, 2017 which has been nicknamed as 'Great Repeal Bill'. This Bill was enacted as European Union (Withdrawal) Act, 2018 and repealed the European Communities Act, 1972. The significant of this Bill is that once UK exits from the EU the EU law will no longer be applicable to UK. The EU law was no longer supreme than the UK domestic law as well following this Exit. This withdrawal of UK from EU has an implication upon the UK judicial system. The main concern was what would be the status of judgments of Court of Justice of European Union (hereinafter mentioned as CJEU) within the United Kingdom and whether the UK judiciary would be bound by the CJEU judgment anymore. Lady Hale in *R (Miller)* v *Secretary of State for Exiting*

[165] Article 50 – Treaty on European Union (TEU).
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218 (3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

the European Union.[166] raised this concern and stated that-'*... one major concern that we have in the [Supreme Court], and probably throughout the judiciary, is that it should be made plain in statute what authority or lack of authority, or weight or lack of weight, is to be given to the decisions of the Court of Justice of the European Union after we have left, in relation both to matters that arose before we left and, more importantly, to matters after we leave. That is not something we would like to have to make up for ourselves, obviously, because it is very much a political question, and we would like statute to tell us the answer.'*

The position of the UK government on this issue was that with the exit of UK from EU the jurisdiction of CJEU would also come to an end. However, there would be EU-derived laws operative in UK even post exit. Therefore, a common understanding has to be developed basing on the interpretation of EU-derived law pre and post exit and this would also maintain a certainty as well. To maximise certainty the UK judiciary would interpret the EU-derived laws referring CJEU judgments. Article 6 of the European Union (Withdrawal) Act, 2018 the EU-derived law and principles laid down by CJEU will be applicable to United Kingdom so far as these are unmodified. However, the same does not bind the Supreme Court of the United Kingdom. This Article also clarified that 'retained EU law' includes EU-derived laws and case laws delivered by CJEU till the exit of UK from EU. Regarding post-exit case laws Article 6 (1) and Article 6 (2) of the Act of 2018 have laid down that no tribunal and domestic judiciary of the United Kingdom shall be bound by the CJEU judgment. There it is left to the discretion of the domestic judiciary to consider CJEU judgment. Lord Neuberger in an interview with BBC has stated that *If the Government] doesn't express clearly what the judges should do about decisions of the CJEU after Brexit, or indeed any other topic after Brexit, then the judges will simply have to do their best ... But to blame the judges for making the law when Parliament has failed to do so would be unfair ..*[167].

Brexit i.e. exit of Britain from EU ensured no more references of CJEU judgments by domestic courts post Brexit[168]. Regarding retained EU-derived laws the domestic

[166] *R (Miller)* v *Secretary of State for Exiting the European Union* [2017] UKSC 5.
[167] David Lloyd Jones, Brexit and the Future of English Law, 49, *VUWLR* (2018).
[168] The system of Reference has enabled CJEU to develop its principles uniformly amongst all the member states. It also ensured that EU law is applied unanimously and consistently amongst member

courts will be the sole authority to interpret. This has definitely ensured independence to the UK judiciary to some an extent. United Kingdom's membership of EU has resulted in development of various principles of English legal system. Prior to joining EU the common law principle of English legal system was never exposed to any other legal system. However, the membership of EU exposed this common law system to continental law system. The membership of EU automatically made it mandatory for UK judiciary to be bound by principles developed by CJEU. For example, general principle of EU law include proportionality, legal certainty, legitimate expectation, non-discrimination and procedural rights. All these principles were adopted by the UK judiciary and these principles were highlighted in cases like *Council of Civil Service Union* v. *Minister for the Civil Service*[169] and *R.* v. *Secretary of State for the Environment Ex. p. Nottinghamshire County Council*[170] where the Apex court of the United Kingdom reviewed administrative discretion on the grounds already laid down by CJEU.[171]

states. The system of Reference is ceased by the Article 6 of the European Union (Withdrawal) Act, 2018.

[169] *Council of Civil Service Union* v. *Minister for the Civil Service* [1985] AC 374.

[170] *R.* v. *Secretary of State for the Environment Ex. p. Nottinghamshire County Council* [1985] UKHL 8

[171]David Lloyd Jones, Brexit and the Future of English Law, 49, *VUWLR* (2018).