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Constitutional and Administrative Law (Law1035) 2009/10

"The establishment of the Supreme Court from the 1st of October [2009] ... presents at least the possibility that we may see a move in time towards perhaps a constitutional court..."

Keir Starmer, DPP, Speech to the CPS (Oct 2009)

Discuss whether constitutional changes in the UK such as the creation of the Supreme Court and the Human Rights Act 1998 have led to an increase in judicial power.

"[The definition of Dicey's] that the residue of "discreti onary of arbitrary authority, which at any given time is legally left in the hands of the Crown," [1] does not take up very far. It is extremely difficult to be precise because in former times there was seldom a clear-cut view of the constitutional position." Per Lord Reid. From this quote, one can decipher that constitutional changes are difficult to point down especially due to the un-codified constitution[2] the United Kingdom has. With the constant passing of legislations promoting constitutional reform, it has been seen that judicial power has increased significantly in a theoretical status however the real question is does the increase in judicial power apply at a practical status too.

Ever since the passing of the 1911[3] and 1949[4] Parliament Acts, judicial power has been greatly reduced and limited under the removal of the veto and the shortening of the power of delay[5]. According to A.V. Dicey's doctrine on Parliamentary sovereignty[6], whatever Parliament enacts in statute is law regardless of content and cannot be challenged in Court which holds strongly against judicial review aga inst

Parliamentary legislation, 'Judges and adjudicators have to apply the law as they find it, and not as they wish it to be', Lord Justice Brooke, which further stresses the restrictions in judicial review[7].

In order to approach this question properly, one might begin by analyzing the constitutional changes and to what extent they have led to an increase in judicial power both in de jure and de facto. Firstly, the landmark decision made by the House of Lords in the "*GCHQ case*"[8], relating to the extent of judicial review against the prerogative[9], proved the increase of judicial power. Ever since the House of Lords' decision held in the GCHQ case, the Executive's actions are no longer completely immune from judicial review. Courts have since expanded the application of judicial review against prerogative powers[10] inevitably leading to a greater constitutional role played by the courts themselves[11]. The reason as to why the phrase 'not completely immune' was used in the previous sentence, is due to how certain prerogative powers fall under areas referred to as 'High Policy Areas' which are non-justiciable by courts[12].

The establishment of the 1998 Human Rights Act (HRA) incorporates the European Convention on Human Rights (ECoHR) in order to protect the fundamental freedoms and rights of individuals within the state. This has been seen to give courts a substantial increase in judicial power with a higher body (the European Court of Human Rights (ECHR) as part of the EU) ensuring that this new and extended power is not overruled, abused or removed by the Executive[13].

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According to Section 3[14] of the HRA[15], all legislation must be read as far as possible in order to comply with the European Co nventions on Human Rights (ECHR)[16]. In effect of this section, it has given courts new judicial powers of interpretation. In the alleged rape case *Regina v A [2001]*[17], the House of Lords' decision, through the use of Section 3 of the HRA, removed a limitatio n on the rights of the defendant in questioning the alleged victim(s) of rape which were initially 'seriously limited' under Section 41 of the Youth Justice and Criminal Evidence Act (YJCEA) 1999. The removal of this limitation greatly marked an increase o f judicial power in relation to statutory interpretation. *Regina v A [2001]* shows that courts are willing to use Section 3 of the HRA[18] however there are limitations as to how far courts are willing to go with Section 3[19].

It can be argued that the HRA has led to an inevitable increase in judicial power [20] however courts have not been exercising these powers to the degree of which politicians had feared[21]. The application of the 'discretionary leave policy' by the Executive disregards Dicey's 2 nd principle on the Rule of Law[22] along with undermining judicial power on human rights[23].The courts however overcame this issue after making a landmark decision declaring that all finding of contempt of Court by Ministers will be prosecuted in result of *M v Home Office [1993]*[24]. Clashes between the Judiciary and Executive over Human Rights push judges towards the political arena which can be seen as an increase in power as judges were once only confined within the legal arena[25].

Section 4 of the HRA empowers courts to issue a 'declaration of incompatibility' if legislation is unable to comply with the ECoHR. When Courts put forth a declaration

of incompatibility, there is moral pressure applied on Parliament to amend the legislation to comply with the ECoHR[26] which can be seen as an indirect effect aiding to the increase in judicial power through public pressure such as in *Bellinger v Bellinger [2003]*[27] where the government promised to review and make appropriate reforms in the Matrimonial Causes Act 1973 which were contrary to Article 8 of the ECoHR. In several other successful cases where the 'declaration of incompatibility' was issued, such as in *ex parte Anderson and Taylor [2002]*[28], courts have been able to amend Minister's existing powers with the support of the European Court of Human Rights[29] proving a great increase in practical judicial power.

However due to the British Government's derogation on Article 5 (order 2001), which eradicated all of Article 5 in the ECoHR from being applicable in the UK, judicial power has been limited under the HRA[30]. This can therefore be used as evidence of how Parliament still retains all sovereignty, as mentioned above using Dicey's doctrine on Parliamentary Sovereignty, which limits the extension and growth of judicial power.

Although other constitutional changes such as the formation of the Supreme Court in October 2009 can be seen to aid in the increase of judicial power, by being a physically separate legal body from the rest of Parliament, there is still no complete separation of powers in the UK thus subjecting the Judiciary in sharing a relationship with the Executive. However in argument, the creation of the new Supreme Court is a step forward to an increase in judicial neutrality from the Executive thus over time, can be seen to increase the power of the Judiciary.

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In conclusion, judicial powers have increased tremendously over time as constitutional reforms have taken place [31] however, these powers tend to rest in a more theoretical manner than it does practical as was seen in *Bellinger v Bellinger [2003]* by the House of Lords' reluctance to interpret section 11(c) of the Matrimonial Causes Act 1973 in a manner which allowed a male -to-female transsexual to be treated as a female under the law. The establishment of the Human Rights Act 1 998 has empowered courts' legal power throughout the political arena up to the scope of international influence, as seen in *R v S [2002]*[32]. It is still definite that constitutional changes have led to an inevitable increase of widening the remit of courts , as was seen in the GCHQ case, and will continue to increase their judicial powers so long as constitutional reforms occur.

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[1] A.V. Dicey, Introduction to the Study of the Law of the Constitution, 10 th edn. (London:Macmillan, 1959), 424

[2] "...The difficulty about our unwritten, flexible, permeable, part monarchical and part parliamentary constitution is to make sure that those princ iples [of the rule of law and parliamentary sovereignty] apply in practice." Lord Lester (PAC Report, 2003)

[3] Blackstone's Statues, Oxford Press University, Robert G. Lee, Parliament Act 1911 pg 15

[4] Parliament Act 1949, http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=1097466

[5] "...The 1949 Act could also be used to introduce oppressive and wholly undemocratic legislation. For example, it could theoretically be used to abolish judicial review of flagrant abuse of power by a government or even the role of the ordinary courts in standing between the executive and the ci tizens." Lord Steyn (para. 102)

[6] The Nature of The Crown – A Legal and Political Analysis, Oxford Press University, Edited by Maurice Sunkin and Sebastian Payne

[7] Law's Empire Ronald Dworkin, Hart Publishing; New edition edition (1 Oct 1998)

[8] **Case:** *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374

[9] "Today the controlling facto r in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter..." Per Lord Scarman

[10] For example , **Case:** *R (on the application of Abbasi) v Sec of State for Foreign & Commonwealth Affairs and Sec of State for the Home Dept* [2002] EWCA 157

[11] Sedley, 'The Sound of Silence: Constitutional Law without a Constitution' (1994)110 LQR 270

[12] **Case:** *R (On the Application of Bancoult) v Sec of State for Foreign & Commonwealth Affairs [2008] UKHL 61*, "The fact that such Orders in Council in certain important respects resemble Acts of Parliament does not mean that they share all their characteristics... The principle of the sovereignty of Parliament, as it has been developed by the courts over the past 350 years, founded upon the unique authority parliament derives from its representative character. An exercise of the prerogative lacks this quality; although it may be legislative in character, it is still an exercise of power by the Executive alone." Lord Hoffman, Bancoult October,2008.
And **Cases:** R v Sec of State for Foreign & Commonwealth Affairs, e *x parte Everett [1989] 1 All ER 655, R v Sec of State Foreign & Commonwealth Affairs, e x Parte Rees Mogg [1994] , R (on the application of Wheeler) v Office o f the Prime Minister [2008] EWHC 1409 (Admin)*

[13] For example, **Cases:** *Malone v United Kingdom (1984) 7 EHRR 14, McCann v United Kingdom [1995] ECHR 18984/91*

[14] Blackstone's Statues, Oxford Press University, Robert G. Lee, Human Rights Act 1998 pg 197

[15] Human Rights Act 1998 http://www.opsi.gov.uk/ACTS/acts1998/ukpga_19980042_en_1

[16] European Convention on Human Rights http://www.hri.org/docs/ECHR50.html

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[17] **Case:** *Regina v A [2001] UKHL 25*
[18] As well as in **Case:** *Ghaidan (Appellant) v Godin -Mendoza (FC) (Respondent) [2004] UKHL 30*
[19] For example, **Case:** *Re S [2002] 1 F.L.R. 1156*
[20] For example in **Case:** *R (Binyam Mohamed) v Secretary of State for For eign and Commonwealth Affairs [2008] EWHC 2048 (Admin)*
"The suppression of reports of wrongdoing by officials in circumstances which cannot in any way affect national security is inimical to the rule of law," Lord Justice Thomas and Mr Justice Lloyd Jones ruled. "Championing the rule of law, not subordinating it, is the cornerstone of democracy."
[21] For example, **Case:** *R v Sec of State for the Home Department, ex Parte Northumbria Police Authority [1988] 2 WLR 590*
[22] "equality before the law", A.V. Dicey's doctrine of Modern Conditions, Introduction to the Study of the Law of the Constitution (1885)
And the courts said in **Case:** *Hasan and Chaush v Bulgaria* (2000) *34 EHRR 1339, para. 84*, "In matters affecting fundamental rights it would be contrary to the rule o f law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power."
[23] For example, **Case:** *R (on the application of S) v Secretary of State for Home Department [2006]*
[24] **Case:** *M v Home Office [1993] 3 All ER 537*
[25] "One thing however is clear. If judges are asked to rule on a highly political matter, they will behave in a political way". Daily Telegraph, 27 March 1999
[26] For example, **Case:** *Starrs and Clamers v Proscurator Fiscal, Linlithgow [2000] SLT 42*
[27] **Case:** *Bellinger v Bellinger [2003] 2 All ER 593*
[28] **Case:** *R v the Secretary of State for the Home Department, ex parte Anderson and Taylor [2002] UKHL 46*
[29] For example, **Case:** *Stafford v United Kin gdom [2002] 35 EHRR 32*
[30] For example in **Case;** *A and others v Se c of State for Home Department [2004] UKHL 56*
[31] For example, the prosecution of all Ministers under the Crown under the finding of any contempt of Court
[32] As seen in **Case:** *R (on the application of Abbasi) v Sec of State for Foreign & Commonwealth Affairs and Sec of State for the Home Dept [2002] EWCA 157*