

# [The role of judiciary law constitutional administrative essay](https://assignbuster.com/the-role-of-judiciary-law-constitutional-administrative-essay/)

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\*\*\*In accordance with the client’s request I have tried to restrict the use of complex language wherever possible, however, a first class piece of work in the field of jurisprudence does demand some fairly sophisticated English. I’ve endeavoured to strike a balance between these competing interests.\*\*\*

## Introduction

This paper examines the important judicial role of statutory interpretation[1]. Judicial independence is a key element of a democratic government, but it is certainly true to say that the independence enjoyed by judges is not wholly unfettered - and for good reason. British judges lack any form of democratic mandate - they are appointed not elected - and as such they are not equipped with the authority to differ from or countermand the express intention of Parliament (which is the democratically elected and sovereign legislature of the land). In plain English, judges do not have the power to override Parliamentary will, as laid down in statute. In this respect, judicial independence is therefore restricted when it comes to statutory interpretation[2]. Judges must not seek to impose their own interpretation or opinion as to what they think a statute should ‘ ideally’ dictate[3]. There are various so-called canons of interpretation[4]that guide judges in their role in this respect[5]. However, one canon stands head and shoulders above the others and it is applied on a daily basis in British courts, while the other canons are only rarely utilised. The Literal Rule is the primary guideline applicable to statutory interpretation and is explored in critical detail in the following section[6].

## The Literal Rule[7]

This canon of interpretation constitutes the predominant rule in this field[8]and dictates that judges must be guided by the actual words employed in a piece law rather than try to draw inferences, fill in gaps or second-guess its meaning themselves[9]. The Literal Rule requires that judges must give the words used in a statute their ordinary, everyday (literal) meaning, and that they must do so regardless of whether this seems to create an unjust, undesirable or illogical outcome: Inland Revenue Commissioners v Hinchy [1960][10]and Whiteley v Chappell (1868)[11]. Therefore the Literal Rule requires strict, blinkered adherence to the actual express words used in a statute and that its interpretation must not vary from its exact, literal construction[12]. The Sussex Peerage Case (1844)[13]held that judges must follow the ordinary meaning of statutory words and not be swayed by any factors or considerations external to the statute itself. Fisher v Bell [1961][14], stands as a graphic example. Here, the actual terms employed in a piece of legislation prohibiting flick knives being sold had the effect of rendering the law almost impossible to break due to the intervention of contract law principles on invitation to treat[15]. However, the courts were compelled to apply the Literal Rule, rendering the legislation nugatory. This canon restricts judicial independence in the process of statutory interpretation and channels judicial conduct in a regimented fashion. The rule quite often seems to create rulings that contradict commonsense - indeed, interpretative pragmatism seems to be sacrificed on the altar of preserving the authority of Parliament at any cost: R v McGinnis (1987)[16]. For another example of this conservative rule of interpretation note the decision in R v Goodwin (2005)[17]. In this case a jet-ski rider faced prosecution under the Merchant Shipping Act 1995 after severely injuring another jet-ski rider. The Act in question stipulated that it is an offence for a ship’s master to commit an act that inflicts injury on another person. Finding itself bound by the Literal Rule, the Court of Appeal resolved to quash the conviction that had been obtained, ruling that a jet-ski could not be defined as a ‘ ship’. It was held that a jet-ski was a leisure device rather than a vessel utilised in ‘ sea-going navigation’ - an essential element in the definition of ‘ ship’ under the statute.

## The Golden Rule[18]

Slapper and Kelly assert[19]that this canon of interpretation should properly be considered a purposive extension of the Literal Rule. The Golden Rule extends or overlays the Literal Rule where application of the latter canon leads to manifest absurdity: Keene v Muncaster [1980][20]. This canon of interpretation thus preserves the literal policy as its default but provides that where a literal interpretation produces obviously inapposite or contrary outcomes (determined with reference to the base goals of the statute in question) it can be set aside[21]. Adler v George [1964][22]provides an illustration. This case saw A trespass inside an Royal Air Force Base (the Official Secrets Act designated such installations as ‘ prohibited places’). A was thereafter prosecuted for an OSA offence requiring that he was ‘ in the vicinity’ of such a location. A asserted that he was not in its ‘ vicinity’, but actually within it. If the Literal Rule had been strictly applied A’s defence might well have succeeded. However, the Golden Rule was applied instead, lending the phrase ‘ in the vicinity of ’ a wider and more purposive definition along the lines that it should be interpreted as meaning near, at or actually within a specified location. Accordingly A’s defence failed and the OSA offence was given a more effective practical scope given that the aims behind the Act were to protect such installations. Re Sigsworth (1935)[23], Prince of Hanover v AG (1957)[24]and Becke v Smith (1836)[25]provide other examples of the Golden Rule in operation. This canon of interpretation thus maintains a literal policy unless this is seen to result in an absurd outcome, at which point limited inferences can be drawn to guide a more sensible result (which will be governed by the underlying objectives of the legislation). It is submitted that the Golden Rule represents the best of both worlds, by preserving democratic sovereignty but being flexible enough to bend to justified commonsense interpretations where necessary.

## The Mischief Rule[26]

This can be conceptualised as an off-shoot or variant of the Golden Rule. The Mischief Rule[27]provides that in situations where statute is clearly designed to address a specific type of conduct or ‘ mischief’ (and the common law is insufficient on the point), then an interpretation that guarantees that the mischief is properly dealt with is permissible[28]. The classic authority is provided by Heydon’s Case (1584)[29], where it was held that the court must consider any pre-existing common law, the mischief in question, and the intention and rationale of Parliament regarding the statutory response. Smith v Hughes [1960][30]offers a famous illustration of the Mischief Rule in application. This case saw entrepreneurially-spirited prostitutes concoct a scheme to avoid prosecution under the Street Offences Act 1959. The 1959 Act prohibited prostitutes from soliciting clients ‘ in the street’. The prostitutes in question decided to rent rooms with balconies overlooking crowded streets and to call down to people walking below, offering them their services. Obviously, blind adherence to the Literal Rule would have meant that no prosecution could be achieved because the prostitutes were, literally, no longer ‘ in the street’. Similarly the Golden Rule would have failed to secure prosecutions because no logical degree of purposive interpretative intent could infer that a building balcony is equivalent to a street. The Mischief Rule, however focused specifically on addressing the behaviour, (or mischief) to be curtailed and the conduct of the prostitutes was deemed to contravene the underlying objectives of the 1959 Act. Prosecution was thus achieved. Corkery v Carpenter (1950)[31]and Gardiner v Sevenoaks RDC (1950)[32]also stand as examples of the Mischief Rule in operation, confirming that under this canon of interpretation a statute is to be construed so as to suppress a common law mischief and advance the appropriate legislative response and remedy.

## Further Observation and Conclusions

It is submitted that it is an oversimplification to state that the role of the judiciary ‘ is simply to interpret statute’, as the title to this work seeks to assert. It is absolutely correct to conclude that the primary role of the judiciary is one of controlled, literal interpretation - and undeniably the Literal Rule is the chief precept in this field. However, judges do have a degree of flexibility and their interpretative role is to some extent malleable and creative, something illustrated by the existence and use of the secondary canons of statutory interpretation, the ‘ problem-shooting’ Golden and Mischief Rules. Moreover, the Human Rights Act 1998[33], has instilled a greater degree of interpretative freedom[34]in the context of the application of relevant legislation via section 3 (see R v A [2001][35]) and this does equip the judiciary with considerable more room for manoeuvre than is afforded by the more traditional rules of interpretation[36]. In addition, British judges have been granted enhanced interpretative freedom, and a degree of purposive and creative latitude, due to the UK’s membership of the European Union. One EU precept in particular - the indirect effect doctrine[37]- encourages UK judges to interpret proximate national law in ‘ sympathetic accord’ with the aims and objectives of EU provisions (see C14/83 Von Colson and Kamann v Land Nordrhein-Westfalen[38]), bending UK law in the direction of the EU objective. It has been referred to as the doctrine of ‘ harmonious interpretation’[39]. That said, there are boundaries to this judicial liberty and the indirect effect doctrine will not countenance nor sustain any attempt to interpret a piece of national law in a manner that is manifestly contra legem[40]: see C268/06 Impact v Minister for Agriculture and Food[41]. In sum therefore, judicial independence is, generally speaking, impacted by the requirement to abide by strictly literal statutory interpretation, but this restriction has for many generations been softened by the secondary canons of interpretation and has been materially loosened in more recent times as a consequence of the intervention of EU and human rights law in their respective fields of application.

## THE END

## EXACT WORD COUNT INCLUDING TEXT OF ANSWER ONLY : 1577

## Question text, case table and bibliography - excluded from the count.

## Oxford referencing protocol employed.

## CASE TABLE (chronological)

Heydon’s Case (1584)Becke v Smith (1836)Sussex Peerage Case (1844)Whiteley v Chappell (1868)Re Sigsworth (1935)Corkery v Carpenter (1950)Gardiner v Sevenoaks RDC (1950)Prince of Hanover v AG (1957)

## Inland Revenue Commissioners v Hinchy [1960]

Smith v Hughes [1960]Fisher v Bell [1961]Adler v George [1964]

## Keene v Muncaster [1980]

C14/83 Von Colson and Kamann v Land Nordrhein-WestfalenR v McGinnis (1987)R v A [2001]R v Goodwin (2005)C268/06 Impact v Minister for Agriculture and Food