

### What is the relationship between the Judiciary and Parliament?

In the USA, the [U.S Supreme Court](#) has the power to declare a law or action ‘unconstitutional’. In doing so it can stop a law or an action from taking place.

In the UK, Parliament is sovereign and there is no codified Constitution, therefore, the UK Supreme Court does not have the same power as that of the US Supreme Court`.

When judges make decisions in the UK they do have to take into account the wishes of Parliament. By their nature, Statute Laws cannot be perfect and cannot account for all situations. Therefore, by making decisions and creating Common Law, judges have to ‘fill the gaps’ in Statute Law. When doing this, judges have to be mindful of what Parliament intended in a Statute Law.

Ultimately, whatever the decision that judges make Parliament can remedy it. As a result of Parliamentary Sovereignty, if Parliament do not like a common law ruling, it can be overturned by a new Statute Law.

#### Terrorist Asset-Freezing Act (2010)

In the Supreme Court Case of HM Treasury v Mohammed Jabar Ahmed it was ruled that the Government had acted unlawfully by freezing the assets of suspected terrorists.

The Government were disappointed with this ruling. As a result, they persuaded Parliament to pass the Terrorist Asset-Freezing Act (2010).

This is a good example that, ultimately, Parliament is sovereign.

### What is the relationship between the Judiciary and Executive?

Despite not being able to find government acts unconstitutional the judiciary does have a role in Judicial Review. UK courts can be asked to review the actions of the government and can decree whether or not they have acted within the law. If they believe that the government has acted *Ultra Vires* (beyond the law) then they can demand that an action is amended or reversed. Judicial Review has become increasingly common in recent years.

The growth of Judicial Review can bring the Executive into conflict with the judiciary. The very nature of judicial review means that courts are considering the actions of government and deciding whether or not they are appropriate. Cases like [Evans vs Attorney-General](#) and [Brexit vs Miller](#) lead to the appearance that the government is being publicly criticised by the judiciary.

### How does Judicial Review work and how important is Judicial Review?

The broad term for when Judicial Review can be considered is known as ‘Ultra Vires’. This means times in which the government has acted beyond the law.

However, this can also be split into three further parts:

1. **Illegality:** for example, an action not taken in accordance with the law that regulates it or goes beyond the powers of the body.
2. **Irrationality:** for example, an action was not taken reasonably, or that no reasonable person could have taken it.

3. **Procedural irregularity:** for example, a failure to consult properly or to act in accordance with natural justice or with the underpinning procedural rule

### When can Judicial Review be requested?

Remember the three I's:

- **Illegality**
- **Irrationality**
- **Irregularity**

Judicial Review has grown significantly in Britain.

In 2014 there were nearly 16,000 cases of Judicial Review. There were 11,200 in 2011 and just 160 in 1974. The biggest growth has come in the areas of asylum and immigration.

It has been argued that the reason that Judicial Review has grown so much for immigration and asylum cases is because of the increased pre-eminence of human rights, especially since the adoption of the Human Rights Act into law in 1998.

However, the number of Judicial Review applications does not necessarily mean they were successful. In 2014, 36% of Judicial Reviews were successful.

### Examples of successful Judicial Reviews in recent years

#### Gurkha's win the right to settle in the UK (2009)

After a campaign led by TV personality Joanna Lumley, a Judicial Review went to the High Court. This Judicial Review was questioning the government's treatment of Gurkhas who had fought in the British Army but had retired before 1997. These Gurkha's did not have the legal right to settle in the UK. However, before the judgement was reached, the Gordon Brown government decided to allow these Gurkha's to settle in the UK. They had preempted the result of the Judicial Review.

#### High Speed Rail Compensation

Currently a 33 Billion Rail Project to install High Speed Rail between London and other parts of the UK is taking place in Britain. This has been opposed by numerous groups, especially those whose communities are going to be affected by the building on the line.

Five judicial reviews were brought by four protest groups, including 18 councils, campaign group High Speed 2 Action Alliance (HS2AA), which represents more than 70 affiliated groups and residents' associations, and a golf club.

They had claimed there were failures in the consultation process and in assessing the highspeed link's environmental impact.

These groups were awarded significant compensation, as a result of Judicial Review.

#### Brexit vs. Miller (Article 50 Case)

The case brought forward by the investment banker Gina Miller is an excellent example of Judicial Review. Gina Miller, as a private citizen, contended that the Government had acted beyond its powers by planning to use the Royal Prerogative to trigger Article 50. She was successful, and the Government was forced to hold a parliamentary vote on the issue in March 2017.

### How does EU Membership impact Judicial Power?

Membership of the EU has changed the interrelationship between the judiciary and government. As part of joining the EU, law in the UK has to be compatible with EU law.

A pre-requisite of joining the European Union (then E.E.C) was accepting that Community Law was superior to national law. This caused problems in Britain, because of the importance of Parliamentary Sovereignty in the UK.

When Britain was believed to have transgressed European Law, Directives and Regulations, the [European Court of Justice](#) would challenge UK laws and the government would need to respond.

However, since the Factortame Case, it is the job of the UK Courts to suspend any UK law that is in violation of EU law.

#### The Factortame Case

The Factortame case grew out of a complaint by Spanish Fisherman that the British Merchant Shipping Act of (1988) violated the Single European Act (1986) by requiring all vessels using UK fishing quotas to register, and that they were only able to do so if they met certain nationality requirements.

The case was referred by the UK High Court to the European Court of Justice and told the Transport Secretary not to take any further action until the issue had been resolved.

The Law Lords in the House of Lords overturned this, saying that no UK court could overturn a parliamentary statute.

However, in 1990 the European Court of Justice said that UK Courts do have the power to suspend Acts of Parliament, if they appear to break EU law.

This judgement effectively guaranteed the supremacy of EU law over UK law and brought further into question the issue of Parliamentary Sovereignty.

#### Be Careful!

Despite the effect this has on political sovereignty (the reality of the situation), the UK Parliament does retain legal sovereignty in that it will now overturn the European Communities Act (1973) via the EU (Withdrawal) Bill.

**What is the European Convention on Human Rights and the Human Rights Act (1998)?**

In 1950 the European Convention on Human Rights (ECHR) was established. This body is separate from European Union. The European Convention on Human Rights sets out the fundamental rights that people within Europe are entitled to.

Any potential violations of the ECHR are investigated by the European Commission on Human Rights and tried by the [European Court of Human Rights](#) in Strasbourg. Before 1998 this caused problems in the British legal system. UK citizens who claimed that their Human Rights were being abused had to go to Strasbourg to have their cases heard, this changed with the introduction of the Human Rights Act in 1998.

**Famous occasions when the UK breached the ECHR****Sexuality of People Serving in the UK's Armed Forces**

In 2000 the ECHR found that the UK had violated the human rights of several homosexual soldiers who had been dismissed from the armed forces because of their sexuality. The ECHR ordered the UK to pay substantial damages to the individuals involved.

**UK Widowers' Entitlement to Benefits**

A 2002 human rights case was brought against the UK regarding a widower's entitlement to receive bereavement benefits. Until 2001 a man whose wife had died was not entitled to receive the lump sum and weekly bereavement payments which a woman whose husband had died would receive. A widower who had given up work to care for his children after the death of his wife in 1996, and who was refused the bereavement benefit, took his case to the ECHR. The ECHR held that the widower had been discriminated against on account of his gender and ordered that he be paid £25,000 in damages.

**The Ban on Prisoners Voting in the UK**

The UK's law preventing prisoners from voting in elections was called into question by a 2005 ECHR case. An ex-prisoner started the case which used human rights law to challenge the UK's ban on prisoners voting. The ECHR held that the ban may constitute a breach of an individual's right to free elections. In 2008, with the UK's law on prisoners voting unchanged, the UN commented that the ban may constitute a breach of human rights. Although the UK is usually prompt in adapting to ECHR rulings, as at April 2015, the ban remains.

**Monitoring of Private Correspondence by the UK Government**

A 2008 case was brought to the ECHR by several civil rights organisations. This questioned the legitimacy of the UK government's use of phone-tapping and the monitoring of emails between the UK and Ireland from 1990 to 1997. The civil rights groups claimed that some of their correspondence had been monitored by the authorities. The law at that time gave a very wide remit for the UK authorities to monitor correspondence and the very existence of that law was said by the ECHR to pose a threat to rights and freedoms. The ECHR was concerned that the law was open to abuse and held that the monitoring constituted a breach of the right to private correspondence. The UK government considered the case to be so sensitive in terms of national security, that it would neither confirm nor deny what had actually taken place.

**Stop and Search under the UK's Terrorism Act**

In 2010 the ECHR found that the stop and search procedures used by the UK police pursuant to the Terrorism Act 2000 were illegal because they did not require the police to have grounds for suspicion before using them. The ECHR found that this was open to abuse and constituted a breach of an individual's right to private and family life.

In 1998 the Human Rights Act was passed, it came into force in 2000. The Human Rights Act incorporated the ECHR into UK Law. This allowed UK citizens to pursue breaches of Human Rights through the UK courts, rather than go to Strasbourg. Any new law to be passed in the UK is now also checked by Human Rights lawyers, to check they comply with the Human Rights Act (1998).

### **How does Human Rights Act work in the UK?**

The Human Rights Act forms part of UK law in three main ways:

- All UK law, as far as possible, must be interpreted in line with the rights set out in the Human Rights Act.
- UK courts can declare legislation is incompatible with Human Rights. However, it cannot overturn the law, this remains up to Parliament.
- No public authority can act incompatibly with Human Rights unless another law specifically says that they can.

Between 1998 and 2015 30 declarations of incompatibility were made.

The idea behind these parts of legislation is that a ‘dialogue model’ is made. This means that courts have been invited by Parliament to comment on Human Rights, but Parliament must decide how it must respond to these comments. Section 19 of the Human Rights acts says that before the Second Reading of every bill, a Minister

#### **What happened to the British Bill of Rights?**

In 2010 David Cameron tentatively proposed replacing the Human Rights Act with a British Bill of Rights. In 2015, it was part of the Conservative’s Election Manifesto. The aim of a British Bill of Rights would be to better fit the principle of parliamentary sovereignty with Rights, given the numerous conflicts between the British Parliament and the ECHR. The proposed Bill of Rights would also include specific responsibilities to citizens. After the Brexit vote, legislation for a British Bill of Rights was announced as postponed by then Justice Secretary Liz Truss.

must declare whether or not he believes the bill is compatible with Human Rights.

### **How does the Judiciary protect Civil Liberties?**

There are a number of ways that the judiciary protects civil liberties. These are:

- Via ruling of Judicial Review cases that are brought to them by citizens.
- By issuing declarations of incompatibility to encourage the UK Government to comply with the Human Rights Act (1998)
- Through listening to appeals within the courts system.
- Through their interpretations of Common Law.

**How independent is the Judiciary?**

Judicial Independence is the notion that judges should be politically neutral and free from political interference. Judicial Independence is necessary to truly uphold the Rule of Law. The opposite of Judicial Independence is **Judicial Activism**. This is the term given when the judiciary have a more active role in the political system.

Increasingly, despite the changes made in the Constitutional Reform Act (2005), it may actually be becoming harder for judges to maintain political independence.

One key reason that Judicial Activism might be growing is the increasing trend for **Judge-Led Inquiries**. This means that because there is an issue of national significance in which it might not be possible for politicians to remain objective, judges are brought in as independent arbiters.

**Examples of Judge-Led Inquiries****Hutton Inquiry**

The Hutton inquiry was a 2003 investigation into the 2003 death of David Kelly, a UN weapons inspector in Iraq. The investigation was led by Lord Hutton, a judge and the head of the Court of Appeal. David Kelly had been the source of suggestions by BBC journalist Andrew Gilligan that the Iraq Dossier had been ‘sexed up’ by Tony Blair’s government in order to win support for war in Iraq. The inquiry delved deep into the heart of the Tony Blair government and particularly, the relationship between Tony Blair’s government and the Press.

**Leveson Inquiry**

In reaction to the Phone Hacking Scandal, Lord Leveson led an independent inquiry into the issue. This went to the heart of David Cameron’s government, because the editor of the News of the World during the scandal, Andrew Coulson, had gone on to become David Cameron’s Director of Communications. Most embarrassing for the government, was the seemingly intimate relationships between all recent governments and the media mogul, Robert Murdoch.

Recently, tensions between Politicians and the Judiciary have begun to grow, after a period in the 1990s when there appeared to be more harmony between the two branches of government.

### Examples of recent tensions between judges and politicians

#### **February 2013: criticism of some members of the judiciary by the Home Secretary, Theresa May:**

Theresa May was accused of politicising the judiciary when she condemned some judges for interpreting the Human Rights Act too generously. May claimed that members of the judiciary were ‘ignoring parliament’s wishes’ by not following the guidance issued by MPs. May argued that these judges were ‘subverting democracy’ by threatening the sovereignty of parliament. She was criticised by Labour peer and lawyer Baroness Kennedy, who accused May of threatening the independence of the judiciary.

#### **October 2013: Lady Hale’s comments on the lack of female judges:**

The most senior female judge in the UK, Lady Hale, said she was ‘disappointed’ that there are so few female judges, and no other female Supreme Court justices. She pointed out that the independent appointments commissions, who recommend new Supreme Court justices are heavily male-dominated, which could explain the lack of female appointments. This is evidence of the lack of diversity within the judiciary.

#### **November–December 2013: criticism by justices of the ECHR:**

Two Supreme Court justices, Lord Sumption and Lord Justice Laws, and the former lord chief justice, Lord Judge, all spoke out separately against the power wielded by the European Court of Human Rights (ECHR). Their general argument is that the ECHR is interpreting the European Convention of Human Rights much more generously than was originally intended by its framers.

The UK codified the European Convention of Human Rights into UK law in the Human Rights Act of 1998, so individuals can bring a human rights case to a UK court, or to the ECHR in Strasbourg. The ECHR can order the UK government to change UK law if it conflicts with the convention, as has been the case in prisoners’ voting rights.

The justices feel that the ECHR judges’ interpretation of the convention is too broad, which allows the ECHR to rule on a far greater range of cases than was originally intended. They argue that the power of the ECHR to interpret the convention as it sees fit, and its power to order the government to change the law accordingly, is a serious threat to the sovereignty of parliament.

#### **November 2016: Criticism of Article 50 Case**

In November 2016 the High Court ruled that the Government could not invoke Article 50 using the Royal Prerogative. This was contested via Judicial Review and in November the High Court ruled that Parliament must be given a say. The judges in the case were heavily criticised in parts of the media and even by politicians. Despite this, the then Justice Secretary Elizabeth Truss did not come out in their defence and was criticised therefore for politicising the judiciary.

**How is the independence of the Judiciary meant to be maintained?**

There are many ways that judicial independence is meant to be maintained. These include:

- **Security of Tenure** – A member of the Senior Judiciary can only be removed by a vote in both Houses of Parliament. This means that judges don't have to worry about their next job, and pleasing anyone to get it!
- **Guaranteed Salaries** – The salaries of judges are not set by politicians. This means that judges don't have to impress MPs to receive a pay rise!
- **Contempt of Court** – It is a criminal offence for politicians to speak out about a criminal case during its proceedings. This helps to stop cases from becoming politicised.
- **The Judicial Appointments Commission** – The new appointments system helps to promote the best person for the job and avoid cronyism.
- **Reputation** – Judges rely on their reputation for impartiality for their future advancement and success. Most judges are unwilling to compromise this by becoming politicised.

**Should judges have more or less political power?**

Arguments for the idea that judges should have more political power include:

- They play a key role, particularly when conducting judicial reviews, in ensuring that government and other public bodies operate within the law and do not abuse their power.
- They also have a role (along with Parliament) in ensuring that human rights and freedoms are upheld.
- Judges are not politicians and are independent from politics. They are, therefore, in a strong position to prevent abuses of power by governments who may wish to gain political advantage.
- They uphold the rule of law, whereby all citizens are treated equally under the law. This prevents governments and public bodies from treating people unequally for political gain.
- While politicians are often influenced by varying public opinion, judges can operate strictly within the law and so prevent abuses of power or human rights which may take place merely to satisfy the short-term public mood.

Arguments against the idea that judges should have more political power include:

- Judges are not elected and are, therefore, not accountable. This means they may make judgements which take no account of the national interest or public opinion. Neither Parliament nor the public has any way of calling judges to account, so their power should be controlled.
- Judges sometimes make rulings that may prevent the government from carrying out its functions and political mandate. In cases where there is a dispute between the power of government and the power of judges, it is argued that democracy demands that government should prevail.
- When upholding EU law or the European Convention on Human Rights, UK judges are sometimes challenging the sovereignty of Parliament, a key principle of the UK constitution.
- It has been argued by some commentators that the UK's senior judiciary is out of touch because its members come from such a narrow social background, being largely educated at private schools and Oxbridge.