JUDGES AND CIVIL LIBERTIES

PROTECTING CIVIL LIBERTIES

The maintenance of civil liberties is generally seen as a defining feature of a liberal democracy. This is because civil liberties establish the relationship between the state and the individual. In doing this, they provide citizens with protection from government interference. The UK's commitment to civil liberties has traditionally been weak by comparison with countries such as the USA and France, where they are formally enshrined in constitutional documents. The US Declaration of Independence (1776) expressed a commitment to the 'unalienable rights' of life, liberty and the pursuit of happiness. The first ten amendments of the US Constitution, ratified in 1791, constitute the 'Bill of Rights', and are largely made up of civil liberties, including the right to freedom of religion, speech, the press, and assembly (The First Amendment), the right to keep and bear arms (The Second Amendment), and so on. The French Revolution led to the establishment of the Declaration of the Rights of Man and the Citizen (1789).

By contrast, the UK has traditionally been reluctant to give basic rights and freedoms explicit legal expression. Instead, it relied on the freedoms that were supposed to be embodied in the common law belief that 'everything is permitted that is not prohibited'. In other words, UK citizens had 'residual' rights; they had the right to do anything that the law did not forbid. As these 'residual' rights were never clearly spelled out, they were very difficult to uphold in law. Furthermore, if UK citizens thought that their rights and freedoms were under threat, they had only a limited range of ways in which to seek redress. These included contacting an MP or local councillor, appealing to an administrative tribunal, or complaining to an **ombudsman**. However, in recent years, the protection of civil liberties has increasingly fallen to the courts. This has happened for two reasons:

Ombudsman: A public officer appointed to safeguard citizens' rights and investigate allegations of maladministration; the Parliamentary Commissioner for Administration, set up in 1967, acts as the 'parliamentary ombudsman'.

- The wider use of the power of judicial review
- The introduction of the Human Rights Act.

JUDICIAL REVIEW

Judicial review (see p. 305) is an important way in which judges can check the powers of other public bodies. In the USA, judges have very far-reaching powers of judicial review because of the existence of a codified constitution. As the US Constitution lays down the powers of other branches of government, judges can declare their actions to be 'unconstitutional' if they conflict with the provisions of the constitution. In the UK, in the absence of a codified constitution, judicial review is not so far-reaching. In particular, judges cannot overturn Acts of Parliament because of the principle

What is ... JUDICIAL REVIEW

Judicial review is the power of the judiciary to 'review', and possibly invalidate, the laws, decrees and actions of other branches of government. In its classical sense, the principle stems from the existence of a codified constitution and allows courts to strike down as 'unconstitutional' actions that are deemed to be incompatible with the constitution. A more modest form of judicial review, found in uncodified systems such as the UK's, challenges the way in which a decision has been made, rather than the rights and wrongs of the conclusion reached. In so doing, it may use the standard of 'reasonableness' or the notion of 'natural' law.

of parliamentary sovereignty. Nevertheless, they can determine the lawfulness of actions that are carried out on the basis of **delegated legislation**. This is done by using the doctrine of **ultra vires**. Judges can decide, quite simply, that other political actors are acting beyond their proper powers. In recent years, judges have been increasingly willing to use this power, particularly in relation to ministers.

Delegated legislation: Laws that allow other bodies to act with Parliament's legal authority; secondary or enabling legislation.

Ultra vires: Literally, 'beyond the power'; this applies when public servants have acted illegally because their actions have no statutory authority.

Judges were traditionally reluctant to use their powers of judicial review. However, the growth in judicial activism since the 1980s has seen a steep rise in its use. In 2011, there were 11,359 applications for permission to apply for judicial review, a 70 per cent increase, accounting for over three-quarters of the increase. In many cases, judicial review has been applied to administrative tribunals dealing with subjects such as finance and tax, pensions appeals, and the provision of social security and child support. In other cases, ministers have been in the firing line. Between 1992 and 1996, the then home secretary, Michael Howard, was defeated by the courts on no fewer than ten occasions. More recent examples include the following:

- In 2009, the High Court ruled that Gurkha veterans who had retired before 1997 with at least four years military service had the right to settle in the UK.
- In 2011, the High Court ruled that the education secretary, Michael Gove, had abused his power in failing properly to consult six councils over plans to scrap their school buildings programmes.
- In October 2013, the Court of Appeal ruled that the health secretary, Jeremy Hunt, did not have the power to implement cuts at Lewisham Hospital in London.
- In November 2013, the Court of Appeal upheld a legal challenge by five disabled people to the government's decision to abolish the Independent Living Allowance.

However, the use of judicial review has proved to be controversial. On the one hand, it has proved to be an important way in which judges can protect civil liberties and ensure that ministers do not act in ways that are illegal, improper, irrational or simply disproportional. On the other hand, the growth of judicial activism has been criticized because it allows judges, in effect, to make policy and, in the process, to challenge the authority of elected governments. A further criticism has focused on the rising financial and administrative costs of dealing with judicial reviews, most of which are eventually rejected. In this light, the government in 2013 increased legal fees and reduced time limits for lodging applications, although some warned that this may result in unlawful decision-making by government going unchecked.

THE HUMAN RIGHTS ACT

The Human Rights Act (HRA), which came into effect in 2000, incorporated the European Convention on Human Rights (ECHR) into UK law. (The ECHR is not related to the EU, except that all EU member states must have signed the Convention.) The Act was a major constitutional reform in that it marked a shift in the UK in favour of an explicit and codified legal definition of individual rights. In doing so, it substantially widened the capacity of the judiciary to protect civil liberties and check the exercise of executive power and, in certain respects, legislative power. However, the HRA did not introduce any new rights. Its main provision is that courts should interpret all legislation (statutes and delegated legislation) in such a way as to be compatible with the Convention. The UK ratified the Convention in 1951 (it came into force in 1953) and British subjects have had the right of access to the European Court of Human Rights in Strasbourg since 1966. The main impact of the HRA has therefore been that it has made the Convention substantially more accessible to UK subjects. Access to the Strasbourg court is very costly and extremely time-consuming. However, the HRA has brought the Convention to the forefront of UK politics, influencing both judicial decision-making and affecting the behaviour of all public bodies.

The Convention establishes a wide range of rights, including the following:

- Right to life
- Freedom from torture
- Freedom from slavery or forced labour
- Right to liberty and security
- Right to a fair trial
- No punishment without trial
- Right to respect for private and family life

- Freedom of thought, conscience and religion
- Freedom of expression
- Freedom of assembly and association (including the right to join a trade union)
- Right to marry
- Freedom from discrimination (sex, race, colour, language, religion, and so on)
- Right to education
- Right to free elections with a secret ballot.

The HRA is, nevertheless, a statute of a very particular kind. It does not constitute an entrenched bill of rights, and it cannot be used to overturn Acts of Parliament. It does not, therefore, invest the judiciary with the powers of constitutional judicial review. Nevertheless, when a court believes that legislation cannot be reconciled with Convention rights, it issues a 'declaration of incompatibility'. This forces Parliament (or, in practice, the executive) either to revise the legislation in question and bring it into line with the Convention, or to set aside certain of its provisions through the process of 'derogation' (meaning the repeal or modification of a law). The UK, for instance, derogated from Article 5 of the Convention, during 2001–05, in order to pass 'tougher' anti-terrorism legislation. As the HRA is not binding on Parliament, it may not be considered as 'higher' law. Rather, it hovers somewhere between an ordinary statute law and an entrenched bill of rights.

Cases in which the HRA or the ECHR have been used to protect or extend individual rights include the following:

- Banning prisoners from voting – in the UK and other countries – was declared to be a breach of their human rights and unlawful (2005).
- The decision not to deport the murderer of Philip Lawrence when his sentence is completed to his country of origin, Italy (2007).
- In a ruling linked to the HRA, the Supreme Court declared that measures to freeze the assets of terrorist suspects were unlawful (2010).
- The deportation to Jordan of Abu Qatada was blocked because of fears that evidence obtained under torture would be used against him (2012). (A new treaty with Jordan nevertheless led to his deportation the following year.)
- Whole life sentences were deemed to be a breach of Article 3 of the Convention, which prohibits torture (2013).

The HRA, and the rulings that have been made under it, have led to considerable controversy. Supporters of the HRA argue that it has significantly strengthened the ability of judges to apply the rule of law and uphold individual rights, including the rights of unpopular minorities. This will, over time, force ministers and other public bodies to be more sensitive to civil liberties issues, thereby promoting greater accountability and improving trust in government. This also extends to the wider public, for whom the HRA has had educational benefits. It has made citizens more aware of their rights and encouraged them to be more assertive in protecting them. In this way, the HRA helps to fulfil one of the functions that, in other systems, is performed by a 'written' constitution. The HRA may, indeed, be a particularly good example of the benefits of the UK's flexible and pragmatic constitution. It provides more effective protection for civil liberties but stops short of allowing judges to strike down Acts of Parliament.

Criticisms of the HRA have come from various directions, though. First, it is commonly argued that the Act allows judges to overstep their traditional role. Through their interpretation of the HRA, judges are, effectively, able to 'rewrite' legislation. This, arguably, makes judges too strong, in that they are able to act more like judges in the USA, who are able to encroach on the policy-making role of politicians. How appropriate is it for the courts to have 'quasi-legislative' powers under which unelected and socially unrepresentative judges can alter the law on policy matters, like access to social security and the right to a tenancy? Second, the HRA and ECHR arguably suffer from the phenomenon of human rights' inflation, the tendency for rights other than those intended to stop gross abuses of government power to be designated as 'human rights', and therefore to be treated as absolute and fundamental rights. This has led to a position in which, for example, the right to a family life enjoys the same legal and moral status as freedom from torture or freedom from slavery. As this effectively rules out the possibility of balancing rights against one another, as well as balancing individual rights against the wider needs of society, it may lead to judicial outcomes that appear to be ethically questionable or inappropriate.

Third, Conservatives in particular have viewed the HRA as a Trojan Horse that allows a particular 'European' conception of rights to take root within the UK. Promising to 'restore sovereignty to Westminster', the Conservatives have therefore argued that Parliament should be given the right to veto judgments of the European Court of Human Rights in Strasbourg, and, failing that, that the UK should withdraw from the Convention itself. Linked to this, the HRA would be replaced by a 'British bill of rights', although the exact status and precise contents of such a bill of rights remain unclear. However, allegations that the European Convention on Human Rights is

somehow 'un-British' fail to take account of the fact that the UK was an original signatory of the Convention and one of the first states to ratify it, in 1951, and that UK civil servants and lawyers played an influential role in its drafting.

CIVIL LIBERTIES UNDER THREAT?

Conflict in recent years between senior judges and the executive has been the result of at least three factors:

- The growth of a human rights culture amongst the senior judiciary, which has been reflected in a greater willingness of judges to challenge ministers
- The impact of the Human Rights Act, which has widened the ability of judges to intervene in politics
- A (perceived or actual) trend for governments to expand their own powers, often at the expense of civil liberties and individual rights.

The third of these developments has led to allegations about the growth of **authoritarianism** in the UK. For example the Labour governments' record on civil liberties between 1997 and 2010 was a mixed one. In the first place, this period witnessed major advances in individual rights. The Human Rights Act was the most significant example of this, but others included the Freedom of Information Act 2000, which marked a major advance in open government and helped to establish a public right to know. On the other hand, Labour's critics drew attention to its civil liberties 'blind spot', reflected in the growth of legislation that expanded the power of the state and weakened or removed civil liberties or individual rights. Various measures contributed to this 'drift towards authoritarianism'. For example:

Authoritarianism: The practice of rule 'from above'; government that is imposed on citizens regardless of their consent.

- Detention was introduced for asylum seekers whose claims have been refused, and access to the benefits system was replaced by shopping vouchers for refugees.
- Public order legislation led to restrictions being imposed on the right to protest.
- Anti-social behaviour orders (ASBOs), first introduced in 1999, imposed a range of restrictions on (usually young) 'offenders', often on the basis of hearsay evidence and in the absence of a jury.

However, the government's most controversial measures were its anti-terrorism legislation, passed in the aftermath of 9/11 (the 2001 terrorist attack on New York and Washington) and 7/7 (the coordinated 2005 terrorist attacks on London). These laws were controversial because they

have, in various ways, allowed the government to detain people without trial. The right to a fair trial is sometimes seen as the core civil liberty, because, without it, the government would be able to punish citizens without having to prove that they have broken the law.

Three major pieces of anti-terrorism legislation were significant:

- *The Anti-terrorism, Crime and Security Act 2001*. This introduced detention without trial of foreign nationals suspected of involvement in terrorism, and gave the police more powers to hold and question suspects.
- *The Prevention of Terrorism Act 2005*. This introduced a process of 'control orders', which allowed the secretary of state to impose various restrictions on the liberty of individuals who could not be deported.
- *The Terrorism Act 2006*. This heightened the government's powers to deport people from the UK who were considered to be promoting terrorism. It also introduced a new offence of 'glorifying, exalting or celebrating' terrorism.
- *Counter-terrorism Bill 2008*. This sought to extend the period of pre-charge detention from 28 days to 42 days, although the measure was defeated in the House of Lords.

The election of the Conservative–Liberal Democrat coalition in 2010 nevertheless created the prospect that tension between the executive and the judiciary over civil liberties may significantly reduce. This was because, albeit to different degrees, both the Liberal Democrats and the Conservatives had criticized what some had portrayed as 'Labour's attack on civil liberties'. The Coalition acted quickly to abandon proposals for the introduction of identity cards and indicated that the use of ASBOs was to be ended. Similarly, in 2011 the 28-day limit on detaining terrorist suspects without charge was allowed to lapse, returning to a 14-day limit.

The issue of control orders, introduced in 2005, nevertheless highlighted differences within the Coalition over the balance between public safety and civil liberties. Although the Liberal Democrats were committed to scrapping control orders, in the end resistance within the Conservative Party meant that control orders were reformed rather than abolished, important aspects of them surviving in the form of 'terrorism prevention and investigation measures'. Although often checked by the Liberal Democrats, Cameron became, over time, increasingly willing to back measures that might have infringed civil liberties in order to contain the threat of Islamist terrorism. This particularly applied in relation to the surveillance of private communications, especially when they involved new media.