Judiciaries

6

Courts of law are part of the political process, for governmental decisions and acts passed by the legislative body may require judicial decisions to be implemented. Courts need to be independent to be respected, but this is difficult to achieve in practice. There is never full independence as far as appointment is concerned, and Blondel warns that in their verdicts judges cannot be expected 'to go outside the norms of the society'.[1] In Britain and America, the courts have traditionally diverged in their behaviour, but today there are more similarities than there were a few decades ago. Judges have become more active players on the political scene. Even so, many British people would probably not consider the courts to be part of the political system, whereas in the United States their political role sometimes becomes very apparent.

We are primarily concerned with the courts in their political capacity rather than with their criminal and civil caseload. We shall explore the role of judiciaries, how judicial independence is protected in both countries, the types of person who become judges, and the differing conceptions of their role and we shall assess the extent to which they are involved in political matters.

POINTS TO CONSIDER

- What mechanisms exist to ensure judicial impartiality? To what extent is the idea of an independent judiciary put into practice in Britain and the United States?
- In making appointments to the Bench, should the personalities and opinions of individual judges be taken into account?
- As judges perform an increasingly political role, should they be elected?
- Does it matter that the social background of leading judges on both sides of the Atlantic is unrepresentative of society as a whole?
- Should the courts lead public opinion or should they follow it?
- To what extent are the courts of law political?

Liberal democracies such as the United Kingdom and the United States, along with Australia, Canada, France, Italy and many other countries, have an independent judiciary which is charged with responsibility for upholding the rule of law. Even those in power, be they Presidents or British ministers, have the same duty to act within the law. Any transgression of it should not go unchallenged. The rule of law is a cardinal principle in any democracy, and where it does not prevail then this is a clear indication of a regime which is in some degree despotic.

In democratic countries, it is expected that the judicial system will be enabled to function freely, without any interference from the government of the day. Judicial independence implies that there should be a strict separation between the judiciary and other branches of government. In most cases, the independence of judges and law officers is ensured by their security of tenure, although their independence could be compromised by the close involvement of politicians in the manner of their recruitment and promotion. Moreover, once recruited, bias can creep in, as a result of the type of person who gains advancement. Judges in many countries do tend to exhibit a remarkable homogeneity. This might pre-dispose them to defend the existing social and political order, and make them unsympathetic to groups who seek to challenge it, such as representatives of racial or other minorities, and militant women.

The operation of the courts in Britain and America

In both countries there is an elaborate network of courts which have responsibility for upholding the law. The guilt or innocence of those involved in criminal offences is determined, after defendants have been given the opportunity to defend themselves. Those involved in civil disputes can get them resolved.

In Britain, there is one basic judicial system for criminal law and a second handles civil law. The United States has a more complex judicial structure. As a federal country, it has two court systems: a series of federal courts and a series of state/local ones. It is the state system which is used in the overwhelming majority of cases.

In Britain and America, courts operate along adversarial lines, with the prosecution and defence each seeking to discredit the arguments advanced by the other side and persuade the judge and/or jury of the merits of their case.

Whereas in America, those who handle cases are all lawyers, in Britain there is a distinction between barristers who in most cases put forward the arguments before judge and jury and the solicitors who are the initial point of contact for those in need of legal assistance. Solicitors do much of the preliminary, out-of-court work.

The functions of judiciaries

There are three main functions of the judicial branch of government. Judiciaries:

- resolve disputes between individuals, adjudicating in controversies within the limits of the law;
- interpret the law, determining what it means and how it applies in particular situations, thereby assessing guilt or innocence of those on trial;
- act as guardians of the law, taking responsibility for applying its rules without fear or favour, as well as securing the liberties of the person and ensuring that governments and peoples comply with the 'spirit' of the constitution.

A key function of the judiciary is that concerning **judicial review**, to which we now turn.

Judicial review

Under the doctrine of judicial review, the courts are granted the power to interpret the constitution and to declare void actions of other branches of government if they are found to breach the document. As explained by Stone, in reference to the situation in the United States, it is 'the power of any judge of any court, in any case at any time, at the behest of any litigant party, to declare a law unconstitutional'.[2] Constitutional issues can therefore be raised at any point in the ordinary judicial system, although it is the Supreme Court which arbitrates in any matter which has broad significance.

judicial review
The power of any court to refuse to enforce a law or official act based on law, because in the view of the judges it conflicts with the Constitution.

Judicial review is particularly important in federal systems to ensure that each layer of government keeps to its respective sphere. The function was not written into the American Constitution, but the ruling of the Supreme Court in the case of *Marbury v Madison* in 1803 pointed to the key role of the Court in determining the meaning of the Constitution. In the United States some of the measures of Roosevelt's New Deal thus fell foul of the Supreme Court, as did Truman's seizure of the steel mills in 1952 to prevent a strike. In exercising its power of review, the Court normally decides on the basis of precedent (*stare decisis* – stand by decisions made), but on occasion it has spectacularly reversed a previous decision and thus enabled the Court to adapt to changing situations and give a lead. The judgement in *Plessy v Ferguson* (1896), which allowed for segregation on the basis that separate facilities were not necessarily unequal was reversed in the *Brown v Board of Education (Topeka, Kansas)* ruling (1954), when it was decided that such facilities were 'inherently unequal'. The case referred to public education, but campaigners rightly saw its wider implications.

The doctrine applies in many countries ranging from Austria and Ireland to Germany and India, as well as in a number of South American states. Normally, it is a duty placed upon special constitutional courts created for this purpose, whereas in the United States review is conducted by regular courts. The German Federal Constitutional Court is the nearest equivalent to the US Supreme Court. It has extensive powers of judicial review which were introduced with the specific intention of ensuring that never again would an extremist party such as the Nazis be allowed to gain office by means which were seemingly constitutional and legitimate.

Judicial review in Britain

In America, the Supreme Court interprets not only the law, but also the Constitution. Britain has no provision for judicial review. No court can declare unconstitutional any law that has been lawfully passed by the British Parliament, which is the sovereign law-making body, a principle that has never been challenged. In the absence of a written constitution, there is – as Heywood points out – 'no legal standard against which to measure the constitutionality of political acts and government decisions'.[3] What it does have is what the same writer refers to as 'a more modest form of judicial review, found in uncodified systems', which allows for the review of executive actions, deciding whether the executive has acted *ultra vires* (beyond its powers).

judicial activism

The view that the courts should be a co-equal branch of government, and act as active partners in shaping government policy – especially in sensitive cases, such as those dealing with abortion and desegregation. Supporters tend to be more interested in justice, 'doing the right thing', than in the exact letter of the text. They see the courts as having a role to look after the groups with little political influence, such as the poor and minorities.

In the last two or three decades, the influence of Europe upon British politics has increased and this has made inroads into parliamentary sovereignty, requiring judges to view European as superior to British law. The habit of challenging legislation has developed, so that there is now something of a tradition of **judicial activism**, in which ministers as well as civil servants and local authorities are found to have acted unconstitutionally and exceeded their powers.

British judges began to assume a growing political significance in the 1980s, and were more than willing to issue judgements which were highly critical of government ministers and declared their actions unlawful. This trend was in part a response to increasing anxiety about the misuse of executive power, but it also reflected a developing interest in the area of human rights. For instance, as Home Secretary, Kenneth Baker was found to be in contempt of court following the deportation of an immigrant which was carried out without the correct procedure being followed. Between 1992 and 1996, his successor,

Michael Howard, was defeated on ten occasions in the courts, and as we shall see his policies aroused strong hostility from some members of the Bench.

In both Britain and America, there is provision for decisions of the courts to be overridden. In Britain, this requires only the passage of an Act of Parliament, although in cases involving law emanating from the European Union this takes precedence over British law and cannot be so changed. In America, on many issues Congress can pass a law to deal with court decisions it dislikes and ensure that future rulings are different. If the matter is a constitutional one, as we have seen in chapter two (pp. 39–40), the arrangements for amending the Constitution are more complicated.

The independence of the judiciary

Courts should be independent, but from whom? It is generally acknowledged at least in theory that they should be subject to no political pressure from the political leaders of the day, but independence may mean more than this. It may imply freedom from what Blondel refers to as the 'norms of the political and social system itself'.[4] In other words, judges operate within the context of the principles on which the society is based, so that they are separate rather than fully independent of the government. In reality, they tend to act in defence of the existing social order rather than as 'independent bodies striving for justice or equity'.

The degree of independence of judges from political interference varies from country to country, and even within a single country's history. When judicial officers displease the ruling group, they can be ignored, removed or even eliminated. In some cases, under particular regimes, the pressure has been overt. Judges might be wary of handing out judgements which are seen as damaging to the interests of those who rule. In the 1970s, the Argentinian dictatorship took a strong line against 'difficult' judges. More than 150 were said to have disappeared, the allegation being that ministers ordered their execution. More commonly, pressure is of a more subtle and indirect character.

The independence of the judiciary is dependent on the existence of certain conditions.

The selection of judges

Their appointment should not ideally be influenced by political considerations or personal views. In practice, there are two methods of selection: appointment, as is practised in most countries (especially for senior judges – the American Supreme Court, for example), or election, as is the means by which most American state judges are chosen. Appointments may also be made on the basis of co-option by existing judges.

As a means of choosing judges, appointment has built-in dangers, namely:

- that it becomes a means of rewarding relatives and friends (nepotism); and
- that people might be chosen not according to their judicial merit but rather on account of their political persuasions and known views on public affairs such as the appropriate scope of state intervention in economic and social life (partisanship).

Election may have the advantage of producing a judiciary which is more representative of the voters and therefore responsive to prevailing feelings, but it carries no guarantee of technical competence. Moreover, those elected may feel unduly beholden to those who nominated them as candidates or to the majority of voters who favoured them.

It does not follow that because judges are appointed for political reasons they will necessary act in the way that those who choose them predict. Several appointees to the US Supreme Court have exhibited a remarkable degree of independence when on the Bench, most notably **Chief Justice Earl Warren**. Appointed by the conservative Dwight Eisenhower, he presided over a remarkable series of liberal decisions, and the Court in his era became a pace-setter in the area of advancing civil rights, much to the surprise and dismay of the President. In the same way, the Nixon appointee Chief Justice Warren Burger was a disappointment to the President. It was Burger's Court which insisted in 1974 that the Nixon White House handed over the damaging tapes in the Watergate controversy.

Earl Warren

A Republican from California who served as Governor, 1943–53 and stood as the unsuccessful vice-presidential candidate in 1948. He served as the Chief Justice of the US Supreme Court between 1953 and 1968, presiding at a time when controversial decisions were made on desegregation, the rights of criminal defendants and support for press freedom.

The appointment of British judges is less overtly partisan than in America. Appointments are made by the Lord Chancellor, who will consult the Prime Minister when dealing with the most senior posts. This provides an opportunity to favour those who broadly share his views, but in practice the pool of barristers from whom the choice is made tend to be of a similar background and type. Many of those selected have, at some time, had to pass examinations in order to demonstrate their abilities, before they are even allowed to be considered for service as judges.

The security of tenure of judges

Once installed in office, judges should hold their office for a reasonable period, subject to their good conduct. Their promotion or otherwise may be determined by members of the government of the day, but they should be allowed to continue to serve even if they are unable to advance. They should not be

liable to removal on the whim of particular governments or individuals. Judges may in some countries serve a fixed term of office.

US Supreme Court judges normally serve for a very long period, their appointment being initially made for their life even if they decide to retire after several years of service. Although theoretically they may be removed by impeachment before Congress if they commit serious offences, this provision has never successfully been employed. In Britain, judges are hard to remove, and those who function in superior courts are only liable to dismissal on grounds of misbehaviour, and this only after a vote of both Houses of Parliament.

Judges are politically neutral

Judges are expected to be impartial, and not vulnerable to political influence and pressure. They need to be beyond party politics, and committed to the pursuit of justice. As we see below, individual judges interpret their role differently.

The independence of judges in practice

In many countries, judges are able to work independently and without fear of undue and improper interference. This is true of some communist or other authoritarian regimes, as well as of liberal democracies. Once appointed, judges have a habit of donning the clothing of judicial fairness, and even when there are insidious pressures they can be singularly resistant and willing to offend the ruling administration. In India, in the 1970s, the increasingly autocratic Mrs Gandhi ran into trouble with the courts. They were willing to cause offence by deciding against the government on key issues. She was actually found guilty of electoral malpractice and disqualified from holding office for five years, though the disqualification was later suspended on appeal. Within days there was a declaration of a state of emergency in which the Prime Minister was able to order mass arrests and impose strict censorship. Thereafter, even when emergency rule was lifted, the challenge to the government from the judiciary was never again so overt.

In several Latin American states, especially those functioning under civilian rule, judges are noted for taking a strongly liberal and independent line which is displeasing to those who exercise political power. In Zimbabwe, the courts have often showed a willingness to offend the ruling Mugabe regime by producing judgements which conflict with the aims of the regime.

The background of judges

A more subtle threat to the notion of judicial independence derives from the social background of judges. In many liberal democracies the type of person

appointed to the Bench tends to be middle class and better-off, and as such they are not fully representative of the society in which they operate.

Judges are often seen as conservative in their approach, and as possessing an innate caution and a preference for order in society. This may make them unsympathetic to minorities, especially strident ones, and hostile to ideas of social progress. Militant demonstrators have often received harsh words and stiff punishments from judges who dislike the causes and methods with which strikers and others are associated. Similarly, legislation which seeks to broaden the scope of governmental action may fall foul of the judiciary. This happened in the United States during the Roosevelt presidency, when key parts of the New Deal were struck down.

The backgrounds of British and American judges

In Britain, judges have been drawn from a narrow social base and are often criticised for being out-of-touch with the lives of the majority of the population. They tend to derive from the professional middle classes, often having been educated privately and then at Oxbridge. They tend to be white, wealthy, conservative in their outlook and are therefore often portrayed by critics as elitist. Of particular concern to some people is the lack of female, and ethnic-minority judges on the Appeal or High Court, and their serious under-representation on the Circuit Bench where in 1995 there were 28 and 4 respectively.

A judge's generally privileged background does not necessarily make him or her biased or unsympathetic in outlook. However, critics would claim that the nature of their training and the character of the job they undertake tends to give them a preference for traditional standards of behaviour, a respect for family and property, an emphasis on the importance of maintaining order and a distaste for minorities (especially if they are militant in their approach to seeking justice for their cause).

Much of the Labour concern in the past about the idea of a British Bill of Rights or incorporation of the European Convention into British law has been based on anxieties about passing power from elected politicians to unelected, unaccountable and often right-wing judges. Labour suspicion did not rest purely on the grounds of their background. It was much influenced by a series of unfavourable verdicts from which the labour movement has suffered in the nineteenth and twentieth centuries in the courts. Throughout much of its history, many in the party and in the unions have felt that their cause has suffered from the decisions made by those on the Bench, particularly in the area of industrial relations.

Labour now appears to have overcome its suspicions about the judiciary, for in office it has incorporated the Convention as a step in the direction of providing

people with a Bill of Rights. However, there are still those who question the wisdom of passing policy decisions and the resolution of any conflicts of social and political values over to the judges. JA Griffiths has spoken for such critics, suggesting that judges have a particular view of the national interest, and that in issues where there is a dispute between the state and citizen they are more than likely to side with the Executive than with striking miners, militant unions, leak-prone civil servants or minority activists. He has claimed that they have a poor record in upholding specifically civil libertarian legislation, and that in particular they have tended to minimise the effects of the Race Relations Acts by adopting a narrow and unhelpful interpretation of statutes. He suggests that

> **they define the public interest, inevitably from the viewpoint of their own class . . . Those values are the maintenance of law and order, the protection of private property, the containment of the trade union movement and the continuance of governments which conduct their business largely in private and on the advice of what I have called the governing group.**[5]

In the United States, all federal judges and Supreme Court justices are appointed by the President. The typical Supreme Court justice has generally been white, Protestant, well-off and of high social status, although there were two female and one African-American members of the Supreme Court at the turn of the twenty-first century. In the lower federal courts, middle class appointees are common, but there has been an attempt by recent Presidents to appoint more women and members of ethnic minority groups. Bill Clinton appointed more than 200 judges in his first term and their composition was notably diverse: 31 per cent were women, 19 per cent were African-American and 7 per cent Hispanic. In general, he leaned towards the appointment of moderate, centrist judges whose nomination would not create difficulties in the Senate.

Much media interest centres on the nominations for judicial office made by modern Presidents. In the 2000 election campaign, commentators speculated on the differing approaches to nomination which George Bush jnr and Al Gore might adopt. It was realised that the impact of a Bush or Gore presidency on abortion rights and other controversial issues could be considerable, if a vacancy arose on the Supreme Court. Since January 2001, the new President has shown signs of seeking to adjust the composition of the judiciary in a more conservative way. In so doing, he has taken advice from the Federalist Society for Law and Public Policy which was formed in the early 1980s. Its members draw inspiration from James Madison, one of the Founding Fathers, who on occasion railed against the power of central government. Members played an influential role in the impeachment proceedings against President Clinton and in the Florida legal offensive which brought Bush to power in 2001. They are trying to steer the judiciary away from the liberalism of the past and as a

means of fulfilling this agenda they seek out ideologically acceptable candidates who might become suitable judges. Most members of George W. Bush's vetting panel for nominees belong to the organisation.

The political involvement of judges in Britain and America

Alexis de Tocqueville noted that 'hardly any question arises in the United States that is not resolved sooner or later into a judicial question'. He was certainly correct, although he could not have anticipated the extent to which the Supreme Court (the highest judicial body) in particular would become involved in controversial decisions. Much of the work of the Court is related to social and political matters that have a direct impact on everyday life – for instance, whether an abortion should be performed, convicted murderers executed or minimum working standards be imposed.

In America, the Supreme Court is clearly a political as well as a judicial institution. In applying the Constitution and laws to the cases which come before it, the justices are involved in making political choices on controversial aspects of national policy. The procedures are legal, and the decisions are phrased in language appropriate for legal experts. But to view the Court solely as a legal institution would be to ignore its key political role. A Chief Justice Hughes once put it: 'We are under the Constitution, but the Constitution is what the judges say it is'.

judicial restraint
The idea that the courts should not seek to impose their views on other branches of government, except in extreme cases. Supporters of this view are 'constructionists', those who want the courts to limit themselves to implementing legislative and executive intentions. They want a passive role for the courts.

In interpreting the Constitution, the nine justices must operate within the prevailing political climate. They are aware of popular feelings as expressed in elements of the media and in election results. They know that their judgements need to command consent, and that their influence ultimately rests on acceptance by people and politicians. This means that the opinions expressed on the bench tend to be in line with the thinking of key players in the executive and legislative branches, over a period of time.

Judicial activism or judicial restraint?

The question of how to use its judicial power has long exercised the American Court, and different opinions have been held by those who preside over it. Some have urged an activist Court, whilst others err on the side of **judicial restraint**. The latter is the notion that the Court should not seek to impose its views on other branches of government or on the states unless there is a clear

violation of the Constitution. This implies a passive role, so some justices have urged that they should avoid conflict, and that one way of doing so is to leave issues of social improvement to the appropriate parts of the federal and state government. Advocates of this position have felt that it would be unwise and wrong to dive into the midst of political battles, even to support policies they might personally favour. Anthony Kennedy is a member of the Rehnquist Court (1986–) who has taken this view, asking: '. . . Was I appointed for life to go around answering . . . great questions and suggesting answers to Congress?' He has provided his own answer: 'That's not our function . . . it's very dangerous for people who are not elected, who have lifetime positions, to begin taking public stances on issues that political branches of government must wrestle with'.

By contrast, judicial activists argue that the Court should be a key player in shaping policy, an active partner working alongside the other branches. Such a conception means that the justices move beyond acting as umpires in the political game, and become creative participants. An exponent of judicial activism was Chief Justice Earl Warren. As we have seen, his court was known for a series of liberal judgements on matters ranging from school desegregation to the rights of criminals. In his era, decisions were made which boldly and broadly changed national policy. So active was his court that members of rightwing groups posted billboards around the country carrying the message 'Impeach Earl Warren'. In some respects the Burger Court which followed (1969–86) was less liberal in its approach, although it confirmed many decisions of the Warren Court and was responsible for a series of bold judgements, including *Roe v Wade* on abortion and support for affirmative action programmes. In such cases, critics argued that the judges were making policy decisions which were the responsibility of elected officials.

The present Rehnquist Court was always expected to be more conservative and it soon began to chip away at liberal decisions on abortion and affirmative action. The majority of its members do not see it as their task to act as the guardian of individual liberties and civil rights for minority groups. It has handled fewer cases than previous courts each term and struck down fewer federal and state laws. Biskupic has commented on these trends: 'Gone is the self-consciously loud voice the Court once spoke with, boldly stating its position and calling upon the people and other institutions of government to follow'.[6]

Yet this view of the Rehnquist Court and its alleged judicial restraint has been questioned. Its greater ideological conservatism is generally accepted, although its record on civil liberties is more mixed than the term might imply. Some commentators have suggested that it has been highly activist in its willingness to challenge the elected branches of government. Rosen is an exponent of such thinking. Comparing the Warren and Rehnquist eras, he

argues that both courts were committed to an increase in judicial power: 'Both combine haughty declarations of judicial supremacy with contempt for the competing views of the political branches'.[7] Others too have observed that for all of the lip service paid to judicial self-restraint, 'most of the current justices appear entirely comfortable intervening in all manner of issues, challenging state as well as national power, and underscoring the Court's role as final arbiter of constitutional issues'.[8]

Growing judicial activism in Britain

In recent years a new breed of judges has begun to emerge. The number of applications for judicial review in Britain has increased sharply, and judges have been markedly more willing to enter the political arena by declaring government policy invalid. Few governments have been subjected to more scrutiny in the courts than those of the Conservatives between 1979 and 1997. In addition, several eminent judges argued publicly for the incorporation of the European Convention on Human Rights into British law, a goal achieved by the passage of the Human Rights Act 1998 which gives judges the opportunity to make judgements based on cases brought under the European document.

Leading judicial figures were also willing to challenge Home Secretary Michael Howard over his policy on sentencing. Many of them disliked the way in which he was laying down rigid guidelines which limited their freedom to pass the sentences which they felt to be appropriate. His successors, Jack Straw and David Blunkett, have also fallen foul of eminent members of the judiciary who, among other things, have criticised ministers for the inroads proposed into jury trial, the limitations of the Freedom of Information Act (2000), the increased use of and conditions in prisons, and stringent rules for asylum seekers who make welfare claims. It seems to be a strange turn-around that appointed liberal judges are willing to take on elected politicians, commanding much sympathy in the media in so doing.

The scope for judicial creativity in policy-making is limited by the way in which British legislation is drafted in considerable detail. Judges are supposed to content themselves with interpreting the law rather than with helping to develop it. In many parts of Europe, there is more opportunity for judges to take a hand in making the law, as laws passed do not cater for all contingencies; judges need to think about the intention behind legislation. Where there exists a written constitution and where legislation is framed in broad phraseology, there is considerable scope for judicial activism. Judges are required to fill in the gaps in laws so that their policy-making role is well established. French judges are frequently required to make laws, the effect of their decisions being not only to clarify but also to reinforce and reshape the law.

Judicial activism is a feature often commented upon by British critics of the European Court of Justice. Euro-sceptics dislike the way in which the decisions of the court have taken the Union ever further down the federal route. The justices have indeed at times been instruments of integration, and this policy-developing role is one unfamiliar to British observers until recent years. There has traditionally been a differing approach between continental judges and their British counterparts in the execution of their task. Continental judges adopt a more policy-orientated attitude. They tend to interpret the law in the light of what they see as its intentions and thus shape the law in a particular direction. In Britain, judges have in the past taken a more conservative stance and confined themselves to strict interpretation of what the law says, although this attitude is changing.

With the passage of the Human Rights Act, there is the prospect of a politicisation of the judiciary in Britain which could become embroiled in the political arena as judges seek to decide on the interpretation and/or validity of a particular piece of legislation. In the words of an opponent of the move, Lord Lloyd, 'To try to bring the judiciary into this sort of contest can only have one effect and that is to destroy the standing of the judiciary in the eyes of the people as a whole.'[9]

Judicial activism has a longer history in America than in Britain. Its written constitution, federal system, traditional of judicial independence, preference for limited government and ease of access to the courts all point in this direction. As Hague and Harrop explain: 'The United States is founded on a constitutional contract and an army of lawyers will forever quibble over the terms'.[10]

Conclusion

As a broad trend, the role of judges in the political system has increased in liberal democracies but also even in authoritarian societies. Fifty years ago, politicians paid relatively little attention to decisions of the courts. Since then, judges have been more willing to enter into areas that would once have been left to national governments and parliaments, striking down laws and regulations passed by those elected to public office. The process has been aided by the increased use of international conventions in the postwar world. There has also been a proliferation of international or transnational courts to enforce them, ranging from the European Court of Human Rights to the European Court of Justice, from the World Trade Organization panels to the North American Free Trade Agreement panels. They test national law against some other body of law, usually treated as being superior. In some cases, these agreements or conventions have involved members of the Bench in any member country ruling against the decisions of the party in power.

The judiciaries of Britain and the United States: a summary

	Britain	*The United States*
Liberal democracies, based on rule of law?	Liberal democracy, based on rule of law.	Liberal democracy, based on rule of law.
Approach to judicial review	Modest form of judicial review of executive actions.	Strong version of judicial review, courts able to strike down laws or other official acts as 'unconstitutional'.
Selection of judges	Judicial appointments made by Lord Chancellor's office.	President appoints Supreme Court justices and federal judges (election of judges in state judicial systems).
Security of judges	Judges very hard to remove.	Appointments normally made for life, though in theory possibility of impeachment.
Background of judges	Chosen from narrow social base, often seen as white, male and middle class, and deeply conservative. Few women and ethnic minority members on Bench.	Presidential appointees vary, Democrat Presidents more likely to appoint women and members of ethnic minorities – e.g. Clinton's willingness to diversify composition.
Judicial activism v judicial restraint?	Judges traditionally confined themselves to interpretation of law, shunned political involvement or controversy. Influenced by European experience, many now more willing to take on ministers, criticising their policies and reviewing their actions.	Republican Presidents tend to prefer judges who adopt a more passive approach to their role and seek only to interpret the Constitution. Many Democrats favour judges who take a more activist approach and who see courts as having a key role in shaping policy.

Other factors are involved in the 'judicialisation' of politics. Among them, Richard Hodder-Williams has mentioned:

1 'the failure of the political process to meet the aspirations of those who are governed under it and with the rise of the administrative state and a bevy of bureaucracies the decisions of which affect so much of so many people's lives';

2 the rise of 'a more educated, more challenging electorate that is less deferential to government in all its forms and is more aware of deficiencies through a lively, and often vulgar, press';
3 the development of 'an ideological shift throughout Europe, which has enhanced the status of rights-based demands and has redefined a substantial part of what politics is about, away from struggles between classes and religious groups towards conflict between the coercive powers of the state and the individual';
4 the influence of particular and influential individuals 'like Lord Denning in Britain and Earl Warren in the United States, who had the strength of character and self-belief to challenge the old orthodoxies and help usher in new values and expectations'.[11]

Some fear that this political involvement has gone too far, and that judges are too often noticed by politicians. The Florida Supreme Court and the Supreme Court in Washington are even involved in deciding who shall be the President of the United States. They feel that there are dangers for the standing of judges if this process is unchecked. Others worry less about the damage which may be done to the judges' reputations, but instead place their emphasis upon fear of judicial power. They are concerned that judges are unrepresentative and argue for a reformed judiciary. Lord Lloyd, speaking from a very different perspective, is less concerned about the backgrounds from which judges are chosen, their competence or their capriciousness in adjudication. For him, Parliament – comprising the elected MPs – should decide on whether abortion or capital punishment is permissible, and what the age of consent should be: 'The fact of the matter…is that the law cannot be a substitute for politics. The political decisions must be taken by politicians. In a society like ours, that means by people who are removable.'[12]

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12 As note 6 above.

USEFUL WEB SITES

For the UK

www.lcd.gov.uk Lord Chancellor's departmental site. Information relating to judicial appointments.

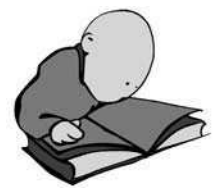
For the USA

www.supremecourtus.gov The official web site of the Supreme Court, providing background information about the Court's history, mode of operation and calendar.

www.uscourts.gov Federal judiciary home page. Comprehensive guide to federal court system, with court statistics, answers to frequently asked questions etc.

www.law.cornell.edu/supct Cornell Law School. Provides a diverse array of legal sources and full text of Supreme Court judgements.

SAMPLE QUESTIONS



1 Discuss the view that an independent judiciary is essential in order to protect the rights of the people.
2 How are senior judges recruited in Britain and the United States? Do and should they reflect certain interests?
3 Compare the political significance of judges in the United States and the United Kingdom.
4 'Legislatures may make laws by passing statutes, but judges have to apply them in particular situations'. To what extent do judges in Britain and the United States make the law?
5 In what ways do judges act as law-makers? Should they?
6 Is judicial activism necessary because some issues are too difficult and contentious for the political branches of government to be able to resolve?
7 To what extent is the judiciary a powerful factor in politics on either side of the Atlantic?