

→ Statute law is written down and have to be read as is whereas common law is interpreted independent of politics, not beholden to neutral → unbiased

## Judges, Justice and Freedom

The principles of judicial independence and judicial neutrality are central tenets of the judiciary.

Under the principle of judicial independence, judges should be protected from political interference and political control. There is some overlap in the UK, however, between the judiciary and the institutions of government. Senior members of the judiciary sit as Law Lords in the House of Lords, while the Lord Chancellor plays a pivotal role at the heart of government. Nevertheless, the bulk of the judiciary remains separate from government and Parliament, and their independence is protected by a combination of statute law, common law and convention.

Judicial independence is deemed essential if judges are to have the authority to protect and defend civil liberties. Such liberties are enshrined in the legal rights we enjoy as citizens of the state, and preserve a range of individual freedoms such as freedom of speech and thought, and freedom of movement and peaceful assembly.

Judicial neutrality holds that judges should be politically neutral. This is closely related to the uncoded nature of the UK constitution and the doctrine of parliamentary sovereignty, discussed earlier.

There is no entrenched constitution in the UK. Parliament is the ultimate source of legal authority, and is not constrained by any higher court (with the exception of the European Court of Justice). Thus the courts cannot overturn an Act of Parliament for being unconstitutional. Rather, judicial neutrality means that judges should be neutral in their stance to the law, and seek to apply laws passed by Parliament in an impartial, unbiased and technical manner.

### From judgement to law

In practice, however, the role of the judiciary goes beyond a strict application of the law. Judicial decisions, over time, have contributed to making the significant body of common law upon which many constitutional principles are based. Even in the case of Acts of

→ Common law = whole collection of interpretation made by judges which set precedents for future judgements. Parliament (statute law), there is often considerable scope for judicial interpretation of what the law entails.

The political weight of the courts has been strengthened by the Human Rights Act (1998) which incorporated the European Convention on Human Rights into UK law. This has given judges the power to make declarations as to the compatibility of Acts of Parliament with the rights set out in the Human Rights legislation, and suggest appropriate remedies where incompatibilities are found. In addition, the process of judicial review permits judges to challenge the conduct of governmental authorities on the grounds that their actions may be unlawful, irrational, or that they have followed improper procedure.

For example, in the mid-1990s, judges declared that the secretary of state for social security had acted unlawfully when he withdrew entitlement to income-related benefits for asylum seekers, while the home secretary was found to have acted unlawfully on 14 occasions several relating to the detention and sentencing of prisoners (Coxall and Robins, 1998; Dearlove and Saunders, 2000). Although this may suggest that the process of judicial review strengthens judges' capacity to defend our civil liberties against an over-arching central government, such high profile cases are rare.

Most cases of judicial review have found in favour of central government, often to the detriment of local government and trades unions. Indeed, the extent to which judges administer justice and defend freedom is inevitably contingent upon their understanding of society and upon the value-judgements they make when weighing up what they consider to be in the public interest. In this respect, the unrepresentative nature of the judiciary - overwhelmingly white, privately-educated, privileged men - must surely raise questions as to whether 'justice' is always done.

Nicola McEwen 2004, Lecturer in Politics, University of Edinburgh

### Exercise

Explain two arguments which suggest Judges protect civil liberties and two which suggest they might not always do so

# The UK before the European Court of Human Rights

By the end of 2010, the European Court of Human Rights had, in 271 cases, found violations of the European Convention of Human Rights by the United Kingdom. These judgments cover a wide variety of areas, from the rights of prisoners to trade union activities. The decisions have also had a profound effect and influence on the approach adopted by the UK to the regulation of activities which could potentially engage Convention rights. As one author has noted, "[t]here is hardly an area of state regulation untouched by standards which have emerged from the application of Convention provisions to situations presented by individual applicants."

→ everything we do is being controlled at EU level.

Notable cases involving violations of the Convention include:

- Criminal sanctions for private consensual homosexual conduct (Dudgeon, 1981);
- Refusal to legally recognise transsexuals (Rees, 1986);
- Different ages of consent for homosexuals and heterosexuals (Sutherland, 2000);
- Parents' rights to exempt their children from corporal punishment in schools (Campbell and Cosans, 1982);
- Sentencing a juvenile young offender to be "birched" (Tyrer, 1978);
- Wiretapping of suspects in the absence of any legal regulation (Malone, 1984);
- Restrictions on prisoners' correspondence and visits by their lawyers (Golder, 1975);
- Routine strip-searching of visitors to a prison (Wainwright, 2006);
- Allowing the Home Secretary rather than a court to fix the length of sentences (Easterbrook, 2003);
- Admitting testimony obtained under coercion as evidence (Saunders, 1996);
- Keeping a suspect incommunicado in oppressive conditions without access to a solicitor (Magee, 2000);
- Extradition of a suspect to the United States to face a capital charge (Soering, 1989);
- Granting the police blanket immunity from prosecution (Osman, 1998);
- Shooting of Provisional Irish Republican Army suspects in Gibraltar without any attempt to arrest them (McCann, 1995);
- Killing of a prisoner by another mentally-ill detainee with whom he was sharing a cell (Edwards, 2002);
- Investigation of an unlawful killing by police officers conducted by the police officers who participated in the killing (McShane, 2002);
- Failure to protect a child from ill-treatment at the hands of his stepfather (A, 1998);
- Failure by a local authority to take sufficient measures in the case of severe neglect and abuse of children by their parents over several years (Z, 2001);
- Ineffective monitoring of a young prisoner who committed suicide during a short sentence (Keenan, 2001);
- Keeping a disabled person in dangerously cold conditions without access to a toilet (Price, 2001);
- Granting of an injunction against the Sunday Times for publishing an article on the effects of thalidomide (Sunday Times, 1979);
- Injunction against the Sunday Times for publishing extracts from the Spycatcher novel (Sunday Times (no. 2), 1991);
- Ordering a journalist to disclose his sources (Goodwin, 1996);
- Agreement obliging employees to join a certain trade union in order to keep their jobs (Young, 1981);
- Keeping a database of DNA samples taken from individuals arrested, but later acquitted or have the charges against them dropped (Marper, 2008).

## Question

how effectively do judges protect civil liberties?

legal ≠ moral judgement

What do the above suggest about the protection of civil liberties in the UK?

## Extension question

↙ society ≠ perfect  
↘ quite a few civil liberties not protected.

Do you think it is possible for the UK government to effectively protect all civil liberties ... are the government more culpable in some types of cases than others?

↙ Bill of Rights would be helpful  
↘ no, because some law is ambiguous and every case requires special consideration