

FACTFILE: GCE GOVERNMENT & POLITICS

THE JUDICIARY



The judiciary

The judiciary is a term which refers to all of the United Kingdom's judges. However, for the purposes of studying AS Unit 2 – the British Political Process the focus shall be on the role of the judges who sit on the UK's Supreme Court. There are 12 senior judges in the Supreme Court and ultimately they have the final say on rulings in the UK. Cases which end up at the Supreme Court have usually started at the High Court or at the Court of Appeal. Most of these cases are about clarifying the meaning or scope of a law and making sure it doesn't breach the Human Rights Act or contradict an EU law. It is the role of clarifying the meaning of the law that is the most political of all the roles that the judiciary performs and is a matter of significant interest. This role gives the judiciary the power to suggest that a law needs to be changed, which is seen as a political role rather than a purely judicial one. The purpose of the judiciary is to make sure that all laws are fair, that all laws comply with EU law and the Human Rights Act (1998), and to make sure the law applies equally to all citizens.

Judicial independence

It is important for the judiciary to be independent from the executive if they are to perform their roles effectively and without bias. There are a number of ways judicial independence has been protected in the UK. The principle that judges should be free from political control is a key feature of a democratic system.

Methods to ensure judicial independence include:

- 1. Security of tenure.** Once appointed, judges can only be removed from their posts if they resign, retire (age 75) or commit a serious crime. In other words they can't be sacked for going against a government or challenging a law.
- 2. Guaranteed salaries.** Judges are paid a guaranteed salary (which can't be altered by Parliament) from the Consolidated Fund, the government's general bank account at the Bank of England. This means that politicians can't threaten to reduce their salary or offer to increase salaries in order to obtain the court rulings they want.
- 3. Growing separation of powers.** The creation of the new UK Supreme Court in 2009 has enhanced the independence of the judiciary. Prior to this the most senior judges actually sat in the House of Lords, and the Lord Chancellor, who is a member of the cabinet, had a lot of influence over appointments. This meant the Lord Chancellor had a role in the government, the legislature and the judiciary. This was seen as a breach of the principle of the separation of powers. Since the passage of the Constitutional Reform Act of 2005, the role of the Lord Chancellor has been significantly reduced. Separation of powers is seen as desirable in a modern democracy and the current roles and responsibilities of the Lord Chancellor demonstrate a clear separation of powers which was not previously the case.

4. An independent appointments system.

The Constitutional Reform Act of 2005 also created an independent Judicial Appointments Commission to remove some of the power for judicial appointments from the Prime Minister and to make it more open.

5. Training and apprenticeship. Most senior judges have worked their way up through the system, having begun their careers as barristers, and they are therefore very proud of their profession and unlikely to simply bow to political pressure.**Judicial neutrality**

Judicial neutrality is different to judicial independence as it simply means judges acting impartially; in other words, judges being able to suspend their personal biases when making rulings about the law. It is impossible to guarantee judicial neutrality; however, there are ways of trying to maintain it:

- 1. Anonymity** – judges have traditionally tried to stay out of the public eye and to avoid being drawn into arguments about their rulings.
- 2. Restriction on political activity** – judges are not supposed to campaign on behalf of either a political party or a pressure group. They can vote, but their political views should not be known to the public.
- 3. Legal justifications for arguments** – judges are expected to show clearly how they came to their decisions and this should be rooted in law not personal preference. Supreme Court decisions are available to the public on the Supreme Court's website.

The neutrality of judges is questioned because of their background, which continues to be a reflection of a narrow section of society. Most judges still tend to be white, middle-class men who have been privately educated and who have attended Oxford or Cambridge. This is a far cry from the norm and calls into question their ability to truly identify with wider society. Critics also point out that the Human Rights Act (1998) has drawn judges more and more into the political arena. This is called the 'politicisation of the judiciary' and it is generally seen as something to be avoided. The judiciary, however, would defend their role by pointing out that they have a role in defending the public from the political establishment and they are simply adhering to the Human Rights Act (1998), if and when they make judgements which go against the government.

How are judges appointed?

Before the **Constitutional Reform Act of 2005** appointments of senior judges were made by the monarch on the advice of the Prime Minister and the Lord Chancellor. In effect this meant that the Prime Minister made all the appointments when positions became available. This system was criticised for compromising the separation of powers and for putting too much power in the hands of the Prime Minister. The reforms brought in under the Constitutional Reform Act were designed to make judicial appointments fairer, to aid recruitment from a wider pool in the hope it would result in a judiciary more representative of wider society and that the role of the Lord Chancellor would be reduced. By January 2008 the Judicial Appointments Commission had appointed ten high court judges; all were white, male and former barristers and six had been educated in leading public schools. The composition of the Supreme Court in 2008 demonstrated that the aim of making the judiciary more representative of society as a whole would take longer than anticipated.



Lady Hale, the only female justice on the Supreme Court.

The arrangements for selecting a Justice of the Supreme Court were set out in the Constitutional Reform Act 2005 and subsequently amended by the Crime and Courts Act of 2013. At present, justices of the Supreme Court must have held high judicial office for at least two years or have been a qualifying practitioner for 15 years (advocate in Scotland, member of the bar in Northern Ireland or a solicitor entitled to appear in the High Court in England and Wales). Vacancies are filled by a selection commission convened by the Lord Chancellor. The President of the Court chairs the selection commission, membership of which will include a senior judge from anywhere in the UK, a member of each Judicial Appointments Commission for England and Wales, the Judicial Appointments Board for Scotland, the Judicial Appointments Commission in Northern Ireland and one lay member. The selection commission considers possible nominees and then makes a

recommendation to the Lord Chancellor. The Lord Chancellor can then accept the nomination by notifying the Prime Minister, reject the selection or request that the ad hoc commission reconsider their selection. Once notified, the Prime Minister must recommend the approved candidate to the Queen.

The very first Supreme Court became operational on October 2009. The founding justices were those active Law Lords in post at that time. Under the Constitutional Reform Act the most senior of the 12, Lord Phillips, took on the role of President of the Court, with the second most senior judge, Lord Hope, assuming the role of deputy head. These justices remain members of the House of Lords but are barred from sitting and voting in the Lords as long as they are Supreme Court justices. Under the Constitutional Reform Act future appointees to the Supreme Court will not be made Lords.



The powers of the judiciary

Judicial review

The principle of Parliamentary Sovereignty means that the UK Supreme Court cannot strike down UK laws which they consider to be unconstitutional. However, the Supreme Court still has a number of significant powers. The most significant of these is the power to review government actions in order to decide if they have acted 'ultra vires' or beyond their powers. This is carried out through a process called **Judicial review**.



The power of the Supreme Court has been enhanced by membership of the EU and by the Human Rights Act (1998). British laws that break EU law can be challenged in the courts. The ground-breaking case for this was the **Factortame** case (1988) which forced the UK government to change the

Merchant Shipping Act (1988) when it was found by the then Court of Appeal to be breaking EU law. Under the terms of membership of the EU, member states recognise that EU law takes precedence over domestic law if there is a conflict between the two. Since Factortame, UK courts have been able to suspend UK statutes that appear to violate EU law, so this has added a significant power to the court.

The Human Rights Act (1998) has given the Supreme Court greater scope for activity. Under the Human Rights Act, UK courts can issue a **declaration of incompatibility** where a parliamentary statute appears to violate the rights guaranteed. Parliament is not, however, obliged to amend the offending statute.

The Supreme Court

The Supreme Court was established in order to address a number of issues:

1. Concerns that the previous system failed to provide a proper separation of powers, particularly with regard to the role of the Lord Chancellor and the presence of the Law Lords in the upper house of Parliament.
2. Criticisms of the way senior judges were appointed.
3. Widespread confusion over the work of the Law Lords.

Whilst the Supreme Court did resolve some of these matters, its creation also raised expectations that it would receive new powers. It has, however, continued to do the same work as the Law Lords with very little change. Roles include:

1. Acting as the final court of appeal in England, Wales and Northern Ireland.
2. Hearing appeals on issues of public importance surrounding arguable points of law.
3. Hearing appeals from civil cases in England, Wales and Northern Ireland.
4. Hearing appeals from criminal cases in England, Wales and Northern Ireland.



The UK Supreme Court.

The impact of the Supreme Court

1. The appointments procedure is more transparent and more politically independent.
2. There has been no change to the actual powers of the judges.
3. Judicial independence appears to have increased as a result of a clearer separation of powers. However, this is more apparent than real as evidence from actual cases before 2005 would indicate that senior judges were already very independent.

Possible future impacts

1. The new building raises the profile of the Supreme Court which may enhance its role in the future.
2. Lifting restrictions on television cameras and introducing some televised sessions should demystify the role of the judiciary.

3. Changes to the way rulings are delivered, for example the text of Supreme Court rulings can be read via the Supreme Court's website.
4. All of these changes are likely to gradually change the relationship between the Supreme Court and other branches of government.

Assessing the powers of the Supreme Court

The Labour government in 1997 set out to try to clarify the rights of UK citizens by means of three key pieces of legislation:

The Human Rights Act 1998

The Data Protection Act 1998

The Freedom of Information Act 2000

The Human Rights Act incorporated most of the articles of the European Convention on Human Rights into UK law. This permits UK citizens to pursue cases under the European Convention on Human Rights through UK courts as opposed to having to go to the European Court of Human Rights in Strasbourg. In summary, the Human Rights Act codified the 18 articles of the ECHR into British law.

The Human Rights Act has been cited in a number of high profile cases since it was introduced and has been regarded as making it easier for the Supreme Court to both protect citizens' rights and to hold government to account. Two examples of the application of the Human Rights Act are:

1. The decision by the court to impose a lifetime ban on revealing the new identities of the two boys who killed the toddler Jamie Bulger. The court cited Articles 2, 3 and 8 in their decision.
2. The Mental Health Act 1983 was challenged on the basis that it reversed the traditional burden of proof and was therefore discriminatory towards those convicted of offences who had a mental health issue. The case was taken by a convicted murderer who was being held at Broadmoor psychiatric prison, and his objection was that he had to prove he was cured before he was released. The court upheld his appeal citing Articles 5 and 6 of the Human Rights Act in their ruling.

The Human Rights Act has featured heavily in a number of judicial rulings post 9/11. Following the events of 9/11 the government introduced a raft of 'emergency powers' legislation, many of which infringed upon citizens' rights. In some cases which have come before the courts, the Supreme Court has supported the government but, in others, they have ruled against them. Examples include the following:

1. The Anti-Terrorism, Crime and Security Act 2001 allowed the indefinite detention of foreign terrorist suspects. Initially this was seen as permissible as Article 15 of the ECHR allows for the suspension of normal rights if there is a 'public emergency threatening the life of the nation'. However, in December 2004, the court declared Section 23 of the Act to be incompatible with the ECHR.
2. Belmarsh ruling – in 2004 a case was heard by the then Law Lords challenging the Anti-Terrorism, Crime and Security Act. In *A and Others v. Sec of State for the Home Dept* the indefinite detention of terrorist suspects was judged to be in contravention of Articles 5 and 14 of the Human Rights Act. This became known as the Belmarsh case as the detainees were held there.
3. In June and August 2006 the High Court found that control orders allowed under the 2005 Prevention of Terrorism Act violated Article 5 of the Human Rights Act.

The Freedom of Information Act 2001 initially appeared to have little impact on holding the government or officials to account. It came into its own, however, during the row over MPs' expenses. This scandal was revealed as a result of the *Daily Telegraph's* decision to publish leaked details of MPs' expenses and the process was initiated when a journalist, Heather Brooke, requested details of these expenses under the Freedom of Information Act.

The impact of both the events of 9/11 in New York and 7/7 in London was that the majority of UK citizens became prepared to accept restrictions on their civil liberties as part of the so called fight against terrorism. However, as the threat has receded, opposition to government measures which threaten individual rights is growing. A large number of acts have emerged in response to the perceived threat of terrorism and many of these infringe on civil liberties in a number of ways:

- 2000 Regulation of Investigatory Powers Act** – allowed police and local authorities to undertake covert surveillance of citizens.
- 2001 Anti-Terrorism, Crime and Security Act** – allowed for the indefinite detention of foreign terrorist suspects.
- 2002 Proceeds of Crime Act** – allowed for the assets of suspected terrorists to be confiscated even when they hadn't been prosecuted.
- 2003 Criminal Justice Act** – limited the right to trial by jury in certain cases.
- 2003 Anti-Social Behaviour Act** – allowed for the imposition of curfews.
- 2005 Prevention of Terrorism Act** – introduced control orders.
- 2005 Serious Organised Crime Act and Police Act** – restricted protests in the vicinity of Parliament.
- 2006 Identity Card Act** – provided for the introduction of a compulsory biometric ID card scheme.
- 2006 Terrorism Act** – made it an offence to glorify acts of terrorism.
- 2008 Counter-Terrorism Act** – allowed the police to restrict photography in public places and to monitor those suspected of involvement in terrorist activity.
- 2009 Coroners and Justice Act** – allowed inquests into deaths relating to terrorist activities to be held in secret.
- 2015 The Counter Terrorism and Security Act** allows police to temporarily seize travel documents and to place temporary exclusion orders from the UK. More controversially it places a duty on local authorities, prisons and schools to prevent people being drawn into terrorism by challenging extremist ideas.
- 2016 The Investigatory Powers Bill** is an attempt by the Conservative government to require internet and mobile phone providers to keep a record of each individual customer's browsing activity.

The role of the Supreme Court in making sure that citizens' rights are upheld and that the government does not abuse these powers is demonstrated mainly through the power of judicial review. Judicial reviews must be instigated by citizens and cannot be applied for by people or groups who are unaffected by the issues. In addition to this, there is a limited time frame for the consideration of a review, and government guidelines have made it more difficult for reviews to be instigated. A judicial review must be applied for within three months of the decision

which is being appealed against; there is a fee of £140 for applying and, whilst not prohibitive, there are the additional costs if the case is taken on by the Supreme Court. In order for a case to be heard it must fulfil one of three criteria: the decision has to be unfair, illegal or there has been a failure to follow proper procedures. There are many more judicial review cases today than there were before the Human Rights Act was passed in 1998. This prompted the former Conservative leader, David Cameron, to call for both the scrapping of the Human Rights Act and further restrictions on judicial review. In 2014 there were 11,000 judicial review applications, the vast majority of which were asylum cases. Judges, lawyers, human rights groups and the Lords have all objected to attempts to change or restrict judicial review as they believe it would severely impact on the democratic rights of citizens to be protected from governmental abuse of powers. If a case makes it through to a judicial review and is heard by the court, the judges can rule against the government body thereby overturning their original decision or forcing the body to reconsider. Most judicial reviews are related to a government agency or body, for example an objection to a housing decision or a welfare issue. Although only one fifth of rulings go against the government, they are an important method of holding the government to account and, as such, are one of the main functions of the Supreme Court.

Judicial inquiries

The second way in which the Supreme Court can hold the government to account and protect democracy is through the holding of judicial inquiries. These are very different to judicial reviews as they are often held a long time after the events and are usually set up by a later government to investigate an issue or event which happened under a previous administration. Therefore judicial inquiries are often not about holding the current executive to account

Additional materials

[The most recent news stories on the UK Supreme Court](#)

[Short video explaining the work of the UK's Supreme Court](#)

[An informative BBC 4 documentary on the Supreme Court: - 'UK Supreme Court: The highest court in the land'.](#)

but more a way of making sure that all governments know that their actions will have consequences and that abuses of power or failures to follow due procedure may come back to haunt them. The main drawback with inquiries is the amount of time they take to reach their conclusions and the sheer cost of holding these inquiries (the Saville inquiry, also known as the Bloody Sunday inquiry, cost £191 million and took 12 years to complete). This has caused many people to question if they are worth the expense. It is also increasingly the case that one event can be the focus of several inquiries which seems even more wasteful and unnecessary. Significant inquiries to date have dealt with controversial issues such as institutional racism and the events of Bloody Sunday, making them both significant for wider human rights issues and deeply emotive for the relatives of those affected. Significant inquiries which are well worth a deeper investigation would include:

- The Widgery Inquiry
- The Scarman Inquiry
- The Scott Inquiry
- The Nolan Inquiry
- The McPherson Inquiry
- The Saville Inquiry
- The Hutton Inquiry

There are arguments for and against the effectiveness of inquiries and judicial reviews in holding the government to account, and certainly many political commentators have reservations about the increasingly political role of judges. However, a central part of any democracy is the existence of an independent judiciary that is able to uphold its citizens' rights and whose justices feel they can redress citizen's grievances if they believe the government has overstepped the mark. The conservative view that judges should not become involved with policy decisions has some support, but it is difficult to see how citizens' rights could be adequately protected if the judiciary didn't have these powers and governments were able to ignore any recommendations they found unpalatable.

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