

The recent discovery of public Covid contracts between the Health Secretary and different private companies were classed as 'unlawful' by the High Court.¹ The government's rejection to publish these contracts makes it an excellent fitting qualification for this essay because it shows that the judiciary can take decisions to scrutinise unlawful public actions. Their scrutiny is essential because people can request the courts to review the decision-making process of public bodies rather than reviewing the law itself. However, there are criticisms about the growing overpower of the unelected judges changing Parliament's legislation while taking decisions outside of their limits. In opposition to those criticisms, this essay will demonstrate that judges respect Parliament's authority when making decisions as an independent and unelected public body. The arguments to support this statement will be presented in the following order: (a) the Separation of Powers, (b) Judicial Review and (c) the Human Rights Act 1998.

In modern democratic states, the three institutional branches are essential for the country's correct functioning to avoid any overpower. Montesquieu's doctrine of Separation of Powers (SOP) stated that the "legislative and executive powers" should be separated. Plus, the judiciary should be separated from the other powers to avoid a lack of liberty in the state.² The SOP has been followed in states like the US or France. Those countries have separated all three branches while placing a system of checks and balances to avoid abuse of power.³ However, in the UK, Parliament represents the legislative branch (House of Lord and House of Commons), where the executive power controls the majority party in the House of Commons. This example conflicts with Montesquieu's doctrine as the legislative is not entirely separated from the executive.⁴ However, Lord Hope stated that there is a balance between the branches owed to "the mutual respect which each institution has for the other"—showing that the UK can correctly function without a strict SOP within a system of checks and balances.

Meanwhile, the judiciary is an independent court system that recently had its powers increased. This branch strengthened its independence through the Constitutional Reform

¹R v Secretary of State for Health and Social Care [2021] EWHC 346 (Admin)

² Montesquieu, *The Spirit of Laws* (first published 1748) pp. 151–52

³ Britannica, 'Checks and balances' Revised (2019) <<https://www.britannica.com/topic/checks-and-balances>> accessed 7 March 2021

⁴ Ibid (n 2)

Act 2005 (CRA) that was introduced to comply with Art 6(1) of the Human Rights Act 1998 (HRA) of 'fair trial'. It now allows people to bring human rights cases before the national Supreme Court. This court was created to physically separate the judiciary from the government to ensure that the law is executed independently without influence. Meanwhile, the CRA also established the relationship between the judiciary and the other institutional branches under sections 5 and 7. The judiciary is now allowed to overview unlawful actions, especially from the executive power through the Supreme Court, while respecting its boundaries with the two institutional branches. Thus, it is possible to state that both acts restructured the functioning of the English Legal System to protect the judiciary from being politically influenced. Lord Hope stated that there needs to be "judge's impartiality whatever the case [the judge] has to deal and whatever the circumstances".⁵ Thus, judges must be neutral to conduct highly professional decisions.

The sceptics from the executive branch argue about an increased overpower of non-elected judges taking political decisions through their scrutiny power. The House of Commons and the executive power are fully elected. However, the House of Lords is partially elected because there are hereditary and elected positions. Furthermore, judges' political views are not present when selected by the Independent Judicial Appointment Commission 2006. In contrast to the US, where judges are selected by the President under Article 2 of the constitution and confirmed by the Senate.⁶ It is then possible to suggest that the US's judges would be more politically influenced than the UK.

One of the aims of Judicial Review (JR) is to hold the executive accountable for their unlawful actions. Part 54 of the Civil Procedure Rules allows a person to bring a case against the government if the High Court allows it.⁷ In the case of *Miller v Prime Minister*,⁸ the Supreme Court ruled that the prorogation of Parliament by the executive was 'unlawful'. Even though article 9 of the Bill of Rights 1688 excluded the courts to comment in proceedings in Parliament.⁹ This case shows that the courts can intervene in exceptional circumstances to challenge the legality of the process. However, Lord

⁵ Lord Hope of Craighead, 'Judicial Independence' [2002] SLT 106

⁶ U.S. Constitution, Article 2, Section 1

⁷ CPR 54.1 (1)(a)(g)

⁸ *Miller v Prime Minister* [2019] UKSC 41

⁹ *Ibid* (Lord Keen of Elie QC)

Howard, a former barrister and Conservative party leader, criticised unelected judges making decisions against the government through JR.¹⁰ It could be contended that the judiciary has overstepped its boundaries when ruling against a political action during the Brexit situation. Plus, undisclosed political views of judges could have caused biased decisions against conservatives if there are more left-wing than right-wing judges.

Alternatively, the judiciary is defended for its lack of motivated bias. The former Supreme Court President Lady Hale declared that although there is no possibility of knowing judges' political views, there is no political motivation.¹¹ For instance, the case of *Shamima Begum* had a controversial situation of whether a 'fair trial' should take precedent over policy concerns.¹² JR was 'granted' by the Court of Appeal, but her claim was dismissed in the Supreme Court. Giving judgement, Lord Reed accepted the initial Home Secretary's decision as he was "democratically accountable to Parliament".¹³ At the same time, it highlighted the tension between the courts and government while revealing a high level of discretion from the executive on an issue of national security.

However, Griffin clearly outlined that there are matters "for Parliament, not judges, to decide upon" as an elected branch.¹⁴ Thus, the case of *Shamima*¹⁵ shows that the courts respect Parliament's decisions as they are interested in outlining the unlawfulness, even if it is within the courts. Thus, judges' political beliefs should not be publicly exposed even though there is a misconception of bias. However, Boris Johnson's proposal to introduce the US styled Supreme Court would allow the executive to elect judges.¹⁶ This situation would not be ideal because the judiciary would be politically exposed. Eric Hamilton stated that the "Politicisation of the

¹⁰ BBC, 'Michael Howard: Judges sometimes 'distort' the law to reach result they want' *The BBC News* (London, 28 December 2019) <<https://www.bbc.co.uk/news/uk-politics-50933535>> accessed 14 February 2021

¹¹ Ibid

¹² *Begum v Secretary of State* [2021] UKSC 7

¹³ Ibid 134

¹⁴ Miles Geffin, 'The judiciary: shifting the constitutional boundary and usurping Parliament's role?' [2008] *Fam Law* 550

¹⁵ Ibid (n12)

¹⁶ Edward Malnick, 'Supreme Court to be overhauled to curtail its constitutional powers' (The Telegraph, 14 November 2020) <<https://www.telegraph.co.uk/politics/2020/11/14/britains-supreme-court-faces-overhaul-concerns-us-style-election/>> accessed 24 March 2020

Supreme Court causes the American public to lose faith in the Court”.¹⁷ If this happens in the UK, the public could lose faith in the English Legal System owing to the total overlap of power criticised by Montesquieu.¹⁸

Meanwhile, the domestic law of Human Rights Act 1998 gives controversial powers to UK courts. Judges can use the law from the ECHR in the UK to protect people's rights and freedoms.¹⁹ Sceptics of parliamentary sovereignty argue that the act increased the courts' power to limit Parliament's power. Indeed, s.3 of the Act 1998 gave the UK courts the power to interpret primary and secondary legislation up to an extent to make them compatible with the ECHR. In *Fitzpatrick v Sterlin Housing Association Ltd*,²⁰ the Court of Appeal interpreted the word 'family' from the Rent Act 1977 to make it compatible with Art 14 of the ECHR.²¹ The initial meaning passed by Parliament only alluded to heterosexual families. However, the courts extended that meaning also to include same-sex couples. Further reinforced by the case of *Ghaidan v Godin-Mendoza*,²² where the House of Lords interpreted the words “living with the original tenant as his or her wife” to include homosexual couples.²³ These two cases can be examples of the courts' power to limit Parliament to make any law.

Alternatively, the judiciary respects its limits when interpreting legislation. Art 8 of the ECHR could have also been used to help claims under the sex discrimination Act 1975. It means that judges' interpretation is necessary when aiding legislation through the incorporation of the convention rights. In the case of *International Transport v Secretary of State for the Home Department*,²⁴ Laws LJ stated that the courts must properly “discharge the duty... Parliament has placed upon them by enacting the Human Rights Act 1998”. It indicates that judges understand the duty placed upon them by Parliament, which created and gave effect to s.3. Thus, it is possible to content that s.3 of the HRA 1998 is not a threat because of Parliament's supremacy to overrule any act in the UK.

¹⁷ Eric Hamilton, 'Politicizing the Supreme Court' [2012] 65 SLR <
<https://www.stanfordlawreview.org/online/politicizing-the-supreme-court/>> accessed 18 February 2021

¹⁸ Ibid (n 2)

¹⁹ Human Rights Act 1998, c42

²⁰ [2001] 1 AC 27

²¹ Ibid 34

²² [2004] UKHL, 26

²³ Ibid 143

²⁴ [2002] EWCA Civ 158, 139

Overall, the SOP reflects the courts' power and the relationship between the branches. Followed by JR, which explains that judges can easily grasp more unpopular decisions than Parliament as they are not elected. Judges' decisions take a more detached view on their judgements because they are not affected by the criticisms from the media. At the same time, Parliament takes the final decision in cases where their expertise is needed as rule-makers elected by the public. Furthermore, the political views of judges should not be exposed to protect the integrity of their judgements. Their role in interpreting legislation could also be affected if there were political influences. Meanwhile, the HRA 1998 showed that judges had expressed their commitment to interpreting legislation while respecting Parliament's supremacy to keep up with changes in society. However, the judiciary should have the power to protect the HRA 1998 because Parliament can amend or even remove any act in the UK.

Reference List

Table of cases

Fitzpatrick v Sterlin Housing Association Ltd [2001] 1 AC 27

Ghaidan v Godin-Mendoza [2004] UKHL, 26

International Transport v Secretary of State for the Home Department [2002] EWCA Civ 158, 139

R (Good Law Project Ltd & ors) v Secretary of State for Health and Social Care [2021] EWHC 346 (Admin)

R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland [2019] UKSC 41

R (on the application of Begum) v Secretary of State for the Home Department [2021] UKSC 7

Table of legislation

Civil Procedure Rules 1998

Constitutional Reform Act 2005

Human Rights Act 1998

Judicial Appointment Commission 2006

Sex Discrimination Act 1975 (As Amended in 2004)

U.S. Constitution, Article 2, Section 1

Bibliography

BBC, 'Michael Howard: Judges sometimes 'distort' the law to reach result they want' The BBC News (London, 28 December 2019) <_Michael Howard: Judges sometimes 'distort' the law to reach result they want - BBC News> accessed 14 February 2021

Britannica, 'Checks and balances' Revised (2019) <<https://www.britannica.com/topic/checks-and-balances>> accessed 7 March 2021

Edward Malnick, 'Supreme Court to be overhauled to curtail its constitutional powers' (The Telegraph, 14 November 2020) <<https://www.telegraph.co.uk/politics/2020/11/14/britains-supreme-court-faces-overhaul-concerns-us-style-election/>> accessed 24 March 2020

Eric Hamilton, 'Politicizing the Supreme Court' [2012] 65 SLR <<https://www.stanfordlawreview.org/online/politicizing-the-supreme-court/>> accessed 23 February 2021

Lord Hope of Craighead, 'Judicial Independence' [2002] SLT 106

Miles Geffin, 'The judiciary: shifting the constitutional boundary and usurping Parliament's role?' [2008] Fam Law 550

Montesquieu, *The Spirit of Laws* (first published 1748)