

## Topic 4: Relations Between Institutions

### What is the Judiciary and what is its role?

The Judiciary is the branch of government that deals with the administration of justice. For example, the Courts System is part of the judicial branch. The Judiciary includes all courts in the UK, from local County Courts all the way up to the UK Supreme Court. The term Judiciary is also used as a wider term for all those who work within the courts and legal systems, from judges through to administrators in courts.

The overall role of the UK Judiciary is to:

- To interpret UK Law.
- To enforce UK Law.
- To check the legality of government actions (check the government is not acting **Ultra Vires**).
- To make sure external law is being applied (for instance EU Law).
- To protect the rights and liberties of individuals.
- To arbitrate in the political process (when required or instructed).
- To maintain **judicial neutrality** from the political process.

### What was the Constitutional Reform Act (2005)?

The Constitutional Reform Act was passed in 2005. It made a number of changes to the Judicial System in the UK.

#### The Constitutional Reform Act and the establishment of a Supreme Court

Prior the Constitutional Reform Act of 2005 the highest court in the land was the **Appellate Committee of the House of Lords**. This committee of the House of Lords was made up of 12 ‘Lords of Appeal in Ordinary’ (**Law Lords**). It heard appeals that were referred to them by both the Criminal and Civil Divisions of the Court of Appeal.

The Law Lords sat in the House of Lords and could both debate and vote on issues within Parliament. This meant that there was no separation of powers between the legislature and the judiciary and stopped the Law Lords from being able to show they were independent.

To address this, the Labour Government created the Supreme Court of the UK and placed it in new buildings in Middlesex Guildhall. The highest court in the land is now constitutionally and physically separated from the legislature.

#### The Constitutional Reform Act and the role of the Lord Chancellor

Before the Constitutional Reform Act (2005) the position of Lord Chancellor was one of the most powerful in British politics. The Lord Chancellor was the **Speaker of the House of Lords**, the Head of the Judiciary and a Cabinet Minister. The Lord Chancellor therefore played an important role in all three branches of government.

As part of the Constitutional Reform Act the Lord Chancellor lost his position as Speaker of the House of Lords, and in his place there is now a speaker elected by the House of Lords. In addition, the **Lord Chief Justice** replaced the Lord Chancellor as Head of the Judiciary. By convention, it has now been established that the **Justice Secretary** shall hold the position of Lord Chancellor. This means that the Lord Chancellor can sit in the House of Commons.

However, the changes mean that the role of Lord Chancellor is now limited to ceremony and their power has been divided to other positions. This has achieved a far greater separation of powers in the UK political system.

### Lord Chancellor

The last Lord Chancellor under the old system was Charlie Falconer. He had been Tony Blair's flatmate at University and was an important advisor to him. Falconer himself, was a keen believer that the traditional powers of the position should be abolished.

The powers office of Lord Chancellor fell to Jack Straw in 2007 in his role as Justice Secretary. It is currently held by David Gauke.

### Speaker of the House of Lords

The first Speaker of the House of Lords elected under the new system was Baroness Hayman. The role is currently held by Baroness Fowler. The position is chosen via an election of members of the House of Lords and consists of five-year terms, for which the Speaker can only sit for a maximum of two.

The role of Speaker of the House of Lords is far less important than that of the Commons. This is mainly because the Lords largely regulates itself and is far less adversarial in nature. The role of the Speaker of Lords is far more procedural, rather than refereeing debates.

## The Constitutional Reform Act and the Judicial Commission

The **Senior Judiciary** is made up of the Justices of the Supreme Court and the senior judges of the Appeal Courts and High Court.

Traditionally **judicial appointments** to the Senior Judiciary were made by the Lord Chancellor. He did this through consulting sitting judges and was under no obligation to appoint someone who had formally applied for the position. This secretive process was known as **secret soundings**. In 1994 this system was opened up, with jobs being advertised and panel interviews taking place which included a Senior Judge as well as someone from outside the legal profession. This system lacked transparency and it was argued that it resulted in a lack of diversity in the senior judiciary, with few ethnic minorities and females represented.

As part of the Constitutional Reform Act of 2005 the Lord Chancellor lost their traditional ability to make judicial appointments. A new **Judicial Appointments Commission (JAC)** was set up to formalise the process of appointments to the Judiciary.

The new system works by:

### Step 1

Setting up a panel of: 5 Judges 5 Lawyers 5 People from outside the Legal Profession This panel is permanent and vacancies on the panel are filled when required.

### Step 2

Jobs are advertised openly and applications taken.

### Step 3

Candidates are interviewed and short-listed.

## Step 4

Selection and recommendations are sent to the Lord Chancellor for approval. He can still reject the recommendation of the panel, but has to give reasons for doing so. It is broadly expected that he will accept the judgement of the panel and appoint who they recommend.

### How is the Supreme Court organised?

The Supreme Court was established as part of the Constitutional Reform Act (2005) and was opened in 2009.

The Supreme Court is made up of 12 justices. 11 of the 12 Law Lords who had comprised the House of Lords Appellate Committee moved to the new building of Middlesex Guildhall which houses the UK Supreme Court. Although the Law Lords do still remain members of the House of Lords, by convention they do not speak or vote on debates in the Chamber. They are now called **Justices of the Supreme Court** and there is a **President of the Supreme Court**.

Not all members of the Supreme Court sit on cases. This is different from the US Supreme Court where all nine justices sit on every case. However, a minimum of three justices sit on any case and if a case is considered to be particularly important then all twelve justices will sit on it. This was the case with the case of **Miller vs Brexit Secretary**.

#### **Be Careful!**

Do not confuse the Lord Chief Justice with the President of the Supreme Court. The Lord Chief Justice is Head of the Judiciary but is based in the Royal Courts of Justice. The current Lord Chief Justice and Head of the Judiciary is Lord Thomas.

### What is the role of the Supreme Court?

The Supreme Court carried on four key roles that had previously been held by the Appellate Committee of the House of Lords:

- It acts as the final court of appeal in both Civil and Criminal Cases in England, Wales and Northern Ireland.
- It hears appeals on issues of particular public importance.
- It concentrates on cases of the greatest public and constitutional importance.
- It maintains and develops the role of the highest court in the United Kingdom as a leader in the common law world.

In addition, the Supreme Court has taken on the role of resolving legal disputes between the devolved governments of Northern Ireland, Scotland and Wales and the UK Parliament.

#### **The Supreme Court and Devolution**

The first major time the Supreme Court decided upon an issue of devolution was *Martin and Miller v. Lord Advocate*, [2010].

This case occurred when it appeared that the Scottish Parliament had tried to legislate on reserved powers, those that were within the purview of the Westminster Government. The issue surrounded driving offences, which are legislated for by Westminster. However, the Scottish Parliament believed if these driving offences were 'criminal' in nature, they could have separate legislation as Scotland controls its own criminal law. The Supreme Court upheld the case of the Scottish Parliament that they were able to legislate on these issues.

### How are appointments made to the Supreme Court?

The process by which new appointments are made to the Supreme Court is similar to that of the Judicial Appointments Commission. However, there are some differences:

Firstly, to be a Supreme Court justice a candidate must:

- Have been a member of the Senior Judiciary for at least two years.
- Been a qualified legal practitioner for at least 15 years.

When a vacancy arises for the Supreme Court applicants are interviewed by a specialist interview panel. It is made up of five members:

The President of the Supreme Court

The Deputy President of the Supreme Court

One member of the Judicial Appointments Committee

One Member of the Judicial Appointments Board for Scotland

One Member of the Northern Ireland Judicial Appointments Commission

The interview panel then notify the Lord Chancellor of their choice. The Lord Chancellor can then either:

Accept the selection

Reject the selection

Require the panel to choose a different candidate

#### **Be Careful!**

Although this system would seem to suggest that the Lord Chancellor still retains a lot of power over the appointments process, in reality, it is expected that the Lord Chancellor will accept the recommendation of the Selection Commission. If the Lord Chancellor was to reject the Selection Commission's recommendation, there would be a major political outcry.

**Members of the Supreme Court (2009-2018)**

Current Supreme Court Justices are in bold  
Justices in Red transferred from the Law Lords

<u>Name</u>	<u>Year Appointed</u>	<u>Gender</u>	<u>School</u>	<u>University</u>
<b>Lord Phillips (First President)</b>	2009	Male	Independent	Oxbridge
Lord Hope	2009	Male	Independent	Oxbridge
Lord Saville	2009	Male	State	Oxbridge
Lord Rodger	2009	Male	Independent	Oxbridge
Lord Walker	2009	Male	Independent	Oxbridge
<b>Lady Hale (Third President)</b>	2009	Female	State	Oxbridge
Lord Brown	2009	Male	Independent	Oxbridge
<b>Lord Mance</b>	2009	Male	Independent	Oxbridge
Lord Collins	2009	Male	Independent	Oxbridge
<b>Lord Kerr</b>	2009	Male	State	Queen's
Lord Clarke	2009	Male	Independent	Oxbridge
Lord Dyson	2010	Male	Independent	Oxbridge
<b>Lord Wilson</b>	2011	Male	Independent	Oxbridge
<b>Lord Sumption</b>	2012	Male	Independent	Oxbridge
<b>Lord Reed</b>	2012	Male	Independent	Oxbridge
<b>Lord Carnwath</b>	2012	Male	Independent	Oxbridge
Lord Neuberger (Second President)	2012	Male	Independent	Oxbridge
<b>Lord Hughes</b>	2013	Male	Independent	Durham
Lord Toulson	2013	Male	Independent	Oxbridge
<b>Lord Hodge</b>	2013	Male	Independent	Oxbridge
<b>Lady Black</b>	2017	Female	Independent	Durham
<b>Lord Lloyd-Jones</b>	2017	Male	State	Oxbridge
<b>Lord Briggs</b>	2017	Male	Independent	Oxbridge

**What is the descriptive representation of the Supreme Court?**

The Supreme Court has been criticised for not being representative and from drawing minorities from a limited ethnic, gender and educational background:

- Only two Supreme Court Justices have been female. That is 8.6 %. However, there are currently two female members, Lady Hale and Lady Black. In addition, Lady Hale is the current President of the Supreme Court.
- There have been no Supreme Court justices from a BME background.
- Only three justices have been educated at State Schools. That is 13%.
- Only three justices did not go to Oxbridge. That is 13%.

## What are the differences between the Supreme Court and the Appellate Committee of the House of Lords?

The actual way that the Supreme Court hears cases are not that different from the how they had been heard by the Law Lords. Early cases heard by the Supreme Court seemed to be similar in opinion and outcome to previous cases under the Law Lords.

The Supreme Court receives around 230 applications for hearings each year, and hears around 90 cases. Most cases come to the Supreme Court from the Court of Appeal, however, some can come directly from Lower Courts, especially if they are of particular public interest.

Cases are usually heard by a panel of five justices. This is similar to how the Law Lords operated. However, if a case were seen to be particularly important more justices may sit on it.

One of the key powers of the Supreme Court, is to consider whether or not UK laws and actions of the government have been in line with the Human Rights Act.

One big difference between the Law Lords and Supreme Court is how open and transparent it is. The Supreme Court uses social media to interact with the public about its work and publishes press summaries on each case. The work of the Supreme Court is also videoed and streamed online, wherever possible.

Despite the creation of the Supreme Court, it is not altogether clear that the changes that have been brought about because of it are revolutionary:

**Appointments and composition** – Appointments to the Supreme Court are far more transparent than that of the Law Lords, previously. However, the composition of the court is not broadly different to that of the Law Lords, as of yet.

**Power** – There has been not fundamental difference in the power of the Supreme Court, compared to the Law Lords.

**Judicial Independence** – There has been a clearer separation of powers. However, there was already friction between the Judiciary and Politicians which would suggest they were already quite separate.

**Physical Separation** – The move to Middlesex Guildhall has raised the profile of the judicial branch and allowed it to develop its own character.

**More visible** – The allowance of TV cameras within the Supreme Court has demystified the upper judiciary and allowed a new relationship between the media and senior judges.

**Delivery of rulings** – Rulings passed down from the Supreme Court are clearly made with the media and wider public in mind. Along with the official ruling, there are press summaries which allow for greater scrutiny of the court by those people who are not legal experts.

Overall, the court has seemingly done little to suggest there is a fundamental departure from the previous situation under the Law Lords. For example, the court's rulings have been mainly regarding the concept of the government acting Ultra Vires (beyond the law) and making '**declarations of incompatibility**' under the Human Rights Act (1998).

This raises the question of whether the Supreme Court has made any substantive difference at all.

**What major cases has the Supreme Court heard and what precedents have been set?****HM Treasury vs. Mohammed Jabar Ahmed et al**

On the 27th January 2010 the Supreme Court ruled that the government had acted Ultra Vires (beyond the law) in its treatment of terror suspects. This is because it had, on the advice of the United Nations, frozen the financial assets of terror suspects without trial. The Court ruled that this encroached on the Human Rights (under the Human Rights Act) of these terror suspects. The court, however, was acting no differently than they may have done as the Law Lords.

**Case Precedent: The case clearly set the precedent that being suspected of a crime, no matter how strong the suspicion, does not enable the government to take punitive action against someone.**

**Divorce Case (Wyatt vs. Vince)**

In 2015 Kathleen Wyatt took legal action against her ex-husband Dale Vince. She was looking to be allowed to win a divorce settlement from her husband, this was despite the fact that they had divorced 20 years ago. Wyatt's former husband, Dale Vince, had made a fortune after they divorced. Wyatt claimed entitlement to some of that fortune because she had laid the groundwork for his success. The Supreme Court ruled that the amount of time passed since the divorce was not a significant factor in whether or not that ruling was legitimate. They ruled that the case should go back to a family court, who could decide whether or not she should be awarded a divorce settlement. She eventually received £300,000.

**Case Precedent: This case set the precedent that the moment of divorce and initial settlement did not necessarily draw a line under the financial inter-dependency of divorcing couples.**

**Prince Charles' letters (Evans vs. Attorney General)**

In 2015 the Supreme Court ruled against the government that letters written by Prince Charles to government ministers were not protected by his right to privacy. This means that the Guardian Newspapers request to see the so-called 'Spider Letters' (because of Charles' distinct penmanship) was seen as applicable under the Freedom of Information request. This is a very high profile example of Judicial Review and the ultimate position of the Supreme Court within that process.

**Case Precedent: The case set the precedent that the government did not have the right to withhold correspondence from Freedom of Information Requests on the grounds of privacy when Government Business was discussed.**

**Article 50 Case (Miller vs. Secretary of State for Exiting the European Union)**

A case was brought forward by Gina Miller, an investment banker from London. She took up a legal challenge stating that the Prime Minister and the Cabinet did not have the power to invoke Article 50, the article of the Lisbon Treaty that would trigger Britain to leave the European Union, without a Parliamentary vote. In December 2016 the Supreme Court ruled that Parliament should have to vote on triggering Article 50.

**Case Precedent: This case set the precedent that matters of significant constitutional reform should not be settled with the use of the Royal Prerogative.**

### **Has the Judicial Appointments Commission worked?**

The Judicial Appointments Commission was set up to reform the way that members of the Senior Judiciary were appointed. One of the aims in setting up the commission was to try to promote a more diverse judiciary and a more transparent system:

Between 2006 and 2016 4,300 judges were recommended for the Senior Judiciary. Of these:

- 42% were women. Overall, the number of women in the Senior Judiciary has risen from 17% to 25%.
- The number who identified as BME doubled, with a rise from 3% to 6%.