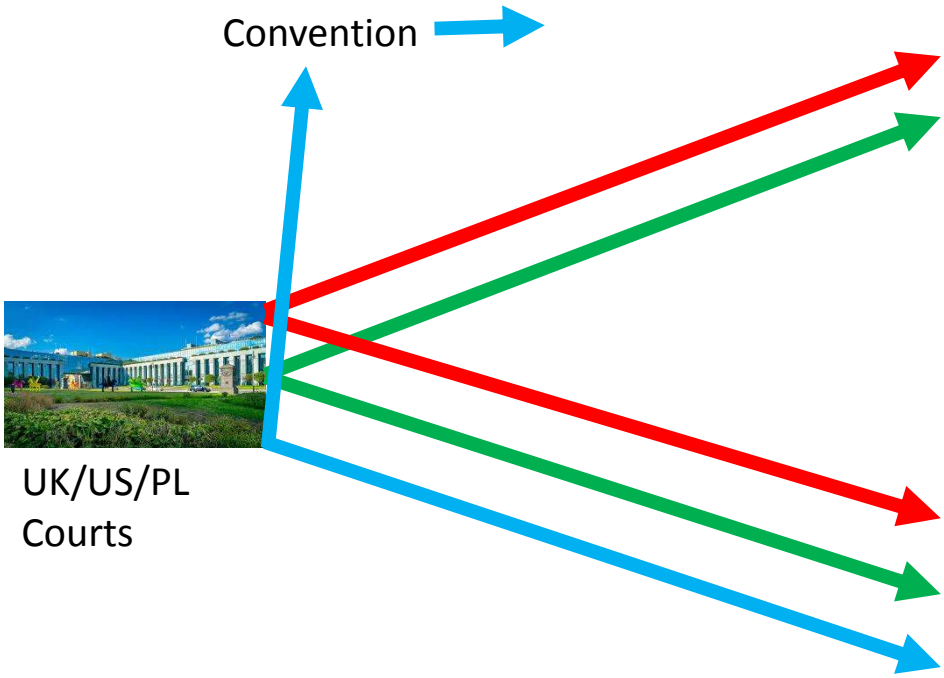


Fundamentals of Anglo- American and Polish Legal Systems – Constitutional Law

Dr Jan Halberda
(jan.halberda@uj.edu.pl)

Judicial review – the scope



Acts of US/PL Parliament (eg. LAWS!)



Acts of UK/US/PL Government (eg. Regulations, Executive Prerogative)

Judicial Appointments

- He [**POTUS**] shall nominate, by and with the Advice and Consent of the **Senate**, Judges of the Supreme Court (Art. 2 Sec. 2)
- **The President** appoints judges on the motion of **the National Council of the Judiciary** (art. 179)
- **The Queen** (Royal prerogative) [*on the advice of the Government*] on the motion of special ad hoc commission



Checks and ballances



- President and the Courts:
- President appoints the federal judges (Senate's participation, Art. 2 Sec. 2)
- Courts have the power of judicial review (Case law)





Article 3 - The Judicial Branch

- Discretionary jurisdiction of Supreme Court.
- Service during **good behaviour**.
- President Jefferson: „the problem with the Supreme Court is that they never retire, and they rarely die.”





Checks and ballances

- How courts influence President and Congress?
- What is not written in the Constitution:
- The power of *judicial review* was asserted by Chief Justice Marshall in the landmark Supreme Court Case *Marbury v. Madison* (1803).
- Must see: Crash Course Government and Politics
- <https://www.youtube.com/watch?v=mWYFwl93uCM&list=PLByhO0MIG8HSzck2r15UYSGLaq6oMLmGr&index=8>



Marbury v. Madison (1803)

Former
President
John Adams
(FED)

New
President
Thomas
Jefferson (DR)

New
Secretary
of the State
James
Madison (DR)

Appointment on
the basis of the
Judiciary Act 1789

William
Marbury
(would-be
Justice of
Peace) (FED)

Claim for
mandamus
to be granted

Certificate
refused

Chief Justice
John Marshall
(FED)

Refusal was
illegal;
but mandamus
could not be
grated as the
Judicial Act 1789
was
unconstitutional



The Judicial Branch

- What is not written in the Constitution:
- the implied judicial power of common law courts to formulate persuasive precedent
- *Erie Railroad Co. v. Tompkins* (1938) – there is no general federal common law; state courts are not bound by federal interpretations of state law



Judicial review in Poland

- The direct application of the Constitution by the courts –

Art. 8 (1) The Constitution shall be the supreme law of the Republic of Poland.

(2) The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise.

- The President's right to refer the bill to the Constitutional Tribunal

Art.122 (3) The President of the Republic may, before signing a bill, refer it to the Constitutional Tribunal for an adjudication upon its conformity to the Constitution. The President of the Republic shall not refuse to sign a bill which has been judged by the Constitutional Tribunal as conforming to the Constitution.

Limits of the Royal Prerogative



- R (Miller) v. Secretary of State for Exiting the European Union (2017)
- SC 8-3 (the first „11”), leapfrogging from HC
- Article 50(1) of the TEU: Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
- Question: whether giving Article 50 notification was within the [Crown's prerogative powers](#) for the conduct of foreign relations or whether the prerogative cannot be used in a way that undermines an act of the United Kingdom Parliament?



Limits of the Royal Prerogative



- R (Miller) v. Secretary of State for Exiting the European Union (2017)
- Royal prerogative =? nonjusticiable political matter (???)
- Decision (8-3) : the EU Treaties not only concern the international relations of the United Kingdom, they are a source of domestic law, and they are a source of domestic legal rights many of which are inextricably linked with domestic law from other sources. Accordingly, the Royal prerogative to make and unmake treaties, which operates wholly on the international plane, cannot be exercised in relation to the EU Treaties, at least in the absence of domestic sanction in appropriate statutory form
- <https://www.legislation.gov.uk/ukpga/2017/9/enacted>



Limits of the Royal Prerogative



- R (Miller) v. The Prime Minister and Cherry v. Advocate General for Scotland (2019)
- SC 11-0 (the second „11”), leapfrogging from HC
- Legality of the prorogation during Brexit talks
- Questions (and Decisions):
- Was the matter justiciable? (Yes)
- What are the limits to the power of prorogation? (Parliamentary Sovereignty)
- Did prorogation frustrate the ability of Parliament to carry out its constitutional functions? (Yes)

