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Editor's Introduction

Lorne Neudorf[*]

In the second year of its existence, the Supreme Court of the United Kingdom decided 58 cases that touched upon a wide range of legal matters. This issue continues the ground-breaking work of last year's inaugural Annual Review by providing insightful analysis and commentary on both the institution of the Supreme Court and its jurisprudence throughout the 2010–11 legal year. The founding of the *Cambridge Journal of International and Comparative Law* as the successor to the *Cambridge Student Law Review* reflects our renewed commitment to examining the Supreme Court from an international and comparative perspective.

There were several notable changes to the composition of the Supreme Court over the past year, including the sad death of Lord Rodger. Professor Rosa Greave's thoughtful obituary highlights some of the many contributions of this erudite jurist. In terms of new appointments, Lord Wilson joined the Supreme Court in May 2011, while Lord Phillips, President of the Supreme Court, announced that he will retire in September 2012. We are very fortunate to publish Lord Phillips' reflections upon his tenure as the first President of the Supreme Court.

This year's Annual Review seeks to situate the work of the Supreme Court in a context that relates to the law's economic, social, and political implications and its effect on the legal development of other jurisdictions. Framing the discussion is the Honourable Justice Marie Deschamps' engaging foreword, which highlights the dynamic relationship between the UK Supreme Court and the Supreme Court of Canada by demonstrating that each country's law benefits from looking to the experience of the other's courts. Part I takes up this comparative theme with the Honourable Justice K. M. Hayne's article that provides a fascinating glimpse into the evolution of legal relationships between the High Court of Australia and the UK Supreme Court. Through his analysis of select Supreme Court decisions over the past year, Professor John Bell's article reveals the use of foreign law as a comparative benchmark of the rightness of what English judges think is an appropriate solution to domestic legal problems. In considering the Supreme Court's lawmaking function, Julien du Vergier's article

[*] Managing Editor, UK Supreme Court Annual Review

compares the Court's approach to law reform with that of the Law Commission, while my piece discusses the implications of the Supreme Court's institutional independence by drawing on the experience of apex courts in Canada and the United States. Finally, Joshua Rozenberg's contribution speaks to the issue of public awareness of the Supreme Court and its work by looking at the evolving relationship between the Court and the media.

In Part II, five thematic articles consider particular issues from the Supreme Court's jurisprudence in-depth by supplying a broader economic and social context to those decisions, while the summaries in Part III provide an overview of each case decided by the Supreme Court in the 2010–11 legal year, organised into 12 subject groups. Finally, the statistics section in Appendix B provides a snapshot of the Supreme Court's performance over the past year, offering for the first time a year-by-year comparison.

We offer our gratitude to all of our authors and editors for their work in bringing this issue of the Annual Review to fruition. Andrew Sanger and Rumiana Yotova, our Editors-in-Chief, demonstrated tremendous leadership in their ambition to found the Journal. Managing Editors Fernando Lusa Bordin, Samuel Dahan, and Claire Simmonds did an exceptional job in organising the editorial teams who authored the thematic and summary articles. And we extend a very special note of appreciation to Managing Editor Sidney Richards, whose impressive technical skills made the production of this issue possible.

It is our hope that the Annual Review of the Supreme Court's work will continue to be a valuable resource for both legal practitioners and academics in the years to come, serving as a forum for the exchange of informed discussion on salient legal issues and the institution of the Supreme Court.

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Foreword

The Honourable Madam Justice Marie Deschamps[*]

The evolution of a country's domestic law is not a solitary undertaking, but a product of scholars, practitioners, and judges working together to develop the law. In recent decades, the efforts of these contributors to the development of law have increasingly been inspired by the experience of their counterparts in other countries. The topics of this volume illustrate that supreme courts in Europe and in the Commonwealth have much in common: there are few areas of the law that are unique to any one country. This volume is thus a resource not only for the United Kingdom, but also for the international legal community.

From my Canadian perspective, I see the UK Supreme Court as an institution that has much in common with the Supreme Court of Canada. Both courts play a leading role in the development of the law by deciding cases of genuine public importance. Both have been granted broad jurisdiction as the final arbiter for citizens in all areas of law. Having a single court of final jurisdiction facilitates access to justice for individual claimants. It also encourages coherence among different aspects of the law, as our courts are constantly attempting to weave what F.W. Maitland describes as a "seamless web".[1] Beyond mere coherence, the existence of such courts benefits the evolution of law as judgments rendered in one area of the law inform judgments rendered in others.

But our courts share more than broad jurisdiction. As with other Commonwealth courts, Canada's legal heritage is distinctly British and its cultural influence is evident when one looks closely at many areas of law. Historically, Canadian notions of the relationship between citizens and the state drew heavily on the United Kingdom's experience, tailored to our own circumstances. Canada's adoption of the *Charter of Rights and Freedoms* (*Charter*) in 1982 set us on a different path, one in which judges had the great challenge and responsibility of interpreting a written constitution which included a 'code' of rights and freedoms. Three decades later, we are still working out what this entails in our society not only because our understanding of the *Charter* has been refined over time but also because society is in constant evolution.

[*] Justice of the Supreme Court of Canada.

[1] F.W. Maitland, 'A Prologue to a History of English Law', (1898) 14 *L. Qtrly. Rev.* 13.

The UK Supreme Court confronts a similar situation in interpreting the Human Rights Act 1998 and in pronouncing on the conformity of domestic law with challenges brought under the European Convention on Human Rights (ECHR).[2] Our constitutional frameworks and the language of our constitutional documents may differ. Yet the same challenges remain: to reconcile constitutional constraints with Parliament's legitimate legislative powers and to define the limits of constitutional rights in a free and democratic society.

In reviewing recent decisions, it is striking to realize how often our courts have arrived at similar positions based on similar reasoning on a variety of issues, even though we approach these matters from different constitutional points of departure. It is a testament both to our shared cultural history and how much our globalized society has preserved those shared values. However, each court also remains unique.

The Supreme Court of Canada has often taken inspiration from the reasons of its British counterpart. For example, in its discussion of the scope of the fair comment defence to defamation in *WIC Radio Ltd v Simpson*,[3] our court examined *Reynolds v Times Newspapers Ltd*.[4]

Similarly, the UK Supreme Court has looked across the Atlantic to our law on a number of occasions. For example, in *Ambrose v Harris*,[5] Lord Brown cited the Supreme Court of Canada's decision in *R v Grant*[6] to suggest that the right to legal counsel is not absolute and that the issue of whether certain evidence is admissible after that right is infringed must be determined in accordance with the circumstances of each case.

At other times, our courts have considered similar factors even though we function in quite different constitutional frameworks. In *ZH (Tanzania) v Secretary of State for the Home Department*,[7] Lady Hale found that the best interests of children must be given primary consideration in the proportionality assessment under Article 8 of the ECHR when a decision to deport a parent is being considered. The *Charter* lacks a provision equivalent to Article 8 that specifically protects family life. However, Canadian judges have found that international law may introduce considerations relating to children into immigration decisions. In *Baker v Canada (Minister of Citizenship and Immigration)*,[8] Justice L'Heureux-

[2] 213 UNTS 221.
[3] 2008 SCC 40.
[4] [1999] 4 All ER 609.
[5] [2011] UKSC 43.
[6] 2009 SCC 32.
[7] [2011] UKSC 4.
[8] [1999] 2 SCR 817.

Dubé found that a minister must take the best interests of a claimant's child into consideration when exercising his or her discretion to grant an exemption based on humanitarian and compassionate considerations for a residency requirement. These two cases are by no means identical, but they do suggest that our courts resort to similar considerations, even when they are examining different legislative language.

Finally, there are times when our domestic laws simply appear to take different paths. In *Crookes v Newton*,[9] the Supreme Court of Canada recently determined that the mere presence of a hyperlink on a web page does not constitute publication of the contents of the 'hyperlinked' site. This restricted scope for internet publication suggests a possible contrast with the United Kingdom's more expansive view of publication in certain decisions.[10] Whether we truly differ in approach will only be confirmed in future judgments, judgments which I am sure will continue to be informed by the ongoing conversation between our two courts.

The commonalities and differences between our courts present an opportunity for fruitful exchanges between scholars, judges, and practitioners in the United Kingdom, Canada, and elsewhere. Our commonalities will provide guidance when a court in one jurisdiction must address legal issues that have already been considered in the other jurisdiction. Our differences may provoke self-reflection and sharpen our understanding of our own unique traditions and values, following Seymour Lipset's observation that those who know one country know no country well.[11]

The useful and thoughtful contributions in this volume highlight our commonalities and differences and serve as welcome invitation to those of us abroad to continue our ongoing dialogue.

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[9] 2011 SCC 47.

[10] See, *e.g.*, *Loutchansky v Times Newspapers Ltd & Ors*, [2001] EWCA Civ 1805, affirming *Duke of Brunswick v Harmer*, (1849) 14 QB 154.

[11] S. Lipset, *American Exceptionalism: A Double-Edged Sword* (W.W. Norton, 1997), at 17.

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Obituary
Alan Ferguson Rodger, Lord Rodger of Earlsferry (1944–2011)

Professor Rosa Greaves[*]

The School of Law and the University of Glasgow mattered very much to Lord Rodger, one of the leading Scottish lawyers of his generation, and he never forgot his *alma mater*. Alan Rodger graduated MA, LLB from this University, being the last undergraduate to obtain a double first in Scots and Civil law, before going to Oxford to pursue research into classical Roman law for which he obtained a DPhil. He received an honorary LLD in 1995, was appointed an Honorary Professor at the University of Glasgow in 1999, and became a member of the School of Law Advisory Panel in 2010.

Upon his appointment as an Honorary Professor at the University of Glasgow, Lord Rodger imposed a condition on his acceptance of that position, namely that the appointment should mean something for the students. He was always keen to accept invitations to deliver lectures at the School and thoroughly enjoyed dialogue and discussion with the students, not only in respect of their studies, but also of their concerns. He delivered his last lecture at the School in January 2011 to a packed lecture theatre of Diploma students. The lecture was a fascinating insight, from a very personal perspective, on the role and the daily life of a Justice of the Supreme Court, and Lord Rodger dealt with everything from the Timorous Beasties curtains in his new chambers to the collegiate atmosphere among the justices. He also offered students guidance and advice about presenting pleadings in court.

Alan Rodger was a Justice of the UK Supreme Court, one of the two Scottish members of the Court, but he was also an outstanding scholar of Roman law, Scots law, and legal history. The description of 'a jurist on the bench' is a fitting accolade for Alan Rodger who devoted an enormous amount of his time to academic pursuits. Indeed, at first, he seemed to have chosen an academic ca-

[*] Head of School of Law, University of Glasgow.

reer having remained at Oxford as Dyke Junior Research Fellow at Balliol and thereafter as a Fellow and Tutor of New College but he resigned his fellowship in 1972 to pursue a career as an advocate back in Scotland.

His professional career was meteoric, becoming a member of the Faculty of Advocates in 1974 (Clerk of the Faculty in 1976 and took silk in 1985), Solicitor General for Scotland from 1989–92, and Lord Advocate from 1992–95. He was made a Life Peer as Baron Rodger of Earlsferry and Privy Counsellor in 1992. Lord Rodger was appointed to the Court of Session bench in 1992 and Lord President of the Court and Lord Justice General of Scotland from 1996–2001. Then he became Lord of Appeal in Ordinary in the House of Lords and Justice of the Supreme Court upon its establishment in 2009. He was elected a Fellow of the British Academy in 1991 and became a Fellow of the Royal Society of Edinburgh in 1992. In 2008, he was elected High Steward of the University of Oxford and Visitor of Balliol.

His peers considered him to have been an outstanding court advocate with equal success in civil and criminal cases, and if he had chosen not to devote his talents to the public service he would certainly have been a leader of the civil bar. As a judge, Lord Rodger believed in clarity above all, expressing publicly the belief that it is important to write clear and unambiguous judgments using short sentences "for the simple reason that you can hide in long sentences".[1] He was well known for spending a significant amount of time drafting and revising judgments.

However, it is as a brilliant and talented legal scholar that Lord Rodger will be mostly remembered among academe. Lord Rodger's breadth of legal intellect was simply outstanding and his extensive publication record, the envy of many senior academics.

Professor Ernest Metzger, holder of the Douglas Chair in Civil Law at the University of Glasgow, commented that

> [a]s a scholar Alan had a special readership. Judicial opinions, good or bad, must be read, but the same isn't true for scholarship: every reader must be won over singly. And Alan was in fact one of the most read, cited, and admired writers on Roman law. No matter that most of his readers do not have English as their first language: he won them over anyway. His books and articles were direct and persuasive, and missed none of the current scholarship, of which

[1] R. Johnston, 'Lord Rodger of Earlsferry: CaseCheck Interview Part 2' <http://www.casecheck.co.uk/tabid/1420/default.aspx?article=Lord+Rodger+of+Earlsferry+CaseChec+Interview+Part+2%20655> [last accessed 3 April 2012].

> only a fraction is in English. Most important, everything he wrote reminded his readers that while the study of Roman law required many different talents, it would always need an eye of a penetrating lawyer.[2]

As a man he was known for the high standards he set for himself and a total commitment to the task in hand. He was focussed on resolving interesting problems and was never satisfied until he had asked all the questions which enabled him to find the answers.

Lord Rodger's life is fascinating and noteworthy for the unexpected career choices he made. For example, after graduating at Glasgow, unlike his peers, he decided not to qualify for the bar, but to go southwards in pursuit of academic research. Having established himself as a leading scholar in Oxford he gave that up to come back to Scotland to train for the bar. Yet he distinguished himself in each of his careers: as an academic, at the bar, as a Law Officer, as a member of the Government Front Bench in the House of Lords, and as a judge in the highest courts of the United Kingdom.

Nevertheless, he never really gave up his academic career, and throughout his life he continued to research, lecture, and write about problems of Roman law, Scots law, and legal history. Lord Rodger always responded to invitations to come and speak to students or young lawyers. Lord Rodger's life judgments and academic publications will remain a rich source of reasoned answers to a wide range of legal problems.

[2] E. Metzger, 'The Rt. Hon. Lord Rodger of Earlsferry: Tributes by Robert Rennie, Tom Mullen and Ernest Metzger' <http://www.gla.ac.uk/schools/law/newsevents/headline_203660_en.html> [last accessed 3 April 2012].

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The Birth and First Steps of the UK Supreme Court

The Right Honourable Lord Phillips of Worth Matravers, KG, PC[*]

At the end of this legal year I will step down from my position as the first President of the UK Supreme Court, having overseen the first three years of its existence. It would be nice to be able to say that I was involved in the creation of the Court from the first twinkle in the eye to the present day. But it was not to be. No senior judge had been consulted or even warned before Tony Blair announced in June 2003 that the Law Lords were to be abolished and a supreme court to be created in their place. The decision was part of a constitutional package, which included the abolition of the office of Lord Chancellor. The latter aim proved more complicated than the Prime Minister anticipated, and we still have a Lord Chancellor with important statutory responsibility for upholding the rule of law and the independence of the judiciary, albeit with his judicial functions removed.

Notwithstanding the shock of the manner of the announcement, I had for many years shared the opinion of Lord Bingham and other senior jurists that the importance in our unwritten constitution of the separation of powers required the UK to change its arrangements for hearing appeals at the highest level. The Lord Chancellor, a member of the government but also then the highest judge in the land, presided over the Law Lords, who were not only judges but members of a legislative body in the House of Lords. For the public, this was a confusing picture and an 'appeal to the House of Lords' did not make it clear that, in practice, the judicial and legislative functions of this body were kept almost completely separate. Moreover, justice could not easily be seen to be done with hearings in a remote committee room and judgments delivered on the floor of the House in a ceremony which conveyed almost nothing about the decision that had been made. A supreme court would be a change of form rather than substance, but form in this instance was of vital importance.

It took two years to pass the necessary legislative measures—found in the Constitutional Reform Act 2005—and a further four years before the Supreme Court opened its doors on 1 October 2009. The majority of the delay was

[*] President of the Supreme Court of the United Kingdom.

attributable to the search for suitable premises for the new Court and their conversion for the purpose. The old Middlesex Guildhall, ideally situated although apparently undistinguished before skilful restoration disclosed its manifest virtues, was selected and has provided us with a Supreme Court building, which offers working conditions comparable with the purpose-built housing of supreme courts overseas, while being rich in history.

Fundamentally little about the role of the UK Supreme Court has changed from that of the House of Lords. The 12 Law Lords became, in October 2009, Justices of the Supreme Court. As the senior Law Lord, I became President of the new Court and Lord Hope its Deputy President. The jurisdiction of the Court mirrored that of the House of Lords and it became the final court of appeal for all appeals in civil and criminal matters from England and Wales, Scotland, and Northern Ireland, save for criminal appeals in Scotland. We were concerned to preserve the relative informality of the Committee Room, so the courtroom was designed with the advocates and justices on the same level. Justices have remained unrobed and, last year, advocates were invited to appear without wigs and/or gowns if they so wished. So far they have taken up the invitation enthusiastically, so the atmosphere of debate which has always marked out the Court from lower appeal courts is further emphasised.

There were some who predicted that the mere fact of the move across Parliament Square would inevitably lead to those same judges and their successors becoming more assertive and more ready to question Parliament's legislation. Both Lord Falconer and Lord Neuberger were among their number, the latter basing his prediction on the law of unintended consequences. I would not myself regard those fears as having been made out as the Supreme Court approaches the end of its third year. The Law Lords were quite ready to stand up to Parliament when necessary, as they demonstrated in 2004 when they declared provisions of the Anti-Terrorism, Crime and Security Act 2001, which permitted foreign terrorist suspects to be detained without trial, to be incompatible with rights protected by the European Convention on Human Rights.[1] The Supreme Court has continued this work in a number of cases dealing with control orders. The perception that relations between Parliament and the judges have become more confrontational rather arises from the enactment of the Human Rights Act 1998, which, for the first time, required courts to scrutinise legislation to ensure compliance with human rights. However, the supremacy of Parliament is preserved under the Act and often, if the issue lies at the periphery rather than the heart of legislation, it is the government which urges the Court

[1] 213 UNTS 221.

to interpret legislation in a manner which gives effect to the human rights in question, even though they recognise such interpretation departs from the intention of the Parliament which enacted it. The Act has achieved a delicate constitutional balance and has, in my view, made an outstanding contribution to the upholding of the rule of law in this country.

What has changed is the transparency of what we are doing at the Court and its accessibility, the importance of which should not be underestimated. The fact that the justices now have ample space to meet and to discuss cases being heard has led, I hope, to the opportunity being taken where possible to produce more single judgments setting out the majority or minority view, so as to add to the clarity of the basis of our decisions. When judgment is handed down, the proceedings are broadcast live, the presiding justice now gives a short explanation of the issues and the decision, and the judgment is made publicly available with a press summary providing further brief detail. Visitor numbers to the Court, including large numbers of school visits, have exceeded our expectations. For important appeals, television screens also broadcast the proceedings outside the Court and in the exhibition space, so that visitors can be sure of being able to see the case being argued. They could, if they prefer, sit at home and watch the proceedings broadcast live on the website of Sky News. I hope, also, that the two documentaries produced about the work of the Supreme Court in its first year widened public understanding of who the justices are and our approach to the cases we are asked to decide.

It may surprise some people to discover that the overwhelming majority of appeals heard by the Supreme Court are in civil cases (some 85%), and that human rights issues only arise in about a quarter of them. Nevertheless, the cases we hear are a far cry from the time I started practising as a barrister, about 50 years ago, when a large part of the work of the Law Lords was resolving commercial disputes between individuals or companies. Now public law issues arising from challenges by individuals to the exercise of executive power by the state are perhaps the most important part of the diet of the Supreme Court. There have, in the first two years of the Court, been a number of high profile appeals where the importance of the public law issues has caused the appeal to be heard by panels of seven or nine justices. The space available in the Supreme Court has enabled this to be done much more easily, whenever we feel it is appropriate, and as a result about 18% of our cases in the first two years were heard by seven justices and 9% by nine justices. These appeals often feature difficult issues and give rise to finely balanced decisions. However, in the general run of appeals we are able to reach unanimous decisions (allowing about half) some 75% of the time.

A pressing challenge for the years ahead, and for my successor, will be the appointment of future justices. Another of the reforms introduced by the Constitutional Reform Act was the setting up of the Judicial Appointments Commission and specific arrangements for the appointment of Supreme Court justices, which reduced the role of the Lord Chancellor to a limited and rather complex power of veto. Two criticisms continue to be levelled at the appointments made thus far. The first is that the Court has no democratic mandate but is accused of making decisions which frustrate the wish of a democratically elected Parliament. As I stated above, I think this arises from a misunderstanding of the task given to the courts by Parliament, which remains supreme. I would be concerned at any suggestion that the solution to this lay in the politicisation of judicial appointments. In this country justices take an oath to administer justice 'without fear or favour, affection or ill will', and that is what we strive to do.

The second criticism is of more concern. It is that the Supreme Court is not representative of the people. It is white and has only one woman. This is a reflection of the fact that there are relatively few women and non-white judges in the higher echelons of the judiciary, from which almost all the applications for appointment to the Supreme Court come. Radical changes are needed to make the bench more attractive to women and more compatible with bringing up a family. Solicitors' firms must also be persuaded to encourage their partners to become judges as this would be a potential source of high calibre women judges. Over time there should be more women applicants but it is clear that the rate of change is still disappointingly slow.

It has been a feature of my time at the Supreme Court that the composition of the Court has necessarily changed rapidly, chiefly because so many justices have been close to their compulsory retirement age, but also by reason of the immensely sad death of Lord Rodger last year. By the end of next year not only myself but Lords Brown, Walker, and Hope will have retired. This leaves the remarkable position that of the Law Lords who sat through the last year of the House of Lords, only two will still remain. A new generation of justices, without the history or experience of sitting in the House of Lords, may introduce new approaches and working practices that will make the last three years appear a period of transition. For me that period has been the most satisfying of my fifty odd years in the law.

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The High Court of Australia and the Supreme Court of the United Kingdom: The Continued Evolution of Legal Relationships

The Honourable Justice K. M. Hayne, AC[*]

To read the decisions of the High Court of Australia as they are reported in the *Commonwealth Law Reports* is to read a social history of Australia. World wars, depressions, conflicts between labour and capital, the great political controversies of the day—all are reflected in the decisions of the Court. It is unsurprising, then, that there can readily be traced through the decisions of the High Court of Australia the changes that have occurred in the relationship between the United Kingdom and Australia generally and, in particular, the changes in the relationship between the work of the High Court of Australia and the decisions of British courts (especially the House of Lords and now the UK Supreme Court).

In the earliest years of the High Court it was unthinkable that there could be any difference in the common law as it was made and applied in the courts of England and Wales and the common law as it was to be applied in Australia. For years, all of the courts of Australia were enjoined to follow not only the decisions of the House of Lords (and Privy Council) but also the decisions of the Court of Appeal of England and Wales.[1] Because appeals could be,[2] and were frequently, taken from Australian courts to the Privy Council, the decisions of the High Court are to be read knowing that the judges were deciding issues alert to the possibility that these issues may have ended up in London. There was, therefore, frequent reference to and reliance upon the decisions of the English courts.

Three important changes happened in the twentieth century. First, there were social changes in Australia. Especially after the Second World War, there

[*] Justice of the High Court of Australia.

[1] See, *e.g.*, *Wright v Wright*, (1948) 77 CLR 191, at 210, per Dixon J; *Commissioner of Stamp Duties of New South Wales v Pearse*, [1954] AC 91, at 112, per Lord Cohen.

[2] See Section 74 of the Constitution of the Commonwealth of Australia.

was a growing self-awareness in Australia accompanied and evidenced by an increasingly prominent sense of national identity. Migration caused the emergence, by the last decades of the century, of a multicultural society. By the 1980s, English was a second language for many Australians who had no family in or other ties to the United Kingdom. By 1999, the High Court could decide[3] that a person regarded as a British citizen by the statute law of the United Kingdom was ineligible for election to the Australian Senate because she was "a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a *foreign power*".[4]

Second, in 1963, the High Court decided, for the first time, that it would not follow a decision of the House of Lords. In *Parker v The Queen*,[5] Chief Justice Dixon, speaking for the whole Court,[6] said:

> Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions and cases decided here, but having carefully studied *Smith's Case*[7] I think that we cannot adhere to that view or policy.[8]

Although Chief Justice Dixon spoke for the Court in making this comment, he (with Justice Windeyer) dissented in the result in *Parker*.[9] The Privy Council allowed an appeal.[10] Lord Morris, delivering the opinion of the Board, specifically endorsed the conclusions of Chief Justice Dixon and Justice Windeyer and offered no comment— adverse or otherwise—on Chief Justice Dixon's approach to United Kingdom authority.[11] If the apron strings were not then cut, they were loosened. And the final severance can be seen to have taken place when in 1986 the Parliament of the Commonwealth of Australia and the Parliament at Westminster each passed the Australia Act 1986—an Act which, in its long title in Australia, was said "to bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation".[12]

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[3] *Sue v Hill*, (1999) 199 CLR 462.
[4] Section 44(i) of the Constitution of the Commonwealth of Australia (emphasis added).
[5] (1963) 111 CLR 610.
[6] *Ibid.*, at 633.
[7] *Director of Public Prosecutions v Smith*, [1961] AC 290.
[8] *Supra*, note 5, at 632.
[9] *Ibid.*, at 633, per Dixon CJ; *ibid.*, at 664, per Windeyer J.
[10] *Parker v The Queen*, [1964] AC 1369.
[11] *Ibid.*, at 1390.
[12] Long Title of the Australia Act 1986 (Cth).

Section 11 of each of those Acts provided for the termination of appeals to the Privy Council "from or in respect of *any* decision of an Australian court".[13]

The third (and now most pressingly relevant) change that occurred during the last years of the twentieth century was the emergence of statute as the all-pervading and pre-eminent source of the norms and principles which courts are called on to apply. The most cursory glance at the indexes to the reports of decisions of the UK Supreme Court shows how often reference is made in the decisions of that Court to the Human Rights Act 1998, an Act which has no federal equivalent in Australia, whether statutory or constitutional.

To speak now of the influence of the work of the UK Supreme Court on the work of the High Court of Australia is to speak of the influence of one of the most important courts of ultimate resort in the common law world. But the influence that the Supreme Court's work has on the work of the High Court can no longer be explained in social or historical—let alone precedential—terms. The relationship between the courts is a relationship between equals. And it follows that the work of the Supreme Court has influence because of the cogency of the reasoning that is revealed in the opinions of the Court and the relevance of that reasoning to the particular issue that must be decided. It is this essential second step of identifying whether the reasoning *can* be applied to the particular problem that is most affected by the different statutory and constitutional contexts in which the two courts work. And it is because the statutory and constitutional contexts in which the two courts work are now so very different that there is much less frequent reference in decisions of the High Court of Australia to the work of the UK Supreme Court than once was the case.

Despite these changes, the work of ultimate courts of appeal in all common law countries continues to present issues that are resolved in ways from which we all learn. Most recently, in Australia, we have seen reference to the work of the UK Supreme Court in areas as diverse as practice and procedure relating to the summary termination of proceedings,[14] the notion of 'proportionality' in Australian federal constitutional law,[15] the effect of general statements of human rights and responsibilities at the state level[16] on the construction and applica-

[13] Section 11(1) *ibid*. (emphasis added); Section 11(1) of the Australia Act 1986 (UK) (emphasis added).

[14] *Spencer v The Commonwealth*, (2010) 241 CLR 118, at [24], n. 52, referring to *A v Essex County Council*, [2010] UKSC 33, at [44], [119], [133], and [163].

[15] *Hogan v Hinch*, (2011) 243 CLR 506, at [72], n. 110, referring to *In re Guardian News and Media Ltd*, [2010] UKSC 1.

[16] Charter of Human Rights and Responsibilities Act 2006 (Vic).

tion of state statutes creating criminal offences,[17] causation in cases where it is alleged that negligent exposure to asbestos caused malignant mesothelioma,[18] and the doctrine of 'act of state' in connection with an allegation of abuse of process where an accused person was brought before the Australian courts as a result of wrongful conduct by the agents of a foreign state whom the Australian executive assisted.[19]

In all of these cases, the way in which the Supreme Court has identified the relevant problem and then reasoned to its conclusions has been important, even central, to the High Court's own consideration. Identification of the question that the Supreme Court was answering is critical. Often enough, identifying the question that was being addressed reveals the importance of the statutory and constitutional framework within which the case was determined. So, for example, it is the nature and extent of those differences that underpinned the views expressed by the High Court in *Momcilovic v The Queen*[20] about the extent to which United Kingdom learning about the Human Rights Act can be translated to the radically different context of a statutory statement of human rights and responsibilities enacted at a state level.[21] And at the other end of the spectrum, it was the evidentiary foundation laid at trial in Australia—radically different from that examined a decade earlier by the House of Lords in *Fairchild v Glenhaven Funeral Services Ltd*[22]—in relation to medical knowledge about the causes of malignant mesothelioma which meant that the High Court in *Amaca Pty Ltd (Under NSW Administered Winding Up) v Booth*[23] simply did not reach the questions considered by the House of Lords in *Fairchild* and, later, by the Supreme Court in *Knowsley MBC v Willmore*.[24] The close analysis made by Lords Walker and Collins in their joint reasons in *Lucasfilm Ltd v Ainsworth*[25] of the doctrine

[17] *Momcilovic v The Queen*, (2011) 85 ALJR 957, at [48], nn. 93 and 95–6, and [546], nn. 775 and 777, referring to *Principal Reporter v K*, [2010] UKSC 56, at [60–1]; *Birmingham City Council v Frisby*, [2011] UKSC 8, at [62]; and *Ahmed v Her Majesty's Treasury*, [2010] UKSC 2 and [2010] UKSC 5, at [112] and [115].

[18] *Amaca Pty Ltd (Under NSW Administered Winding Up) v Booth*, (2011) 86 ALJR 172, at [52], [81–2], and [86–7], referring to *Knowsley MBC v Willmore*, [2011] UKSC 10, at [18], [80–1], [104], and [191].

[19] *Moti v The Queen*, (2011) 86 ALJR 117, at [48] and [52], referring to *Lucasfilm Ltd v Ainsworth*, [2011] UKSC 39, at [60–8] and [85–6].

[20] *Momcilovic v The Queen*, *supra*, note 17.

[21] *Cf. ibid*., at [37–51], [146(i)–(iii)], [148–61], and [541–76].

[22] [2003] 1 AC 32.

[23] *Amaca Pty Ltd (Under NSW Administered Winding Up) v Booth*, *supra*, note 18, at [52–3] and [81–2].

[24] *Knowsley MBC v Willmore*, *supra*, note 18.

[25] *Lucasfilm Ltd v Ainsworth*, *supra*, note 19, at [50–87].

or doctrines usually placed under the heading 'act of state' finds evident reflection in the reasons of the plurality in the High Court decision of *Moti v The Queen*.[26] So too the discussion by the Supreme Court in *A v Essex County Council*[27] of when a case has such bleak prospects of success that it should be terminated summarily finds more than echoes in what was said by the High Court in *Spencer v The Commonwealth*.[28]

The traffic is not one way. From time to time the Supreme Court has looked to the work of the High Court. An elementary search on BAILII[29] reveals 16 cases before the Supreme Court in which there has been reference to cases reported in the *Commonwealth Law Reports*: in fields as diverse as refugee law,[30] application of the doctrine of act of state,[31] the intersection between statutory insolvency regimes and private contracts,[32] and the compulsory acquisition of land.[33] Examination of decisions such as *HJ (Iran) v Secretary of State for the Home Department*[34] shows that the work of the High Court can be very important to decisions of the Supreme Court. In *HJ*, Lord Rodger (with whom Lords Walker,[35] Collins,[36] and Dyson[37] agreed) followed[38] the decision of the majority of the High Court in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*.[39] The headnote to the Supreme Court's decision rightly records

[26] *Moti v The Queen*, *supra*, note 19, at [48–52].

[27] *A v Essex County Council*, *supra*, note 14, at [44], [57], [133], and [163–4].

[28] *Spencer v The Commonwealth*, *supra*, note 14, at [24]; *cf*., at [57].

[29] *British and Irish Legal Information Institute* <http://www.bailii.org/> [last accessed 31 January 2012].

[30] *HJ (Iran) v Secretary of State for the Home Department*, [2010] UKSC 31, referring at points too numerous to list to *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*, (2003) 216 CLR 473; *Applicant A v Minister for Immigration and Ethnic Affairs*, (1997) 190 CLR 225; *SZATV v Minister for Immigration and Citizenship*, (2007) 233 CLR 18; and *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*, (2005) 79 ALJR 1142.

[31] *Lucasfilm Ltd v Ainsworth*, *supra*, note 19, at [60] and [63–8], referring to *Potter v Broken Hill Pty Co Ltd*, (1906) 3 CLR 479, at 495, 498–9, 502–3, and 513.

[32] *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd*, [2011] UKSC 38, at [13] and [161], referring to *International Air Transport Association v Ansett Australia Holdings Ltd*, (2008) 234 CLR 151, at [74] and [76].

[33] *R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council*, [2010] UKSC 20, at [11], [38], and [81], referring to *Clunies-Ross v The Commonwealth*, (1984) 155 CLR 193, at 199; and *R & R Fazzolari Pty Ltd v Parramatta City Council*, (2009) 237 CLR 603, at [40] and [42–3].

[34] *HJ (Iran) v Secretary of State for the Home Department*, *supra*, note 30.

[35] *Ibid.*, at [86].

[36] *Ibid.*, at [100].

[37] *Ibid.*, at [108].

[38] *Ibid.*, at [69].

[39] *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*, *supra*, note 30.

that *Applicant S395/2002* was "applied".[40] And there are other, briefer references to be found in a range of different kinds of matter, including criminal cases[41] and cases[42] about the 1980 Hague Convention on the Civil Aspects of International Child Abduction.[43] To Australian eyes it is, perhaps, a little surprising that there is not more extensive reference to the work that the High Court has done for so many years in relation to constitutional issues of a kind that seem not very different from those presented by the Scotland Act 1998,[44] but that may be dismissed as a needlessly parochial view. What is clear is that it may confidently be expected that the Supreme Court will continue to look to the work of other courts of final appeal in the common law world, including the High Court, as it sets about its work.

How often each Court looks to the work of the other is ultimately determined by considerations of the kind mentioned at the start of this piece. The work of the courts in Australia and in the United Kingdom, including the work of the High Court of Australia and the UK Supreme Court, reflects the social issues of the time and the place. Because the work reflects the society in which the issues are litigated, it is inevitable that the courts of each country confront different issues. And if the issues differ, there is less opportunity for the consideration and adoption of what has been done in the courts of the other country.

Perhaps the issues that we confront in courts of final appeal will converge. Whether or not that is so, the work of the UK Supreme Court now repays, and in the future will continue to repay, the closest attention by any other common law court of final appeal. Australia is no exception to that general rule. As time passes, the ways in which the Supreme Court does its work will very likely change, if only because the way in which all courts of final appeal do their work continues (and should continue) to change and evolve. And who knows what changes will follow as the separation—both physically and institutionally[45]—from the House of Lords becomes an unremarked and accepted fact of distant memory. What will not change is the Supreme Court's unshakeable fidelity to the principled development of the law. That is why its work is and

[40] *HJ (Iran) v Secretary of State for the Home Department*, *supra*, note 30.

[41] *R v Horncastle*, [2009] UKSC 14, at [4–5], referring to *Bannon v The Queen*, (1995) 185 CLR 1, at 12–13, 24–5, 28, and 40–1.

[42] *Re E (Children)*, [2011] UKSC 27, at [12] and [31], referring to *Minister for Immigration and Ethnic Affairs v Teoh*, (1995) 183 CLR 273, at 292; and *DP v Commonwealth Central Authority*, (2001) 206 CLR 401, at [9] and [44].

[43] 1343 UNTS 89.

[44] *Cf*., *Martin v HM Advocate*, 2010 SLT 412.

[45] *Cf*., Lord Walker, 'Moving In and Moving On—One Justice's View', (2011) 7(2) *Cambridge Student Law Review* 1.

will remain central to the knowledge of the well-furnished Australian lawyer and the judge who seeks a principled answer to issues tendered for decision.

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Comparative Law in the Supreme Court 2010–11

Professor John Bell[*]

The use of comparative law by highest courts has been the subject of much writing among comparative lawyers in recent years. It is taken to be one of the indicators that legal systems are not self-contained but develop as a result of ideas coming from outside as well as from inside the system. In addition, it is seen as evidence of the increasing globalisation of the law. Such potentially expansive claims from the importance of comparative law as a judicial method of decision-making need to be put in context. Two recent contributions, by the late Lord Bingham and by Dr Elaine Mak, suggest a more limited role for comparative law, and this is borne out by the practice in the Supreme Court in 2010–11.

In his Hamlyn Lectures of 2009, Lord Bingham said:

> If…it is true, as I think it is, that modern British judges are on the whole more inclined than their forebears to consider the effect of foreign authority in appropriate cases, the case should not be put too high. It is not easy, if indeed it is possible, to identify cases in which resort to foreign authority (I am excluding cases relating to the law of the EU, international law and human rights law) can be confidently said to have had a decisive effect on the outcome in the sense that the judge would have decided differently but for the foreign authority. We should not, I think, regard foreign authority as a match-winner, a magical ace of trumps. But there are perhaps two situations in which foreign authority may exert a significant if not a decisive influence. One is where domestic authority points towards an answer that seems in appropriate or unjust. The other is where domestic authority appears to yield no clear answer. In such situations…the courts have proved willing to take notice of, and give weight to, solutions developed elsewhere.[1]

Two of the areas which Lord Bingham used as illustrations of the use of foreign law recurred in 2010–11. The area of the immunity in tort for those involved

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[1] T. Bingham, *Widening Horizons* (CUP, 2010), at 7–8.

in court proceedings reprised the arguments in *Arthur J.S. Hall & Co. v Simons*,[2] which concerned the liability of barristers. There Commonwealth case law was cited. In *Jones v Kaney*,[3] the issue was the immunity of expert witnesses and was decided principally with reference to the principles enunciated in *Hall* and the need for consistent treatment of those involved in the court process. A further weighty argument was the absence of sound empirical evidence that, without immunity, experts would be less willing to testify in court. The experience of other Commonwealth and United States jurisdictions was cited by some of the Supreme Court justices, but only as a way of checking that no relevant argument had been ignored.[4] The second case concerned the issue of proof of causation in tort actions relating to the effects of asbestos in *Fairchild v Glenhaven Funeral Services Ltd*,[5] in which case law from a range of United States, Commonwealth and European civilian jurisdictions was cited. The issue came back to the Supreme Court in *Knowsley MBC v Willmore*,[6] in order to determine the effect of Section 3 of the Compensation Act 2006. The decision in the case turned on the interpretation of the Act and the scope of the *Fairchild* approach to the proof of causation in negligence—whether it applied to 'single exposure' cases. There was significant discussion of the submissions made by counsel for the defendants which related to the United States experience of proof of causation in 'toxic tort' cases. A number of justices included this as demonstrating the limits of epidemiological evidence and thus closing off a potential line of argument.[7] Indeed, Lord Mance considered that he needed more argument before coming to a view on whether epidemiological evidence could be used to prove causation.[8]

Elaine Mak in her interviews with the Supreme Court justices differentiated between cases where the subject matter of the case required consideration of foreign national law (*e.g.*, the conflict of laws or extradition) and where it was merely a means of gathering information towards a decision.[9] An example of the former is *Revenue and Customs Commissioners v Tower MCashback LLP 1*,[10]

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[2] [2002] 1 AC 615; *ibid*., at 11–13.

[3] [2011] UKSC 13.

[4] See Lord Collins, *ibid*., at [75–81]; Lord Dyson, *ibid*., at [105]; and Lord Hope, *ibid*., at [157] and [172].

[5] [2003] 1 AC 32; *supra*, note 1, at 3–16.

[6] [2011] UKSC 10.

[7] See Lord Phillips, *ibid*., at [85–9] and [97–9]; Lord Rodger, *ibid*., at [154] and [156]; and Lord Dyson, *ibid*., at [217].

[8] *Ibid.*, at [194].

[9] E. Mak, 'Why do Dutch and UK Judges cite Foreign Law', (2011) *CLJ* 420, at 443.

[10] [2011] UKSC 19, at [15–19].

where there was discussion of the French legal term *erreur judiciaire* as a way of throwing light on the meaning of "miscarriage of justice" in Section 133 of the Criminal Justice Act 1988. The Act had implemented a provision of the UN International Covenant on Civil and Political Rights 1966,[11] for which French was an authentic language. In *Patmalniece v Secretary of State for Work and Pensions*,[12] there was an incidental reference to Latvian social security law in a question about rights under UK social security law for an EU national.

So the principal area for discussion, Mak considers, is where the foreign law is used as part of the information gathering exercise. In this case, she argues that relevant materials may be 'cherry picked' so that only those supporting their argument may be cited. At the same time, they thought it only courteous to cite materials included in the argument of the case.[13] The use in *Knowsley* very much reflects courtesy to counsel, who had presented the material at length and so merited a response, even if it was not very positive. Certainly Lord Mance's comments reflect a concern to show that he had considered the material, even if he felt he could come to a decision without having to make a final decision on the value of that material. There are undoubtedly issues of personal style. So Lords Collins and Dyson were more likely to discuss foreign law materials than, say Lord Brown, who usually considered that he could decide the case without it.

Uses that Mak identified included where the subject-matter of the case was of public importance or where the judges wanted to find a yardstick for measuring the appropriateness of a solution. A good example is the '*Star Wars*' decision.[14] This involved claims brought in respect of infringement of copyright in the reproduction of helmets originally commissioned for the film *Star Wars*. The first part of the action related to whether the defendant had breached English copyright law. Giving the main judgment of the case, Lords Walker and Collins discussed New Zealand case law interpreting the notion of 'sculpture' within copyright legislation similar to the English law. That decision (on whether a Frisbee was a 'sculpture') provided support for the view that a helmet did not come within the class of objects for which copyright protection was given under English law.[15] The second aspect of the decision was whether an action could be brought in England for the breach of a foreign copyright. The argument that the matter was not justiciable involved extending the rule in

[11] 999 UNTS 171.
[12] [2011] UKSC 11.
[13] *Supra*, note 9, at 445.
[14] *Lucasfilm Ltd v Ainsworth*, [2011] UKSC 39.
[15] *Ibid.*, at [30–5].

British South Africa Co v Companhia de Moçambique[16] that the English court has no jurisdiction to entertain an action for the determination of the title to, or the right to possession of, foreign land, or the recovery of damages for trespass to such land, to matters involving foreign intellectual property. The conflict of laws is a matter on which Lord Collins, as editor of Dicey and Morris, *Conflict of Laws*,[17] is an acknowledged expert. It is therefore not surprising that his erudition is reflected in his extensive discussion of Commonwealth and United States cases, as well as the principles developed by the American Law Institute and the European Union Max Planck Group on the Conflict of Laws.[18]

To a more limited extent, *R v Chaytor*[19] also shows the use of foreign materials with English law roots where there is a gap in English law. Here the question was whether criminal proceedings could be brought against Members of Parliament for offences in connection with their claims for parliamentary expenses. The defendants argued that Section 9 of the Bill of Rights Act 1689 precluded this, since the actions were proceedings in Parliament. The Supreme Court relied on two Privy Council decisions from Sri Lanka and New Zealand on similar provisions. But, in these cases, the judges were English and drawing analogies in foreign cases to their views of English law. So, in a sense, they were more like *obiter dicta* in an English case, rather than the interpretation of a foreign law.

This limited selection of cases confirms Lord Bingham's view that a foreign legal judgment is not a defining reason for a UK judicial decision. As Mak suggests, it is more of a benchmark of the rightness of what the justices think is the appropriate English law solution. If a foreign court has decided a similar point, it is sensible to consider whether that solution reveals anything useful about whether it would be an appropriate decision in an English, Welsh, Scots, or Irish context.

Readers may wonder why there was so little reference to decisions of European national courts. The answer is given by the parenthesis in the quotation from Lord Bingham. A very large number of the cases before the Supreme Court involved the application of the European Convention on Human Rights[20] or European Union law. For that reason, he devoted the third of his Hamlyn lectures to the application of international instruments as a vector for the widening of British judicial horizons. There were a large number of references to

[16] [1893] AC 602.
[17] L. Collins, *et al*., (eds), *The Conflict of Laws* (Sweet & Maxwell, 2006).
[18] See, *e.g*., *supra*, note 14, at [65], [81–6],[93–4], and [99–100].
[19] [2010] UKSC 52, at [33–4].
[20] 213 UNTS 221.

the decisions of the courts of Strasbourg and Luxembourg. It is through those decisions that the state of the law in other European countries comes to the notice of the UK justices. Strasbourg and Luxembourg consider the different ways a common problem is handled by national courts and select a permitted range of acceptable solutions (often by deferring to national decisions, rather than imposing a single right answer). As a result, it is not necessary for lawyers or justices to look directly at national law. Indeed, there was no serious discussion of the rules of European national laws in 2010 similar to that which Lord Bingham identified in *Fairchild*.

If the paucity of decisions in 2010–11 which directly discuss foreign law might at first sight disappoint the comparative lawyer, it actually reflects the recent analyses of the widening horizons of UK judges. A prudent and careful use of foreign law as a benchmark when needed, combined with the overwhelming importance of international instruments,[21] suggests that UK national laws cannot be viewed as self-contained and that the Supreme Court is very open to look at a variety of sources when value can be added to the justifications for their decisions by doing so.

[21] See also *Re E (Children)*, [2011] UKSC 27, on the Hague Convention on the Civil Aspects of Child Abduction 1980, 1343 UNTS 89.

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The Supreme Court and the New Judicial Independence

Lorne Neudorf[*]

Abstract
In this article, the author argues that the establishment of the Supreme Court imported a new and much broader conception of judicial independence into the constitutional landscape that goes beyond protecting judicial decision-making in individual cases from direct interference by the executive and the legislature: the Supreme Court now interacts with the other branches of government as a distinct institution instead of working alongside them as a component of Parliament. It is argued that the new judicial independence demands institutional autonomy and increasingly formal interactions between the judiciary and the other branches. The article then considers the implications of the new judicial independence in terms of the legitimacy of judicial lawmaking by the Supreme Court, offering a comparison with the experience of the apex courts of Canada and the United States.

1 Introduction

Has public confidence in the courts increased now that the highest judges in the land decide their cases in splendid solitude? In June of 2003, the Blair Government announced that it would create a new court sitting at the apex

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of the British judicial system.[1] While the need for a final court of appeal distinct from the House of Lords had been the subject of a perennial academic debate prior to the announcement, the Government initially expressed little interest in stripping Parliament of its 600 year old judicial function, having rejected the idea only two years earlier.[2] To explain its sudden *volte-face*, the Government posited that judicial independence and the separation of powers required it to extract judges from the legislative branch. Moving that the bill creating the Supreme Court be read for a second time in the House of Commons, the Under-Secretary for Constitutional Affairs stated that the new institutional arrangements would put "beyond any doubt the independence from politics and the legislature of the highest appellate court in the United Kingdom".[3] Given that judges do "something different" from Parliament they should "be doing it separately, and should be *clearly seen* to be doing it separately".[4] More than six years after the announcement, a panel of Supreme Court justices began to hear arguments in their first case.

It is arguably a difficult task to improve confidence in the courts of a country where an impartial and independent judiciary has most clearly flourished.[5] Perhaps it is more pertinent to consider whether the public has even noticed the new Court. If Joshua Rozenberg's contribution to this issue is any indication,

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[1] The Supreme Court was initially conceived of as a court of final appeal for England and Wales; however, the Government later clarified that the Supreme Court would operate as a court of last resort for most matters throughout the United Kingdom.

[2] Royal Commission on the Reform of the House of Lords, 'A House for the Future', January 2000, at ch. 9 <http://www.archive.official-documents.co.uk/document/cm45/4534/contents.htm> [last accessed 30 April 2012]. The Commission's report pointed to a number of benefits of judicial participation in Parliamentary proceedings, such as the increased judicial awareness of "the broader policy context in which legislation and policies are formulated". In the Commission's view, Parliament's judicial function did not "undermine the independence of the judiciary or public confidence in the judiciary", and the Commission concluded that there was "no reason why the second chamber should not continue to exercise … judicial functions". See also 'The House of Lords: Completing the Reform', 7 November 2001, at [82] <http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/constitution/holref/holreform.htm> [last accessed 30 April 2012], in which the Government stated that it was "committed to maintaining judicial membership within the House of Lords".

[3] C. Leslie, 'Members in the Commons Hansard Debates text for Monday 17 Jan 2005', vol. 429, part 22, at col. 554 <http://www.publications.parliament.uk/pa/cm200405/cmhansrd/vo050117/debtext/50117-07.htm> [last accessed 30 April 2012]. The legislation was originally introduced in the House of Lords on 24 February 2004 as the Constitutional Reform Bill, no. 30 of 2003–2004, to which the Lords made a number of substantial amendments.

[4] *Ibid*., at col. 563 (emphasis added).

[5] M. Shapiro, *Courts* (University of Chicago Press, 1988), at viii.

the Court's ambition to create a public profile has failed to meet expectations.[6] Despite prime-time television documentaries and a series of public relations activities, including the publication of a press summary alongside each written judgment, and a Twitter account, the Supreme Court has been unable to capture the public attention for more than a fleeting moment.[7] We should not be surprised, however, by the lack of interest. In the United States, where the Supreme Court commands extensive and on-going media attention, surveys repeatedly confirm that Americans "evince little or no knowledge of or concern for the Court".[8]

Yet public indifference tends to mask the constitutional transformation that lies behind the creation of the Supreme Court. The Government downplayed the impact of these constitutional changes by claiming that the Court would merely clarify the position of the judiciary within the British constitutional order.[9] On the contrary, the separation of judges from Parliament set in motion significant change that will become apparent only over time. Although it is not possible to predict the precise consequences of this change, this article discusses the implications arising from the creation of the Supreme Court, which imported a new and much broader conception of judicial independence into the constitutional landscape. It is argued that, over time, the new judicial independence will recast the relationship between the judiciary and the other branches of the government and raise questions about the legitimacy of the lawmaking activities of an institutionally autonomous, and unelected, Supreme Court.

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[6] J. Rozenberg, 'The Media and the UK Supreme Court', *infra*, at 44.

[7] The BBC, for example, advertised its documentary on the Supreme Court, 'The Highest Court in the Land: Justice Makers', in the following terms: "They are the UK's most powerful arbiters of justice and now, for the first time, four of the Justices of the Supreme Court talk frankly and openly about the nature of justice and how they make their decisions." <http://www.bbc.co.uk/programmes/b00xz0s5> [last accessed 30 April 2012].

[8] G.A. Caldeira, 'Neither the Purse nor the Sword: Dynamics of Public Confidence in the Supreme Court', (1986) 80(4) *American Pol. Sci. Rev*. 1209, at 1223.

[9] Although this argument was not entirely convincing given that the Government referred to the judicial function as courts doing 'something different' from the legislative branch: *supra*, note 3, at col. 563.

2 Importing the new judicial independence: The importance of informal constraints

Unwritten conventions[10] are a defining feature of the British constitution, serving to regulate the activities of and between governmental actors. Being unenforceable in the courts, constitutional conventions operate as informal constraints rooted in shared political values and the application and practice of those values over time. While the non-legal status of informal constraints engenders anxiety in some quarters given the absence of judicial sanction,[11] the upside is that conventions can be easily extended to accommodate new circumstances. By focusing on values instead of rigid rules, conventions also have the flexibility to evolve to meet contemporary challenges. Although informal constraints are premised on values, they do not work in isolation from formal rules: there is often a symbiotic relationship between them. Conventions tend to grow up around rules that embody a fundamental value, filling gaps and furthering the underlying purpose of the rules to circumstances beyond their immediate application.

By way of illustration, the Act of Settlement 1701 supplied English judges with only two guarantees: payment of salary and tenure of office during good behaviour. While the enactment of those rules was undoubtedly a tremendous achievement at the time, given the unenviable position of the judiciary in the tug-of-war between the King and Parliament prior to the Glorious Revolution, they established precise and fixed limitations on the interaction between judges and the other branches of government. Guarantees of salary and tenure responded to the two ways in which judges had been previously manipulated by the King and Parliament: threats to withhold remuneration or dismissal from office.[12] While the Act of Settlement condemned those methods of interference, its simple rules could not regulate the complexity of the on-going day-to-day interactions between judges and the other branches of government. Instead, the Act of Settlement's underlying commitment to a judicial decision-making pro-

[10] Conventions are unwritten in the sense that they are not codified or enforced by the courts as formal legal rules, unlike statutory legislation: see, *e.g.*, G. Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (OUP, 1987).

[11] See, *e.g.*, the majority opinion of Chief Justice Lamer in *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3, at [141]; although there is no legal sanction for a breach of a constitutional convention, there may be a political cost.

[12] S. Shetreet, 'Judicial Independence: New Conceptual Dimensions and Contemporary Challenges' in S. Shetreet and J. Deschênes (eds), *Judicial Independence: The Contemporary Debate* (Nijhoff, 1985), 590, at 600–602; and Shapiro, *supra*, note 5, at 98.

cess free from manipulation by the executive and legislative branches enabled the value of judicial independence to flourish.

Over time, constitutional conventions grew up and around the value of preserving the decisional autonomy of judges in a range of interactions with the executive and legislative branches of government. These conventions include limits on judicial testimony before Parliamentary committees, such as the *sub judice* convention that restricts Parliamentary discussion of matters awaiting adjudication in the courts;[13] limitations on a minister's public comments critical of judges or judgments;[14] limitations on the manner and form of communication between the executive and the judiciary to reduce the opportunity for a minister to have special access to a judge;[15] and a convention that only Law Lords would participate in deciding appeals as opposed to the general membership of the House.[16]

By removing judges from the House of Lords, the Supreme Court swept away the constitutional conventions that had grown up to protect decision-making for judges working *within* the institution of Parliament. Many of those conventions are, of course, no longer needed given that the judges now comfortably work within their own institution. The creation of the Supreme Court thus presents an opportunity for the growth of new informal constraints to govern the judiciary's new *institutional relationship* with the other branches of government.

Like the Act of Settlement, the legislation establishing the Supreme Court embodies a particular conception of judicial independence. Unlike the Act of Settlement, this conception goes beyond protecting judicial decision-making from direct interference by the executive and the legislature: the Supreme Court now interacts with the other branches of government as a distinct institution instead of working alongside them as a component of Parliament. These

[13] R. Kelly and the Parliament and Constitution Centre, 'The sub judice rule', 31 July 2007, standard note SN/PC/1141 <http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-01141.pdf> [last accessed 30 April 2012].

[14] Lords Select Committee on the Constitution, 'Sixth Report' Session 2006–07, at ch. 2 <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15104.htm> [last accessed 30 April 2012].

[15] *Ibid*.

[16] *Ibid*. Lady Hale commented on these conventions shortly before the creation of the new Supreme Court by observing that, "[p]eople go on the way they go on, and it's what people do, rather than the institutions that matter. We are independent as members of the House of Lords. We do our job independently of the Parliamentarians, albeit in the same building": D. Pimentel, 'Reframing the Independence v. Accountability Debate: Defining Judicial Structure in Light of Judges Courage and Integrity', (2009) 57 *Clev. St. L. Rev.* 1, at 14.

institutional arrangements reflect a new and much broader conception of judicial independence. The new judicial independence demands institutional autonomy and increasingly formal interactions between the judiciary on the one hand and the executive and legislative branches on the other hand. Constitutional conventions will grow up to support this new vision of judicial independence over time, which comes at the expense of a loss of flexibility in the traditionally dynamic intergovernmental relationships of the Westminster system of government.[17]

Where did the new judicial independence come from? Given prevailing trends, it is hardly surprising that the Government bought into an expanded notion of judicial independence in creating the Supreme Court. If anything, it is surprising that the importation of the new judicial independence to the United Kingdom took as long as it did. In recent decades, the institutional independence of the judiciary has grown in popularity along with the transformation of the judicial role and expanding judicial power in many democratic states.[18] A proliferation of international standards, such as the UN Basic Principles on the Independence of the Judiciary, promotes extensive guarantees of judicial freedom as an international standard and accepted best practice.[19] For example, the Basic Principles broadly set out that judges must perform their functions "without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason".[20] Furthermore, it is hard to argue against the perceived benefits of the new judicial

[17] British judges have traditionally relied on non-judicial constitutional actors to defend their independence: see G. Gee, 'Defending Judicial Independence in the British Constitution' in A. Dodek and L. Sossin, *Judicial Independence in Context* (Irwin Law, 2010), 381.

[18] See, *e.g.*, C. Guarnieri, P. Pederzoli, and C.A. Thomas, *The Power of Judges: A Comparative Study of Courts and Democracy* (OUP, 2002); notably, judicial power is also on the increase in some authoritarian states, where an independent judiciary may enhance the legitimacy of the governing regime: T. Ginsburg and T. Moustafa, *Rule by Law: The Politics of Courts in Authoritarian Regimes* (CUP, 2008).

[19] See *e.g.*, J. Crawford and J. McIntyre, 'The Independence and Impartiality of the "International Judiciary"' in S. Shetreet and C. Forsyth, *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Nijhoff, 2011), 187; and S. Shetreet, 'The Normative Cycle of Shaping Judicial Independence in Domestic and International Law: The Mutual Impact of National and International Jurisprudence and Contemporary Practical and Conceptual Challenges', (2009–10) 10 *Chicago J. Int'l. L.* 275.

[20] 'Basic Principles on the Independence of the Judiciary', adopted at the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held in Milan in 1985, endorsed by GA Resolution 40/32, 29 November 1985, A/RES/40/32, and GA Resolution 40/146, 13 December 1985, A/RES/40/32 <http://www2.ohchr.org/english/law/indjudiciary.htm> [last accessed 30 April 2012].

independence, which include improved social stability and economic growth.[21]

The new judicial independence is already at work in the United Kingdom. Since the creation of the Supreme Court, judges have sharpened their criticism of government legislation and policies that are seen to touch upon their institutional autonomy. By harnessing the rhetorical power of the language of rights and the rule of law, along with the persuasive power of public pressure, the judiciary has assertively sought to forge a more formal relationship with the other branches. For example, in a public speech delivered at University College London in February of 2011, Lord Phillips, President of the Supreme Court, stated that judicial independence is essential to the rule of law, which forms the bedrock of a democratic society.[22] In order to ensure that judges can effectively carry out their duty to protect the rights of citizens and uphold the rule of law, judicial independence requires judges to be "free of personal pressures *and institutionally independent*, that is free of pressure from the State".[23] Lord Phillips evaluated the Supreme Court's judicial selection process, its funding arrangements, and questions relating to staffing and administration in light of the new judicial independence. In terms of funding, Lord Phillips concluded that ongoing negotiations between the Supreme Court and the Ministry of Justice to determine the Court's operating budget do "not satisfactorily guarantee our institutional independence".[24] In an exceptional illustration of the new judicial independence, Lord Phillips pointedly criticised the Ministry of Justice for using funding as the means "to gain the Supreme Court as an outlying part of its empire".[25]

3 Judicial lawmaking and the new judicial independence: Questions of legitimacy

The view of the new judicial independence as a panacea for society's ills tends to ignore more revealing questions about the nature and role of judicial institu-

[21] L. Feld and S. Voigt, 'Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators', CESifo Working Paper No. 906, April 2003 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=395403> [last accessed 30 April 2012].

[22] N. Phillips, 'Judicial Independence', speech delivered at the UCL Constitution Unit's Judicial Independence Research Project launch event, 8 February 2011 <http://www.ucl.ac.uk/constitution-unit/events/judicial-independence-events/lord-phillips-transcript.pdf> [last accessed 2 May 2012].

[23] *Ibid*.

[24] *Ibid*.

[25] *Ibid*.

tions that are useful to consider in light of the creation of the Supreme Court. While a certain degree of independence from litigants, including the Government, serves to protect the perceived impartiality of the trial judge as a third party to resolve a dispute,[26] the case for independence is not quite so obvious for appellate courts given that they are the furthest removed from the dispute itself (and, in fact, the dispute has already been decided by the trial judge). Common law appellate courts do not ordinarily hear new evidence, and in many cases, have no direct contact with the parties. Observers might liken appellate proceedings to an academic debate between lawyers about how a legal rule should be correctly applied and what direction the law should take. The facts giving rise to the proceedings are a sample of the uncertainty or deficiency of a particular legal rule.[27] As a result, lawmaking is the primary judicial function of appellate courts. While judges at all levels make law by incrementally filling gaps in legal rules and applying those rules to novel facts, few courts have the lawmaking *effect* of appellate courts, which serve as a hierarchical control mechanism by binding lower courts to their pronouncements of the law.[28] And despite some limitations, such as the doctrine of *stare decisis* and the court's reliance on the parties to frame the issues for adjudication, judicial lawmaking is an especially significant activity at the Supreme Court, where only fifty to sixty cases are selected each year to settle the most important points of law.[29]

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[26] Although it is difficult for judicial independence to maintain the third party status of the judge in cases that engage the social control function of the judiciary, such as criminal law trials. For a discussion of judicial impartiality and the ancient pedigree of judicial independence, see L. Neudorf, 'Judicial Independence: The Judge as a Third Party to the Dispute', LL.M. thesis, Institute of Comparative Law, McGill University, 1 February 2009 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1597341> [last accessed 2 May 2012].

[27] Shapiro, *supra*, note 5, at 49–56. Common law appellate courts have developed a practice that allows only questions of law to be considered on appeal; the trial judge's finding of the facts must stand, barring exceptional circumstances: see *Gross v Lewis Hillman*, [1970] Chancery 445, at 459F, where Lord Justice Cross wrote, "A Court of Appeal is not entitled to disturb findings of fact made by the trial judge, which depend to any appreciable extent on the view that he took as to the truthfulness or untruthfulness of a witness whom he has seen and heard, and the Court of Appeal will not do so unless it is completely satisfied that the judge was wrong. It is not enough that it has doubts, even grave doubts, as to the correctness of the judge's finding. It must be convinced that he was wrong." See also *Thomas v Thomas*, [1947] AC 484, at 486–7, per Viscount Simon.

[28] Shapiro, *ibid*., at 39 and 49–56.

[29] The Supreme Court's website states that the Court "concentrates on cases of the greatest public and constitutional importance": Supreme Court of the United Kingdom, 'Role of the Supreme Court' <http://www.supremecourt.gov.uk/about/role-of-the-supreme-court.html> [last accessed 2 May 2012].

The range of claims that now appear before the courts could scarcely have been imagined a generation ago, calling upon courts to make law in a vast array of cases. In the 2010–11 legal year, for example, the Supreme Court considered the suitability of night-time incontinence pads for a person suffering from mobility issues in terms of meeting the local authority's duties under disability legislation,[30] what constitutes 'sea fish' or 'sea fish products' landed in the United Kingdom for the purpose of a statutory levy,[31] who bears the cost of damage to an oil rig under a contract of insurance while the rig was towed from Texas to Malaysia,[32] the legality of a three-bedroom home disguised as a barn,[33] the artistic purpose or function of the Imperial Stormtrooper helmet used in *Star Wars* as part of a copyright claim,[34] and the effect of a bus lane on several species of bats in terms of the United Kingdom's obligations under a European directive.[35]

English courts have traditionally attempted to maintain a limited interstitial lawmaking role by deferring to Parliamentary legislation and interpreting that legislation in light of Parliament's intention although the clever use of various doctrines, such as the 'clear language' doctrine where legislation trenches on fundamental rights, has enabled judges to exercise considerable control of legislative power in certain cases.[36] The generally deferential and sheltered lawmaking role of the English courts was dramatically changed, however, with the advent of the Human Rights Act 1998, which incorporated the human rights guarantees of the European Convention on Human Rights[37] into domestic law.

[30] *R (McDonald) v Kensington and Chelsea RLBC*, [2011] UKSC 33.

[31] *Bloomsbury International Ltd v Sea Fish Industry Authority*, [2011] UKSC 25.

[32] *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad*, [2011] UKSC 5.

[33] *Secretary of State for Communities and Local Government v Welwyn Hatfield BC*, [2011] UKSC 15.

[34] *Lucasfilm Ltd v Ainsworth*, [2011] UKSC 39.

[35] *Morge v Hampshire County Council*, [2011] UKSC 2.

[36] See, *e.g.*, *ex parte Simms* [2000] 2 AC 115, where Lord Hoffman wrote, at 131, that

> [f]undamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

[37] 213 UNTS 221.

Suddenly the lawmaking activities of English judges were at once both expanded and pushed into a more public forum, requiring judges to adjudicate difficult social and moral questions with widespread implications.

Human rights cases most clearly expose judicial discretion because they call upon judges to interpret and value an individual's claim to a legal right premised on human dignity. Courts must weigh the human right against other legal rights, or the political majority represented by the governmental policy or action in question.[38] While the scope of judicial lawmaking in human rights cases is not unlimited, statutory rights guarantees cast in broad terms combined with a lack of existing case law necessitates judicial choice. It is unsurprising that reasonable and informed minds disagree on how to interpret and apply these 'legalised' human rights and the appropriate balance to be struck between competing interests.[39] Divisions on the Supreme Court reveal the contentious nature of its lawmaking activities: more than a quarter of its judgments in the 2010–11 legal year included at least one dissenting opinion, a disproportionate number of which involved human rights claims.[40] While courts cannot avoid these cases, given that Parliament placed them in the position of adjudicating claims under the Human Rights Act, the question is whether the courts will be capable of maintaining public support for this work in light of the new judicial independence.

As an institution separate from Parliament, the Supreme Court is likely to find itself increasingly drawn into live political issues where litigants have lost in the political arena and turn to the courts for a second 'bite at the cherry' by challenging governmental policy decisions through judicial proceedings. The judicialisation of politics may, in some cases, be driven by the Government itself when it is only too happy to deflect sensitive matters to the courts.[41] The

[38] M. Shapiro, 'Judicial Review in Developed Democracies' in S. Gloppen, R. Gargarella, and E. Skaar (eds), *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (Frank Cass, 2004), 18, at 20–1, describes human rights cases as having an inherent anti-majoritarian dimension. Notably, pursuant to Section 2 of the Human Rights Act 1998, a Minister must make his or her own human rights assessment for proposed legislation by publishing a 'statement of compatibility'.

[39] The government policy or action challenged represents the view of the elected branches on the appropriate balance to be struck between competing interests, presumably including those relating to human rights.

[40] In the 2010–11 legal year, the Supreme Court produced divided judgments in 16 cases (26%); out of its 15 appeals that involved a human rights issue, the Court split in six cases (40%): see the Appendix to this issue, *infra*, at 142.

[41] By way of example, the Canadian Parliament enacted legislation to expand the definition of marriage to include same-sex couples, but only after prompting by the appellate courts

high stakes encourage litigants to devote tremendous resources to persuading judges of their positions and shaping the law. But participation in the courts is not just limited to the parties: Rule 26 of the Supreme Court Rules permits any person with an interest in the proceedings to apply for permission to intervene in an appeal.[42] In the 2010–11 legal year, 42 individuals or groups acted as interveners by submitting written information or making oral argument in 24 appeals, being 41% of the total number of cases heard by the Court.[43] Increasingly, trial participants introduce expert evidence and social science information in support of their positions, in which case the Court transforms into a virtual legislative body by taking into account issues far beyond the confines of the immediate case and its effect on the parties to the underlying dispute.[44] For example, in *Radmacher v Granatino*, a majority of the Court took into account evidence of marital relationships in deciding to change the law of ante-nuptial agreements, observing that "statistics… show that about 45% of marriages are likely to end in divorce".[45] In *Yemshaw v Hounslow LBC*, Lord Rodger's opinion

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of seven provinces, which found that the opposite-sex requirement of marriage infringed the equality guarantee of Section 15 of the *Charter of Rights and Freedoms*. In introducing the marriage legislation, Prime Minister Martin referred to the court decisions more than half a dozen times: P. Martin, 'Statement on the Civil Marriage Act', 16 February 2005, Hansard no. 058, at 1520–50 <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=38&Ses=1&DocId=1640291#SOB-1132346> [last accessed 2 May 2012].

[42] Supreme Court of the United Kingdom, 'The Supreme Court Rules 2009', 2009 No. 1603 (L. 17), at Rule 26 <http://www.supremecourt.gov.uk/docs/uksc_rules_2009.pdf> [last accessed 2 May 2012].

[43] The 24 cases in which an intervener participated in the 2010–11 legal year were *Al Rawi v Security Service*, [2011] UKSC 34; *Baker v Quantum Clothing Group Ltd*, [2011] UKSC 17; *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd*, [2011] UKSC 38; *Birmingham City Council v Frisby*, [2011] UKSC 8; *Bloomsbury International Ltd v Sea Fish Industry Authority*, *supra*, note 31; *Cadder v HM Advocate (Scotland)*, [2010] UKSC 43; *Eba v Advocate General for Scotland*, [2011] UKSC 29; *Home Office v Tariq*, [2011] UKSC 35; *Jivraj v Hashwani*, [2011] UKSC 40; *Manchester City Council v Pinnock*, [2010] UKSC 45 & [2011] UKSC 6; *Patmalniece v Secretary of State for Work and Pensions*, [2011] UKSC 11; *R v Chaytor*, [2010] UKSC 52; *R (GC) v Commissioner of Police of the Metropolis*, [2011] UKSC 21; *R (McDonald) v Kensington and Chelsea RLBC*, *supra*, note 30; *Walumba Lumba (Congo) 1 and 2 v Secretary of State for the Home Department*, [2011] UKSC 12; *R (Cart) v Upper Tribunal*, [2011] UKSC 28; *R (G) v The Governors of X School*, [2011] UKSC 30; *Re E (Children)*, [2011] UKSC 27; *Re MacDermott*, [2011] UKSC 18; *Re McCaughey*, [2011] UKSC 20; *R (SK (Zimbabwe)) v Secretary of State for the Home Department*, [2011] UKSC 23; *Spiller v Joseph*, [2010] UKSC 53; *Yemshaw v Hounslow LBC*, [2011] UKSC 3; and *ZH (Tanzania) v Secretary of State for the Home Department*, [2011] UKSC 4.

[44] Shapiro, *supra*, note 5, at 44; and R. A. Posner, *How Judges Think* (Harvard University Press, 2008).

[45] [2010] UKSC 42, at [7], per Lords Phillips, Hope, Rodger, Walker, Brown, Collins, and Kerr.

considered an article written by a medical doctor that discussed the implications of psychological trauma in deciding to expand the definition of 'violence' under the statutory homelessness scheme.[46] In the same decision, Lord Brown referred to the "extensive material put before us by the [intervener] Woman's Aid Federation of England".[47]

Such cases raise a number of questions relating to the legitimacy of judicial lawmaking, especially as the new judicial independence further isolates courts from branches of the government that claim superior democratic credentials.[48] In appeals that bring contentious political debate into the courtroom, the Supreme Court can no longer claim that it avoids politics. The exercise of judicial discretion will be obvious in many cases, particularly where dissenting opinions plainly reveal an element of judicial choice. It is instructive to observe that the Supreme Court of Canada initially tried to portray itself as a neutral and objective decision-maker under the *Charter of Rights and Freedoms* when it claimed that it could deduce 'objective and manageable standards' to help it decide politically-charged cases.[49] Throughout its early adjudication of *Charter* rights, the Supreme Court of Canada formulated multiple-step legal tests to provide the guise of objectivity to what was often a subjective and political balancing exercise.[50] Finding it increasingly difficult to maintain this appearance, judges eventually acknowledged that choices had to be made in cases with good arguments on both sides, especially in appeals that ended up before the highest court in the land. Justice Beverly McLachlin, now Chief Justice, observed extra-judicially that it was impossible for judges to avoid value judgments and

[46] *Yemshaw*, *supra*, note 43, at [40] and [45].

[47] *Ibid*., at [48].

[48] Increased independence tends to correspondingly result in increased judicial lawmaking: Shapiro, *supra*, note 5, at 30; and J. J. Brudney, 'Recalibrating Federal Judicial Independence', (2003) 64 *Ohio St. L. J*. 149, at 175. In terms of judicial lawmaking, a number of the court's institutional limitations may be problematic, including: party-driven litigation that results in cases and issues appearing before the court in a piecemeal fashion; *ex post facto* judicial review resulting in new interpretations of law that are imposed on parties retroactively; holding decision-makers to potentially unrealistic standards with the benefit of hindsight; prospects of future judicial lawmaking contributing to legal uncertainty; the lack of appropriate remedies in certain cases; and a lack of judicial expertise to issues raised in the proceedings.

[49] *Reference Re s. 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 SCR 486, at 497–99, discussed in A. Petter, '*Charter* Legitimacy on Trial: The Resistible Rise of Substantive Due Process' in A. Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (University of Toronto Press, 2011), 50.

[50] See, *e.g*., the Supreme Court of Canada's decision in *R v Oakes*, [1986] 1 SCR 103, discussed in A. Petter, 'Rip Van Winkle in *Charterland*' in Petter, *ibid*., 135.

that such considerations were 'essentially arbitrary'.[51]

But where do the values that inform judicial lawmaking come from? Increased public awareness of policy choices made by courts could encourage intrusive examinations into judicial personalities. In the United States, for example, Supreme Court nominees are investigated by a Senate committee. Congressional lawmakers, and to a lesser extent the public, seek to know a great deal about the men and women nominated to the Supreme Court: their personal backgrounds, political views, and working habits are both investigated and subject to intense questioning at publicly televised hearings. Commentators see these judicial confirmation hearings as 'bloodbaths' that have the potential to destroy reputations.[52] After President Bush took office in 2001, the *New York Times* ran a front-page story that read, in part:

> They are mobilising troops, developing battle plans and moving their supporters to a state of high alert. Interest groups on the left and the right are busy preparing for the possibility of a Supreme Court vacancy, perhaps as early as summer, and what many predict will be a brutal political war.[53]

The increasing awareness of judicial discretion is also likely to result in demands for a socially representative composition of judges on the higher courts. As observed by Lord Phillips in this issue, the Supreme Court is not yet representative of the people and "[r]adical changes are needed".[54]

Unsurprisingly, public confidence in an institutionally autonomous judiciary tends to correspond with the outcomes of important cases. For example, Terri Jennings Peretti writes that support for the Supreme Court of the United States is based on the substantive results of its decisions as opposed to any kind of 'public reverence' for the judicial role.[55] Peretti concludes that "when the public does evaluate the Court's decisions, it is political factors, particularly agreement with the substance of those decisions", which determine the level of public support.[56] Similarly, after conducting a detailed study on public per-

[51] B. McLachlin, 'The *Charter*: A New Role for the Judiciary?', (1991) 29 *Alta. L. Rev.* 540, at 545–6, discussed in Petter, *ibid*.

[52] M. Mone, 'An Impartial and Independent Judiciary', (2002) 20(4) *Adv. Soc. J.* 15, at 17.

[53] R. Toner, 'Interest Groups Set for Battle on a Supreme Court Vacancy', *The New York Times*, 21 April 2001, A1.

[54] N. Phillips, 'The Birth and First Steps of the UK Supreme Court', *supra*, 9, at 12.

[55] T.J. Peretti, *In Defence of a Political Court* (Princeton University Press, 2001), at 6, 163–77, and 186.

[56] *Ibid*., at 5.

ceptions of the Supreme Court of the United States over 12 years, Gregory A. Caldeira observes that shifts in confidence "march to the beat of a markedly policy-oriented drummer".[57] "[I]n evaluating the justices, the public appears to respond to events on the political landscape and to actions taken by the Supreme Court. If, for example, the Court adopts a position against a law-making majority, the public accordingly exacts a cost in confidence."[58]

Siding with the majority is easier for courts in a federal state that decide cases pitting one level of the government against another. In such cases, the court can always claim the backing of one political majority.[59] How courts maintain public confidence when faced with cases bringing an individual's human rights claim directly against the political majority is a much more difficult question. In the United States, the Supreme Court ended up with 'mixed results' in deciding human rights cases, even after building a foundation of popular support over 130 years of deciding federalism cases (often siding with the federal majority against the states to expand the national market and promote economic growth).[60] The Warren Court's incursion into human rights starting in the 1950s took a strategic approach: according to Martin Shapiro, the celebrated decision of *Brown v Board of Education*[61] ending racial segregation was a compromise in that the Supreme Court ignored the constitutional rights of communists in order to protect African-Americans because it felt that it could not afford to defend both groups.[62]

The effect of judicial lawmaking in human rights cases can be significant. Court decisions may require the Government to deviate from its original policy objectives and exact a significant, and sometimes unintended, cost on broader economic and social concerns. For example, in the Supreme Court of Canada's decision in *Tétrault Gadoury v Canada*,[63] the Court held that a jobseeker's allowance program discriminated on the basis of age given that it did not include workers over the age of sixty-five in the ordinary benefit plan. The financial implication of the Court's decision that resulted in the extension of benefits to this group cost millions of dollars, which required the Government to search for savings within the program. Parliament responded by altering the scheme to reduce the duration of benefits for the unemployed and by tightening eligi-

[57] *Supra*, note 8, at 1223.
[58] *Ibid*., at 1223–4.
[59] Shapiro, *supra*, note 38, at 18.
[60] *Ibid*., at 9–11.
[61] 347 US 483 (1954).
[62] Shapiro, *supra*, note 38, at 12.
[63] *Tétrault Gadoury v Canada*, [1991] 2 SCR 22.

bility restrictions. As a result, 30,000 persons lost their benefits with female, immigrant, elderly, and disabled workers disproportionately affected.[64]

Although *Tétrault Gadoury* involved primary legislation under the *Charter of Rights and Freedoms*, the Canadian context is not entirely dissimilar from the United Kingdom under the Human Rights Act. Pursuant to Section 3(1) of that Act, Parliamentary legislation must be judicially interpreted to conform with human rights, "[s]o far as it is possible to do so". According to the Government's white paper on the Human Rights Act, this power of judicial interpretation,

> goes far beyond the present rule which enables the courts to take the Convention into account in resolving any ambiguity in a legislative provision. The courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so. This 'rule of construction' is to apply to past as well as to future legislation. To the extent that it affects the meaning of a legislative provision, the courts will not be bound by previous interpretations. They will be able to build a new body of case law, taking into account the Convention rights.[65]

Moreover, government policy is increasingly made by the executive through subordinate legislation, which can be struck down by the courts in human rights cases.[66]

Several decisions of the Supreme Court in the 2010–11 legal year resulted in alterations to social schemes with associated funding implications. In *Yemshaw*, for example, the Supreme Court overturned the decision of the Court of Appeal and expanded the definition of 'violence' in housing legislation beyond physical violence to include "threatening or intimidating behaviour and any other form of abuse which, directly or indirectly, may give rise to the risk of harm".[67] The effect of this decision is to capture a larger group of persons who must be provided with housing at the expense of local authorities. Notably, Lord Brown

[64] J. Bakan, *Just Words: Constitutional Rights and Social Wrongs* (University of Toronto Press, 1997), at 59, discussed in A. Petter, 'Conclusion' in Petter, *supra*, note 49, 232.

[65] Secretary of State for the Home Department, 'Rights Brought Home: The Human Rights Bill', October 1997 <http://www.archive.official-documents.co.uk/document/hoffice/rights/chap2.htm> [last accessed 2 May 2012].

[66] In *A (FC) v Secretary of State for the Home Department*, [2004] UKHL 56, for example, a majority of the Law Lords quashed the Government's Human Rights Act 1998 (Designated Derogation) Order 2001.

[67] *Supra*, note 43, at [28].

observed that "Parliament is unlikely to have contemplated or intended" the expanded definition of violence advocated by the majority, but concurred in the result nevertheless.[68]

Judicial lawmaking that touches upon broader economic and social interests is likely to be scrutinised by the other branches of government and the public. Given the institutional autonomy of the judiciary that places it further beyond the influence of the elected branches, how will the Supreme Court be held accountable in its lawmaking activities? By increasing the isolation of judges and courts, the new judicial independence may contribute to a perception that judges are distant and out of touch, deprived by their independence of a window to the outside world.[69] The evidentiary foundation supplied by the parties in appeals may prove incomplete, as was the case in *Tétrault Gadoury*, discussed above.[70] Furthermore, participation by interveners will not always provide an adequate foundation to support the Supreme Court's lawmaking activities given that, almost by definition, the evidence presented will be geared toward advancing particular interests, and not representative of society as a whole. Only those with sufficient resources will be capable of bringing a claim or acting as an intervener, contributing to a distorted view of economic or social issues by limiting participation in judicial lawmaking to a select few who are able to marshal the necessary resources. Before the creation of the Supreme Court, the Law Lords were reminded of the economic implications of their decisions by the judges' woolsack, a wool-stuffed seat introduced into the House of Lords in the 14th century, which reflected the importance of the wool industry to the economic well-being of the country. It is not clear what will keep the Supreme Court connected to prevailing economic issues and social values given its separation from Parliament, where detailed information on economic and social problems is collected and disseminated through the work of committees.

Given the nature of common law judicial precedent, in that courts stand by what has already been decided, precedent in human rights cases will eventually become out of sync with changing social values. Should the Supreme Court change its mind, and the law, to keep pace with the latest trends? The Supreme Court of Canada sees constitutional rights as capable of changing with

[68] *Ibid*., at [47–60].

[69] See, *e.g*., McLachlin, *supra*, note 51, at 543, who writes that "[i]t is obvious that [judges] must remain in touch with the world around them if they are to render relevant and helpful decisions".

[70] *Supra*, note 63, at [55], where Justice La Forest observed that "there was no evidence put forth to show that the government could not afford to extend benefits to those over 65".

the times: judicial precedent is 'essentially secondary' to the supremacy of the legal principles themselves.[71] However, this approach results in legal uncertainty if courts too eagerly abandon their previous decisions in favour of what they see as new or emerging social realities. It also is problematic to the extent that the law is updated on an *ad hoc* basis, relying on those who have the time, energy, and financial resources to challenge the existing law by bringing a case and pursuing it through the appeal process.

4 Conclusion

It is only a matter of time before the Supreme Court will face calls for new measures of accountability to act as a counterweight to the new judicial independence. The trigger may be a high profile and politically-sensitive human rights case. In order to defend the new judicial independence, the Supreme Court must cultivate a public commitment to its lawmaking role by demonstrating governance improvements resulting from the new institutional arrangements.

In Canada, the principal justification for the Supreme Court's role in fundamental rights cases is the 'dialogue theory'. First popularised in a 1997 law review article by Peter W. Hogg and Allison A. Bushell, dialogue theory posits that while judges exercise discretion, they are engaged in an interactive dialogue with the other branches of government about rights issues.[72] The theory places limits on the judicial role by emphasising that Parliament has the final word in the dialogue as a result of the structure of the *Charter of Rights and Freedoms*.[73] Dialogue theory has been expressly endorsed by the Supreme Court of Canada.[74] Yet observers have pointed out that the Canadian dialogue is sometimes more like a judicial monologue given political reluctance to challenge judicial decisions that hold rhetorical advantages, particularly in human rights cases.[75] In the result, legislative 'responses' include the repeal of offending statutory provisions or the taking of other action in direct compliance with judicial directives, such as the *Reference re Manitoba Language Rights* case, where the legislature hastily translated its entire repertoire of statutory legislation into

[71] McLachlin, *supra*, note 51, at 544.

[72] P.W. Hogg and A.A. Bushell, 'The *Charter* Dialogue Between Courts and Legislatures (or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)', (1997) 35 *Osgoode Hall L. J.* 75.

[73] Sections 1 and 33 of the *Charter*, although the Canadian Parliament has been reluctant to invoke these sections.

[74] *Vriend v Alberta*, [1998] 1 SCR 493, at [137–9].

[75] A. Petter, 'Legalise This: The *Chartering* of Canadian Politics' in Petter, *supra*, note 49, 211.

the French language before the Supreme Court of Canada's declaration of invalidity took effect (which would have resulted in a "legal vacuum with consequent legal chaos" given that all statutory instruments exclusively in English were held to be unconstitutional and thus invalid).[76]

Dialogue theory might provide some answers to the legitimacy concerns of judicial lawmaking but it is a descriptive theory in that it does not immediately justify *why* courts should be part of a dialogue in the first place, particularly if there is no such thing as a 'correct' policy answer: what makes judicial values superior to the values of the executive or legislature? Some evidence relating to the improved quality of the democratic process as a result of judicial contributions may be required.[77] Even as a descriptive theory, dialogue offers an idealised view that overstates the Government's participation in the discussion over rights, which is potentially misleading and could increase the comfort of courts to engage in politically-charged lawmaking: dialogue theory cuts against the grain of deference to the elected branches of government by actively seeking out the pronouncements of courts as an important part of the on-going dialogue. Despite these limitations, it seems that some form of dialogue theory looms on the horizon in the United Kingdom given the dialogic structure of the Human Rights Act.[78] It remains to be seen, however, whether the Government will be comfortable sharing governance with the courts and ultimately dencentralising its political power.

A further justification offered for the new judicial independence is the increased capacity of the courts to hold the executive to account. The Supreme Court has seized upon the accountability function to justify its institutional autonomy. In his February 2011 speech, Lord Phillips stated that because "the individual citizen is subject to controls imposed by the executive in respect of almost every aspect of life", courts must review executive actions for legality, and thus "it is from executive pressure or influence that judges require particularly

[76] *Ibid*.; *Reference re Manitoba Language Rights*, [1985] 1 SCR 721.

[77] See, *e.g.*, K. Roach, 'Dialogic Judicial Review and Its Critics' in D. Dyzenhaus, S.R. Moreau, and A. Ripstein (eds), *Law and Morality: Readings in Legal Philosophy*, 3rd ed. (University of Toronto Press, 2007), 589, at 609, who describes dialogue as "a means to manufacture disagreement and to turn complacent majoritarian monologues into democratic, and at times, divisive dialogues", which contributes to democracy by giving the debate a "sharper and clearer edge"; however, this analysis again presumes that the elected branches are capable of an effective response to the legal and rights rhetoric of the courts.

[78] Section 4(2) of the Human Rights Act 1998 authorises courts to issue a 'declaration of incompatibility' with respect to primary legislation that is found by the court to infringe an enumerated right, triggering certain powers for the executive to take remedial action pursuant to Section 10.

to be protected".[79] However, English judges have had little difficulty in holding the executive to account through judicial review for decades, so it is not entirely clear how the new judicial independence enhances this role.[80] If the idea is that the scope and intensity of judicial supervision will be expanded through judicially-constructed rules as a result of the new judicial independence, it raises many of the same legitimacy concerns over judicial lawmaking as previously discussed.

The impact of the new judicial independence on other judicial functions must also be considered. While this article focused on the lawmaking of appellate courts, the functions of the courts cannot be so neatly divided, especially in the public mind. Changes to one judicial function may alter the functioning of others. Emboldened and institutionally autonomous courts, wading deeper into controversial issues pitting individuals against the political majority, may undermine public confidence in the core judicial function of dispute resolution. By revealing the political nature of rights-based adjudication, the decisions of courts in controversial cases may threaten the perceived impartiality of the trial judge in resolving ordinary conflict. Paradoxically, in such a situation, the new judicial independence would counteract the very thing it was designed to do: protect the status of the judge as a third party to the dispute. As a result of this possibility, a critical eye must be cast upon the direction in which the new judicial independence leads the courts to ensure continued public confidence in the administration of justice.

[79] *Supra*, note 22.

[80] English courts have even utilised interpretive techniques to evade statutory provisions purportedly seeking to oust judicial review: see *Anisminic v Foreign Compensation Commission*, [1969] 2 AC 147.

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The Media and the UK Supreme Court

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The Supreme Court is understandably pleased with the "close relationship with media organisations"[1] that its five-person communications team has built up over the past couple of years. In the Court's annual report for 2010/11, it describes two television documentaries broadcast on minority channels as the "highlight of this year".[2] These programmes apparently went down well with members of the public who contacted Court staff after transmission—though neither generated any particular news coverage.

But that is hardly a novelty; there has been very little coverage of the Court in its first two years or so. Though many of its rulings have been reported in the press and some have even made their way onto the television bulletins, it has not yet been asked to decide the sort of 'right-to-life' case that might attract wide public attention. There is little interest in newly-appointed judges. For all the visitors who pop in to use the only free toilets on Parliament Square, the Court remains largely unknown to the British public.

Perhaps that explains why it seized on the Julian Assange case quite so enthusiastically, declaring in December 2011 that the Wikileaks founder would not only be granted permission to appeal against extradition but also that his case would be heard little more than a month later by seven justices instead of the normal five, "given the great public importance of the issue raised".[3]

That issue—which had never struck the law lords as of any importance before—was whether a state could designate a prosecutor as a "judicial authority" within the meaning of the Extradition Act 2003. It would certainly be of great public importance if the Supreme Court were now to tell states that they could not. But what should we read into the decision to assemble a panel of

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[1] The Supreme Court of the United Kingdom, 'The Supreme Court Annual Reports and Accounts, 2010–2011', at 33 <http://www.supremecourt.gov.uk/docs/ar_2010_11.pdf> [last accessed 4 April 2012].

[2] *Ibid.*

[3] The Supreme Court of the United Kingdom, 'Application for Permission to Appeal: Julian Assange v Swedish Judicial Authority', 16 December 2011 <http://www.supremecourt.gov.uk/news/379.html> [last accessed 4 April 2012].

seven judges for the hearing? Does this mean the Supreme Court is gearing up to overturn one of its previous rulings? Or are the justices queueing up to take part in a case in which, for once, the public may be interested?

I say 'may' rather than 'will': there is less interest in Assange than there once was. Those watching the hearing are likely to find the legal arguments pretty arcane unless there is a commentator to explain what is going on.

And it is not just the arguments that people find difficult to follow. The Supreme Court is particularly proud of the press summaries[4] it issues for every case it decides. These are certainly better than nothing: unlike law reports, court judgments do not carry headnotes telling you which side has won. But—in contrast to press releases issued by, for example, the European Court of Human Rights[5]—Supreme Court press summaries do not include a headline or introductory paragraph summarising the result. Normally, you have to persevere until page two to find out whether or not the appeal has been successful. And you can't skip straight to page two because you need to read the first page to know which side had brought the appeal.

The list of forthcoming hearings published each term is much better at this: it uses pithy headlines, such as "what counts as age discrimination?"[6] But the Supreme Court judges are deluding themselves if they think that their press summaries are summaries for the press. They read as if they are written by lawyers for lawyers.

And what about televising the Court's proceedings? There are small video cameras in each courtroom and a feed of the Court's proceedings has been available to broadcasters since the Court opened in 2009. Although providing this resource must be quite a expensive operation, the Court could not afford the extra cost of streaming its proceedings online. Somewhat demeaningly, a commercial broadcaster is now subsidising the Court: since May 2011, hearings have been shown live on the Sky News website.[7]

This is a useful service for those who might wish to follow the argument in an individual case. But its value should not be exaggerated. Only one hearing can be watched although there may be two courts sitting simultaneously. More

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[4] The Supreme Court of the United Kingdom, 'Decided Cases' <http://www.supremecourt.gov.uk/decided-cases/index.html> [last accessed 4 April 2012].

[5] European Court of Human Rights, 'Press Releases' <http://www.echr.coe.int/ECHR/EN/Header/Press/News/Press+releases/> [last accessed 4 April 2012].

[6] Current cases are described at the Supreme Court of the United Kingdom, 'Current Cases' <http://www.supremecourt.gov.uk/current-cases/index.html> [last accessed 4 April 2012].

[7] 'Supreme Court Live', *Sky News* <http://news.sky.com/home/supreme-court> [last accessed 4 April 2012].

importantly, there is no archive of previous hearings through which a viewer may search: unlike the websites for parliamentary broadcasting[8] and the Leveson inquiry,[9] there is no facility for users to watch a significant passage they may have missed. Sky News is providing its service to further a long-term campaign that it hopes will lead to the broadcasting of criminal trials. But the broadcaster knows that—with no oral evidence from victims or witnesses—there is very interest among the public in most cases heard by the Supreme Court.

All-in-all, there is no doubt that the Supreme Court is easier to understand than its predecessor. But it has yet to make the impact it must have hoped for.

[8] Parliament of the United Kingdom, 'Parliament TV' <http://www.parliamentlive.tv/Main/Home.aspx> [last accessed 4 April 2012].

[9] The Leveson Inquiry, 'Hearings' <http://www.levesoninquiry.org.uk/hearings/> [last accessed 4 April 2012].

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Instruments of Law Reform: The Supreme Court and the Law Commissions of the United Kingdom

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Abstract
This article argues that law reform is the pursuit and progressive realisation of the ideal form of law through a programme of positive and significant legal change from within the legal field. The article concludes that the Supreme Court and the Law Commissions are complementary and the only instruments of law reform operating in the United Kingdom today.

1 What is law reform?

Law reform generally refers to programmes designed to change the law. The word 'reform' does not refer simply to any change but implies a positive, and significant, development in the law. For example, no one would suggest that incorporating the 19th century doctrine of coverture into family law, or merely altering the grammar in the income tax legislation, constitutes law reform. Accordingly, two difficulties arise when trying to particularise the meaning of 'law reform'. First, the phrase invokes an opinion about what constitutes a good change in the law. Second, it suggests that law reform involves legal change that results in some form of social impact, whether in the legal field or beyond. These two aspects pose problems for articulating precisely what law reform is because we need to harmonise our subjective views as to what is positive and significant legal change.

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While these subjective aspects underlie the meaning of law reform, the term is undeniably used in practice to refer to the reform of what is colloquially called 'lawyers' law'.[1] That is, matters of primary concern to lawyers and the profession. This manifests in codification, where the object of reform is the consistent and systematic arrangement of a branch of law, and procedural improvements, where the purpose is to reform housekeeping requirements of the justice system.[2] Law reform in practice is often also seen as the abolition of outdated statutes and doctrines, like the abolition of wager of law in 1833. While these examples are all facets of law reform, it would be wrong to describe the meaning of law reform as simply good changes to lawyers' law. To do so would be to fail to fully recognise that law reform implies significant change that originates from, but may extend beyond, the legal field.

1.1 Sources and impact of legal change

While legal change is ultimately a type of social change that takes place in the legal field,[3] we can nevertheless distinguish between the internal and external forces that drive it. Some legal change originates within the legal realm itself and is pursued by lawyers and judges in their professional capacities. This may involve members of the judiciary, who champion the reform of an area of the law by establishing and then maintaining a new doctrine through case law. For example, in *Ghaidan v Godin-Mendoza*,[4] the House of Lords construed 'husband and wife' under the Rent Act 1977 to protect same-sex partners by using the interpretative power under Section 3 of the Human Rights Act 1998. Likewise, courts expanded the equitable doctrine of breach of confidence to protect the reasonable expectation of privacy in the cases of *Douglas v Hello!*[5] and *Campbell v MGN*.[6]

Legal change also originates outside of this realm when social, economic, and political factors become pressing upon the legal system. Demands for legal change are frequently exogenous and are driven by interest groups, government departments, and public opinion. Lobbying, editorials, and protests are but a

[1] R. Gibson, 'Machinery and Responsibilities', in G. Zellick (ed), *The Law Commission and Law Reform* (Sweet & Maxwell, 1988), at 44.

[2] L. Friedman, 'Law Reform in Historical Perspective', (1969) 13 *St. Louis University Law Journal* 351.

[3] See P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field', (1986) 38(5) *Hastings Law Journal* 805, at 806 (R. Terdiman trans.).

[4] [2004] UKHL 30.

[5] [2005] EWCA Civ 595.

[6] [2004] UKHL 22.

few instances of the world beyond the legal realm making its presence felt on legislative agendas and perhaps even in the minds of those in the judiciary.

Not only can we distinguish between the sources of legal change, but we can also measure their impact on society. Some legal change has an outside impact as a result of its scale and consequence, while others are trivial and have no outwards impact on society. For example, a new statute that merely subtracts a word here or there from previous legislation or corrects poor grammar makes only a slight formal change within the legal realm. In contrast, other legal changes may have greater impact and a ripple-like effect extending beyond the legal realm and into the social world. Major pieces of legislation designed to introduce new economic, political, or social policies and important judicial decisions that lay down new doctrines or sweep older ones away are of this type.

1.2 Categories of legal change

Both internal and external forces can effect legal change. This legal change in turn can have an impact on behaviour both within and outside the legal field. Accordingly, we can categorise the possible variations of legal change with a view to identifying whether they can all be regarded as categories of law reform.[7] The first category is where the source and impact of legal change are both external. Change of this kind, which begin and end in the non-legal world, are virtually never referred to as law reform *per se*. Instead, this category is better described as being that of policymaking and clearly within the realm of politics. For example, the hypothetical situation where complaints are made to the Ombudsman for Health Services about the treatment of the elderly in nursing homes that may lead to widespread public outcry and direct legislative intervention to ensure higher nursing standards. This is an example of policymaking that affects society generally.

The second category is where the source of legal change is external but its impact is internal. In these circumstances, we are presented with another category of policymaking, but one in which the social effect is merely to regulate the legal profession. Take, for instance, the situation where law firms begin advertising their services for personal injury suits on a no win, no fee basis, and the legislature intervenes to regulate such behaviour to stem civil liability suits. This is policymaking that affects the legal realm.

It is really the third and fourth categories of legal change, and not the first two, that can be classified as law reform. The third category is where the source

[7] See *supra*, note 2.

and impact of legal change are both internal. This sort of change is virtually always thought of as proper law reform, associated as it is with formal improvements to aspects of the law by the profession itself. This category is clearly illustrated by the codification and consolidation of legal principles.

The real contention, though, is with the fourth category, where the source of legal change is internal but its impact is external. This category involves situations where lawyers and judges preside upon cases or direct the development of the law in a way that changes the *status quo*. Changes of this kind often provoke those who sound charges of judicial activism and undemocratic judicial policymaking. Regardless, the fourth category arguably best meets the definition of law reform ascribed by this article and, as we will discuss, both the Supreme Court and the Law Commissions have instituted changes of this type.

2 What is the machinery of law reform?

From the discussion above, it is clear that Parliament and political actors can institute legal change. However, they do so from a source that is necessarily external to the legal field and thus they are not truly instruments of law reform. They are lawmakers, not law reformers. The remainder of this article aims to understand the instruments of law reform and the way in which their work contributes to the realisation of the ideal form of law. To this end, two instruments are posited as having a special role in the United Kingdom: the Supreme Court and the Law Commissions.

2.1 The Supreme Court

Superior courts are often accused of taking on policymaking agendas,[8] but are rarely thought of as undertaking programmes of law reform. However, superior courts are frequently regarded as being agents of social change[9] and this is but an extension to their natural role in instituting change in the legal field. As the highest court in the land, the Supreme Court has a special role beyond just presiding over and dispensing justice in individual cases. The Supreme Court has a powerful say over which cases it will hear: focussing on those that are of

[8] R. Aitken, H. Smallwood, and L. Stirton, 'Judicial Politics: Reigning Supreme?', (2011) 161 *New Law Journal* 1671.

[9] R. McKay, 'The Supreme Court as an Instrument of Law Reform', (1969) 13 *St. Louis University Law Journal* 387.

the greatest public and constitutional importance.[10] Indeed, through its selection of cases the Supreme Court can be seen as adopting programmes of law reform by selecting those areas of the law that require adjustment in light of wider social issues. In this way, the Supreme Court is part of the machinery of law reform, constantly reviewing the rules of the land and pursuing the ideal form of law.

The Supreme Court is an instrument of law reform not only because of its role in the making of significant legal decisions, which have far-reaching social consequences, but also because it is an important part of the machinery of government. Recent research using the policy content coding scheme of the UK Policy Agendas Project has analysed the workload of the Supreme Court between October 2009 and July 2011.[11] The results of this study showed that human rights issues dominated the workload of the Supreme Court in its first two years. This may suggest a deliberate focus on these areas, akin to the adoption of programmes of law reform.

It is instructive to look at some of the legal changes that the Supreme Court has instituted. For example, in the context of separation, the decision of *Radmacher v Granatino* overturned as obsolete the rule that prenuptial agreements should not be given effect.[12] Accordingly, the Supreme Court moved away from a long-standing policy based on Section 25 of the Matrimonial Causes Act 1973, which requires the courts and not the parties to determine any award. This decision evidences a clear willingness to respond and review the law in light of social developments.

The Supreme Court's responsiveness to social change and its corresponding willingness to transform this into the legal field was also evident following the global financial crisis.[13] For example, the Supreme Court's approach in *Office of Fair Trading v Abbey National Plc* was one that was sensitive to social context and which led the Court to call for legislative intervention to protect clients and improve consumer protection laws even despite finding in favour of the banks.[14] While the case did not directly lead to legal change, its call for reform is perhaps no different than an unanswered Law Commission proposal to government.

A similar argument has been made with respect to the US Supreme Court,

[10] See the Supreme Court of the United Kingdom, Practice Direction 1 <http://www.supremecourt.gov.uk/docs/pd_01_UKSC.pdf> [last accessed 5 April 2012].

[11] *Supra*, note 8.

[12] [2010] UKSC 42, at [52], per Lord Phillips.

[13] A. Bochon and F. Hobden, 'Politics and the Supreme Court', (2011) 7(2) *Cambridge Student Law Review* 33.

[14] [2009] UKSC 6, at [52], per Lord Walker.

which was described during the 1960s as a potent force for social change through its approach to individual liberties.[15] Since then the US Supreme Court's jurisprudence, like *Roe v Wade*[16] and *Lawrence v Texas*[17] concerning the right to an abortion and the constitutional invalidity of sodomy laws respectively, has only affirmed its approach in keeping law in balance with social developments. This is quintessentially the work of law reform. No different, really, to the abolition of trial by battle in 1819, which had before that time been socially unacceptable but still legally possible.

Even in the context of jurisdictions without a constitutional bill of rights, the highest courts in the land have taken on the mantle of law reform in the context of individual liberties and human rights. Take, for example, the High Court of Australia led by Chief Justice Mason during the 1990s, which implied a constitutional freedom of political communication in *ACTV v Commonwealth*.[18] Nothing evidences the power of courts to transform an area of the law more clearly than the creation of a fundamental freedom. Arguably, the human rights framework adopted in the United Kingdom gives the newly constituted Supreme Court a similar opportunity to adopt programmes of reform and to be a force for positive legal change.

2.2 The Law Commissions

Apart from the Supreme Court, the only other instruments of law reform that operate within the legal field are the Law Commissions of the United Kingdom.[19] Like the Supreme Court, these specialist bodies are independent from government and consist of distinguished legal minds. Lady Hale, for instance, oversaw a number of reforms to family law in her role as a Law Commissioner before assuming her role as a Justice of the Supreme Court.

The Law Commissions Act 1965 envisaged that the Chairman and Commissioners would always be drawn from the bench, professional practice, and academia.[20] Indeed, that has been the practice since the appointment of the Law

[15] *Supra*, note 9, at 402.
[16] 410 US 113 (1973).
[17] 539 US 558 (2003).
[18] (1992) 177 CLR 106.
[19] The Law Commission (for England and Wales) and the Scottish Law Commission were established by Sections 1 and 2 of the Law Commissions Act 1965. Meanwhile, the Northern Ireland Law Commission was established in 2007 pursuant to the Justice (Northern Ireland) Act 2002.
[20] Sections 1(2) and 2(2) of the Law Commissions Act 1965.

Commission's first Chairman, Sir Leslie Scarman of the High Court. Similarly, Commissioners and other staff have all been counsel, practising solicitors, or leading academics. This approach has been adopted because it is considered to be beneficial to have all branches of the legal profession with "different experiences of life and the law" when pursuing law reform.[21] So, while the Law Commissions operate within the legal field, like the Supreme Court, they do so from a slightly wider array of legal experiences.

The Law Commissions were designed to introduce a level of independence from government. Before 1965, bodies that updated the law consisted merely of *ad hoc* committees, royal commissions, or disparate government departments. There were no instruments to review the entirety of the law, outside of the courts. Accordingly, the currency for example of criminal law was the task of the Home Secretary and the maintenance of company law was the job of the Department of Trade. The effect of the Law Commissions Act 1965 was to institutionalise law reform through the establishment of specialised but independent instruments that operated as part of the ordinary machinery of government.

The statutory duty of these new instruments was to "keep under review all the law" with a "view to its systematic development and reform".[22] The words 'all the law' were very important because they gave the Law Commissions very wide terms of reference. While the Act does not impose any particular limit on the work of the commissions, they have traditionally avoided subjects that involve political controversy. Certainly, codification and consolidation took up a great proportion of the Law Commissions' time in the early years, much of which could be described as concerning lawyers' law.[23] However, the Law Commissions have not limited themselves to this category of reform. Indeed, much of the work in the field of family law, such as those involving family property, division of asserts upon divorce, and illegitimacy concerned undecided areas of social policy. Therefore, like the Supreme Court, the Law Commissions have also treaded carefully but nevertheless instituted significant social change from within the legal realm.

A significant difference in the Law Commissions' approach in contrast to that of the courts are their method of consultation and the inclusion of a draft bill in their final report. While this method has its advantages, there has been

[21] P. Archer and A. Martin (eds), *More Law Reform Now* (Barry Rose, 1983), at 232.

[22] See Section 3(1) of the Law Commissions Act 1965.

[23] W.H. Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada* (Juriliber, 1986), at 67 and 85.

a difficulty with the legislative implementation of their reports.[24] This impediment may lie in the fact that some proposed bills are more palatable when they deal with lawyers' law as opposed to those with more policy content. The capacity of the Law Commissions to have a social impact is strengthened by their unique consultation method but counterbalanced by their dependency on the legislature.[25]

3 Conclusion

Ultimately, the Supreme Court and the Law Commissions approach law reform from different but complementary positions within the legal field. The Supreme Court has independent authority but is necessarily distant from Parliament and the people, whereas the Law Commissions have the potential to direct widespread legislative reform but have only fragile independence. As instruments operating within the legal realm, the Supreme Court and the Law Commissions are uniquely placed to do what no government body can—to realise the ideal form of law by adopting programmes of positive and significant legal change.

[24] G. Drewry, 'The Legislative Implementation of Law Reform Proposals', in Zellick, *supra*, note 1, at 28–9.

[25] A. Diamond, 'The Law Commission and Government Departments', in Zellick, *supra*, note 1, at 21.

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Children and the Family

Katie O'Byrne
Sahib Singh

1 Introduction

The Supreme Court's decisions in the 2010–11 legal year[1] reflect several remarkable features of the continuously evolving and diverse construct that is the modern family. Importantly, the Court grappled with complex issues such as child abduction, nuptial agreements, conflicting rights within the family unit, and the advancement of the rights of certain members of the family. The Court's reasoning is a useful guide for the navigation of these issues. But more than these complex points of legal analysis, the Court offered its view on profound questions about the nature of modern marriage and the link between a child's identity and his or her citizenship. What emerges is not only the resolution of several difficult cases, but a significant contribution to our understanding of society and the role of family within it.

Further, the Court's approach to the law in these cases is comprehensively international. Three of the four family law cases decided in 2010–11 concerned a binational couple and children who do not share the homeland of at least one parent, with concomitant risks of stretching family ties over international boundaries and thereby infringing the rights of one or more family members.[2] An increasing number of cases before UK courts engage the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[3] and the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention),[4] and the Court's reliance on Strasbourg jurisprudence in such cases feeds back into UK law. Many cases about

[1] In its second year the Court decided four cases concerning family and child law: *Radmacher v Granatino*, [2010] UKSC 42; *Principal Reporter v K*, [2010] UKSC 56; *ZH (Tanzania) v Secretary of State for the Home Department*, [2011] UKSC 4; and *Re E (Children)*, [2011] UKSC 27.

[2] *Radmacher* concerned a French/German couple with children raised in the UK, Germany and Monaco; *ZH (Tanzania)* concerned a Tanzanian/British couple with children raised in the UK; and *Re E (Children)* concerned a British/Norwegian couple with children raised in Norway.

[3] 213 UNTS 221.

[4] 1343 UNTS 89.

nuptial agreements involve binational or foreign couples, since nuptial agreements are commonplace (and commonly enforceable) elsewhere.[5] The Court's use of international jurisprudence in family law cases ties in with its reliance on more practical measures of international cooperation.[6] The internationality of family law, and at points the family unit, is now resolutely settled.

2 Does marriage matter? The changing nature of family relationships

A number of the Court's decisions in 2010–11 reflected the changing nature of family relationships, and particularly of the central conjugal partnership from which 'family' is generally thought to spring. In *Radmacher v Granatino*, the majority of the Court acknowledged that marriage today is somewhat uncertain, noting that "about 45% of marriages are likely to end in divorce".[7] *Radmacher* exposed the growing prevalence and public acceptance of ante– and post-nuptial agreements, which provide in calm contractual terms for that eventuality. The case of *Principal Reporter v K*[8] raised issues about the rights of unmarried parents, which increasingly owe their force to the fact of parenthood *per se*, rendering marital status of lesser significance.

In *Radmacher*, the majority swept away the old rule[9] that ante-nuptial agreements are void under UK law. Traditionally, as explained by the majority, "[t]he approach of the courts to separation agreements … differed markedly from the approach to nuptial agreements that merely anticipated the possibility of separation or divorce and which were consequently considered to be void as contrary to public policy".[10] In the 2008 case of *MacLeod v MacLeod*,[11] the Privy Council advised that the public policy rule should "disappear" in relation to nuptial agreements made after marriage has taken place,[12] but did not disturb

[5] See, *e.g.*, *F v F (Ancillary Relief: Substantial Assets)*, [1995] 2 FLR 45; *S v S (Matrimonial Proceedings: Appropriate Forum)*, [1997] 1 WLR 1200; *M v M (Prenuptial Agreement)*, [2002] 1 FLR 654; and *MacLeod v MacLeod*, [2008] UKPC 64.

[6] See, *e.g.*, *Re E (Children)*, *supra*, note 1.

[7] *Radmacher*, *supra*, note 1, at [7], referring to Resolution, *Family Agreements: Seeking Certainty to Reduce Disputes* (2010) <http://www.resolution.org.uk/site_content_files/files/family_agreements.pdf> [last accessed 9 May 2012].

[8] *K*, *supra*, note 1.

[9] *Cocksedge v Cocksedge*, (1844) 14 Sim 244; *H v W*, (1857) 3 K & J 382.

[10] *Radmacher*, *supra*, note 1, at [42].

[11] *Supra*, note 5.

[12] *Ibid*., at [36] and [38–9].

the rule on ante-nuptial agreements.[13] The majority in *Radmacher* was not persuaded of any material difference between "an agreement concluded the day before the wedding [and] one concluded the day after it",[14] and accordingly held that "the ancillary relief court should apply the same principles when considering ante-nuptial agreements as it applies to post-nuptial agreements".[15]

Radmacher was the only family law case in 2010–11 to split the Court, and it was the spirited dissent of Lady Hale that engaged most deeply with underlying questions about marriage and what it means. Her Ladyship followed *MacLeod* in drawing a bright line between ante– and post-nuptial agreements based on the fact of marriage. There is, her Ladyship insisted, something special about that fact which distinguishes it from mere cohabitation:[16] "Nowadays there is considerable freedom and flexibility within the marital package but there is an irreducible minimum. This includes a couple's mutual duty to support one another and their children."[17] That duty, her Ladyship considered, "may generate a continued need for support"[18] after separation, rendering repugnant the notion that "couples should be allowed to contract out of the fundamental obligations of the married state which they are about to enter".[19] Inequality and vulnerability were overarching considerations for her Ladyship: "unlike a separation agreement, the object of an ante-nuptial agreement is to deny the economically weaker spouse the provision to which she—it is usually although by no means invariably she—would otherwise be entitled".[20] Lady Hale expressly extended her analysis to civil partnerships,[21] making a tacit but powerful comment on both the changing nature of marriage institutions and the importance of equal treatment of same-sex couples.[22]

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[13] *Ibid*, at [31].

[14] *Radmacher*, *supra*, note 1, at [57].

[15] *Ibid*., at [63]. Those principles involve weighing the significance to be accorded to the agreement based on a number of different factors. In November 2011, the High Court relied heavily on *Radmacher* in *Z v Z (No 2)*, [2011] EWHC 2878 (Fam).

[16] *Radmacher*, *supra*, note 1, at [191] and [195].

[17] *Ibid*., at [132].

[18] *Ibid*., at [188].

[19] *Ibid*., at [162].

[20] *Ibid*., at [137]

[21] *Ibid*., at [131].

[22] Her Ladyship's judgment is also notable for its gutsy interrogation of the judicial process itself. In it, she qualified her own statements in *MacLeod*, at [138(4)] and [168], and acknowledged her own contribution to the fact that "the law of marital agreements is in a mess" (at [133] and [139]). She extolled "the democratic way of achieving comprehensive and principled reform" led by the Law Commission rather than the courts, at [134–5]. And, in discussing the position of the wife in pre-nuptial contract precedents, her Ladyship pointed out that "there is a gender

Until the decision of *K*, the fact of marriage had a special significance for some fathers in children's hearings in Scotland. A married father counted as a "relevant person" under the Children (Scotland) Act 1995;[23] an unmarried father did not, meaning that he was not entitled to participate in hearings about his child.[24] Here, the fact of marriage overwhelmed the fact of parenthood and the ability to participate in the life of the child. The issue of unmarried fathers' rights has long been an emotive topic of public discourse and legal challenges in the UK[25] and Europe.[26] In UK law, married mothers and fathers and unmarried mothers automatically acquire parental responsibility,[27] while unmarried fathers do not.[28] In Strasbourg jurisprudence, while mothers automatically have a right to "family life" under Article 8 of the ECHR regardless of marital status,[29] unmarried fathers have encountered challenges in establishing that they have a "family life" at all.[30] Accordingly, the legal position of unmarried fathers has been precarious and often painful. As Lord Rodger put it during the hearing in *K*, "the train may have left the station while the father is still waiting at the barrier".[31]

But again, things are changing. The Children (Scotland) Act has now been amended[32] to recognise an unmarried father who is registered as the child's father as a "relevant person", but this came too late for the father in *K*.[33] The Court

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dimension to the issue which some may think ill-suited to decision by a court consisting of eight men and one woman", at [138].

[23] Section 93(2)(b) read with Section 3(1).

[24] Section 45(8).

[25] See A. Bainham, 'When is a Parent not a Parent? Reflections on the Unmarried Father and his Child in English Law', (1989) 3(2) *International Journal of Law, Policy and the Family* 208.

[26] See M.T. Meulders-Klein, 'The Status of the Father in European Legislation', (1996) 44(3) *American Journal of Comparative Law* 487.

[27] Section 2(1) of the Children Act 1989.

[28] Section 2(2) of the Children Act 1989. In practice the effect of this sharp legal distinction is tempered where the unmarried father is registered as such upon birth of the child, in which case he will acquire parental responsibility: see Section 4 of the Children Act 1989; and see generally, A. Bainham, *Children: The Modern Law* (Family Law, 2005), Ch. 5: 'The Unmarried Family'.

[29] *Marckx v Belgium*, (1979) 2 EHRR 330; *Berrehab v The Netherlands*, (1988) 11 EHRR 322; and *Gül v Switzerland*, (1996) 22 EHRR 93.

[30] *Johnston v Ireland*, (1986) 9 EHRR 203; *Keegan v Ireland*, (1994) 18 EHRR 342. Reinforcing this position, the European Court of Human Rights held in *McMichael v The United Kingdom*, (1995) 20 EHRR 205 that it was not discrimination to treat married men and unmarried men differently.

[31] *K*, *supra*, note 1, at [33].

[32] Section 23 of the Family Law (Scotland) Act 2006.

[33] Section 23(4) of the Family Law (Scotland) Act 2006; *K*, *supra*, note 1, at [16].

found that where there is "demonstrable interest in and commitment by the father to the child both before and after its birth", as there was in this case, the father will have established "family life".[34] K's exclusion from the hearings violated Article 8,[35] and "the automatic imposition of a burdensome procedural hurdle" on unmarried fathers violated the prohibition on discrimination in Article 14 of the ECHR.[36] Similarly, Strasbourg jurisprudence is dismantling barriers for unmarried fathers trying to establish "family life",[37] and the rights of the unmarried father in England[38] have also been the subject of recent legislative reform. Section 56 and Schedule 6 of the Welfare Reform Act 2009, which are not yet in force, will amend the Births and Deaths Registration Act 1953 to allow regulations requiring an unmarried mother to provide information about the father upon registration of the birth of the child, as well as regulations enabling a father to declare his identity to the registrar and requiring the mother to confirm or deny the declaration.[39] This signals a shift towards a presumption that unmarried fathers should have the same recognition, responsibilities and rights as mothers.

The fact of marriage made no positive difference in *Radmacher* and no negative difference in *K*. This raises the question whether, to borrow from Lady Hale, "[m]arriage still counts for something in the law of this country"[40] or whether the decisions of the Court allow parties to reduce it to a shell devoid of meaningful substance. As noted by her Ladyship, "[m]atrimonial practice has changed out of all recognition"[41] since the 1950s. From divorce reform to the rise in cohabitation and single parent families; from the rejection of the marital rape exemption:[42] to shifting gender roles to the Civil Partnerships Act 2004[43] mar-

[34] *K, supra,* note 1, at [36], quoting *Lebbink v The Netherlands*, (2004) 40 EHRR 417, at [36].

[35] *K, ibid*., at [48].

[36] *Ibid*., at [53].

[37] See *Görgülü v Germany*, (Appl. No. 74969/01) judgment of 26 February 2004; *Anayo v Germany*, (Appl. No. 20578/07) judgment of 21 December 2010.

[38] See generally R.M. Moon, 'An Examination of UK Law as it Pertains to the Unmarried Father: Current Legal Thinking in an International Context', (2010) 6(1) *Cambridge Student Law Review* 259.

[39] The amendments also extend to cases where the second parent is another woman. Exemptions exist where the father is unknown or where the mother has reason to fear for her safety or that of her child if the father is contacted in relation to the registration.

[40] *Radmacher, supra,* note 1, at [195].

[41] *Ibid*., at [146].

[42] *R v R*, [1992] 1 AC 599.

[43] See, *e.g.,* M. Welstead, 'Reshaping Marriage and the Family—The Gender Recognition Act 2004 and the Civil Partnership Act 2004', in A. Bainham (ed), *The International Survey of Family Law* (Jordan, 2007), discussing the impact of the Civil Partnerships Act 2004 on the institution

riage has changed, and in doing so it has survived much. Its strength lies in adaptability as well as tradition. Furthermore, while marriage reflects fundamental social values, it has always been an imperfect institution, with undercurrents of crisis, scandal, and injustice attending its development.[44]

In the main, the evolution of marriage has reflected contemporaneous social reality and, increasingly, the free choice of the parties to a partnership. It may be that upholding unmarried fathers' rights and freedom of agreement in and about marriage affects not so much the institution itself but the consequences of choice in the individual case. But in assessing questions about marriage, including the weight to be given to nuptial agreements in ancillary relief proceedings, the Court must not forget to ask itself *whose* reality, and *whose* choice: we are now inclined to see marriage as internally equal, and must not lose sight of the truth that it is not always so. It may be this that threatens modern marriage more than the question of when a nuptial agreement is signed. Additionally, we have to be prepared, as the Court was in *K*, to set the fact (or absence) of marriage aside where other facts, like those of parenthood and the rights of the child, are more significant.

3 Competing rights and the "primacy" of a child's best interests

The import of the Court's decisions extends beyond how we conceive of marriage and conjugal relationships. The Court's decisions demonstrate its utilitarian approach to familial rights: defining and realising the rights of family members

through the lens of promoting the rights and welfare of the child. In *Re E (Children)*, the Court interpreted the Hague Convention as based on the best interests of the child, and read into it the requirement for proceedings to treat those interests as a "primary consideration".[45] In *ZH (Tanzania) v Secretary of State for the Home Department*,[46] the Court considered that the child's best interests, as a primary consideration, outweighed immigration concerns.

In *Re E (Children)*, the Court considered anew the relationship between Article 8 of the ECHR and the Hague Convention, subsequent to the controver-

of marriage.

[44] See, *e.g.*, M. Waller, *The English Marriage: Tales of Love, Money and Adultery* (John Murray, 2009).

[45] *Re E (Children)*, *supra*, note 1, at [12–18].

[46] ZH (Tanzania), supra, note 1.

sial[47] decision of *Neulinger and Shuruk v Switzerland*.[48] It concluded that they walk "hand in hand".[49] The Court's reasoning, while legally sound, remains troubling. Reasonably, the Court pursued the utility of the best interests of the abducted child, first by reading it into the object and purpose of the Hague Convention,[50] and secondly by ensuring that these best interests be "a primary consideration"[51] under the Convention. Each move is consistent with Article 8. However, the Court did not sustain any such interests on behalf of other family members, despite the arguable potential to do so.[52] Given the clear Article 8 requirements to make a balanced and reasonable assessment of the interests and rights of *each* family member,[53] the Court's approach the Hague Convention seems to create a small, and entirely avoidable, differentiation in the legal tests applied by both treaties.[54] In turn, this leaves the Court open to the critique that it has received from some quarters: it has a problem with Strasbourg's principled rights–based approach to the distribution of familial rights.[55] More importantly, it is submitted that this approach may have led to the Article 8 rights of the mother being viewed only through the lens of her children's rights and interests[56] and not as a competing or divergent right that needed to be balanced or reconciled with the latter.[57] In *Re E (Children)*, the mother had, she

[47] *Re E (Children)*, *supra*, note 1, at [1].

[48] [2011] 1 FLR 122.

[49] *Re E (Children)*, *supra*, note 1, at [27].

[50] *Ibid*., at [14–16].

[51] *Ibid*., at [18].

[52] *Ibid*., at [15]. Contrary to the Court's assertions, the interests of family members may be considered as part of the objective of the treaty—even if certainly a subsidiary one. Indeed, the Hague Convention contains a number of provisions which explicitly seek to safeguard the specific rights of persons which include family members (*e.g.*, Articles 3(a), 8, and 21) and these may at times fall within the "object" of the treaty as it is defined in Article 1 (specifically subsection (b) for present purposes). It is admitted that the Hague Convention prioritises the best interests of the child, but this does not mean that it *solely* protects such rights or that its *sole* objective is to protect such rights. It protects the rights of other family members, even if they are viewed through the lens of what is best for the child. Arguably the Court did not sufficiently take this into account.

[53] *Supra*, note 48, at [134].

[54] It is not contended that the same rights and interests of each family member would be capable of consideration under both treaties. Rather, the legal reasoning could have enabled a clearer recognition and relationship between different familial rights.

[55] See H. Fenwick, 'Clashing Rights, the Welfare of the Child and the Human Rights Act', (2004) 67(6) *Modern Law Review* 889.

[56] Article 13(b) of the Hague Convention formally requires this perspective, but an Article 8 balancing exercise does not.

[57] For an excellent discussion of the way in which family law oscillates between utilitarian and

alleged (with the support of her eldest daughter), been subject to "serious psychological abuse",[58] and her mental health, the Court accepted, was subject to real risk[59] if forced to return to Norway without adequate support and protection. It is questionable whether the safeguards accepted by the Court are truly adequate.[60] Therefore, the Court's approach might be regarded as overly formalistic, and perhaps one that could have been tempered through a more reconciliatory approach between the Hague Convention and Article 8 of the ECHR and consequently a more nuanced approach to the rights of the mother, as well as greater restraint in seeking to set aside the high standard of review required of domestic courts in such cases under the Hague Convention, as obligated by the European Court of Human Rights in *Neulinger*.[61]

A similar critique can be made of the Court's reasoning in *ZH (Tanzania)*. Crucially, the Court not only differentiated the primacy principle, as it relates to a court's treatment of a child's best interests, from its different manifestations and from the paramountcy principle, but also gave it a working definition.[62] This is to be welcomed. However, in defining the rights, interests and considerations that were to be balanced, the Court stated the matter as between

principle rights based approaches and the resulting reconceptualisation of the rights themselves, see S. Parker, 'Rights and Utility in Anglo-Australian Family Law', (1992) 55(3) *Modern Law Review* 311, at 319. For advocates of a parallel balancing test see S. Choudhry and H. Fenwick, 'Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act', (2005) 25(3) *Oxford Journal of Legal Studies* 453.

[58] *Re E (Children)*, *supra*, note 1, at [40] and [50].

[59] *Ibid*., at [49].

[60] The Court accepted: (a) an undertaking from the father who is alleged to have abused the mother that he would behave appropriately—an undertaking unenforceable in Norwegian Courts; and (b) that the mother would be protected since the Norwegian Courts had the capacity to issue protective orders: see *ibid*., at [44] and [46–7]. It is contended that both are dependent on the *promise* of specific action or the *possibility* that a foreign court *may* issue protective orders. Given that the Court made a finding of the existence of a real risk to the mother's mental health if return to Norway was required, relying on a promise and potential action seems inadequate. The Court acknowledged the critique made of undertakings in similar cases: *ibid*., at [7].

[61] *Supra*, note 48, at [139]; see the Court's discussion in *Re E (Children)*, *supra*, note 1, at [22–5]. An acceptance of *Neulinger* would arguably have resulted in a less restrictive reading of Article 13(b) of the Hague Convention and an understanding of the depths and consequences of the situation: see *Re E (Children)*, *supra*, note 1, at [25]. However, given that the European Court of Human Rights in *Neulinger* used children's rights to achieve a more liberal approach to Article 13 of the Hague Convention, any acceptance of this case may not have altered the Court's fundamental approach to recognising the extent of the mother's rights, and considering them as competing rights.

[62] *ZH (Tanzania)*, *supra*, note 1, at [25]. For clarification, the paramountcy and primacy principles differ in how they govern the relationship between the best interests of the child and the

the Article 8 rights of the children, specifically their best interests as a primary consideration, and decisive countervailing factors such as "the need to maintain firm and fair immigration control" as well as the mother's poor immigration history.[63] The Article 8 rights of the mother were not considered in this balancing exercise, despite the Court citing the case of *Rodrigues da Silva, Hoogkamer v Netherlands* where this was expressly done.[64] While it is not suggested that the Article 8 rights of the mother are engaged to the same extent as in *Rodrigues*, it is submitted that they should have been recognised and formed a part of the Court's balancing exercise.[65] The concern here is that the utilitarian move to consider a mother's rights solely through the lens of her children's rights detracts from the principled value that should be given to her rights, thereby striking a degree of tension with a balancing rights-based approach. The problem posited is one of method and certainly not one of result.

The utilitarianism of the Court's approach to the interdependence of familial rights is not problematic from a philosophically principled perspective. However, this approach does demonstrate a point of divergence with Strasbourg. Furthermore, if as Lady Hale stated in *ZH (Tanzania)*, "the central point about family life … is that the whole is greater than the sum of its individual parts",[66] then it is naturally problematic if the Court fails to fully and properly construct each of the relevant individual parts and give them an independent principled value. It is one thing to recognise individual family members' rights

rights of other family members. The paramountcy principle determines that the rights and interests of the child may essentially trump any conflicting or divergent rights of other family members. A notable example is section 1 of the Children Act 1989. The primacy principle ensures that the best interests and rights of the child are a primary consideration yet it enables a court to balance and limit such rights by virtue of any conflicting rights of other family members.

[63] *Ibid*., at [33]. This reasoning in this paragraph is integral to the judgment: see *ibid*., at [38].

[64] (2009) 44 EHRR 729, quoted at length by the Court in *ZH (Tanzania)*, *supra*, note 1, at [19]. The relevant part of *Rodrigues* is found in (2009) 44 EHRR 729, at [44], which specifically examines the Article 8 rights of the mother as a balancing factor.

[65] The responsibilities of the mother to her children, as well as towards helping maintain their relationship to their father, would have changed dramatically if she had been sent back to Tanzania and taken the children with her. While in *Rodrigues* this change in responsibilities was considered a part of Article 8, the situation was significantly different, since the children had been ordered to stay with their father. Furthermore, it is contended that the Article 8 rights of the father in *ZH (Tanzania)* were never fully explored by the Court. The argument that it did not do so because it found a compatible result through the best interest of the children undermines the idea that principled value should be given to such rights and they should then be balanced—even if it leads to the same result.

[66] *ZH (Tanzania)*, *supra*, note 1, at [14], quoting *Beoku-Betts v Secretary of State for the Home Department*, [2008] UKHL 39, at [4].

as synergistic and interdependent; it is another to construct each of these different individual parts through the utilitarian perspective of one set of rights: the rights of the child. It is arguable that this approach constructs an asymmetrical understanding of the familial unit. The question then becomes one of desirability: is this an understanding that society wishes to adopt?

4 Conclusion: Greater than the sum of its individual parts

This analysis of the 2010–11 family law decisions of the Supreme Court shows that the family can be a shimmering yet elusive web in the law—an interconnected cluster of rights, interests and relationships that is hard to grasp. One way in which this manifests is that the fact of familial life or connection means that the courts and other authorities cannot apply legal tests, categories and consequences in the usual way. Because she is a mother, the illegal immigrant cannot be legally removed. Because she is a mother, the British citizen must return to a life in Norway and risk her mental health. Because he is a father, the man subject to child abuse accusations must be allowed to participate in decision-making about his alleged victim. Because they intend to be married, a purported contract between two consenting adults may not be enforced or enforceable.

The cases reveal that family rights and interests may conflict and compete both with each other, as in *Radmacher*, *K*, and *Re E (Children)*, and with broader public policy objectives, as in *ZH (Tanzania)* (immigration control) and *Radmacher* (the institutional stability of marriage). It is the interconnectedness of family relationships, in combination with the complicating influence of internationality, that engenders a critical need for principled regulation in this area, but that also makes legal control challenging, both for the parties and for the courts.

In 2010–11 the Court worked with both the challenges and consequences of family law to deliver a holistic approach to family matters. In every case, there was more engagement with rights discourse than in previous years,[67] as well as extensive reliance on Strasbourg jurisprudence. The focus on children's rights in particular, while problematic where it threatens to usurp consideration of the rights of other family members, places valuable emphasis on maintaining

[67] See N. Rodgers and C. Simmonds, 'Thematic Analysis: Children and the Family', (2011) 7(2) *Cambridge Student Law Review* 23.

family ties even after separation and changes of circumstance, across borders, or as an exemption to laws that would otherwise apply. Despite the changing sociological landscape and omnipresent concerns about vulnerability in relationships, this substantive protection of families and their children bodes well, and should be promoted. The Court's rationale appears to rest on recognition of the family, in all its ever-evolving forms, as the foundational unit of society.

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Criminal Evidence and Procedure

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1 Introduction

This year, two main themes can be discerned from the criminal jurisprudence of the Supreme Court: first, the Court's treatment of Scottish human rights cases and second, its contrasting approach to public protection. This article examines the Court's judgments in these areas in greater depth. The article considers five cases which the Court heard in the 2010–11 legal year. First, in relation to the Scottish human rights jurisprudence, *Cadder v HM Advocate (Scotland)*[1] and *Fraser v HM Advocate (Scotland)*[2] will be discussed. Second, in relation to the public protection theme, the cases of *R v Maxwell*,[3] *R v Smith*,[4] and *R (GC) v Commissioner of Police of the Metropolis*[5] will be examined.

2 Scottish human rights cases

The case of *Cadder v HM Advocate (Scotland)* concerned the right of access to a solicitor during police detention. The Court followed the recent European Court of Human Rights (ECtHR) case of *Salduz v Turkey*[6] and allowed the appeal: lack of access to a solicitor during police detention was held to be contrary to the European Convention on Human Rights (ECHR)[7] Articles 6(1) and (3)(c).[8]

[1] [2010] UKSC 43.
[2] [2011] UKSC 24.
[3] [2010] UKSC 48.
[4] [2011] UKSC 37.
[5] [2011] UKSC 21.
[6] (2008) 49 EHRR 421.
[7] 213 UNTS 221.
[8] Respectively, the right to a "fair and public hearing" and the right of a person to defend himself "in person or through legal assistance of his own choosing".

The decision in *Cadder* caused controversy north of the border, since the Supreme Court does not have any jurisdiction over Scottish criminal cases; the highest court of appeal in Scotland on such matters is the High Court of Justiciary (High Court). The Supreme Court can, however, hear Scottish appeals on human rights issues.

The backlash from *Cadder* by the Scottish Nationalist Government was instant and vehement, and their panic resulted in emergency legislation being rushed through the Scottish Parliament in the form of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, which amended the Criminal Procedure (Scotland) Act 1995. The 2010 Act received Royal Assent a mere three days after the Court's judgment.

Scottish First Minister Alex Salmond, and others in the Scottish National Party, criticised the Court's judgment as having "unwittingly undermined" the High Court's position as the "highest criminal authority in Scotland".[9] Such legal nationalism in the face of ECtHR authority has been criticised by Scottish academic commentators who have defended the Court's decision for a number of reasons.[10]

First, the decision of the Court was not unexpected in light of previous Strasbourg jurisprudence. The ECtHR is the final court of appeal for human rights issues in all member states, and, as noted above, it had already ruled that lack of access to a solicitor was contrary to the ECHR. Had the Court not ruled the way it did, any appeal to the ECtHR would have eventually concluded that Scots law breached the ECHR, given the decision in *Salduz v Turkey*. A different decision by the Court may only have "delayed the inevitable".[11] Lord Hope was also sure to point out that the Court should follow ECtHR jurisprudence where it was "clear and constant", which, in his view, the relevant case law was.[12] In any event, the Court is bound to "take into account" ECtHR judgments.[13]

Second, the Scottish Government claimed that English lawyers should not be deciding points of Scottish criminal law. This ignores the fact that two of the

[9] R. Dinwoodie, 'Salmond: Scotland's Legal System is Being Undermined', *The Herald (Scotland)*, 27 October 2010 <http://www.heraldscotland.com/news/crime-courts/salmond-scotland-s-legal-system-is-being-undermined-1.1064085> [last accessed 6 April 2012].

[10] Volume 15(2) of the *Edinburgh Law Review* contained a symposium on the subject. See, *e.g.*, F. Stark, 'The Consequences of *Cadder*', (2011) 15 *Edinburgh Law Review* 293 and F. Leverick, 'The Supreme Court Strikes Back', (2011) 15 *Edinburgh Law Review* 287. *Cf.*, P.R. Ferguson, 'Repercussions of the *Cadder* Case: The ECHR's Fair Trial Provisions and Scottish Criminal Procedure', [2011] *Crim. L.R.* 743.

[11] Stark, *supra*, note 10, at 293.

[12] *Supra*, note 1, at [45–51].

[13] Section 2(1) of the Human Rights Act 1998.

justices hearing the case were Scottish,[14] and the other justices do tend to follow their lead on points of Scots law.[15] It has also been described as "patronising" to suggest that the other justices, the premier judges in the UK, cannot be trusted to decide points of law in jurisdictions which are "not *that* different" from their own.[16] It also ignores the point above that an appeal could have been made to the ECtHR—where none of the judges are Scottish, and the authority of decisions has never been questioned on that basis.[17]

Third, the emergency legislation rushed through the Scottish Parliament has been criticised as being unnecessary and poorly drafted.[18] Indeed, it is clear to see that the legislation did not restrict itself to any "emergency" caused by the Court's judgment. Not only did the 2010 Act add the right to consult a solicitor at the detention stage,[19] it also extended the time limit for detention from six to 12 hours.[20] It could be argued that such a provision does precisely the reverse of what the Court was trying to achieve in terms of protecting suspects.

The Scots' wariness of the Court was compounded by the case of *Fraser v HM Advocate (Scotland)*. Nat Fraser has been making headlines in Scotland since 1998 when his wife, Arlene, disappeared. Her body was never found, but Fraser was nevertheless convicted of her murder. The appeal to the Court concerned details about an adminicle of evidence;[21] the "cornerstone"[22] of the prosecution's (entirely circumstantial) case.

The appeal was successful: details casting doubt on whether this evidence indicated Fraser's guilt should have been revealed to the court by the prosecution, since it was crucial to the prosecution's case.[23] Had it been so revealed, the verdict might very well have been different.[24] Therefore, the Court held

[14] Lord Hope and the late Lord Rodger.

[15] As well as *Cadder*, *supra*, note 1, see *Royal Bank of Scotland Plc v Wilson* [2010] UKSC 50, described as a "*Cadder* for repossession proceedings": P. Nicholson, 'Default Position', (2010) 55(12) *Journal of the Law Society of Scotland* 56.

[16] Stark, *supra*, note 10, at 294.

[17] *Ibid.*

[18] *Ibid*., at 295–7.

[19] Section 15A of the Criminal Procedure (Scotland) Act 1995, as inserted by Section 1 of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.

[20] Section 14 of the Criminal Procedure (Scotland) Act 1995, as amended by Section 3 of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.

[21] Three of Mrs Fraser's rings found in her house.

[22] *Supra*, note 2, at [2].

[23] There was doubt as to whether Fraser placed the rings there, apparently to make it look like his wife had voluntarily walked out on him, or whether the rings had been there since before she disappeared.

[24] *Supra*, note 2, at [39], per Lord Hope, with whom Lords Rodger, Kerr, and Dyson agreed.

that under Article 6(1) ECHR, Fraser had been denied a fair trial. A retrial is currently under way. Reaction to this case was neither as instantaneous nor as widespread as in the wake of *Cadder*, perhaps due to its lack of knock-on effects. *Cadder* led to hundreds of cases being abandoned as they fell foul of the new requirements, since interviews had already taken place without access to legal advice.[25] Nevertheless, Salmond reiterated his feelings that the Court should have "no role" in matters of Scots criminal law.[26]

In the wake of these decisions, Salmond set up a working group to examine the relationship between the High Court and the Court in criminal cases.[27] In its final report,[28] the working group recognised that the Court should continue to have an appellate role on points of ECHR law in Scottish criminal cases, but that its jurisdiction should be "clearly defined and limited" and that the High Court's position as the supreme court of criminal law in Scotland should be preserved.[29]

The tension between the Scottish Government and the Court is regrettable, with the latter making continued strides in the balancing of domestic law with ECHR principles. On the one hand, the Court has been at pains to point out that it "must always be careful to bear in mind the fact that the High Court of Justiciary is the court of last resort in all criminal matters in Scotland".[30] On the other hand, it was noted above that the Court also acknowledges the need to look to the ECtHR for guidance. Thus, the Court must reconcile the jurisprudence of the High Court and the ECtHR—an unenviable position when the two conflict.

3 Public interest and criminal law

The tension between public welfare and the protection of individual human rights runs through the basic principles of criminal procedure and criminal ev-

[25] 'Rape Allegations Among Cases Affected by *Cadder* Ruling', *BBC News*, 9 February 2011 <http://www.bbc.co.uk/news/uk-scotland-12406944> [last accessed 6 April 2012].

[26] 'Supreme Court Threat to Scots Law—Alex Salmond', *The Scotsman*, 25 May 2011 <http://www.scotsman.com/news/supreme_court_threat_to_scots_law_alex_salmond_1_1655512> [last accessed 6 April 2012].

[27] The group consisted of Lord McCluskey, Sir Gerald Gordon, Sheriff Charles Stoddart, and Professor Neil Walker. It was assembled in June 2011.

[28] Final Report of Review Group, 'Examination of the Relationship Between the High Court of Justiciary and the Supreme Court in Criminal Cases', 14 September 2011 <http://www.scotland.gov.uk/Resource/Doc/254431/0120938.pdf> [last accessed 6 April 2012].

[29] *Ibid*., at 1.

[30] *Supra*, note 2, at [11], per Lord Hope, with whom Lords Rodger, Kerr, and Dyson agreed.

idence.[31] This explains why the adjudicative process tries to bring together the values of accurate fact finding and other public interests. It is true that the notion of public interest itself is wide and that political theory offers various approaches to the concept.[32] In this debate, however, the main question is: 'what is to be considered as the greater evil? The unintentional conviction of the innocent or the unintentional acquittal of the guilty?'[33] The case law of the Court for 2011 has to a great extent attempted to provide an answer as to how public interest can be reconciled with individual human rights for the defendant in the area of criminal law.

The case of *R v Maxwell* concerned the question of "whether the police misconduct [in obtaining evidence against the defendant] so tainted the criminal process that it would on that account not be in the interest of justice to order a retrial".[34] The Supreme Court in exercising its discretion found that the Court of Appeal was correct in holding that "the public interest in convicting those guilty of murder outweighs the public interest in maintaining the integrity of the criminal justice system".[35] The appeal was therefore dismissed, since the Court of Appeal was not found to have erred in ordering a retrial.

This case highlights the difficulty inherent in exercising judicial discretion.[36] In examining this aspect, the Court crystallises four distinct criteria that ought to be taken into account:

1. the nature and scale of prosecutorial misconduct;
2. whether the misconduct has infected both the outcome of the main trial and the first appeal;
3. the other grounds on which the prosecution has been based; and
4. the circumstances under which the appellant's admissions of guilt had been made.

However, in the present case, the gravity of the admitted crime made a tremendous difference. In particular, the appellant manifestly and before different persons admitted his guilt. This element sufficed to overshadow the gravity of the

[31] I.H. Dennis, *The Law of Evidence* (Sweet & Maxwell, 2002), at 28.

[32] A. Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (Sweet & Maxwell, 2002), at 69.

[33] See further, R.A. Duff, *Trials and Punishments* (CUP, 1986).

[34] *Supra*, note 3, at [12], per Lord Dyson.

[35] [2009] EWCA Crim 2552, at [67], per Lord Hooper delivering the judgment of the Court of Appeal; cited with approval by Lord Brown, *supra*, note 3, at [62].

[36] *Supra*, note 3, at [36], per Lord Dyson: "[d]ifferent courts can legitimately differ as to the weight they accord to relevant factors".

police misconduct in the interest of public protection. In drawing this conclusion, the Court held that the 'but for' argument brought forward by the defendant was too far reaching. In so doing, it assimilated the 'direct causality' principle which characterises the criminal systems of continental Europe, especially that of Germany.[37] Police misconduct was only one of the factors leading to the admission of guilt, which was otherwise made on a voluntary basis and for the defendant's own purposes.

Therefore, on the facts of the case, the notion of a fair trial, as envisaged in Article 6 ECHR,[38] as regards the abuse of process and public confidence in the criminal justice system were compromised[39] in favour of the need to protect the public from a defendant who admitted his guilt of murder.

Public policy and protection is also the main issue running through the case of *R v Smith*. Specifically, the case concerns the imposition of a sentence of imprisonment for public protection (IPP),[40] on a defendant who was already serving a sentence of life imprisonment. The Court dismissed the appeal, holding that it lies within the judge's discretion to deem a defendant as posing a risk of serious harm to the public.

The determinative factor in this case was the fact that the defendant had spent most of his adult life imprisoned and had thus been characterised as a 'career criminal'.[41] It was this element that was dispositive.

The core of the appellant's argument was the apparent absence of any substantive benefit for the general public by the parallel imposition of both a life sentence and an IPP, given that the former already entails an assessment as to whether the defendant constitutes a present risk to the public. In answering this question, the Court emphasised that it lies within the discretion of the appellate court to disagree with the Parole Board and consider the actions of the defendant as potentially harmful enough to justify the imposition of such a sentence.

In reconciling *R v Maxwell* with *R v Smith* we may conclude that it is the gravity of the crime and the elements of the defendant's character that lead the Court in reaching its decision as to the exercise of its balancing powers. In cases where the need for securing the public interest prevails, the notion of a fair trial and a provision's *ratio legis* are being reshaped in order to accommodate the

[37] See P.K. Ryu, 'Causation in Criminal Law', (1958) 106 *University of Pennsylvania Law Review* 773.

[38] See Article 6 of the ECHR as to the right to a fair trial.

[39] *Supra*, note 3, at [115], per Lord Collins, dissenting.

[40] A sentence of indeterminate length where a defendant is deemed to pose a risk of reoffending and causing serious harm to the public.

[41] *Supra*, note 4, at [6], per Lord Phillips, delivering the judgment of the Court.

aforementioned need.

Conversely, the Court perceived the need to protect the public interest differently in the case of *R (GC) v Commissioner of Police of the Metropolis*. The Court repeated the reasoning of the ECtHR in *S and Marper v United Kingdom*[42] and deemed the retention of DNA samples from defendants who had not been convicted to be contrary to Article 8 ECHR.

The cases relating to the retention of DNA samples have had an immense impact on UK public opinion and have been widely covered by the press, especially due to the fact that the UK runs the largest DNA database worldwide.[43] The case law of the ECtHR has equally sparked a fierce political debate in the UK,[44] which mainly flagged up the conflict between the need for respect for citizens' private data, on the one hand, and the public interest in investigating and resolving crimes, on the other. The UK Government has recently decided to adopt for England and Wales a system similar to that of Scotland, according to which DNA records are generally destroyed if the case does not proceed or if the accused is not convicted (although DNA may be held for three years subject to a two year extension, for certain violent or sexual offences).[45] On 11 February 2011, the Protection of Freedoms Bill was introduced in the House of Commons aiming to "restore freedoms and civil liberties".[46] The Bill clearly adopts the protections of the Scottish model for the retention of DNA and fingerprints.

Although *GC* mainly related to the determination of the suitable remedies for a breach of Article 8 ECHR,[47] it placed emphasis on proportionality and condemned the blanket and non-discriminatory nature of the given provision. The Court once more took the view that in exercising its balancing powers a court should mainly focus on the nature and gravity of a case. Thus, as in Scot-

[42] (2008) 48 EHRR 1169.

[43] See, *e.g.*, A. Travis, 'DNA Profiles to be Deleted from Police Database', *The Guardian*, 11 February 2011 <http://www.guardian.co.uk/politics/2011/feb/11/dna-profiles-deleted-police-database> [last accessed 6 April 2012].

[44] 'DNA Database Debate is "Confused"', *BBC News*, 9 April 2010 <http://news.bbc.co.uk/1/hi/uk_politics/election_2010/8611278.stm> [last accessed 6 April 2012].

[45] S. Almandras, House of Commons Research Briefing, 'Retention of Fingerprint and DNA Data', 22 June 2010 <http://www.parliament.uk/briefing-papers/SN04049> [last accessed 6 April 2012]; R. Cahill, 'Scottish DNA Model to be Adopted UK-Wide', *Holyrood*, 28 May 2010 <http://www.holyrood.com/articles/2010/05/28/scottish-dna-model-to-be-adopted-uk-wide/> [last accessed 6 April 2012]. For the Scottish provisions, see Sections 18–20 of the Criminal Procedure (Scotland) Act 1995, as amended.

[46] Queen's Speech, HL Deb. vol. 719 col. 6, 25 May 2010.

[47] See Article 8 of the ECHR as to the right to respect for private and family life.

land, the gravity of the case should determine whether DNA samples may, or must, be stored.

In drawing the connecting line between the previous two cases examined and the present one, the decisive criterion has been the maintenance of the proportionality principle. When exercising discretion and balancing of powers, a court ought to consider the gravity and nature of the case and the character of the defendant. Therefore, all the cases reflect the same basic reasoning. What causes them to differentiate is the fact that from the latter case it becomes clear that the approach as to public protection is not a holistic one; rather it ought to be exercised under specific standards.

The tension between the public interest and a defendant's rights is not a new concept for criminal law. However, the fact that it influenced the case law of the Court to the extent discussed above during 2011 is indicative of the greatest need for public protection and security within an era of economic recession and wider social problems. Therefore, it appears to be imperative that the fine line between these two conflicting interests be drawn. In so doing, the old established legal principle of proportionality, as interpreted under the line of ECtHR decisions, provides useful insights as to the application of the balancing exercise.

4 Conclusion

The Scottish human rights cases of *Cadder* and *Fraser* have caused much controversy with the Scottish Government. Given that the working party's report on the Court flags up a section of "Outstanding Questions", and with a referendum on Scottish independence looming, it seems that the debate is not yet over. This is unfortunate, given that the Court has continued admirably the trend that it set in its first year of attempting to harmonise domestic law with the ECHR.

The second main theme of this year's criminal jurisprudence refers to the equally controversial attempt to reconcile the interest of public protection with that of the protection of individual human rights as envisaged under ECHR Articles 6 and 8 relating to the criminal procedure. The recent cases of *R v Maxwell*, *R v Smith*, and *GC* focus the ongoing debate on issues of proportionality. Therefore, the balance between the two conflicting values is to be determined by the gravity of the crime and the individual circumstances of each case. It remains to be seen how this doctrine will be developed under the Court's jurisprudence for 2012.

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European Dimensions

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1 Introduction

Ever since Lord Denning alerted his colleagues to the "incoming tide" of European law flowing into the estuaries of the British legal system in 1974, courts in the UK have grappled to define their relationship to the European Union and its predecessors.[1] What does the case law of the Supreme Court of the past year tell us about the way it interacts with EU law, both with legislation from Brussels and with jurisprudence from Luxembourg? This analysis examines two ways in which this judicial interaction takes place: first, through means of interpretation, and second, through the institutional method of preliminary references.[2] While the Supreme Court generally rides the European wave, the cases demonstrate that it does not shy away from erecting dams when it fears a flood.

2 European law in British courts: The search for purpose

Interpretative processes for reconciling European and UK law come in different guises and can have variant consequences. In their most extreme form, interpretative principles may compel national courts to 'disapply' domestic law to the extent that it is incompatible with EU legislation.[3] In no case last year did the Supreme Court revert to such drastic measures. In a milder and more frequent manifestation, they require British courts, when multiple interpretations are possible, to construct a national rule in line with the European legislation that

[1] *HP Bulmer Ltd v J. Bollinger SA*, [1974] Ch. 401, at 418.
[2] See Article 267 of the Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), 2010/C 83/01 OJ 47.
[3] See Case C–10–22/97, *Ministero delle Finanze v IN.CO.GE.'90 Srl*, [1998] ECR I–6307, at [21].

the rule was designed to implement.[4] This is sometimes referred to as the duty of consistent interpretation.[5] An example from last year is the Court's approach in *Jivraj v Hashwani*.[6] The main question in that case was whether the Employment Equality (Religion or Belief) Regulations 2003, implementing a European anti-discrimination Directive,[7] applied to arbitrators. Relying on case law from Luxembourg, the Court found that European law distinguishes between 'workers' and 'independent suppliers of services'.[8] It grouped arbitrators in the latter category, concluding that the Regulations did not apply to them.[9]

More subtle is the effect that interpretative interaction between European and UK courts has on the *method* of statutory interpretation by British courts. Traditionally, British courts have strived towards a literal interpretation of statutory texts.[10] In order to avoid judicial lawmaking, which would impede on Parliamentary sovereignty, courts in the UK have typically shunned interpretive methods that go much beyond the actual wording of the legislative text.[11] In contrast, the European Court has always displayed a much more purposive or teleological interpretative approach in its decisions.[12] The Court in Luxembourg is not afraid to interpret rules in light of the object and purpose of the

[4] See Case C–106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA*, [1990] ECR I–4135, at [8].

[5] See, *e.g.*, C. Turpin and A. Tomkins, *British Government and the Constitution* (CUP, 2011), at 322. The reverse arose in *Parkwood Leisure Ltd v Alemo-Herron*, [2011] UKSC 26, at [22], where Lord Hope, quoting Lord Brown in *R (Hurst) v London Northern District Coroner*, [2007] UKHL 13, at [52], observed that "[i]n cases where no European Community rights would be infringed, the domestic legislation is to be construed and applied in the ordinary way". See discussion *infra*, at note 53.

[6] [2011] UKSC 40, particularly at [8].

[7] 2000/78/EC.

[8] *Supra*, note 6, at [26–7] and [40], referring to Case C–256/01, *Allonby v Accrington and Rossendale College*, [2004] ICR 1328, in particular at [62–71].

[9] *Ibid*., at [50].

[10] J. Bridge, 'National Legal Tradition and Community Law: Legislative Drafting and Judicial Interpretation in England and the European Community', (1981) 19(4) *Journal of Common Market Studies* 351, at 363; J. Jupille and J.A. Caporaso, 'Domesticating Discourses: European Law, English Judges, and Political Institutions', (2009) 1(2) *European Political Science Review* 205, at 210.

[11] A particularly eloquent articulation of the conservative approach to judicial interpretation comes from Viscount Simmonds, who deemed any other method than literal construction "a naked usurpation of the legislative function under the thin guise of interpretation". See *Magor and St Mellons RDC v Newport Corporation*, [1952] AC 189, at 191.

[12] Bridge provides three explanations for this approach. First, "the multilingual nature of Community law vastly reduces the significance of literal meanings". Second, the European treaties explicitly lay out their objectives, which makes purposive interpretation fairly straightforward. Third, dynamic interpretation fits the evolving nature of the European project. See

relevant EU legislation, even going so far as to construct the EC as "a new legal order of international law".[13] During almost 40 years of interplay between the British courts and Luxembourg, the practice of purposive interpretation has spilled over as a method of legal reasoning to UK judges.[14] Already in 1974, Lord Denning contemplated the consequences for British courts when interpreting European legislation: "[n]o longer must they examine the words in meticulous detail. No longer must they argue about the precise grammatical sense. They must look to the purpose or intent. … They must divine the spirit of the Treaty and gain inspiration from it."[15]

As some of its decisions in the 2010–11 legal year demonstrate, the Supreme Court has become very comfortable with this approach—perhaps a little too comfortable. Two cases in particular show how policy considerations can steer the Court's interpretative process. In *Brent LBC v Risk Management Partners Ltd*,[16] the Court applied an exemption to the law of public procurement to avoid "inappropriate interference with local authorities' right to co-operate in discharging their public functions".[17] A number of London boroughs had joined forces to create a mutual insurance company (LAML), but a private insurer claimed that this violated EU public procurement rules. The Court considered whether the contract to establish the LAML fell within the '*Teckal* exemption'.[18] This principle, derived from European case law rather than from legislation, excludes application of the European public procurement rules when a public body contracts with a legally distinct person over which it exercises control (the 'control test') and that carries out an essential part of the public body's activities (the 'function test').[19] The case turned on the question of whether collective control by local authorities over the LMAL satisfied the control test, or whether

Bridge, *supra*, note 10, at 367–8.

[13] Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen*, [1963] ECR 1, at 12.

[14] Bridge, *supra*, note 10, at 373–6 and Jupille, *supra*, note 10, at 219–23.

[15] *Supra*, note 1, at 426. See also Lord Diplock in *DPP v Henn and Darby*, [1980] 2 CMLR 229, at 233.

[16] [2011] UKSC 7.

[17] *Ibid*., at [92].

[18] See Case C–107/98, *Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia*, [1999] ECR I–8121. As Lord Hope observed, the exemption itself is not part of the relevant Directive 2004/18/EC, but "[i]t is a judicial gloss on its language". However, giving his judgment in *Brent*, he considered the exemption "not just a technicality", but rather "a considered policy of EU law" and "a significant and policy-based exemption": *ibid*., at [17] and [22]. Note that Lord Hope seems entirely comfortable with the fact that this is an instance of judicial policymaking by the European Court.

[19] *Brent*, *ibid*., at [16].

individual control was required. The justices purposefully constructed the control test broadly, deciding that collective control is enough. Lord Hope observed that "[n]o injury will be caused to the policy objective of the Directive" by this interpretation[20] and Lord Rodger found that the public procurement rules had no "legitimate application" in this case.[21] While neither the UK Public Contract Regulations 2006 nor the European Directive on public procurement[22] explicitly provide for the exemption, the Court's purposive interpretation has opened the door for local councils to cooperate more closely in public service delivery. In a time of economic downturn, the Court may be applauded for supporting local authorities in their attempts to cut costs.

As the Court's reasoning in *Brent* fits with recent European jurisprudence[23] and efforts by the European Commission to modernize EU public procurement policy,[24] its teleological approach to the case is clearly correct and appropriate. More controversial is its decision in *Patmalniece v Secretary of State for Work and Pensions*, in which the Court balanced EU non-discrimination provisions against the "risk of social tourism".[25] In this case, the Court again interpreted domestic and European legislation from a policy perspective, but this time came to conclusions that may be in opposition to the objectives of the EU.

Patmalniece was a Latvian national who had unsuccessfully applied for asylum in 2004, but had stayed in the UK where she lived off a Latvian state pension of £50 per month. She never worked in the UK. When Latvia joined the EU later in 2004 and Patmalniece became an EU citizen, she claimed UK state pension credit. Her claim was denied on the ground that she did not have a 'right to reside' in the UK, as required by Regulation 2 of the State Pension Credit Regulations 2002.[26] Before the Court, Patmalniece argued that the right to reside requirement discriminated against her on grounds of her nationality and

[20] *Ibid*., at [53].

[21] *Ibid*., at [92].

[22] 2004/18/EC.

[23] See Case C–295/05, *Carbotermo v Comune di Busto Arsizio*, [2006] ECR I–4137; Case C–324/07, *Asociación National de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa)*, [2007] ECR I–2999; Case C–340/04, *Coditel Brabant SA v Commune d'Uccle*, [2008] ECR I–8457; and Case C–480/06, *Commission of the European Communities v Federal Republic of Germany*, [2009] ECR I–4747.

[24] European Commission, Proposal for a Directive of the European Parliament and of the Council on public procurement, COM/2011/0896 final, 2011/0438 (COD).

[25] *Patmalniece v Secretary of State for Work and Pensions*, [2011] UKSC 11, at [44], quoting the opinion of Advocate General Geelhoed in Case C–456/02, *Trojani v Centre Public d'Aide Sociale de Bruxelles*, delivered on 19 February 2004 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002CC0456:EN:HTML> [last accessed 7 April 2012], at [18].

[26] The right to reside test is part of the habitual residence requirement, used to determine eligi-

violated various EU non-discrimination provisions. A four-to-one majority of the justices hearing the appeal found, in summary, that the denial of benefits constituted indirect rather than direct discrimination[27] and that this discrimination was justified by the Secretary of State's desire "to prevent exploitation of welfare benefits by people who come to this country simply to live off benefits without working here".[28] "[O]nly those who are economically or socially integrated with the host Member State *should* have access to its social assistance system", Lord Hope argued in a textbook example of purposive reasoning.[29]

While the majority of the Court cited European case law in support of its policy considerations,[30] its reasoning is at odds with the European Commission's position on the right to reside. Even before the Supreme Court's decision in *Patmalniece*, the Commission had announced its intention to initiate infringement proceedings against the UK concerning the test.[31] It followed this up with a 'reasoned opinion' in late September 2011.[32] According to the Com-

bility for most social benefits. Section 2 of Regulation 2 of the State Pension Credit Regulations 2002 states that "no person shall be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland if he does not have a right to reside in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland".

[27] The European Court has specified the application of the non-discrimination principle to social security in Case C–124/99, *Borawitz v Landesversicherungsanstalt Westfalen*, [2000] ECR I–7293, where it distinguished between 'overt' and 'covert' discrimination. Lord Hope preferred the terms 'direct discrimination', which is "based on the nationality of the beneficiaries", and 'indirect discrimination', where "through the application of other criteria, the legislation leads to the same result": *Patmalniece*, *supra*, note 25, at [24].

[28] *Patmalniece*, *ibid*., at [46].

[29] *Ibid*., at [52] (emphasis added).

[30] See, in particular, Advocate General Geelhoed's opinion in *Trojani*, *supra*, note 25, at [70], where he argued that "[t]he basic principle of Community law is that persons who depend upon social assistance will be taken care of in their own Member State".

[31] European Parliament Committee on Petitions, *Petition 1119/2009 by Piotr Kalisz (Polish) on the British authorities' refusal of his application for unemployment benefit ('Jobseeker's allowance')*, PE448.691, CM\884141EN, 16 November 2011. The Commission held that "[b]y applying the Right to Reside Test, the UK legislation makes the access to certain social security benefits more difficult for other EU nationals than it is for the UK nationals who pass this test automatically. Other EU nationals are thereby being discriminated and treated unequally as regards their access to the social security benefits": at 2.

[32] European Commission Press Release, *Social security coordination: Commission requests United Kingdom to end discrimination of EU nationals residing in the UK regarding their rights to specific social benefits*, IP/11/1118, 29 September 2011. The UK Government responded immediately with a letter in *The Telegraph*, accusing the Commission of attempts to "completely undermine" UK welfare reforms: I.D. Smith (Work and Pensions Secretary), 'Brussels poses serious threat to our welfare reforms', *The Telegraph*, 30 September 2011 <http://www.telegraph.co.uk/news/uknews/immigra-

mission, the test "indirectly discriminates non-UK nationals coming from other EU Member States [and] contravenes EU law". It echoes Lord Walker's point of dissent in *Patmalniece*, namely that the test is "probably aimed at discriminating against economically inactive foreign nationals on the grounds of nationality".[33] This suspicion may be fuelled by the fact that the test was introduced into legislation on the day that Latvia and nine other states joined the EU.[34] In whatever way the Court constructs the right to reside test and its possible justification, it seems difficult to exclude nationality from the equation. *Patmalniece* raised complex political questions, and the Court took the liberty to address those issues itself. By doing so, it stretched its authority to interpret legislation purposively. Paraphrasing Lord Denning, the Court gained inspiration from the Treaty,[35] but the EU deems its interpretation less than divine. This raises the question: should the Court have referred the matter to Luxembourg for a preliminary ruling?

3 British law at the European Court: Preliminary references

The preliminary reference procedure is commonly recognized as the most important of the European Court's various jurisdictions, both in volume and in substance: it generates an immense number of cases and has allowed the Court to develop some of the cornerstone doctrines of EU law.[36] At the same time, it serves the need for uniformity of EU law. While it is essential for the functioning of the EU system of adjudication that national courts apply EU law, it is the European Court's task to prevent "a body of national case law not in accord with the rules of [European] law from coming into existence in any Member

tion/8798443/Brussels-poses-serious-threat-to-our-welfare-reforms.html> [last accessed 7 April 2012].

[33] *Patmalniece*, *supra*, note 25, at [79]. Lord Walker pointed out that the justification presented by the majority itself discriminates on the basis of nationality.

[34] Regulation 2 of the State Pension Credit Regulations 2002 was amended by Regulation 5 of the Social Security (Habitual Residence) Amendment Regulations 2004 as from 1 May 2004: see *ibid*., at [7].

[35] Over time, the Treaty has changed. In 1974, it was the Treaty Establishing the European Economic Community, after the Maastricht conference in 1993, it became the Treaty Establishing the European Community. Post-Lisbon, Lord Denning would have meant the Treaty on the Functioning of the European Union.

[36] See Turpin, *supra*, note 5, at 306.

State".[37]

Article 267 of the Treaty on the Functioning of the European Union (TFEU) distinguishes between courts with *discretion* to refer and courts that *must* refer.[38] The latter are the courts "against whose decisions there is no judicial remedy under national law".[39] However, this obligation on courts of last resort has been restricted. First, as was decided in *Da Costa*,[40] a question before national courts may not necessitate a reference to Luxembourg if the question has already been adequately answered in a previous ruling of the Court. Second, a court is bound to refer to the European Court unless it "can with complete confidence resolve the issue itself", having no "real doubt" as to the conclusions on the law.[41] These conditions constitute the so-called *acte clair* doctrine,[42] or the '*Else* test', as it is known in British jurisprudence.[43] As some Supreme Court decisions from the past year show, application of this test by national courts can be a contentious issue.

During the past year, the Supreme Court considered referral to the Court of Justice of the European Union (CJEU) in a number of cases. It submitted questions to Luxembourg in *FA (Iraq) v Secretary of State for the Home Department*,[44] *R (Edwards) v Environment Agency*,[45] and *Parkwood Leisure Ltd v Alemo-Herron*.[46] The most interesting decisions not to refer can be found in *Home Office v Tariq*,[47] and of course, *Patmalniece*.[48] Before turning to the latter, the Court's reasoning

[37] Case 107/76, *Hoffmann-La Roche v Centrafarm*, [1977] ECR 957, at [5]. See also P. Craig, 'Britain in the European Union' in J. Jowell and D. Oliver (eds), *The Changing Constitution* (OUP, 2011), 102, at 130.

[38] Articles 267(1) and 267(3) of the TFEU, *supra*, note 2, respectively. See also F. Jacobs, 'European Law and the English Judge' in M. Andenas and D. Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: a Liber Amicorum* (OUP, 2009), 419, at 427.

[39] Articles 267(1) and 267(3) of the TFEU, *supra*, note 2.

[40] Cases C–28/62 to C–30/62, *Da Costa en Schaake NV, Jacob Meijer NV and Hoechst-Holland NV v Nederlandse Belastingadministratie*, [1963] ECR 31, at 38 and 135.

[41] *R v International Stock Exchange ex parte Else*, [1993] QB 534, at 545, per Bingham MR.

[42] See Case C–283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, (1982) ECR 3415, at [16–21]. The *acte clair* doctrine applies where there is no prior ECJ/CJEU decision on point.

[43] See *Else*, *supra* note 41, at 545.

[44] [2011] UKSC 22.

[45] [2010] UKSC 57.

[46] [2011] UKSC 26.

[47] [2011] UKSC 35.

[48] Other cases in which the Court dealt with questions of European law without referring to Luxembourg include *Morge v Hampshire County Council*, [2011] UKSC 2; *Brent*, *supra*, note 16; *Duncombe v Secretary of State for Children, Schools and Families*, [2011] UKSC 14; *Bloomsbury International Ltd v Sea Fish Industry Authority*, [2011] UKSC 25; *Jivraj*, *supra*, note 6; and

on the question of referral in the cases mentioned here will be briefly discussed.

FA (Iraq) concerned an Iraqi minor who had been refused admission to the UK on both asylum and humanitarian protection grounds. However, he had only been allowed to appeal the asylum decision. He claimed that this violated the principle of equivalence, a principle of EU law holding that claims based on EU law (in this case the humanitarian protection claim) must not be subject to rules which are less favourable than those based on claims which have national law as their source (the asylum claim).[49] Lord Kerr, delivering the judgment of the panel, agreed that the principle of equivalence qualified the procedural autonomy of member states, but found that European jurisprudence left open many questions relating to the scope and application of this principle. Since the issue had not been "directly considered" by the European Court, a reference was required.[50]

In *Parkwood*, UK courts had ruled that when a business is transferred from the public to the private sector, its employees continue to be paid according to collective public sector agreements, unless the parties agree otherwise.[51] However, in *Werhof v Freeway Traffic Systems GmbH & Co Kg*,[52] the CJEU had found that European law did not bind the transferee (*i.e.*, the new employer) to any collective agreement made after the expiry of an agreement that was in force at the date of the transfer. This raised a question about the duty of consistent interpretation: could national courts interpret domestic legislation, which was intended to give effect to the relevant European Directive, more generously in favour of employees than the Directive itself envisaged?[53] With explicit reference to the *acte clair* doctrine Lord Hope submitted this question to Luxembourg.[54]

In the last case to be referred this year, *Edwards*, the Court sought the guidance of the CJEU on its own competence with regard to cost allocation. The appellant had applied for a costs order so as to cap her liability for the costs of an application for judicial review.[55] Even though the European Directives

Houldsworth v Bridge Trustees, [2011] UKSC 42.

[49] *Supra*, note 44, at [6].

[50] *Ibid.*, at [42] and [47–8].

[51] *Parkwood*, *supra*, note 5, at [7–9].

[52] Case C–499/04, [2006] ECR I–2397.

[53] The provisions of UK law in question were Articles 5(1) and 5(2) of the Transfer of Undertakings (Protection of Unemployment) Regulations 1981 (TUPE). The relevant European legislation concerned Directive 77/187/EEC, as amended by 98/50/EC. Although the 1977 Directive had been superseded by 2001/23/EC, the Court focused on the former, as that was the Directive that TUPE was intended to implement.

[54] *Supra*, note 46, at [48].

[55] In dispute was a permit for the operation of a cement works in Rugby, Warwickshire: *ibid.*, at

on which the appellant relied[56] provided that proceedings falling within their scope should not be "prohibitively expensive", the House of Lords had refused to cap her costs. The Supreme Court indicated that it was willing to reconsider this decision, but remained unsure as to whether it should apply an objective or subjective test to determine whether costs are "prohibitively expensive". The Court recognized that "it cannot be said to be so obvious as to leave no reasonable scope for doubt as to the manner in which the question would be resolved", and citing the case of *CILFIT*,[57] asked the CJEU for guidance.[58]

In *Tariq*, the Court applied the *Else* test in deciding *not* to refer questions to Luxembourg. The question at issue was whether a claimant in employment tribunal proceedings could be excluded from certain aspects of those proceedings on grounds of national security, without breaching his fair trial rights under the European Convention on Human Rights (ECHR)[59] and EU law. The Court examined the Race Directive,[60] the Employment Equality Directive,[61] and EU principles governing discrimination, as well as case law of both the European Court of Human Rights (ECtHR)[62] and the CJEU.[63] Tariq requested a reference to Luxembourg, but Lord Mance felt that "the principles of European Union law which arise for consideration in this case are clear" and that "[i]t is not the role of the Court of Justice to rule on the application of established general criteria to a particular provision or arrangement, which must be considered in the light of the particular circumstances in the case in question".[64] In line with CJEU jurisprudence, any further guidance was to be found in the ECHR and the case law of the ECtHR. While this reasoning may seem unsatisfactory, Lord Mance also noted that it remained open to Tariq to seek redress in Strasbourg.[65] Since the ECtHR can consider the particularities of the case itself, rather than having to restrict itself to abstract findings on the law, such a proceeding offered better

[6–12].

[56] 85/337/EEC and 96/61/EC.

[57] See *supra*, note 42.

[58] [2010] UKSC 57, at 36.

[59] 213 UNTS 221.

[60] 2000/43/EC.

[61] 2000/78/EC.

[62] *Chahal v United Kingdom*, (1996) 23 EHRR 413 and *A v United Kingdom*, (2009) 49 EHRR 695.

[63] Cases C–402/05 P and C–415/05 P, *Kadi v Council of the European Union*; Case T–85/09, *Kadi v Commission of the European Union (Council of the European Union intervening)*; and Case T–228/02, *Organisation des Modjahedines du Peuple d'Iran v Council of the European Union*. While these cases dealt with freezing orders rather than employment proceedings, they gave rise to the similar legal questions relating to the right to a fair trial.

[64] *Supra*, note 47, at [61].

[65] *Ibid*.

protection of Tariq's right than a preliminary ruling. The Court thus had good reasons to decline reference to the CJEU.

This brings the analysis back to *Patmalniece*. At least two issues in the judgment could have been referred to Luxembourg for clarification. The first was whether the right to reside test is directly or indirectly discriminatory. The justices drew an analogy with *Bressol v Gouvernement de la Communauté Française*, where the European Court had found that a Belgian law, in imposing certain residency restrictions on access to public education, *indirectly* discriminated against foreign nationals.[66] As the European Commission seems to have accepted that the right to reside test is indirectly discriminatory, the Court arguably made the right call on this matter.[67] The second issue concerned the justification for indirect discrimination. Here, the majority relied on CJEU findings that grant national courts discretion to assess the compatibility of domestic legislation with EU law.[68] However, not only did the question of a justification divide the Court, the justices must have been aware of the pending infringement proceedings against the UK on exactly this point. Real doubts still existed, requiring reference to the CJEU. Even if the CJEU had come to the same conclusion as the Supreme Court, it would have been the better forum to decide whether the right to reside test is compatible with EU law, and why.[69] As the European Court has declared,[70] the CJEU's jurisdiction under Article 267 of the TFEU is meant to enable it to assist in the resolution of genuine disputes and not just to answer interesting legal questions.[71] There is, however, a fine line between using the *acte clair* doctrine to avoid burdening the CJEU,[72] and apply-

[66] Case C–73/08, *Bressol v Gouvernement de la Communauté Française*, [2010] 3 CMLR 559. In this case, Advocate General Sharpston argued that the test constituted direct discrimination. The Court of Justice neglected her finding but, as Lord Walker pointed out, failed to explain why she had been wrong. While the conclusion of the Court was clear, a preliminary ruling would have elucidated the reasons to treat the case as indirect discrimination: see *Patmalniece*, *supra*, note 25, at [63–4].

[67] See the Commission's press release, *supra*, note 32, where the Commission notes that the test "indirectly discriminates non-UK nationals coming from other EU Member States".

[68] *Bressol*, *supra*, note 66, at [64].

[69] See M. Cousins, 'Social Security—right to reside—whether right to reside compatible with EU Law', (2011) 18(3) *Journal of Social Security Law* 136, at 142.

[70] See Case C–244/80, *Pasquale Foglia v Mariella Novello*, [1981] ECR 3045, at 18.

[71] See A. Dashwood, *et al*., *European Union Law* (Hart, 2011), at 230.

[72] Lately national courts have been less reluctant submit preliminary references. Consequently, the workload of the European Court has become higher. As its annual reports indicate, the number of references for a preliminary ruling submitted by national court has exponentially increased in the last few of years; in 2010 a record number of 385 references were submitted: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-05/ra2010_ac-

ing it to avoid undesirable policy outcomes. In *Patmalniece*, the Court may have crossed that line.

4 Conclusion

As the cases discussed in this analysis demonstrate, the 'tidal force' of European law is strongly felt by the British judiciary; it plays a key role in a significant number of cases at the UK's highest court and even affects the Court's methods of legal reasoning. From decisions on mutual insurance schemes of London boroughs to setting the standards of protection of a local bat population, Brussels and Luxembourg loom underneath the water line.

Yet the European tide does not flow in one direction. The Supreme Court may have gleaned purposive interpretation techniques from the European Court and may regularly seek its assistance in the construction of European and domestic rules; but it is not afraid to turn those methods against Brussels, or to deny Luxembourg a say, when it deems the European Union too intrusive. The cases sent for a preliminary ruling in the past year had a fairly narrow scope. They concerned questions of legal procedure, such as in *FA (Iraq)* and *Edwards*, and employment arrangements as in *Parkwood*. In contrast, the Court refused to submit questions in *Tariq*, which involved fundamental political rights, and in *Patmalniece*, which challenged the structure of the British welfare state. The Court's teleological construction in the latter case is particularly controversial—not because the Court usurped the function of lawmaker, but because it acted as a staunch defender of the national interest in the face of European opposition.

Where do UK–European judicial relations go from here? Some take a dim view. Critics consider the European project "a tidal wave bringing down our sea walls and flowing inland over our fields and houses—to the dismay of all".[73] The current political tensions between London and Brussels seem to confirm this mindset.[74] This suggests more jurisdictional clashes between the EU and the UK in the coming years. On the other hand, *Patmalniece* could be seen as an anomaly. It raised particularly thorny dilemmas that are hardly fit for judicial resolution. In the majority of cases in the past year, however, the Supreme

tivite_cour_final_en.pdf> [last accessed 7 April 2012].

[73] In 1990, Lord Denning's cautious enthusiasm from the early years had clearly taken a turn for the worse. See Lord Denning's introduction in G. Smith, *The European Court of Justice: Judges or Policy Makers?* (Bruges Group, 1990).

[74] See, *e.g.*, 'Euro Crisis: UK alone as Europe agrees fiscal compact', *BBC News*, 9 December 2011 <http://www.bbc.co.uk/news/world-europe-16115373> [last accessed 7 April 2012].

Court successfully navigated the European waters and arrived at decisions that respect British as well as European law. One thing is certain: the tide—and the occasional wave—will keep coming, but the Supreme Court has its barriers in place.

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Foreign States before the Supreme Court

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1 Introduction

The Supreme Court heard a number of cases touching on aspects of international and comparative law in the 2010–11 legal year, including an assessment of the capacity of a court in a non-forum state to review an arbitral tribunal's exercise of *Kompetenz-Kompetenz*;[1] the interpretation of the English municipal statute designed to incorporate resolutions of the UN Security Council into domestic law;[2] a possible conflict between the Hague Convention on the Civil Aspects of International Child Abduction[3] and the European Convention on Human Rights (ECHR)[4] and its resolution;[5] and, in light of new jurisprudence from Strasbourg, a re-examination of the impact of ECHR Article 2 on an inquest.[6]

Given the broad scope of these cases, this article focuses on *NML Capital Ltd v Argentina*[7] and *Lucasfilm Ltd v Ainsworth*,[8] two cases that reveal the widening international horizons of the Supreme Court and the continued decline of doctrines within statute and the common law that previously prevented the English judiciary from engaging with such issues. Together, these cases illuminate the treatment of the personality and acts of foreign states by the English courts. Our analysis of these cases identifies two themes:

1. in both cases, the competence of the Supreme Court was not held to be limited by the involvement of a foreign state in the proceedings, indicat-

[1] *Dallah Real Estate and Tourism Holding Co v Pakistan*, [2010] UKSC 46.
[2] *R v Forsyth*, [2011] UKSC 9.
[3] 1343 UNTS 89.
[4] 213 UNTS 221.
[5] *Re E (Children)*, [2011] UKSC 27.
[6] *Re McCaughey*, [2011] UKSC 20.
[7] [2011] UKSC 31.
[8] [2011] UKSC 39.

ing that the Court is cognizant of the reality of international litigation; and

2. Lord Collins appears to have emerged as something of a leader on such issues.

2 The central issue

The central issue in both *NML Capital* and *Lucasfilm* was the manner in which foreign states are treated by the English courts, and more particularly, the general notion that matters considering foreign states are beyond their judicial competence. From the point of view of international and comparative lawyers, the central issue in *NML Capital* concerned state immunity, being the protection given to foreign states by national courts in order to shield them from civil or criminal proceedings.[9] Conversely, *Lucasfilm* concerned the doctrine of act of state,[10] which refers to the non-justiciability before the English courts of the acts of a foreign state within its own territory,[11] or exceptionally, outside it.[12]

2.1 *NML Capital Ltd v Argentina*

The facts of the case are relatively straightforward and were laid out in the judgment of Lord Phillips.[13] The appellant company was an affiliate of a New York–based hedge fund of a species known on occasion as a 'vulture fund'. Much like its namesake, a vulture fund will feed on carrion, purchasing the debts of economically distressed states at discounted rates and then attempting to enforce them at face value. Argentina was one such state, having undergone a substan-

[9] See, generally, H. Fox, *The Law of State Immunity* (OUP, 2008), at 237–316.

[10] See, generally, S. Fatima, *Using International Law in Domestic Courts* (Hart, 2005), at 385. Act of state forms the inner core of a wider doctrine concerning the non-justiciability of the acts of foreign states, with the exterior occupied by the concept of 'judicial restraint', under which an English court will refuse to pronounce on the transactions of foreign states in international law due to a lack of 'manageable standards': see *Buttes Gas & Oil Co v Hammer (No 3)*, [1982] AC 888, at 932–3, per Lord Wilberforce.

[11] *Luther v Sagor*, [1921] 3 KB 532, at 548, per Warrington LJ; *ibid*., at 934, per Lord Wilberforce; *Kuwait Airways Corporation v Iraqi Airways Co (No 4 & 5)*, [2002] 2 AC 883, at 922, per Lord Hope; and *Jones v Saudi Arabia*, [2004] EWCA Civ 1394, at [10], per Lord Mance.

[12] *R v Bow Street Magistrate; ex parte Pinochet*, [2000] 1 AC 61, at 106, per Lord Nicholls.

[13] *Supra*, note 7, at [1–4].

tial fiscal crisis,[14] which led it to declare a moratorium on some USD 132 billion of public debt, including the bonds at issue in this case. The bonds contained a "Waiver and Jurisdiction Clause" that appeared to permit the respondent to be sued with respect to the bonds and judgment so obtained enforced. Seeing this, the appellant bought Argentinian bonds issued at discounted rates, and when the respondent failed to make the agreed interest payments, obtained a judgment in its favour before the courts of New York. The appellant then sought to have the judgment enforced as a debt in England, only to be confronted with the respondent's objection that, as it was a state, it was immune from the action for enforcement under Section 1(1) of the State Immunity Act 1978. In response, the appellant argued that the matter fell within the exemption in Section 3(1)(a) of the Act, that "[a] State is not immune as respects proceedings relating to … a commercial transaction entered into by the State".

The question for determination before the English courts was whether the action for the enforcement of a judgment that was based on a commercial transaction, here, the sale of the bonds, was sufficiently linked to the original transaction to fall within the exemption and defeat the claim to state immunity.

The Supreme Court unanimously held that Argentina was not entitled to state immunity against enforcement of the judgment, but split on the reasoning. Lord Phillips, with whom Lord Clarke agreed, held that the proceedings could be considered "proceedings relating to … a commercial transaction" within the meaning of the exemption in Section 3(1)(a) of the Act.[15] In so doing, he took issue with two previous decisions on this point by lower courts: the decision in *AIC Ltd v Federal Government of Nigeria*,[16] and its approval by the Court of Appeal in *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)*.[17]

Lord Collins, with whom Lord Walker agreed (with Lord Mance giving a separate opinion concurring in this line of reasoning),[18] investigated the law at

[14] See further J. Hornbeck, 'The Argentine Financial Crisis: A Chronology of Events' (US Congressional Research Office, 2002) <http://fpc.state.gov/documents/organization/8040.pdf> [last accessed 7 April 2012].

[15] *Ibid*., [19–42].

[16] [2003] EWHC 1357 (QB).

[17] [2007] QB 886.

[18] Lord Mance also disagreed with Lord Phillips, but held that state immunity was no defence to enforcement due to Section 31(1)(b) of the Civil Jurisdiction and Judgments Act 1982. This provides that when considering a judgment given by a foreign court against a state, that judgment may be enforced in the United Kingdom where "that court would have had jurisdiction in the matter if it had applied rules corresponding to those applicable to such matters in the United Kingdom in accordance with sections 2 to 11 of the State Immunity Act 1978". Put an-

the time the Act was drafted and concluded that it would not have been envisaged that Section 3(1)(a) would apply to the enforcement of a foreign judgment based on a commercial transaction against a foreign state. As no provision was made elsewhere in English law for service out in such enforcement proceedings until 1982,[19] the action for enforcement was seen as unrelated to the commercial transaction underpinning the original judgment. However, Lord Collins turned to Section 2(2) of the Act that operated to waive state immunity where the state submitted to the jurisdiction of the courts by prior written agreement. The Waiver and Jurisdiction Clause of the bonds was held to be sufficient for this purpose, a conclusion dovetailing neatly with international practice of restrictive immunity coupled with the capacity for waiver.[20]

2.2 *Lucasfilm Ltd v Ainsworth*

This case considered an attempt by the appellant to bring a claim for the breach of a United States copyright before the English courts. The facts are somewhat notorious, considering as they do the iconic *Star Wars* series of films. The respondent in *Lucasfilm* was an individual skilled in the vacuum molding of plastic and was commissioned by George Lucas, the creator of the films, to produce the iconic 'Imperial Stormtrooper' helmets from 1977. In 2004, he made versions of these helmets for public sale. The appellant, who held the copyright to the helmets in the United States, sued the respondent, first in California and then, when judgment there remained unsatisfied, before the English courts. Leaving the intricacies of the overlapping intellectual property claims to one side,[21] the interesting question for present purposes was whether United States intellectual property rights—produced through an act of a United States official—could be rendered non-justiciable through the act of state doctrine.

On appeal,[22] it was held that the United States copyright claims were not justiciable before English courts. The fulcrum for this conclusion was the rule

other way, had the matter underpinning the New York judgment been heard at first instance before the English courts, it would have been within the exemption provided by Section 3(1)(a) of the Act. Accordingly, the action for enforcement was not subject to state immunity: *supra*, note 7, at [98].

[19] *Ibid*., [114].

[20] *Ibid*., [126], citing §1605(a)(i) of the US Foreign Sovereign Immunities Act of 1976; Article 2(b) of the 1972 European Convention on State Immunity, 1495 UNTS 181; and Article 7(1) of the 2004 UN Convention on Jurisdictional Immunities of States and their Property, GAOR, 59th Sess. Supp No 49, A/59/49 (not yet in force).

[21] For a summary of proceedings, see *supra*, note 8, at [1–7], per Lords Collins and Walker.

[22] [2010] Ch 503, at 548–50.

in *British South Africa Co v Companhia de Moçambique*[23] and its subsequent development, phrased as follows contemporaneously by Dicey as Rule 39: "[An English court] has no jurisdiction to entertain an action for (1) the determination of the title to, or the right to possession of, any immovable situate out of England … or (2) the recovery of damages for trespass to such immovable".[24] The conclusion of the Court of Appeal in this respect was as follows:

> [W]e think that the twofold rule in [*Moçambique*] applies to such claims. The *Moçambique* principle is not limited to claims about land, nor to claims about title or validity of the foreign right relied upon. Infringement of an IP right (especially copyright, which is largely unharmonised) is essentially a local matter involving local policies and local public interest. It is a matter for local judges.[25]

In *Lucasfilm*, the Supreme Court was not as divided over the central issue of the proceedings as in *NML Capital*, unanimously endorsing[26] the joint judgment of Lords Collins and Walker. Having identified the rule in *Moçambique* as the basis of the lower court's decision, their Lordships examined the underpinnings of this judgment to determine whether they were still applicable. In doing so, their Lordships considered *Potter v Broken Hill Pty Co Ltd*,[27] a Victorian case that re-framed *Moçambique*, and determined that this decision started the practice of using the act of state doctrine as an impediment to actions for the infringement of foreign intellectual property rights.[28] This holding was then distinguished,[29] based in part on the practice in the United States,[30] where the act of state doctrine had no application to copyright because (as here) there was no need to pass judgment on the validity of an official act, merely its occurrence in fact and any subsequent breach. Their Lordships then reached the "firm conclusion" that:

> [I]n the case of a claim for infringement of copyright of the present kind, the claim is one over which the English court has jurisdiction,

[23] [1893] AC 602.

[24] A. Dicey, *Conflict of Laws* (Stevens and Sons, 1896), at 214–15. The rule was extended to include cases where there was no issue of contested title in *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd*, [1979] AC 508.

[25] *Supra*, note 22, at 548.

[26] Save for Lord Mance, who gave his acceptance with only slight qualification: *supra*, note 8, at [115].

[27] [1905] VLR 612, affirmed (1906) 3 CLR 479.

[28] *Supra*, note 8, at [85].

[29] *Ibid*., [101–8].

[30] *Ibid*., [82–5].

> provided that there is a basis for in personam jurisdiction over the defendant, or, to put it differently, the claim is justiciable. It is clear that much of the underpinning of the *Moçambique* rule and the decision in [*Potter*] has been eroded. All that is left of the *Moçambique* rule … is that there is no jurisdiction in proceedings for infringement of rights in foreign land where the proceedings are 'principally concerned with a question of the title, or the right to possession, of that property'.[31]

3 Discussion

3.1 An internationalist outlook?

Notably, the Supreme Court did not consider the matters raised by the proceedings in either case to be beyond judicial competence. This was despite the fact that there existed plausible interpretations of the law to the contrary, such as those of the Court of Appeal in *NML Capital Ltd*[32] and in *Lucasfilm*.[33] The Supreme Court, and Lord Collins in particular, seemed to be motivated in part by considerations of international policy. To consider *Lucasfilm*, the leading joint judgment contains the following:

> There are no issues of policy which militate against the enforcement of foreign copyright. States have an interest in the international recognition and enforcement of their copyrights, as the Berne Convention on the International Union for the Protection of Literary and Artistic Works shows.[34]

The principled position taken by the Court in *Lucasfilm* runs counter to that taken by the Court of Appeal, which considered foreign copyright to be a local matter and was concerned over a clash of policies such that a defendant might be prevented by injunction from doing in the UK something that was legal under domestic copyright law, but illegal under the copyright law of some foreign country. The joint judgment correctly pointed out that:

[31] *Ibid*., [105]. The joint judgment even appeared to query whether what is left of the *Moçambique* rule would prevent an action concerning the validity of foreign copyright: *ibid*., [106].
[32] [2010] EWCA Civ 41.
[33] [2009] EWCA Civ 1328.
[34] *Supra*, note 8, at [109].

1. such an injunction would only be granted where the acts are anticipated to achieve fruition in another country; and
2. there is no objection in principle with respect to such an injunction, or to any other injunction with extraterritorial effect where the defendant is subject to *in personam* jurisdiction.[35]

The argument of the joint judgment here could be read as indicating that the default outlook of the Court is internationalist in nature. However, in the context of *Lucasfilm*, this may be taking matters a step too far: rather, the judgment may be read as an indication of the Court's cognizance of the international nature of intellectual property rights in the digital age and the need for co-operative enforcement of these rights between municipal courts. In such a situation, there is no need for the act of state doctrine to stand in the way of the Court's competence if the underpinnings of the doctrine—a prohibition on the examination of the *validity* of foreign acts, as opposed to their *occurrence* in fact—can be upheld.

The same pattern may be discerned in *NML Capital*, albeit not as easily. The argument put forward by Argentina fell cleanly into the gap between law and reality: self-evidently, the action for enforcement was connected to the commercial transaction underpinning the New York judgment, but the Act as written appeared to separate the two as a point of statutory construction. The Court's three-way split resulted in a disappointing lack of a majority-endorsed method for the circumvention of state immunity, though it does demonstrate in that context that there are multiple ways to skin a cat. But again, the judgment of Lord Collins was illuminating. In using the waiver provision of Section 2(2) of the Act to circumvent state immunity, his Lordship acknowledged that the separation of the action for enforcement from the underlying sale of the bonds did not give effect to the "practical reality"[36] of the situation and freely admitted that, if this was the end of the matter, there might be some reason in policy to give Section 3 a wider meaning.[37] This again demonstrates that one purpose of a judicial system is to provide legal solutions that do justice according to a commercial reality,[38] and an international commercial reality at that.

[35] *Ibid*., *e.g.*, an anti-suit injunction, which is by its very nature extraterritorial, and a freezing injunction, which has been capable of extraterritorial effect since the case of *Babanaft International Co v Bassatne*, [1990] Ch 13, at [37–9], per Lord Kerr and [41–2], per Lord Nicholls.

[36] *Supra*, note 7, at [111].

[37] *Ibid*., [116].

[38] Indeed, some scholars would argue that this is part of a wider movement within English law to balance "the competing demands of efficiency, justice and comity" that has been afoot for some time: R. Fentiman, *International Commercial Litigation* (OUP, 2010), at ix.

3.2 The influence of Lord Collins

When dealing with a constellation of lawyers that comprise the bench of the current Supreme Court, it is always a perilous thing to attempt to identify one member as exercising a disproportionate influence. Nonetheless, in relation to private international law matters such as those discussed above, the prominence of Lord Collins is apparent. His Lordship gave a judgment that was adopted unanimously by the Court in *Lucasfilm* and gave one of the leading opinions in *NML Capital*. It is also worth noting that in the other private international law matter to come before the Court this year, *Dallah Real Estate and Tourism Holding Co v Pakistan*,[39] his Lordship, alongside Lord Mance, gave a judgment that according to Lord Clarke "analysed the relevant principles so fully and so expertly that it would be inappropriate self-indulgence for me to attempt a detailed analysis of my own".[40]

Lord Collins' influence on the Court is enhanced by his collaboration with Lord Walker. By way of illustration, in *NML Capital*, Lord Walker agreed with Lord Collins and in *Lucasfilm*, the two wrote a joint opinion that carried the balance of the Court. Although Lord Walker was not on the panel of judges that decided *Dallah*, given the admiration of Lord Collins that was expressed by Lord Clarke, it is perhaps not too much to predict what his opinion would have been. If the authors are correct in these observations, then it may be possible to discern the development of a bloc, or at least the nucleus of one, forming within the Court on private international law issues.

[39] *Supra*, note 1.
[40] *Ibid*., at [163].

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Social Welfare

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1 Introduction

A variety of social welfare issues came before the Supreme Court during the 2010–11 legal year, including the consideration of housing legislation, community care services, occupational pensions, the recovery of overpaid benefits, and discrimination within the state pension credit system.

2 Characterisation of "violence" under the Housing Act 1996

Yemshaw v Hounslow LBC[1] arose within the context of the homelessness regime under the Housing Act 1996. After leaving her husband, the appellant sought public housing, which was declined. The case turned on the meaning of "violence" in the Act, which provides that it is unreasonable for a person to continue to occupy their accommodation if it is probable that such continued occupation will lead to "domestic violence or other violence" against them.[2] The effect of the Act is that persons at risk of violence are automatically deemed to be homeless, triggering a duty for local housing authorities to re-house.

But what constitutes "violence"? The issue before the Supreme Court was whether the definition was limited to physical contact, or whether it could be interpreted to include other forms of conduct. At the Court of Appeal below, it was held that the more restricted interpretation based on physical contact must apply as a result of *Danesh v Kensington and Chelsea Royal LBC*.[3]

The Supreme Court unanimously allowed the appeal and remitted the case back to the local authority. Although Lord Brown expressed doubts about over-

[1] [2011] UKSC 3.
[2] Section 177(1) of the Housing Act 1996.
[3] [2006] ECWA Civ 1404.

turning two decisions of the Court of Appeal, he did not dissent.[4] Observing that physical violence is not the only natural meaning of the word violence, the Court referred to a number of broader definitions, including those of the United Nations Committee for the Elimination of Discrimination Against Women (1992),[5] the United Nations General Assembly Declaration on the Elimination of Violence against Women (1993),[6] and various UK examples. The Court concluded that the meaning of a word like violence is capable of evolving over time.[7] The statutory purpose of the Housing Act 1996 would be achieved if "domestic violence" was interpreted to include threatening or intimidating behaviour and other forms of abuse giving rise to the risk of harm.[8]

The significance of *Yemshaw* depends on whether one believes it expands the meaning of violence in the Housing Act 1996 beyond Parliament's intention, thus broadening the duties owed by local housing authorities in homelessness cases, or whether it simply aligns the jurisprudence with the modern understanding that violence may include non-physical harm. Lord Brown expressed concern that the wider definition could result in a broader class of persons falling within the provision, with those persons being harder to identify than victims of physical violence, and arguably requiring less urgent protection.[9] Ultimately, however, the Act states that it is not reasonable for people to live in situations of risk.[10] The test remains an objective one, and objectively, cases of physical violence may trigger the statutory duties of local housing authorities more frequently than non-physical cases. Nonetheless, given the undisputed long-term harm that can result from non-physical abuse, the protective purpose of the homelessness regime is surely served by this decision.

3 On the discriminatory nature of the "right to reside" test for state pension credits

Patmalniece v Secretary of State for Work and Pensions[11] addressed the compatibility of the allegedly discriminatory "right to reside" requirement for state pen-

[4] *Supra*, note 1, at [47–60].
[5] HRI/GEN/1/Rev.7, at 246–52.
[6] GA Res. 48 A/RES/48/104, 20 December 1993.
[7] *Supra*, note 1, at [27]. See also *Fitzpatrick v Sterling Housing Association Ltd*, [2001] 1 Act 27.
[8] Yemshaw, *ibid*., at [28].
[9] *Ibid*., at [57].
[10] Section 177(1) of the Housing Act 1996.
[11] [2011] UKSC 11.

sion credits in light of a guarantee of equality of treatment for EU citizens.[12] A majority of the Supreme Court rejected that the scheme constituted direct discrimination on the basis of citizenship given that UK citizens, even though they have a right to reside, are not automatically entitled to pension benefits under the scheme. All persons with a right to reside, including UK citizens, must *also* demonstrate that they are habitually resident in the UK in order to receive pension benefits.[13]

Even though a majority of the Court held that there was no direct discrimination, it found that the pension credits scheme constituted indirect discrimination given that only persons with a right to reside could be considered habitually resident in the UK. As a result of this finding, the Government was required to justify the scheme on the basis of "objective considerations independent of the nationality of the persons concerned" and proportional to "the legitimate aim of the national provisions".[14] The Court found the Government's justification to prevent the exploitation of welfare benefits by those who come to the UK without any intention of working compelling.[15] Those considerations were seen as independent of nationality as they were based on the principle that persons who benefit from social assistance should maintain a legitimate economic tie to, or achieve a sufficient degree of social integration with, the host member state.[16]

It is worth noting that Lord Walker, the sole dissenting judge, concluded that the state pension scheme discriminated "against economically inactive foreign nationals on the grounds of nationality".[17]

4 Further clarifications regarding tenancy regimes

In *Birmingham City Council v Frisby*,[18] the Supreme Court considered home eviction proceedings against non-secure tenants, some of which held introduc-

[12] See Article 3(1) of (EEC) 1408/71.

[13] *Supra*, note 11, at [27].

[14] *Ibid*., at [23]. See also *R (Bidar) v Ealing London Borough Council*, [2005] QB 812, at [54]; *Collins v Secretary of State for Work and Pensions*, [2005] QB 145, at [66]; Case C–164/07, *Wood v Fonds de Garantie des Victimes des Actes de Terrorisme et d'Autres Infractions*, [2008] 3 CMLR 265, at [13].

[15] *Patmalniece*, *ibid*., at [46].

[16] *Ibid*., at [48].

[17] *Ibid*., at [79].

[18] [2011] UKSC 8.

tory tenancies while others held a licence under the homelessness regime of the Housing Act 1996. Non-secure tenancies serve certain policy purposes and the Act offers non-secure tenants less procedural protection against eviction.[19]

The appellants argued that the possession proceedings amounted to an interference with their homes, which violated Article 8 of the European Convention on Human Rights (ECHR).[20] Pursuant to Article 8(2) of the ECHR, interference may be justified if it is necessary in a democratic society, meaning it must be in accordance with law, for a legitimate aim, and proportionate to that aim. This proportionality review was the principal issue before the Court.

The Court's decision drew heavily on its 2010 decision in *Manchester City Council v Pinnock*,[21] a similar case involving a demoted tenancy.[22] Earlier UK precedents had strictly limited the scope of proportionality defences in possession proceedings.[23] However, the Court reaffirmed its holding in *Pinnock* that a clear line of jurisprudence from Strasbourg and the UK courts established that any person at risk of losing his home at the suit of a local authority was entitled to question the proportionality of the measure.[24]

The Court confirmed that proportionality need only be considered when the occupier raises the issue and the claim is "seriously arguable".[25] In this event, a court should consider whether the eviction is a proportionate means of achieving a legitimate aim. *Pinnock* identified two legitimate aims that would likely justify an eviction order by a local authority:

1. if the order would serve to vindicate the authority's ownership rights; or
2. if the order would enable the authority to comply with its public duties in relation to the allocation and management of its housing stock.[26]

Thus, the decision in *Frisby* means that proportionality review is now streamlined across three types of non-secure tenancy, resolving uncertainty following

[19] *Ibid.*, at [9–19].
[20] 213 UNTS 221.
[21] [2010] UKSC 45.
[22] The human rights aspects of this case were addressed in the 2009–2010 UK Supreme Court Annual Review: K. Coombes and F. Roughley, 'Thematic Analysis: Human Rights', (2011) 7(2) *Cambridge Student Law Review* 26.
[23] See, *e.g.*, *Kay v Lambeth London Borough Council*, [2006] 2 AC 465; *Doherty v Birmingham City Council*, [2008] UKHL 57.
[24] *Supra*, note 18, at [33].
[25] *Ibid.*, at [33].
[26] *Ibid.*, at [36].

the decisions of *Kay v Lambeth LBC*[27] and *Doherty v Birmingham City Council*.[28] *Frisby* confirms that all forms of non-secure tenants facing eviction are entitled to raise questions of proportionality under Article 8 of the ECHR, and if they can meet the seriously arguable threshold, courts will consider proportionality and whether the proceedings pursue a legitimate aim.

Frisby ultimately finds a balance in upholding the statutory purpose of the housing legislation while respecting the requirements of Article 8 of the ECHR. It may appear that judicial deference to housing authorities puts non-secure tenants facing the loss of their homes at an unfair disadvantage compared to secure tenants. However, the Court emphasised social policy reasons behind the exceptions for secure tenancies and rejected a more structured approach to proportionality that would involve weighing non-secured tenants' rights against the rights of the authority, which would have eroded the statutory distinction between secure and non-secure tenancies.

5 Reassessment of needs as a condition for the revision of care plans

R (McDonald) v Kensington and Chelsea RLBC[29] was a difficult case. The Supreme Court expressed considerable sympathy for the appellant, a former prima ballerina of the Scottish Ballet, who had poor mobility caused by a stroke and had experienced several serious falls. The appellant needed to urinate frequently during the night and was cared for by the respondent local authority pursuant to its statutory duty under the Chronically Sick and Disabled Persons Act 1970.[30]

The critical issue in this case was whether the authority could proceed with its revised care plan for the appellant, which provided her with incontinence pads instead of having a personal care worker stay through the night. The authority maintained the new plan would reduce the risk of night-time falls and increase the appellant's independence and privacy. It also saved the authority £22,000 per annum. The appellant fiercely resisted the proposal. She argued that the authority could not alter the plan because there had been no reassessment of her needs. She also made a claim under Article 8 of the ECHR, which was dismissed by the Court as hopeless.[31]

[27] Kay, *supra*, note 23.
[28] Doherty, *ibid*.
[29] [2011] UKSC 33.
[30] Section 2(1)(a) of the Chronically Sick and Disabled Persons Act 1970.
[31] *Supra*, note 29, at [16] and [22].

Lord Brown, with whom Lords Walker and Dyson agreed, considered whether the appellant's needs were "assistance to access the commode at night" or "support with night-time toileting needs".[32] Lord Brown concluded that a change in description from the former in 2009 to the latter in 2010 indicated a reassessment of the appellant's needs and that the pads in the revised care plan would sufficiently meet those needs.[33]

Lord Kerr also concluded that the revised care plan was acceptable, although with some reluctance. As a starting point, he found that there had been no reassessment of the appellant's needs. The appellant's needs were related to mobility as opposed to control of bodily functions. Therefore, the local authority had simply adjusted how the appellant's needs were *expressed* in order to reduce costs.[34]

In her dissenting judgment, Lady Hale focused on the obligation to do what was necessary to meet the needs of a disabled person under the legislation. Seeing a difference between needs and what authorities are prepared to do, she argued that local authorities should not take resources into account when determining what a person's needs are.[35] Lady Hale concluded that, "[i]n the United Kingdom we do not oblige people who can control their bodily functions to behave as if they cannot. ... We are, I still believe, a civilised society".[36]

Was this case decided on semantics? Lady Hale's view that the majority concentrated on a factual question has some merit. One feels considerable sympathy towards a person who is to be treated as incontinent, even though she is not, because of *how* her needs were assessed and described. Equally, however, it is hard to ignore the demand for a pragmatic resolution of the dispute. The local authority owed duties, not just to the appellant, but also to the wider community. Lord Kerr's judgment strikes a reasonable balance, exposing the fiction of the reassessment but reconciling it with the practical consideration that local authorities must be capable of managing their resources fairly and sensibly.

[32] *Ibid*., at [11–14].
[33] *Ibid*., at [14].
[34] *Ibid*., at [39].
[35] *Ibid*., at [70–5], *cf*., *R v Gloucestershire County Council Ex p Barry*, [1997] AC 584, affirmed by the majority in this case.
[36] *R (McDonald) v Kensington and Chelsea RLBC*, *ibid*. at [79].

6 Other social welfare issues

The central question in *Child Poverty Action Group v Secretary of State for Work and Pensions*[37] was whether the Secretary of State could seek recovery of overpaid social security benefits at common law. The Court decided that the Social Security Administration Act 1992 provided a "comprehensive and exclusive scheme" for recovering overpaid benefits.[38] However, it should be noted that the Welfare Reform Bill is expected to reverse this position and enable the Secretary of State to more broadly recover working age benefit overpayments resulting from official error.[39]

Houldsworth v Bridge Trustees Ltd[40] dealt with occupational pension schemes. Although the facts of the case were complex, the decision essentially turned on the definition of "money purchase benefits" in the Pension Schemes Act 1993.[41] If the Secretary of State was correct in arguing that benefits were not money purchase benefits, part of the contributions paid by members would be used to satisfy rights of other members under the order of priority for winding up pension schemes.[42] In these times of economic austerity and uncertainty, the prospect of employees losing benefits is a matter of public concern. Fortunately for members, the argument of the Secretary was rejected by a majority of the Court.

7 Conclusion

Through its judgments, the Supreme Court provided clarity in several complex areas of social welfare, showing a willingness to situate its decisions within a broader horizon by referring to European and international law. Article 8 of the ECHR arose in several of these cases and its jurisprudence is gradually emerging. The case law does not disclose any obvious factions on the bench; however, Lady Hale's opinions may demonstrate an orientation towards victims in the social welfare context, while Lord Brown takes a more conservative stance.

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[37] [2010] UKSC 54.

[38] *Ibid*., at [15].

[39] S. Kennedy, 'Recovery of Benefit Overpayments due to Official Error', House of Commons Library Standard Note SN05856, 8 February 2011, at 11 <http://www.parliament.uk/briefing-papers/SN05856.pdf> [last accessed 8 April 2012].

[40] [2011] UKSC 42.

[41] Section 181 of the Pension Schemes Act 1993.

[42] Section 73 of the Pensions Act 1995.

Patmalniece will have serious implications for EU nationals in the context of receiving a state pension. One commentator asserted that the claimant's inability to secure a right of residence, which in turn barred her from the state pension credit, reflects poorly on the value of EU citizenship and older EU nationals may be in particular danger of failing to integrate based on the current arrangement.[43] As such, elderly EU nationals may not be able to acquire a satisfactory quality of life when residing in other member states, particularly if they have been employed in another EU state for most of their adult lives.[44] Adhering to the Court's position in *Patmalniece* may result in greater inequality between British citizens and non-British EU nationals.

[43] K. Puttick, 'Paying Their Way? Contesting "Residence", Self-Sufficiency, and Economic Inactivity Barriers to EEA Nationals' Social Benefits: Proportionality and Discrimination', (2011) 25(3) *Journal of Immigration, Asylum and Nationality Law* 280, at 292.
[44] *Ibid*.

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Overview: Administrative Law

Jamie Trinidad

Five administrative law cases were decided by the Supreme Court in the 2010–11 legal year. *MA (Somalia) v Secretary of State for the Home Department*[1] concerned the extent to which it is legitimate for an appeal court to interfere with assessments of fact made by a special tribunal on the grounds of error of law. The Asylum and Immigration Tribunal (AIT) had decided that, as a result of lies told by MA in his asylum appeal, it was unable to make any relevant factual findings, and that MA had therefore failed to prove his case. The Court of Appeal in turn held that the AIT had erred in law by failing to take into account objective evidence about conditions in MA's native Mogadishu. The Supreme Court agreed that objective evidence could prevent deportation even when the claimant's account was wholly incredible, although such evidence would need to be extremely strong. Nevertheless, it held that an appeal court should be slow to infer that objective evidence had not been taken into account simply because it was not mentioned by the tribunal. MA's asylum appeal to the AIT had failed because he had been unable to discharge the burden of proof that lay on him to the satisfaction of the tribunal, and not merely because he had lied. The Court thus decided there was no error of law in the AIT's assessment of MA's lies.

The appellant in *R (Coke-Wallis) v Institute of Chartered Accountants in England and Wales*[2] was a chartered accountant who had been subject to successive complaints against him by his professional regulatory body. The first related to his conviction for failing to comply with a direction of the Jersey Financial Services Commission (JFSC) and was dismissed on the ground that the offence in question did not correspond to an indictable offence in England and Wales. The second complaint concerned the appellant's failure to comply with a direction of the JFSC. The Court held that the two complaints were precisely the same, and that the matter was therefore *res judicata*. Lord Collins noted that the effect of the Court's unanimous decision was regrettably "that a person who has shown by his discreditable conduct that he is not fit to practise may continue to do so".[3]

[1] [2010] UKSC 49.
[2] [2011] UKSC 1.
[3] *Ibid*., at [60].

R (Cart) v Upper Tribunal[4] concerned the scope for judicial review of decisions of the Upper Tribunal (UT) that could not be appealed. The UT was established under the Tribunals, Courts and Enforcement Act 2007, which created a new and integrated tribunal structure in the UK. The Court recognised that a more restrictive approach to judicial review was warranted under the new tribunal structure. It held that a decision of the UT to refuse permission for an appeal to itself would be judicially reviewable, as long as the criteria that apply to the grant of permission for second-tier appeals to the Court of Appeal for England and Wales were satisfied.

Eba v Advocate General for Scotland[5] was a Scottish appeal dealing with the same issue. The Court held that Scotland's approach should align itself with that in England and Wales as set out in *Cart*. The phrases "some important point of principle or practice" and "some other compelling reason" were held to provide the benchmark for the exercise of supervisory jurisdiction by the Court of Session over a decision of the UT that cannot be appealed against.[6]

The respondent in *R (G) v Governors of X School*[7] was subject to school disciplinary proceedings, which can result in a referral to the Independent Safeguarding Authority (ISA), which has the power to prevent an individual from working with children. The issue was whether a decision of the governors of a school to deny the claimant legal representation at a disciplinary hearing was a breach of the claimant's right to a fair hearing under Article 6 of the European Convention on Human Rights.[8] The case law of the European Court of Human Rights (ECtHR) required the Court to focus on the relationship between the school proceedings and the ISA proceedings, and most notably on the possibility that the former proceedings could influence the determination of the claimant's civil rights by the ISA. The majority held that Article 6 did not apply in the school disciplinary proceedings as ISA case workers are "required to form their own opinion on the gravity and significance of the facts", and there is "no reason to suppose that the ISA will be influenced profoundly (or at all) by the school's opinion of how the primary facts should be viewed".[9] Lord Kerr, dis-

[4] [2011] UKSC 28.
[5] [2011] UKSC 29.
[6] *Ibid*., at [48], per Lord Hope.
[7] [2011] UKSC 30.
[8] 213 UNTS 221.
[9] *Ibid*., at [83], per Lord Dyson.

senting, agreed with the Court of Appeal that it was "inevitable that the views of the disciplinary panel *and the report of the evidence given to it* were likely to have a substantial influence on the decision of ISA".[10]

[10] *Ibid*., at [105] (emphasis in the original).

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Overview: Constitutional Law

Hui-min Loh

Four constitutional law cases were decided by the Supreme Court in the 2010–11 legal year. *R v Chaytor*[1] concerned whether parliamentary privilege precluded prosecutions for false accounting in relation to false claims for parliamentary expenses. At issue was the scope of parliamentary privilege as derived from Article 9 of the Bill of Rights 1688 and the exclusive cognisance of Parliament. On the former, the Court noted that the available jurisprudence supported the proposition that Article 9 is principally directed at freedom of speech and debate in the Houses of Parliament and in parliamentary committees.[2] Lord Phillips held that "[s]crutiny of claims by the courts will have no adverse impact on the core or essential business of Parliament, it will not inhibit debate or freedom of speech".[3] Regarding exclusive cognisance, the Court noted that it can be waived or relinquished by Parliament;[4] and the House had done so by referring the matter to the police for consideration of criminal proceedings and cooperating with the police in an inquiry into the facts.[5] Even if this were not so, the implementation of decisions in relation to matters of administration taken by parliamentary committees is not subject to privilege, unlike the decisions themselves.[6] The Court thus dismissed the appeal.

In *R v Forsyth*,[7] the Court rejected the appellant's submission that the UK Government's power to create new criminal offences by executive order under Section 1(1) of the United Nations Act 1946 was confined to urgent use. First, the Court noted that there was no express provision of a time limit in the Act. Then, citing the broader context in which the year 2000 Order came about, the Court observed that resolutions were not one off measures. An evolving situation could call for further measures to meet an emerging problem. Lord Brown, delivering the judgment of the Court concluded that, "[i]t would be not merely inappropriate as a matter of construction but regrettable as a matter of

1 [2010] UKSC 52.
2 *Ibid*., at [47].
3 *Ibid*., at [48].
4 *Ibid*., at [63].
5 *Ibid*., at [83].
6 *Ibid*., at [89] and [92].
7 [2011] UKSC 9.

fact were this court now to stultify the power conferred under the 1946 Act by confining its exercise within an artificially restricted time-frame".[8]

Fraser v HM Advocate (Scotland)[9] concerned an appeal against the Scottish Appeal Court's refusal of a motion for an additional ground of appeal and a devolution minute—that the Crown's failure to disclose information material to the proper presentation or preparation of the appellant's case infringed his rights under Article 6(1) of the European Convention on Human Rights (ECHR).[10] Special leave to appeal to the Supreme Court had been granted because the Appeal Court's decision amounted to a determination of a devolution issue for the purposes of the Scotland Act 1998,[11] and applying the tests set out in *McInnes v HM Advocate*,[12] it was seriously arguable that material was withheld from the appellant which ought to have been disclosed and he consequently had not received a fair trial.[13]

Having refused to entertain the devolution minute, the Scottish Appeal Court had dealt with the non-disclosure aspects of the appeal as a fresh evidence appeal under the Criminal Procedure (Scotland) Act 1995.[14] The question was whether the tests applied by the Scottish Appeal Court when doing so satisfied the *McInnes* requirement, which would have been applied where considering a breach of the Appellant's rights under Article 6 of the ECHR.

The Court found that they did not. For comparison purposes, the tests were divided into two parts: the threshold test and consequences test.[15] Regarding the former, the test applied by the Appeals Court was a more stringent and narrowly defined test compared to the *McInnes* test.[16] Regarding the latter, Lord Hope noted

> what the *McInnes* test does is to provide, for the assessment of whether or not there was a fair trial for the purposes of article 6, what was lacking in the Cameron test for appeals on the ground of additional evidence: a definition of what the expression 'miscarriage of justice' in section 106(3) of the 1995 Act means in this

[8] *Ibid*., at [18].
[9] [2011] UKSC 24.
[10] 213 UNTS 221.
[11] Schedule 6, Part II of the Scotland Act 1998; see discussion, *ibid*., at [12].
[12] [2010] SLT 266.
[13] *Supra*, note 9, at [12].
[14] Section 106 of the Criminal Procedure (Scotland) Act 1995.
[15] *Supra*, note 9, at [20].
[16] *Ibid*., at [25].

> context, by reading it in a way that is compatible with the Convention right.[17]

The Court applied the *McInnes* test and held that there was a miscarriage of justice;[18] the case should be remitted to a differently constituted Appeal Court to determine whether there should be a retrial and for the conviction to be quashed.

In *Al Rawi v Security Service*,[19] the Court had to determine whether it had the common law power to adopt a closed material procedure in an ordinary civil claim for damages. By a majority of six to three, the Court dismissed the appeal. The majority held that a closed material procedure, unlike the public interest immunity procedure, involved a departure from the principles of open and natural justice which its inherent power to control its own procedure was subject to.[20] Lord Dyson noted that the closed material procedure excludes a party from the closed part of the trial[21] and highlighted the limitations of a special advocate system: "the special advocate will be hampered by not being able to take instructions from his client on the closed matter … further … it may not always be possible for the judge … to decide whether the special advocate will be hampered in this way".[22] Finally, there was no established line of authority that courts had power to order a closed material procedure in the absence of statutory authority,[23] and where exceptions are made in narrowly defined classes of cases, they "cannot be relied on to justify creating a rule of general application".[24] Change, if any, should be legislated for by Parliament.[25]

[17] *Ibid*., at [29].
[18] *Ibid*., at [43].
[19] [2011] UKSC 34.
[20] *Ibid*., at [41].
[21] *Ibid*., at [35].
[22] *Ibid*., at [36].
[23] *Ibid*., at [59].
[24] *Ibid*., at [65].
[25] *Ibid*., at [48].

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Overview: Criminal Law

Jastine C. Barrett

The Supreme Court decided eight cases in the 2010–11 legal year which touched on criminal law. Two of these cases, *R v Chaytor*,[1] involving prosecutions for false accounting in relation to parliamentary expenses claims, and *R v Forsyth*,[2] relating to the UK Government's power to create new criminal offences by executive order under the United Nations Act 1946, are discussed in the constitutional law summary.

Rights under the European Convention on Human Rights (ECHR)[3] were invoked in three criminal cases. In the first case, *R (GC) v Commissioner of Police of the Metropolis*,[4] the Court held that the statutory right for the police to retain biometric data could be read and exercised in a rational and proportionate manner that would not require indefinite retention of the information for all suspects (which would breach the right to privacy under Article 8 of the ECHR).[5] There was therefore no requirement for a declaration of incompatibility under Section 4 of the Human Rights Act 1998. However, the Court granted a declaration to the effect that the police guidelines implementing the indefinite retention of biometric data were unlawful on the ground of incompatibility with Article 8 of the ECHR.[6]

In two cases emanating from the Scottish High Court of Justiciary, the Supreme Court addressed an accused's right to a fair trial under Article 6 of the ECHR. In both cases, the Court unanimously overturned the decisions of the Scottish High Court. In *Cadder v HM Advocate*,[7] the Supreme Court held that admissions made by the accused during a police interview without access to legal advice were inadmissible as evidence[8] and therefore reliance on such admissions to secure a conviction breached the accused's rights under Article

[1] [2010] UKSC 52.
[2] [2011] UKSC 9.
[3] 213 UNTS 221.
[4] [2011] UKSC 21.
[5] *Ibid*., at [26] and [35].
[6] *Ibid*., at [46].
[7] [2010] UKSC 43.
[8] *Ibid*., at [55].

6 of the ECHR, being protection against self-incrimination.[9] Applying the European Court of Human Rights' decision in *Salduz*,[10] a suspect had the right to have access to a lawyer from the first interrogation by the police unless there were compelling reasons in the particular circumstances of the case to restrict this right.[11]

In *Fraser v HM Advocate*,[12] the Supreme Court held that the Scottish High Court had applied the wrong legal test when considering an appeal against a criminal conviction on the basis of non -disclosure of evidence that might have materially weakened the prosecution's case. The Scottish High Court had dismissed the appeal, treating it as if it were a fresh evidence appeal. Lord Hope, delivering the majority judgment, stated that the appropriate question was whether, "in the light of the undisclosed evidence, there is a real possibility that the jury at this trial would have arrived at a different verdict".[13] He concluded there was such a possibility and there had thus been a miscarriage of justice.[14]

In another miscarriage of justice case,[15] the Court considered whether the three appellants, whose convictions for murder had been quashed, were entitled to compensation under the Criminal Justice Act 1988.[16] By a majority of five to four, the Court allowed the appeals in part, holding that the entitlement to compensation was not restricted to those who had established beyond reasonable doubt that they were innocent of the crime for which they had been convicted; a miscarriage of justice for the purpose of compensation under the Act also occurred where a new fact "so undermines the evidence against the defendant that no conviction could possibly be based upon it".[17] The four dissenting justices[18] preferred an interpretation that would limit compensation to those who had clearly demonstrated their innocence.

In *R v Maxwell*,[19] the appellant had made post-conviction admissions, which would not have been made but for police misconduct which had led to his conviction. The question for the Supreme Court was whether the Court of Ap-

[9] *Ibid*., at [63].
[10] *Salduz v Turkey*, Application No. 36391/02, (2008) 49 EHRR 421.
[11] *Supra*, note 7, at [48] and [69].
[12] [2011] UKSC 24.
[13] *Ibid*., at [38].
[14] *Ibid*., at [41–3].
[15] *Re MacDermott*, [2011] UKSC 18.
[16] Section 133 of the Criminal Justice Act 1988.
[17] *Supra*, note 15, at [55].
[18] Lords Judge, Brown, Walker, and Rodger.
[19] [2010] UKSC 48.

peal had erred in law by finding it in the interests of justice to order a retrial of the appellant, in light of the compelling evidence of guilt adduced after his conviction had been quashed on the ground of prosecutorial misconduct. The Court dismissed the appeal. Considering whether a retrial was required in the interests of justice required "an exercise of judgment in which a number of relevant factors have to be taken into account and weighed in the balance".[20] The Supreme Court could only interfere where the Court of Appeal had been plainly wrong in the exercise of its discretion.[21] In the present case, the Court of Appeal was right to consider that the 'but for' test was only one factor[22] and to "respect the strength of the public interest in seeing those against whom there is *prima facie* admissible evidence that they are guilty of crimes, especially very serious crimes, are tried".[23] The two dissenting justices, Lords Brown and Collins, would have allowed the appeal on the basis that the appellant would not have made the admissions 'but for' the egregious and unpunished police misconduct, and it was therefore inappropriate to retry the case on new evidence.[24]

The case of *R v Smith*[25] discussed the legality of an indeterminate sentence of imprisonment for public protection (IPP) in relation to a prisoner already subject to recall on a life licence, pursuant to which he would not be released until he satisfied the Parole Board that he no longer posed a threat to the public. The Court unanimously dismissed the appeal, holding that the imposition of the IPP sentence was lawful, in that the Criminal Justice Act 2003 required the judge to assess whether the defendant posed a significant risk of causing serious harm to the public at the moment the sentence was passed and not to consider whether he would pose such a risk at the end of the minimum term of imprisonment.[26] Additionally, the judge had not erred in the exercise of his discretion. While it was not sensible to impose a sentence of IPP in circumstances where it would achieve no benefit, in this case, IPP enabled the sentencing court to express its finding that the defendant satisfied the dangerousness provisions of the Act.[27]

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[20] *Ibid*., at [19].
[21] *Ibid*.
[22] *Ibid*., at [26].
[23] *Ibid*., at [34].
[24] *Ibid*., at [102–5].
[25] [2011] UKSC 37.
[26] See Section 225(1)(b) of the Criminal Justice Act 2003 and discussion, *ibid*., at [15].
[27] *R v Smith*, *ibid*., at [19].

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Overview: Economic and Safety Regulation

Hui-min Loh

There were 14 Supreme Court decisions on social and economic regulation in the 2010–11 legal year.

Four cases were in the area of company law. In *Holland v Revenue and Customs Commissioners*,[1] the Court held that an individual who is a director of an incorporated body that was itself a corporate director of another company was insufficient to render the individual a *de facto* director of the subject company.[2] The issue was whether the individual assumed responsibilities in relation to the subject company.[3] As long as the relevant acts were performed by the individual entirely within the ambit of his or her duties and responsibilities as director of the corporate director, it was to that capacity that the acts must be attributed.[4]

In *Progress Property Co Ltd v Moorgarth Group Ltd*[5] the Court held that, when considering whether a transaction constituted an unlawful distribution of capital by a company, the proper approach is to inquire into the true purpose and substance of the impugned transaction.[6] A realistic assessment of all the relevant factors has to be conducted, not simply an isolated retrospective valuation exercise.[7]

In *Farstad Supply A/S v Enviroco Ltd*[8] the Court held that there was no basis for construing 'member' differently from the corporate statutes where the term was used in a commercial contract.[9] The meaning of 'member' was to be found in Section 112 of the Companies Act 2006 (formerly Section 22 of the 1985 Act).[10] This definition is not related to the attribution provisions of the corpo-

[1] [2010] UKSC 51.
[2] *Ibid*., at [29].
[3] *Ibid*., at [39].
[4] *Ibid*., at [42].
[5] [2010] UKSC 55.
[6] *Ibid*., at [27].
[7] *Ibid*., at [29].
[8] [2011] UKSC 16.
[9] *Ibid*., at [51].
[10] *Ibid*., at [37].

rate statutes,[11] as these provisions are concerned with rights held or attached to shares as opposed to the status of the party.[12] Where anomalous results arise, it is a matter for Parliament to legislate and not the courts.[13]

Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd[14] concerned the application of the anti-deprivation rule in insolvency law. Looking at the substance of the provisions at issue,[15] the Court noted that "the anti-deprivation principle is essentially directed to intentional or inevitable evasion of the principle that the debtor's property is part of the insolvent estate, and is applied in a commercially sensitive manner, taking into account the policy of party autonomy and the upholding of proper commercial bargains".[16] Applying this test, the Court held that the anti-deprivation rule was not applicable and dismissed the appeal.

The Court considered the compatibility of English law with European law in three cases. In *Patmalniece v Secretary of State for Work and Pensions*[17] the Court held that the conditions of entitlement to state pension credits, prescribed by Regulation 2 of State Pension Credit Regulations 2002, were compatible with a guarantee of equality of treatment for EU citizens.[18] Following *Bressol v Gouvernement de la Communaute Francaise*,[19] the conditions of pension entitlement were looked at holistically and in the context of the legislation. The Court held that the test was one of habitual residence which will not be met on account of nationality alone.[20] The state pension scheme was therefore not directly discriminatory on grounds of nationality.[21] The Court further held that while the scheme was indirectly discriminatory,[22] it was justified on the basis of safeguarding the UK's social security system from exploitation, which operates independently of nationality.[23]

Bloomsbury International Ltd v Sea Fish Industry Authority[24] concerned the

[11] Section 736A of the Companies Act 1985.
[12] *Supra*, note 8, at [42].
[13] *Ibid*., at [44–50].
[14] [2011] UKSC 38.
[15] *Ibid*., at [105].
[16] *Ibid*., at [106].
[17] [2011] UKSC 11.
[18] See Article 3(1) of Council Regulation (EC) 1408/71, 1971/L149 OJ 2.
[19] C–73/08, [2010] 3 CMLR 20.
[20] *Supra*, note 17, at [27].
[21] *Ibid*., at [35].
[22] *Ibid*.
[23] *Ibid*., at [46], [48], and [51–3].
[24] [2011] UKSC 25.

scope of the Sea Fish Industry Authority's power under the Fisheries Act 1981 to impose a levy in respect of sea fish or parts thereof landed in the United Kingdom.[25] Considering the terms used and purpose of the scheme, the Court gave 'landed' a broad interpretation, holding that it covered all sea fish and sea fish products arriving in the UK, including imports.[26] Noting that the associated regulations "must be read as intended to introduce a coherent scheme",[27] the Court held that the levy can be regarded as "a general system of internal dues applied systematically to categories of products according to objective criteria applied without regard to the origin of the products",[28] and was compatible with Articles 28 and 30 of the Treaty on the Functioning of the European Union (TFEU).[29]

In *Parkwood Leisure Ltd v Alemo-Herron*,[30] the Court decided to refer to the Court of Justice for the European Union (CJEU) whether English courts were precluded from interpreting Regulation 5 of the Transfer of Undertakings (Protection of Employment) Regulations 1981. At issue was the CJEU's decision on Article 3(1) of Directive 77/187 in *Werhof v Freeway Traffic Systems GmbH & Co KG*.[31] Examining *Werhof*, the Court noted that the case was distinguishable on its facts[32] and the question addressed by the CJEU's decision differed from the present case.[33] Moreover, an inference as to how the question in the present case should be answered could not be drawn from the *Werhof* decision.[34] Thus, the question was referred anew to the CJEU.

The Court dealt with two cases on employee rights. In *Gisda Cyf v Barratt*,[35] the Court held that where dismissal was communicated to an employee by letter, the effective date of termination under the Employment Rights Act 1996 is when the employee had actually read the letter or had "reasonable opportunity" to do so.[36] The reasonableness of the employee's behaviour was a factor in

[25] Section 4(3) of the Fisheries Act 1981.
[26] *Supra*, note 24, at [19].
[27] *Ibid*., at [44].
[28] *Ibid*., at [50].
[29] Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), 2010/C 83/01 OJ 47.
[30] [2011] UKSC 26.
[31] [2006] ECR I–2397.
[32] *Supra*, note 30, at [43].
[33] *Ibid*., at [44].
[34] *Ibid*., at [45].
[35] [2010] UKSC 41.
[36] Section 97(1)(b) of the Employment Rights Act 1996*; ibid*., at [41].

assessing whether she had a reasonable opportunity.[37] The Court emphasised that Section 97 of the Act was part of a charter to protect employee rights and that therefore the "general law of contract" cannot provide a preliminary guide to its proper interpretation.[38]

Baker v Quantum Clothing Group Ltd[39] concerned the liability of employers in the knitting industry for hearing loss by employees suffered prior to the Noise at Work Regulations 1989 coming into force. Taking into account all the evidence before it,[40] the Court held that employers were generally entitled to rely on the government issued code of practice until the terms of the 1986 Directive[41] became generally known following consultative activities.[42] However, where an employer had greater resources and displayed greater than average awareness of the danger, it incurred greater liability than other employers.[43] It further considered employers' liability under the Factories Act 1961.[44] Noting that safety has to be objectively assessed by reference to the knowledge and standards of the time,[45] the Court held that foreseeability had a role in determining whether a place is safe.[46] As such, safety must be judged according to the general knowledge and standards of the times with the onus being on the employee to show that the workplace was unsafe.[47]

In *Dallah Real Estate and Tourism Holding Co v Pakistan*[48] the Court held that it was entitled to revisit the question of a tribunal's decision on jurisdiction[49] if the party resisting enforcement sought to prove that there was no arbitration agreement binding upon it under the law of the country where the award was made[50] and that it had not submitted to the jurisdiction of the tribunal.[51]

Royal Bank of Scotland Plc v Wilson[52] concerned the enforcement of a stan-

[37] *Barratt*, *ibid*., at [29].
[38] *Ibid*., at [37].
[39] [2011] UKSC 17.
[40] *Ibid*., at [30].
[41] 86/188/EEC.
[42] *Ibid*., at [39].
[43] *Ibid*., at [25].
[44] Section 29(1) of the Factories Act 1961.
[45] *Supra*, note 39, at [64].
[46] *Ibid*., at [68].
[47] *Ibid*., at [80].
[48] [2010] UKSC 46.
[49] *Ibid*., at [30].
[50] *Ibid*., at [28].
[51] *Ibid*., at [26].
[52] [2010] UKSC 50.

dard security under the Conveyancing and Feudal Reform (Scotland) Act 1970. The Court held that the Heritable Securities (Scotland) Act 1894 applied[53] and it would be wrong to water down the precondition imposed by Parliament using the new summary procedure.[54] Thus, a formal requisition had to preclude the proceedings for ejection.[55]

Child Poverty Action Group v Secretary of State for Work and Pensions[56] concerned the recovery of mistakenly inflated awards as provided for by the Social Security Administration Act 1992.[57] Noting the comprehensive scheme of recovery set out in the statute, the Court held that the statute was exhaustive and the common law restitutionary route was therefore unavailable to the Secretary of State.[58]

Global Process Systems Inc v Syarikat Takaful Malaysia Berhad[59] concerned the meaning of "inherent vice" under in the Marine Insurance Act 1906.[60] The Court held, overruling *Mayban General Insurance v Alstom Power Plants*[61] that the inability of a cargo to withstand the ordinary perils of the seas did not automatically amount to an inherent vice. Only where the fortuity operating on the goods came from the goods themselves could the proximate cause of loss properly be said to be the inherent vice of the cargo insured.[62] To hold otherwise would frustrate the very purpose of all risk cargo insurance.[63]

Finally, in *Secretary of State for Communities and Local Government v Welwyn Hatfield BC*,[64] the Supreme Court rejected the Court of Appeal's decision that there had been a "change of use" from no use to use as a dwelling house for the purposes of the Town and Country Planning Act 1990.[65] Following *Impey v Secretary of State for the Environment*,[66] the Court took a long-term view[67] and held that, on a proper understanding of the scheme, it would be artificial to focus

[53] Section 5 of the Heritable Securities (Scotland) Act 1894; *ibid*., at [29].
[54] *Wilson*, *ibid*., at [33].
[55] *Ibid*., at [30].
[56] [2010] UKSC 54.
[57] Section 71 of the Social Security Administration Act 1992.
[58] *Supra*, note 56, at [14].
[59] [2011] UKSC 5.
[60] Section 55(2)(c) of the Marine Insurance Act 1906.
[61] [2004] 2 Lloyd's Rep 609.
[62] *Supra*, note 59, at [31].
[63] *Ibid*., at [35], [52], and [128].
[64] [2011] UKSC 15.
[65] Section 171B(2) of the Town and Country Planning Act 1990.
[66] (1984) 47 P & CR 157.
[67] *Supra*, note 64, at [27].

on whether a building has or is of no use at all as opposed to a change of use.[68] The Court of Appeal's interpretation would give rise to anomalous situations.[69] Even if there had been a change of use, the owner of the building in question would have been precluded from relying on the Act as a result of his deceit in obtaining the planning permission.[70]

[68] *Ibid*., at [29–30].
[69] *Ibid*., at [30].
[70] *Ibid*., at [56].

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Overview: European Law

Jamie Trinidad

The Supreme Court decided 11 cases involving aspects of European law in the 2010–11 legal year.

R (Edwards) v Environment Agency[1] concerned the interpretation of a European Directive[2] that requires member states to ensure that members of the public can review the legality of environmental decisions and that such procedures should not be prohibitively expensive. It was held that the question of whether the review procedure was prohibitively expensive was one for the court, and not the costs officers.

In *Morge v Hampshire County Council*,[3] the Court held that a regulation under the Conservation (Natural Habitats, &c) Regulations 1994,[4] which requires authorities to have regard to the requirements of the Habitats Directive[5] in the exercise of their functions, did not require the respondent to consider and decide whether a development would or would not occasion 'disturbance' to species under Article 12(1)(b) of the Directive.

In *Brent LBC v Risk Management Partners Ltd*,[6] the Court held that the Public Contracts Regulations 2006, which implemented a European Directive on the coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts,[7] had not been breached when a number of local authorities formed a mutual insurance company. Public authorities could participate in the collective procurement of goods and services as long as they did so solely in the public interest while carrying out their public service tasks.

In *Patmalniece v Secretary of State for Work and Pensions*,[8] the Court held that the state pension credit scheme, which restricted entitlement to a state pension to those who had a right to reside in the UK or in the common travel area,

[1] [2010] UKSC 57.
[2] 2003/35/EC.
[3] [2011] UKSC 2.
[4] Regulation 3(4) of the Conservation (Natural Habitats, &c) Regulations 1994.
[5] 92/43/EEC.
[6] [2011] UKSC 7.
[7] 2004/18/EC.
[8] [2011] UKSC 11.

among other criteria, discriminated indirectly against nationals of other member states. However, it held that the discrimination was objectively justified and compatible with EU law because only those who were economically or socially integrated with a member state should have access to its social security system.

Duncombe v Secretary of State for Children, Schools and Families[9] concerned the employment of teachers in European schools outside the UK who educate the children of employees and officials of the European Communities. The staff regulations for those schools provide for a maximum secondment period of nine (exceptionally, ten) years. The claimant teachers brought proceedings under the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 when their terms of employment came to an end. Those regulations require that a successive fixed term contract be turned into permanent employment unless the use of such a contract could be objectively justified. The Court held that the fixed-term contract could be objectively justified on the basis that the teachers were employed to do a particular job for a certain period of time.

Baker v Quantum Clothing Group Ltd[10] concerned the liability of employers for hearing loss suffered by employees prior to the Noise at Work Regulations 1989 entering into force. The regulations implemented a European Directive that deals with matters such as ear protection at work.[11] The Court held that employers had generally been entitled to follow an existing code of practice until a period of two years after the terms of the Directive became generally known. In practice this meant two years from the date of a 1987 consultative document, the same date as when the Regulations entered into force.

FA (Iraq) v Secretary of State for the Home Department[12] concerned the principle that procedures for the enforcement of EU rights must be no less favourable than those governing the enforcement of similar domestic law rights (the principle of 'equivalence'). FA was entitled under domestic law to appeal the refusal of his asylum claim, but not the refusal of his claim for humanitarian protection under the Qualification Directive.[13] The issue was whether he should have been allowed an appeal against the second refusal under the principle of equivalence. The Court decided to refer the matter to the Court of Justice for the European Union (CJEU) for a preliminary ruling.

[9] [2011] UKSC 14 and [2011] UKSC 36.
[10] [2011] UKSC 17.
[11] 86/188/EEC.
[12] [2011] UKSC 22.
[13] 2004/83/EC.

In *Bloomsbury International Ltd v Sea Fish Industry Authority*[14] the Court held that a levy imposed on sea fish 'landed in the UK' extended to fish that had been landed elsewhere and later imported into the UK. The levy in question, which was imposed by the Sea Fish Industry Authority, amounted to an internal tax under Section 110 of the Treaty on the Functioning of the European Union (TFEU),[15] not a charge equivalent to customs duty, and was therefore lawful.

Parkwood Leisure Ltd v Alemo-Herron[16] concerned the rights of public sector employees who had been transferred to a private company under the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE). The Court of Appeal held that pursuant to a European Directive[17] that TUPE implemented, an employer was not bound by an agreement in force at the date of the transfer after the agreement's expiry. The Supreme Court decided that the matter was not *acte clair*, and referred it to the CJEU for a preliminary ruling.

Home Office v Tariq[18] concerned the validity of a closed material procedure in employment proceedings, in which the employee and his representatives were excluded from proceedings when certain evidence was being considered. The Court held this would not necessarily breach Article 6 of the European Convention on Human Rights,[19] the Race Directive,[20] and the Equal Opportunities in Employment Directive,[21] if it could be shown that national security considerations made the procedure necessary and that it contained sufficient safeguards.

The Court held in *Jivraj v Hashwani*[22] that the Employment Equality (Religion or Belief) Regulations 2003, made pursuant to powers contained in a European Council Directive,[23] did not apply to an agreement dealing with the selection, engagement, or appointment of arbitrators, who cannot be considered to be in "employment … under a contract personally to do work" within the meaning of the regulations.

[14] [2011] UKSC 25.
[15] Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), 2010/C 83/01 OJ 47.
[16] [2011] UKSC 26.
[17] Article 3(1) of 2001/23/EC.
[18] [2011] UKSC 35.
[19] 213 UNTS 221.
[20] 2000/43/EC.
[21] 2006/54/EC.
[22] [2011] UKSC 40.
[23] 2000/78/EC.

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Overview: Family Law

Jasmine Moussa

The Supreme Court decided four family law cases in the 2010–11 legal year, three of which expounded on the 'child's best interest' principle and its relationship with Article 8 of the European Convention on Human Rights (ECHR),[1] being the respect for private and family life. The fourth case concerned the weight to be accorded to an ante-nuptial agreement in deciding matters of ancillary relief upon the breakdown of a marriage.

In *ZH (Tanzania) v Secretary of State for the Home Department*[2] and *Re E (Children)*[3] the Court examined the interrelationship between Article 8 of the ECHR and the 'child's best interest' principle.

In *ZH*, the Court allowed the appeal of a decision upholding the finding by the Asylum and Immigration Tribunal that a mother's British children could be expected to follow her when she was deported to Tanzania because they were conceived in the knowledge that the mother's immigration status was precarious. The Court found that the best interest of a child, broadly meaning their well-being, had to be a primary consideration when assessing whether their mother's removal would be considered disproportionate under Article 8 of the ECHR. The Court found the removal to be disproportionate, particularly since the effect of the mother's removal was inevitably that the children, who were British nationals, would also have to leave.[4]

In *Re E (Children)*, a British mother challenged a decision providing for the return of her children, from a Norwegian father, to Norway in execution of the 1980 Hague Convention on Civil Aspects of Child Abduction.[5] She based her claim on the following:[6]

1. primacy of the 'child's best interest' pursuant to Article 3(1) of the Convention on the Rights of the Child in all decisions concerning a child;[7]

[1] 213 UNTS 221.
[2] [2011] UKSC 4.
[3] [2011] UKSC 27.
[4] *Supra*, note 2, at [26] and [30–3].
[5] 1343 UNTS 89.
[6] *Supra*, note 3, at [3]
[7] 1577 UNTS 3.

2. incompatibility of orders under the Hague Convention with Article 8 of the ECHR according to the European Court of Human Right's decision in *Neulinger and Shuruk v Switzerland*;[8] and
3. the interpretation and application of Article 13(b) of the Hague Convention in accordance with its own terms, which make an exception for situations in which there is a grave risk that the child's return will expose them to physical or psychological harm or otherwise place them in an intolerable situation.

The appeal was dismissed on three grounds. First, the Court held that the primary object of the Hague Convention was to deter either parent from taking the law into their own hands to unilaterally determine the outcome of the dispute, while the second was to restore the abducted child promptly to their home country.[9] The Court then observed that, although the Hague Convention did not expressly make the 'child's best interest' a primary consideration in court proceedings, this principle was at the forefront of the whole exercise.[10] There was no similar consideration of the best interests of the adult whose rights had been infringed by the abduction.[11] Second, the Court examined the jurisprudence of the European Court of Human Rights in *Neulinger and Shuruk v Switzerland*,[12] finding that the violation of Article 8 of the ECHR in that case did not arise from the application of the Hague Convention but from the effects of subsequent delay. Hague Convention cases therefore required courts not to return the child automatically but to examine each case on its own merits.[13] Third, the Court found no need for Article 13b of the Hague Convention to be narrowly construed, but rather gave weight to the protective measures which could be placed to prevent the child from facing an 'intolerable situation'.[14]

In *Principal Reporter v K*,[15] the Court addressed the right of unmarried fathers to take part in hearings related to their children. The appellant had previously enjoyed regular contact with his daughter, which was suspended on allegations of sexual abuse, but an order was later made that allowed the father to attend hearings involving his daughter. The Court unanimously held that it was both in the child's as well as the father's best interest for the father to

[8] *Neulinger and Shuruk v Switzerland*, [2011] 1 FLR 122.
[9] *Supra*, note 3, at [8].
[10] *Ibid*., at [14].
[11] *Ibid*., at [15].
[12] *Supra*, note 8.
[13] *Supra*, note 3, at [25–6].
[14] *Ibid*., at [37], [49], and [52].
[15] [2010] UKSC 56.

attend the hearing.[16] The Court also found that the right to respect for family life included a positive procedural obligation, whereby parents must be enabled to participate in the decision-making process *before* authorities interfere with their family life with their children.[17] By excluding the appellant from the children' hearing process, the children's hearings system violated Article 8 of the ECHR.[18]

In *Radmacher v Granatino*,[19] the appeal turned on the weight that should be accorded to ante-nuptial agreements when deciding matters of ancillary relief on the breakdown of marriage. The case was particularly significant as the Law Commission was at the time considering reforms to this area of the law.[20] The appellant challenged a decision by the Court of Appeal giving decisive weight to an ante-nuptial agreement which stated that neither party was to benefit from the other's property on termination of the marriage. The appeal was dismissed, with Lady Hale dissenting. The Supreme Court found that if an ante-nuptial agreement was to carry full weight, it should be entered into by the parties of their own free will, without undue pressure or influence,[21] and without the presence of standard vitiating factors (*e.g.*, duress or fraud).[22] It also held that the overall criterion to be applied in ancillary relief proceedings was that of fairness (need, compensation, and sharing), and that the ante-nuptial agreement in dispute did not conflict with the requirements of fairness.[23]

[16] *Ibid*., at [33] and [44].
[17] *Ibid*., at [41].
[18] *Ibid*., at [69].
[19] [2010] UKSC 42.
[20] *Ibid*., at [6].
[21] *Ibid*., at [68–9].
[22] *Ibid*., at [71] and [118–20].
[23] *Ibid*., at [75] and [121–3].

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Overview: Human Rights Law

Jasmine Moussa

The Supreme Court handed down 15 decisions in human rights related cases in the 2010–11 legal year, of which 12 involved rights guaranteed by the European Convention on Human Rights (ECHR).[1]

In the matter of an application by *Re McCaughey*,[2] the Court addressed the question of whether an inquest into a death occurring before the Human Rights Act 1998 came into force had to comply with the procedural obligations under Article 2 of the ECHR. The appellants were the next of kin of two persons that had been killed by the British Army in Northern Ireland in 1990. An inquest was conducted to determine whether the victims had been subject of a shoot to kill policy.[3] The Court of Appeal of Northern Ireland found that there was no obligation for the inquest to comply with Article 2 of the ECHR because the deaths occurred before the entry into force of the Act. The Supreme Court allowed the appeal on the grounds that the decision of the European Court of Human Rights in *Silih v Slovenia*[4] imposed a free-standing obligation to comply with the procedural requirements of Article 2, where a significant proportion of the inquiry took place after the entry into force of the ECHR.[5] Although the Act did not retrospectively impose an obligation to conduct an inquest in relation to a death, where a state has made a decision to conduct such an inquest, it came under a new, free-standing obligation to ensure that the investigation satisfied the procedural requirements of Article 2 of the ECHR.[6]

Six of the appeals related to ECHR rights involved claims pertaining to the right to respect for private and family rights under Article 8 of the ECHR.[7] In *Principal Reporter v K*,[8] the Court held that the child hearing system in Scotland

1 213 UNTS 221.
2 [2011] UKSC 20.
3 *Ibid.*, at [8].
4 (2009) 49 EHRR 37.
5 *Supra*, note 2, at [50].
6 *Ibid.*, at [61].
7 In two of these cases, *ZH (Tanzania) v Secretary of State for the Home Department*, [2011] UKSC 4, and *Re E (Children)*, [2011] UKSC 27, the Supreme Court examined the "child's best interest" principle in relation to Article 8 of the ECHR.
8 [2010] UKSC 56.

violated Article 8. In that case an unmarried father had been denied the status of 'relevant person' for the purposes of attending his child's hearing because the child's birth was registered prior to the entry into force of the 1996 amendment to the 1995 Children's (Scotland) Act.[9] The incompatibility could be remedied by reading the words "or who appears to have established family life with the child with which the decision of a children's hearing may interfere" into the relevant legislation.[10]

Three other cases related to Article 8 of the ECHR examined whether legislation met the proportionality requirement under the Article and struck an adequate balance between private and public interests.[11] In *R (GC) v Commissioner of Police of the Metropolis*,[12] the Court held that the indefinite retention of biometric data of suspects breached Article 8; however, there was no declaration of incompatibility, as the 1984 Police and Criminal Evidence Act could be interpreted in a manner that was compatible with Article 8.[13] It was the police guidelines providing for indefinite retention that were unlawful and incompatible with Article 8.[14] In *R (McDonald) v Kensington and Chelsea RLBC*,[15] the Court found that a decision to substitute overnight care for a disabled person suffering from bladder problems, with incontinence pads or absorbent sheets, met the proportionality requirement of Article 8.[16]

In three cases, the Court addressed the compatibility of legislation with Article 6 of the ECHR. In *Fraser v HM Advocate (Scotland)*,[17] Fraser appealed against a decision of the Scottish Appeal Court refusing him leave to appeal a criminal conviction on the grounds of non-disclosure of evidence. The appeal was allowed; the Supreme Court held that the appellant had been denied a fair trial and suffered a miscarriage of justice. His case was remitted to a differently constituted Appeal Court to determine whether there should be a retrial and the

[9] *Ibid*., at [16], [18], and [48].
[10] *Ibid*., at [70].
[11] These cases included *Birmingham City Council v Frisby*, [2011] UKSC 8, which dealt with possession proceedings brought against an introductory tenant or homeless person. In this case, the Supreme Court applied the same reasoning it had applied earlier in *Manchester City Council v Pinnock*, [2010] UKSC 45 & [2011] UKSC 6.
[12] [2011] UKSC 21.
[13] *Ibid*., at [35].
[14] *Ibid*., at [46], [49], and [52].
[15] [2011] UKSC 33.
[16] *Ibid.*, at [21–22], [39–41], [56–60] (Lady Hale dissenting).
[17] [2011] UKSC 24.

conviction quashed.[18] Similarly, in *Cadder v HM Advocate (Scotland)*[19] the Court allowed the appeal, on the grounds that absence of a lawyer from the time of the detainee's first interrogation was incompatible with Article 6[20] (in accordance with the ECtHR's decision in *Salduz v Turkey*[21]). On the other hand, in *R (G) v X School Governors*,[22] the Court found that Article 6(1) of the ECHR did not apply to a disciplinary hearing held by a school to investigate allegations of sexual misconduct of one of its employees.[23] Since the disciplinary hearing held at the school was not 'decisive' in determining the claimant's civil rights (the right to remain in employment at the school and to practice his profession), the denial of legal representation to the claimant did not engage Article 6.[24] The Court similarly found in *Home Office v Tariq*[25] that the 'closed material procedure' pursuant to the Employment Tribunals Regulations 2004 did not violate the cross-appellant's Article 6 rights.[26]

Three cases before the Supreme Court dealt with aspects of asylum and immigration. *MA (Somalia) v Secretary of State for the Home Department*[27] concerned an asylum claim made by the respondent Somali citizen (M), which had been refused by the Secretary of State. The Asylum and Immigration Tribunal (AIT) held that M's deportation would not violate Article 3 of the ECHR, as M failed to show that he would be at risk on return to Mogadishu (since he had connections with powerful actors in the city, a fact which M had lied about).[28] The Court of Appeal reversed this decision, noting that the AIT had not taken account of the fact that M had been in detention for several years in the UK, which affected the continuity of his contacts in Mogadishu, possibly putting him at risk.[29] The Supreme Court allowed the appeal on the grounds that the AIT had directed itself correctly when considering the question of M's risk on return, noting that there was a need for restraint with respect to appeals from specialist tribunals.[30] In *R (SK (Zimbabwe)) v Secretary of State for the Home De-*

[18] *Ibid*., at [43–4].
[19] [2010] UKSC 43.
[20] *Ibid.*, at [51-55], and [63]
[21] *Salduz v Turkey*, (2008) 49 EHRR 421.
[22] [2011] UKSC 30.
[23] *Ibid*., at [84].
[24] *Ibid*., at [35], [63–9], and [89–91].
[25] [2011] UKSC 35.
[26] *Ibid*., at [67], [69].
[27] [2010] UKSC 49.
[28] *Ibid*., at [21], [35],[38].
[29] *Ibid*., at [40], [41]
[30] *Ibid*., at [43], [46–51].

partment[31] the Court found unlawful the failure to review a foreign national's detention, pending deportation, according to the Secretary of State's published policy. The appellant was awarded damages for false imprisonment.[32]

In *Jivraj v Hashwani*,[33] one of the cases unrelated to ECHR rights, the Court found that an arbitration clause requiring that arbitrators be drawn from a particular religious group did not constitute discrimination on the grounds of religion. On the facts, Jivraj and Hashwani entered into a joint venture agreement which included an arbitration clause requiring disputes to be resolved by three arbitrators who had to be members of the Ismaili Muslim community.[34] The Court of Appeal held that this requirement rendered the arbitration agreement void for discriminating on the grounds of religion.[35] The Supreme Court allowed the appeal.[36] The decision turned on whether arbitrators fell under the ambit of persons 'employed' under a contract pursuant to the 2003 Employment Equality Regulations. The Court held that, as an independent provider of services not falling under a relationship of subordination to the parties, an arbitrator was not 'employed' within the meaning of the regulations, but rather 'independent providers of service who are not in a relationship of subordination with the person who receives the services'. The 2003 Regulations were therefore not applicable to the case.[37] The Court also held that, had the Regulations applied, the requirement that arbitrators be selected from among the Ismaili community would have fallen under the exception to the regulation as a legitimate and justified genuine occupational requirement.[38]

[31] [2011] UKSC 23.
[32] *Ibid*., at [51] and [55–60].
[33] [2011] UKSC 40.
[34] *Ibid*., at [1].
[35] *Ibid*., at [16–17].
[36] *Ibid*., at [74].
[37] *Ibid*., at [23], [27–8], [34–41], and [50].
[38] *Ibid*., at [67–8].

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Overview: Immigration Law

Geraldo Vidigal Neto

The Supreme Court decided, in the 2010–11 legal year, five cases relating to immigration.

In *MA (Somalia) v Secretary of State for the Home Department*,[1] the Supreme Court unanimously overturned the Court of Appeal's decision that had allowed an appeal against the finding of the Asylum and Immigration Tribunal that the claimant should not be granted asylum. On the facts of the case, the Tribunal had taken note of the claimant's false statements on a relevant aspect of his application in making its decision, among other factors. The Supreme Court held that the role of the Court of Appeal in reviewing the Tribunal was limited to correcting errors of law, such as misinterpretations of the relevant treaties, the application of wrong tests, and procedural impropriety. The Court of Appeal could also intervene if the Tribunal omitted to consider a relevant factor, took into account irrelevant factors, or reached an irrational conclusion. The Court of Appeal's disagreement with the Tribunal's assessment of facts was not a sufficient reason to allow an appeal.[2]

ZH (Tanzania) v Secretary of State for the Home Department[3] concerned the weight to be given to the interests of the children of a person subject to deportation proceedings. The individual in question had two children, both UK citizens. The Court held that Article 3(1) of the United Nations Convention on the Rights of the Child[4] created a legal obligation for British administrative authorities to award primary consideration to the best interests of the child in all proceedings concerning children. The Court held that the children were entitled to enjoy the full benefits of their British citizenship, including continued residence in the UK. The deportation of ZH, their primary caregiver, would deprive them of those benefits.[5]

The cases of *R (SK (Zimbabwe)) v Secretary of State for the Home Department*[6]

[1] [2010] UKSC 49.
[2] *Ibid*., at [44–5].
[3] [2011] UKSC 4.
[4] 1577 UNTS 3.
[5] *Supra,* note 3, at [33].
[6] [2011] UKSC 23.

and *R v Secretary of State for the Home Department*[7] involved foreign nationals who were detained after having completed their sentences for various offences. The Secretary of State's published policy on the detention of these foreign nationals pending deportation was different from the actual practice, the latter generally kept the foreign nationals in detention and did not assess the individuals as required by the policy. The Court held, by majority, that the continued detention of the claimants on the basis of practice that conflicted with the published policy was unlawful, even though the detentions might have been lawful had the authorities followed the published policy and its assessment procedure.[8] The minority held that the conduct of a public official contrary to a published policy did not make unlawful those acts that would have been lawful had the published policy been followed.[9] Among the majority, there was disagreement on the question of damages, specifically on whether nominal or more substantive damages should be awarded. The Court held unanimously that exemplary damages were not due to the appellants.[10]

In *FA (Iraq) v Secretary of State for the Home Department*,[11] the Court unanimously referred a matter to the Court of Justice of the European Union (CJEU). In the case, FA had applied for asylum and humanitarian protection in the UK. The Secretary of State refused both applications. Under domestic law, FA was entitled to to appeal the refusal of the asylum claim but not the refusal of his claim for humanitarian protection under the Qualification Directive.[12] The issue was he should have been allowed an appeal against the second refusal under the principle of equivalence. The Secretary of State argued that the equivalence principle was not applicable given that the claim for asylum was a function of the Qualification Directive and therefore did not have its origin in national law but in EU law.[13] The Court referred the matter to the CJEU for a preliminary ruling.

[7] [2011] UKSC 12.
[8] *Ibid*., at [62–88], [198–207], and [221].
[9] *Ibid*., at [319–34] and [343–60].
[10] *Ibid*., at [90–6] and [150–69].
[11] [2011] UKSC 22.
[12] 2004/83/EC.
[13] *Supra,* note 11, at [45–7].

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Overview: International Law

Geraldo Vidigal Neto

In the 2010–11 legal year, the Supreme Court produced six rulings dealing with issues of international law, ranging from questions of sovereign immunity to the articulation between interpretations of the Human Rights Act 1998 by English courts and posterior jurisprudence to the contrary by the European Court of Human Rights (ECtHR).

Dallah Real Estate and Tourism Holding Co v Pakistan[1] dealt with the review powers of courts seized with the enforcement of an international arbitral award. An arbitral tribunal, sitting in Paris under the auspices of the International Chamber of Commerce, had held the Government of Pakistan liable for damages, which the Government challenged on the basis that it had not been a true party to the arbitration agreement. The Court held unanimously that the principle of *Kompetenz-Kompetenz* did not imply that domestic courts were bound by interpretations made by the arbitral tribunal regarding the existence and validity of the arbitration agreement. Pursuant to the Arbitration Act 1996,[2] which reflected the New York Convention,[3] the validity of the award was determined by the law of the seat of arbitration, but could be challenged before the courts of the country of enforcement.[4] Under French law, courts would apply a test of common intention to an issue of jurisdiction. Here, the mere fact that the Government of Pakistan controlled a party and had signalled its approval to the transaction did not mean that it was itself party to the agreement.

In *R v Forsyth*,[5] the Court unanimously upheld the validity of an order issued in relation to United Nations Security Council Resolution 661,[6] which imposed an embargo on trade with Iraq and Kuwait. The Court rejected the argument that the sanctions imposed by the order were not supported by the United Nations Act 1946 due to the delay between resolution and implementation.[7] There

[1] [2010] UKSC 46.
[2] Section 103(2)(b) of the Arbitration Act 1996.
[3] Article V(1)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 3.
[4] *Ibid*., at [24–31] and [104].
[5] [2011] UKSC 9.
[6] SC Res. 661, S/RES/0661 (1990).
[7] *Supra*, note 5, at [10–11].

was no provision in the Act specifying a time-frame for executive action, and no grounds justified the Court establishing a limitation where Parliament had created none.[8]

Re McCaughey[9] concerned the issue of differing interpretations given to the European Convention on Human Rights (ECHR)[10] by domestic courts and the ECtHR. The Supreme Court held, by majority, that the ECHR was a living instrument and that the evolving interpretation of its rights by the Strasbourg court should prevail over previous interpretations of corresponding provisions of the Human Rights Act 1998 by domestic courts.[11] In the context of this case, the Court examined *Šilih v Slovenia*,[12] a 2009 decision of the ECtHR that interpreted Article 2 of the ECHR. This interpretation justified the Supreme Court in overturning a previous interpretation of the corresponding provision of the Human Rights Act 1998 by the House of Lords.[13]

Re E (Children)[14] concerned the interrelationship between the provisions of the Hague Convention on the Civil Aspects of International Child Abduction[15] regarding return of abducted children, on the one hand, and Article 8 of the ECHR, which guarantees the right to private and family lives of the mother and child, on the other hand. The Supreme Court noted that the two instruments most often go hand in hand.[16] In case of a conflict, the balance struck by the courts should have in mind the best interests of the children. Two main aspects of those interests should be considered: children were entitled, first, to be reunited with their parents; and second, to be brought up in a "sound environment", protected from known risks of harm.[17] The proper application of the Hague Convention would not entail a breach of Article 8 of the ECHR.

NML Capital Ltd v Argentina[18] concerned the issue of state immunity from the enforcement of a foreign judgment before the English courts. A federal court in New York issued an award against Argentina for the payment of a debt in relation to the 2001 economic crisis. The Supreme Court unanimously held

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[8] *Ibid*., at [12–18].
[9] [2011] UKSC 20.
[10] 213 UNTS 221.
[11] *Supra*, note 9, at [91].
[12] *Šilih v Slovenia*, Judgment of 9 April 2009, [2009] 49 EHRR 996, at [159].
[13] The decision of the House of Lords in the case of *In re McKerr*, [2004] 1 WLR 807; see *supra*, note 9, at [133].
[14] [2011] UKSC 27.
[15] 1343 UNTS 89.
[16] *Supra*, note 14, at [27].
[17] *Ibid*., at [20] and [52].
[18] [2011] UKSC 31.

that the award could be enforced, but differed on the reasons. Lord Phillips argued that the question was whether the New York judgment could be converted into an English judgment. The State Immunity Act 1978[19] provided for absence of immunity for acts *jure gestionis*, and the underlying transaction was a commercial one.[20] Lord Collins, with whom Lord Walker agreed, maintained that the question did not relate to the underlying transaction but to the New York judgment itself. Therefore, the applicable legislation was the Civil Jurisdiction and Judgments Act 1982.[21] Under the legislation, judgments given in foreign countries against third countries were enforceable in the UK.[22] Argentina had also, by agreement, waived its right to invoke both immunity from jurisdiction and immunity from enforcement.[23]

Finally, in *Lucasfilm Ltd v Ainsworth*,[24] the Court ruled unanimously in favour of the justiciability in England of foreign intellectual property rights. The Court rejected the analogy of *British South Africa Co v Companhia de Moçambique*,[25] on grounds that the 'act of state' doctrine applied to title to and requisition of land, but not to copyrights.[26] Copyrights did not require registration or deposit with state authorities, and could be examined by foreign courts in light of the law under which they existed. At least to the extent that they did not raise issues of title or validity of the relevant rights, actions for infringement of foreign copyrights could be adjudicated by English courts.[27]

[19] Section 3(1) of the State Immunity Act 1978.
[20] *Supra*, note 18, at [41].
[21] Section 31 of Civil Jurisdiction and Judgments Act 1982; *ibid*., at [99] and [109–16].
[22] *NML Capital*, *ibid*., at [118].
[23] *Ibid*., at [128–9].
[24] [2011] UKSC 39.
[25] [1893] AC 602.
[26] *Supra*, note 24, at [86].
[27] *Ibid*., at [105].

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Overview: Local Government Law

Jastine C. Barrett

There were seven Supreme Court decisions relating to local government issues during the 2010–11 legal year.

In *R (McDonald) v Kensington and Chelsea RLBC*,[1] a majority of the Court upheld a local authority's revised care plan for a woman with mobility issues. Previously, a night-time carer assisted the Appellant with accessing a commode. The revised care plan replaced the carer with incontinence pads, which had the effect of saving the local authority £22,000 per year. Although the the Appellant was not, in fact, incontinent, the new care plan did not interfere with her rights under Article 8 of the European Convention on Human Rights (ECHR)[2] since the local authority had respected her dignity and autonomy, and the provision of pads was proportionate and in the interests of other service users.[3] Lady Hale, dissenting, would have allowed the appeal. In her view, the local authority, in considering what was necessary to meet the needs of the Appellant under the Chronically Sick and Disabled Persons Act 1970,[4] had irrationally confused the need to help her access the commode with the need for protection from uncontrollable bodily functions.[5]

Article 8 of the ECHR was also invoked in *Birmingham City Council v Frisby*.[6] In this case, the Court applied the reasoning from its decision in *Manchester City Council v Pinnock*,[7] and unanimously held that a court must have the power to consider the proportionality of possession orders made against tenants occupying local authority housing under the homelessness or introductory tenancy

[1] [2011] UKSC 33.
[2] 213 UNTS 221.
[3] *Supra*, note 1, at [19].
[4] Section 2(1) of the Chronically Sick and Disabled Persons Act 1970; *ibid*., at [69].
[5] *R v Kensington and Chelsea RLBC*, *ibid*., at [75].
[6] [2011] UKSC 8.
[7] [2010] UKSC 45 & [2011] UKSC 6 where the Court held that Article 8 of the ECHR required a court to consider the proportionality of a possession order against a person occupying under the "demoted tenancy" scheme in the Housing Act 1996, and subsequently considered the terms of the consequential possession order.

regimes of the Housing Act 1996.[8] The Court added that a court would only have to consider whether a possession order was proportionate where the occupier raised a seriously arguable case on proportionality; a threshold that would be crossed only in a small number of cases.[9] The question was then whether making an order for possession was a proportionate means of achieving a legitimate aim, although the Court endorsed a limited and generally deferential concept of proportionality.[10]

In another case under the Housing Act 1996,[11] the issue for the Court was the meaning of the word 'violence'. Under the Act, a local authority is obliged to re-house a person where it is not reasonable for that person to continue to occupy accommodation because of the probability of domestic violence.[12] The appellant's request for housing assistance had been rejected after she left the matrimonial home due to her husband's abusive, but physically non-violent, behaviour. The local authority considered it reasonable for her to continue to live in the matrimonial home given a low risk of physical violence. The Court held that domestic violence was not limited to physical contact but could include threatening or intimidating behaviour and any other form of abuse which, directly or indirectly, may give rise to the risk of harm.[13]

In *Brent LBC v Risk Management Partners Ltd*,[14] the Court issued its first judgment relating to public procurement, holding that a local authority could enter into contracts of insurance with a body it had established, in cooperation with other local authorities, without putting those contracts out to tender in the private sector as required by the Public Contracts Regulations 2006. The Court confirmed that the *Teckal* exemption, established in European case law,[15] would apply to the UK Regulations.[16] The exemption was applicable where there was a collective procurement of goods and services, provided no private interests were involved and the authorities acted solely in the public interest in carrying

[8] *Supra*, note 6, at [3].
[9] *Ibid*., at [33] and [35].
[10] *Ibid*., at [33].
[11] *Yemshaw v Hounslow LBC*, [2011] UKSC 3.
[12] Section 177(1) of the Housing Act 1996.
[13] *Supra*, note 11, at [28]. The decision to allow the appeal was unanimous. Although Lord Brown indicated his "very real doubts" that Parliament intended domestic violence to extend beyond the limits of physical violence, he stated that he did not feel strongly enough to carry those doubts to the point of dissent: *supra*, note 11, at [48] and [60].
[14] [2011] UKSC 7.
[15] Case C–107/98, *Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale di Reggio Emilia*, [1999] ECR I–8121.
[16] *Supra*, note 14, at [22–6].

out their tasks.[17]

Finally, two cases before the Court related to local planning applications. In *Morge v Hampshire County Council*,[18] the Court dismissed an appeal that challenged planning permission for a bus route on environmental grounds, including the route's impact on bat populations that were protected under European law. The Court held that a 'direct disturbance', within the meaning of the European Habitats Directive,[19] must be assessed by taking a case-by-case and "species by species" approach.[20] Additionally, where Natural England[21] expressed satisfaction that a proposed development would be compliant with the Directive, the planning authority was entitled to rely on this assessment.[22]

Secretary of State for Communities and Local Government v Welwyn Hatfield BC[23] related to the application of planning law to a dwelling house disguised as a hay barn. The Supreme Court overturned the Court of Appeal's decision that upheld the certificate of lawfulness for the house. The Supreme Court held that the structure, whilst outwardly resembling a barn, had in fact been a house when first constructed. Further, the Court held that it was contrary to public policy to allow the owner to benefit from planning laws and obtain a certificate of lawfulness, given that he had deliberately deceived the planning authorities.[24]

[17] *Ibid*., at [53].
[18] [2011] UKSC 2.
[19] Article 12(1)(b) of the European Habitats Directive, 92/43/EEC.
[20] *Supra*, note 18, at [21].
[21] The public body with primary responsibility for ensuring compliance with the Habitats Directive.
[22] *Supra*, note 18, at [30].
[23] [2011] UKSC 15.
[24] *Ibid*., at [53–8].

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Overview: Private Law

James Goodwin

The Supreme Court decided 13 cases involving aspects of private law in the 2010–11 legal year.

Global Process Systems Inc v Syarikat Takaful Malaysia Berhad[1] concerned the meaning of 'inherent vice', a risk typically excluded from insurance policies in the marine cargo context. The claim arose when the three legs of a 300 foot tall oil rig snapped off during shipping and sank to the bottom of the Indian Ocean. Argument centred over whether the proximate cause of the metal fatigue was an inherent vice of the legs themselves, or the effect of wave action. The Supreme Court dismissed the appeal, adopting a narrow interpretation of inherent vice, and agreeing with the Court of Appeal that the cause of the metal fatigue was a leg breaking wave.[2]

Interpretation of a term was also in issue in *Multi-Link Leisure Developments Ltd v North Lanarkshire Council*.[3] In that case, the Court unanimously dismissed the appeal and held that a clause for 'hope value' in the relevant lease included developmental potential.

Oceanbulk Shipping & Trading SA v TMT Asia Ltd[4] concerned whether an exception should be made to the inadmissibility of 'without prejudice' negotiations for the purpose of interpreting a contract. In a sole judgment given by Lord Clarke, seven justices agreed that such an exception should be made. Although it was recognised that the 'without prejudice' rule should not be lightly eroded, objective facts which emerge during pre-contract negotiations are part of the factual matrix, and as such, are admissible as an aid to construction.[5] Thus, an interpretation exception has been carved out, and courts can search more widely in aiming to reflect the parties' true intentions.

In a similar vein, the Court in *Autoclenz Ltd v Belcher*[6] confirmed that an employment tribunal should look beyond the written terms of a contract to con-

[1] [2011] UKSC 5.
[2] *Ibid*., at [97].
[3] [2010] UKSC 47.
[4] [2010] UKSC 44.
[5] *Ibid*., at [46].
[6] [2011] UKSC 41.

sider whether the agreement is commensurate with the intentions of the parties, both at the inception of the contract and at later stages in the relationship.

Spiller v Joseph[7] was the first libel case to be considered by the Court. The case concerned a dispute between a band named 'The Gillettes' and their entertainment booking service. The justices unanimously held that the defence of fair comment was open to the appellant entertainment booking service. The result is that the scope and application of the defence of fair comment has been broadened (although Lord Phillips preferred the nomenclature of 'honest comment'[8]). The onus is on the defendant to identify the facts on which the comment is based: the subject needs to be identifiable, but only in general terms.[9] However, with the state of the law in this area still somewhat unclear, the justices invited the Law Commission or another expert committee to look at this important defence to defamation.[10] This will not be the last word on 'honest comment'.

In another first for the Court, the justices in *Brent LBC v Risk Management Partners Ltd*[11] examined an issue of procurement. The Supreme Court unanimously affirmed the decision of the Court of Appeal, meaning that the local authority in question could rely on the *Teckal* exception to the standard procurement procedure. This exception, drawn from European jurisprudence, permits public authorities to depart from regulations (in this case the Public Contracts Regulations 2006) when contracting with 'quasi-in-house' providers.[12]

Knowsley MBC v Willmore[13] provided the latest statement on the vexed tortious questions arising out of mesothelioma caused by wrongful exposure to asbestos. In this case, the Court unanimously held that the exception to the rules on causation established in *Fairchild*[14] applied also in 'single exposure' cases. In *Fairchild* the claimant contracted mesothelioma after being wrongfully exposed to asbestos by several defendants ('multiple exposure').[15] In such a case, 'but for' causation is dispensed with: the claimant must merely show that the defendant's breach 'materially increased' the risk of contracting mesothelioma.

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[7] [2010] UKSC 53.
[8] *Ibid*., at [117].
[9] *Ibid*., at [105].
[10] *Ibid*., at [117].
[11] [2011] UKSC 7.
[12] See Case C–107/98, *Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia*, [1999] ECR I–8121.
[13] [2011] UKSC 10.
[14] *Fairchild v Glenhaven Funeral Services Ltd*, [2002] UKHL 22.
[15] See also *Barker v Corus UK Ltd*, [2006] UKHL 20.

Knowsley applied this reasoning to 'single exposure' cases, where there is a single defendant and other non-tortious exposures to asbestos. The role of the Compensation Act 2006 was also clarified: it is concerned with quantum, not liability.[16]

In a case likely to have important repercussions in the sphere of professional negligence, the justices held by majority in *Jones v Kaney*[17] that the immunity of expert witnesses from suit should be abolished. The clash between majority and minority was on a point of policy. The minority of Lord Hope and Lady Hale identified a long-established immunity which evinced a clear policy choice intended to protect witnesses, and found no principled basis for removing it.[18] However, the majority, while espousing the need for immunity of opposing or court-appointed witnesses, held that removing the immunity for 'own' expert witnesses was commensurate with the principle that "where there is a wrong there must be a remedy".[19]

Baker v Quantum Clothing Group Ltd[20] concerned a test case on the liability of employers in the knitting industry for hearing loss suffered by employees. Negligence was alleged under common law and under the Factories Act 1961.[21] By a bare majority of the five justices, it was held that until the relevant European Directive[22] became known as a consultative document, the average employer was not liable for hearing loss. Certain employers, cognisant of the dangers of hearing loss before this date, were potentially liable.

Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd[23] arose out of the insolvency of Lehman Brothers, and centred on the application of the 'anti-deprivation rule'. The question for the Court was who had priority of claim to collateral under a complex structured finance program: the appellant Lehman Brothers financing vehicle or the respondent noteholders. Under contract terms, the noteholders were granted priority. The appellant argued that such provisions should be unenforceable by reference to the 'anti-deprivation rule': such contractual terms deprived creditors of assets available for distribution out of the insolvent estate. This argument was rejected unanimously by the Court. Lord Collins elucidated that the rule would only apply where there is a

[16] *Supra*, note 13, at [183].
[17] [2011] UKSC 13.
[18] *Ibid*., at [173] and [190].
[19] *Ibid*., at [113].
[20] [2011] UKSC 17.
[21] Section 29(1) of the Factories Act 1961.
[22] 86/188/EEC.
[23] [2011] UKSC 38.

deliberate intention to evade the insolvency laws.[24]

The validity of a contractual term also formed the crux of the dispute in *Jivraj v Hashwani*.[25] The Court unanimously held that arbitrators are not employees for the purposes of anti-discrimination legislation. Therefore, a term in an arbitration agreement requiring all arbitrators to be of a certain religion was valid.

Al Rawi v Security Service[26] concerned questions of procedure arising out of a civil claim. The Court held that a court has an inherent power to order a 'closed material procedure' in certain contexts.

In *Walumba Lumba (Congo) 1 and 2 v Secretary of State for the Home Department*,[27] a majority of the Court held that the fact that the appellants would have lawfully been detained in any case did not negate the Secretary of State's liability for false imprisonment. This fact was relevant to quantum rather than to liability. The appellants were not entitled to exemplary damages, and since they had suffered no loss, they ought to recover no more than nominal damages of £1.

[24] *Ibid*., at [78].
[25] [2011] UKSC 40.
[26] [2011] UKSC 34.
[27] [2011] UKSC 12.

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Overview: Tax Law

James Goodwin

Four cases concerning tax law came before the Supreme Court in the 2010–11 legal year.

In *Holland v Revenue and Customs Commissioners*,[1] the issue was whether the respondent Holland had acted as a *de facto* director for the 42 insolvent companies in question, of which HM Revenue and Customs Commissioners (HMRC) was the sole creditor in respect of corporation tax. On this basis it was alleged that Holland had been guilty of misfeasance and breach of duty in causing the payment of dividends to the companies' shareholders when the companies had insufficient distributable reserves to pay their creditors. The Court held by a bare majority that Mr Holland had simply discharged his duties as the director of the corporate director, and as such was not a de facto director. Therefore, he was not personally answerable to the HMRC's claim under Section 212 of the Insolvency Act 1986. It should be noted that the importance of this case is likely to be limited: Section 155(1) of the Companies Act 2006 now requires that a company must have at least one director who is a natural person who could, if necessary, be held to account for the company's actions.[2]

Revenue and Customs Commissioners v DCC Holdings (UK) Ltd[3] involved a complex tax avoidance scheme. The arrangement involved five repo transactions concerning gilts. A repo transaction is a fixed price sale and purchase of gilts, which has the equivalent economic effect of a short term secured loan.[4] The tax legislation looks to the substance of such arrangements, and is intended to treat the transactions as loans.[5] Thus, the repo transactions are deemed to produce credits and debits between the parties which are subject to tax. The purpose of the appellant's scheme was to create a loss for the company for tax purposes without suffering genuine economic loss. Under the relevant legislation, this seemed perfectly possible. The company appeared to be able to claim a tax loss of £28.8m, while garnering a mere £2.9m of taxable credit. Nevertheless, the justices were driven to find a "symmetrical solution" to avoid the

[1] [2010] UKSC 51.
[2] See also Department of Trade and Industry, *Company Law Reform* (Cm 6456, 2005), at [3.3].
[3] [2010] UKSC 58.
[4] *Ibid*., at [6] and [14].
[5] *Ibid*., at [10].

"absurdity" of the apparent result.[6] The legislation was therefore interpreted in line with its purpose, which was to tax the arrangement as though it were a short term loan. Hence, the tax loss was deemed to reflect the taxable credit: £2.9m. Although the putative loophole in the legislation has subsequently been closed,[7] future tax avoidance schemes may fall foul of the Court's purposive approach to the tax legislation.

In *Revenue and Customs Commissioners v Tower MCashback LLP1*,[8] the justices were required to answer whether expenditure incurred by the respondents on software rights, which was funded partly by loans from the owner of the software, could qualify for a first year allowance under Section 45 of the Capital Allowances Act 2001.[9] The Supreme Court overturned the Court of Appeal and held that only the proportion of the price paid by the respondents was properly incurred for the purposes of a first year allowance: "[a] fair outcome in a confusing case".[10] On a procedural issue, the justices confirmed that tax tribunals are not limited by the exact wording of closure notices, and that closure notices may be drafted in general terms where the complexity of the facts demand it.[11]

Finally, in *Scottish Widows Plc v Revenue and Customs Commissioners*,[12] the Court unanimously allowed the cross-appeal by HMRC and held that amounts included in a life assurance company's Form 40 revenue account, and recorded in three consecutive annual regulatory returns, fell within the scope of Section 83(2)(b) of the Finance Act 1989. Consequently, such amounts constituted an increase in value for tax purposes, regardless of the fact that the amounts were included for regulatory commitments only and that the market value of the fund in question had actually dropped in value. In interpreting the legislation, the Court held that recourse would only be had to legislative history when there was ambiguity in the language of the statute.[13]

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[6] *Ibid*., at [25].
[7] *Ibid*., at [36]; see Part 6 of the Corporation Tax Act 2009.
[8] [2011] UKSC 19.
[9] *Ibid*., at [1].
[10] *Ibid*., at [79].
[11] *Ibid*., at [18].
[12] [2011] UKSC 32.
[13] *Ibid*., at [16].

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Appendix A: Composition of the Supreme Court

Composition of the Court on 1 October 2010

President of the Supreme Court
Lord Phillips of Worth Matravers

Deputy President of the Supreme Court
Lord Hope of Craighead

Justices of the Supreme Court
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood
Lord Mance
Lord Collins of Mapesbury
Lord Kerr of Tonaghmore
Lord Clarke of Stone-cum-Ebony
Lord Dyson

Appointments to the Court during the 2010–11 legal year

Lord Wilson of Culworth
26 May 2011—Assumed Office

Offices vacated during the 2010-11 legal year

Lord Collins of Mapesbury
7 May 2011—Retired

Lord Rodger of Earlsferry
26 June 2011—Deceased

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Appendix B: Statistics

Table 1: General Statistics

	2010–11	2009–10	Change
Case Volume			
Total number of judgments handed down	58 (100%)	52 (100%)	+11.54%
—Michaelmas Term 2010	18 (31.03%)	16 (30.77%)	+0.26%
—Hilary Term 2011	16 (27.59%)	14 (26.92%)	+0.67%
—Easter Term 2011	7 (12.07%)	7 (13.46%)	-1.39%
—Trinity Term 2011	17 (29.31%)	15 (28.85%)	+0.46%
Voting Patterns*			
—Total appeals decided	62 (100%)	52 (100%)	+19.23%
—Full unanimity	14 (22.58%)	15 (28.85%)	-6.27%
—Qualified unanimity	32 (51.61%)	26 (50.00%)	+1.61%
—Divided	16 (25.81%)	11 (21.15%)	+4.66%

* This total includes 4 cross-appeals in addition to 58 main appeals whereas the total for 2009–10 does not count cross-appeals separately. The disposition of each case was coded as one of four categories based upon the perspective of the appellant: (i) appeal allowed; (ii) appeal allowed in part; (iii) appeal dismissed; and (iv) referred to the CJEU. For each category of disposition there is a further descriptor of (i) unanimous—all judges agreed on the disposition with the same legal reasoning; (ii) unanimous in result; division on reasons—all judges voted for the same disposition of the appeal but varied somewhat in their legal reasoning to achieve that result, any substantive legal reasoning by a judge whatsoever is counted as new legal reasoning even if the judge claims to join other opinion(s), although this category includes fully unanimous decisions where there are joint authors since more than one judge participated in writing the decision and thus both judges receive authorship credit; and (iii) by majority; dissenting judges - meaning that at least one judge disagreed on the disposition advocated by the majority of the judges, note that the majority of judges in such a case could themselves be unanimous or split on their legal reasoning, but this information is not recorded. Cross appeals are recorded in the same way but tabulated separately. Note that in the case of *Scottish Widows Plc v Revenue and Customs Commissioners*, the appeal was unanimously decided as moot but on divided legal reasoning.

Table 1: General Statistics (Continued)

	2010–11	2009–10	Change
Disposal of appeals			
—Total number	58 (100%)	52 (100%)	+11.54%
—Appeal allowed, including in part	28 (48.28%)	26 (50.00%)	-1.72%
—Appeal dismissed	26 (44.83%)	23 (44.23%)	+0.60%
—References to the Court of Justice of the European Union	3 (5.17%)	3 (5.77%)	-0.60%
—Appeal moot	1 (1.72%)	—	—
Disposal of cross-appeals			
—Total number	4 (100%)	—	—
—Cross-appeal allowed, including in part	2 (50%)	—	—
—Cross-appeal dismissed	2 (50%)	—	—
Panel Size[†]			
—9	7 (12.07%)	3 (5.77%)	+6.30%
—7	12 (20.69%)	7 (13.46%)	+7.23%
—5	39 (67.24%)	42 (80.77%)	-13.53%
—Panels including Acting Justices	4 (6.90%)	11 (21.15%)	-14.25%

[†] Lord Rodger died in office and did not render a judgment in *Al Rawi v Security Service* or *Home Office v Tariq*, he is therefore recorded as having heard these appeal cases but not as having cast a vote in their judgment; Lord Collins retired on 7 May 2011 but continued to hear cases throughout the legal year as an "Acting Justice"; while Lord Saville retired at the end of the 2009–10 legal year, he delivered a number of opinions in cases released by the Supreme Court in the 2010–11 legal year, the last being *Baker v Quantum Clothing Group Ltd*; Lord Wilson was appointed and assumed office on 26 May 2011, his first case being *Re E (Children)*; in addition to the permanent judges on the Supreme Court, Lords Neuberger and Judge sat on a number of cases as Acting Justices in the 2010–11 legal year.

TABLE 2: STATISTICS FOR INDIVIDUAL JUSTICES[‡]

	Cases decided	Within Majority	Within Minority	Judgments Written
Lord Phillips	28	27 (96%)	1 (4%)	16 (57%)
Lord Hope	37	36 (97%)	1 (3%)	26 (70%)
Lord Walker	35	33 (94%)	2 (6%)	13 (37%)
Lady Hale	35	31 (89%)	4 (11%)	20 (57%)
Lord Brown	33	28 (85%)	5 (15%)	19 (58%)
Lord Mance	26	24 (92%)	2 (8%)	18 (69%)
Lord Kerr	26	22 (85%)	4 (15%)	17 (65%)
Lord Clarke	26	23 (88%)	3 (12%)	17 (65%)
Lord Dyson	29	29 (100%)	0 (0%)	15 (52%)
Lord Wilson	3	3 (100%)	0 (0%)	1 (33%)
Lord Collins	23	22 (96%)	1 (4%)	13 (57%)
Lord Rodger	30	25 (83%)	5 (17%)	14 (47%)
Lord Saville	5	5 (100%)	0 (0%)	3 (60%)
Acting Justices				
Lord Neuberger	2	2 (100%)	0 (0%)	2 (100%)
Lord Judge	2	1 (50%)	1 (50%)	2 (100%)

[‡] The data in this table have been constructed in the following manner. First, each judge on a panel is recorded as being part of one of two groups: either the majority or minority, based on the judge's vote on the disposition of the case and the numbers of the other judges on the panel concurring in the result (but not necessarily the legal reasoning). Second, each judge is determined to have either authored his or her own opinion or to have joined that of another judge or group of judges. Any substantive legal reasoning by a judge whatsoever is counted as a new legal opinion even if the judge claims to join other opinion(s). Each judge receives authorship credit for judgments that list multiple authors. Judges are considered to have joined, and not wrote, an opinion that lists the judge as in agreement or if the judge simply writes that he or she agrees with another judge and does not add any substantive legal reasoning.

Table 3: Comparative Voting Statistics

	Lord Phillips	Lord Hope	Lord Walker	Lady Hale	Lord Brown	Lord Mance	Lord Kerr	Lord Clarke	Lord Dyson	Lord Wilson	Lord Collins	Lord Rodger	Lord Saville	Lord Neuberger	Lord Judge
Lord Phillips		P 14 M 12 D 1	P 16 M 14 D 1	P 20 M 16 D 1	P 19 M 16 D 0	P 15 M 14 D 0	P 12 M 10 D 1	P 13 M 12 D 0	P 16 M 15 D 1	P 1 M 1 D 0	P 13 M 12 D 1	P 16 M 12 D 0	P 0 M 0 D 0	P 1 M 1 D 0	P 2 M 1 D 0
Lord Hope	P 14 M 12 D 1		P 22 M 20 D 0	P 24 M 21 D 0	P 24 M 20 D 1	P 11 M 10 D 0	P 20 M 17 D 1	P 16 M 14 D 0	P 17 M 16 D 1	P 2 M 2 D 0	P 13 M 12 D 1	P 21 M 17 D 0	P 3 M 3 D 0	P 2 M 2 D 0	P 1 M 0 D 0
Lord Walker	P 16 M 14 D 1	P 22 M 20 D 2		P 21 M 18 D 1	P 18 M 16 D 0	P 15 M 14 D 0	P 12 M 9 D 1	P 14 M 12 D 1	P 12 M 12 D 0	P 3 M 3 D 0	P 15 M 14 D 1	P 15 M 13 D 0	P 2 M 1 D 1	P 2 M 2 D 0	P 1 M 0 D 0
Lady Hale	P 20 M 16 D 3	P 24 M 21 D 2	P 21 M 18 D 2		P 22 M 14 D 4	P 15 M 12 D 1	P 17 M 11 D 4	P 13 M 12 D 0	P 13 M 10 D 3	P 2 M 2 D 0	P 12 M 10 D 2	P 20 M 14 D 1	P 1 M 1 D 0	P 2 M 2 D 0	P 2 M 1 D 0
Lord Brown	P 19 M 16 D 2	P 24 M 20 D 3	P 18 M 16 D 1	P 22 M 14 D 4		P 13 M 11 D 1	P 20 M 13 D 4	P 8 M 6 D 1	P 21 M 18 D 3	P 0 M 0 D 0	P 7 M 5 D 1	P 23 M 17 D 1	P 0 M 0 D 0	P 1 M 1 D 0	P 2 M 0 D 1

The data indicate the number of cases in which two Justices participated in the same case (P), the number of times two Justices were part of the same majority (M) and the number of times the Justice listed in the row header was part of the minority at the same time that the Justice listed in the column header was part of the majority (D).

TABLE 3: COMPARATIVE VOTING STATISTICS (CONTINUED)

	Lord Phillips	Lord Hope	Lord Walker	Lady Hale	Lord Brown	Lord Mance	Lord Kerr	Lord Clarke	Lord Dyson	Lord Wilson	Lord Collins	Lord Rodger	Lord Saville	Lord Neuberger	Lord Judge
Lord Mance	P 15 M 14 D 1	P 11 M 10 D 1	P 15 M 14 D 1	P 15 M 12 D 1	P 13 M 11 D 1		P 9 M 5 D 1	P 15 M 12 D 1	P 11 M 10 D 1	P 0 M 0 D 0	P 14 M 12 D 1	P 10 M 10 D 0	P 3 M 3 D 0	P 1 M 1 D 0	P 0 M 0 D 0
Lord Kerr	P 12 M 10 D 1	P 20 M 17 D 2	P 12 M 9 D 2	P 17 M 11 D 2	P 20 M 13 D 3	P 9 M 5 D 3		P 7 M 4 D 1	P 17 M 14 D 3	P 1 M 1 D 0	P 6 M 6 D 0	P 13 M 8 D 0	P 2 M 1 D 1	P 0 M 0 D 0	P 2 M 1 D 0
Lord Clarke	P 13 M 12 D 1	P 16 M 14 D 2	P 14 M 12 D 0	P 13 M 12 D 0	P 8 M 6 D 1	P 15 M 12 D 1	P 7 M 4 D 1		P 11 M 9 D 2	P 1 M 1 D 0	P 14 M 13 D 1	P 12 M 11 D 0	P 4 M 2 D 2	P 1 M 1 D 0	P 1 M 0 D 0
Lord Dyson	P 16 M 15 D 0	P 17 M 16 D 0	P 12 M 12 D 0	P 13 M 10 D 0	P 21 M 18 D 0	P 11 M 10 D 0	P 17 M 14 D 0	P 11 M 9 D 0		P 0 M 0 D 0	P 6 M 5 D 0	P 17 M 14 D 0	P 2 M 2 D 0	P 0 M 0 D 0	P 1 M 1 D 0
Lord Wilson	P 1 M 1 D 0	P 2 M 2 D 0	P 3 M 3 D 0	P 2 M 2 D 0	P 0 M 0 D 0	P 0 M 0 D 0	P 1 M 1 D 0	P 1 M 1 D 0	P 0 M 0 D 0		P 2 M 2 D 0	P 0 M 0 D 0	P 0 M 0 D 0	P 0 M 0 D 0	P 0 M 0 D 0

The data indicate the number of cases in which two Justices participated in the same case (P), the number of times two Justices were part of the same majority (M) and the number of times the Justice listed in the row header was part of the minority at the same time that the Justice listed in the column header was part of the majority (D).

Table 3: Comparative Voting Statistics (Continued)

	Lord Phillips	Lord Hope	Lord Walker	Lady Hale	Lord Brown	Lord Mance	Lord Kerr	Lord Clarke	Lord Dyson	Lord Wilson	Lord Collins	Lord Rodger	Lord Saville	Lord Neuberger	Lord Judge
Lord Collins	P 13 M 12 D 0	P 13 M 12 D 0	P 15 M 14 D 0	P 12 M 10 D 0	P 7 M 5 D 0	P 14 M 12 D 1	P 6 M 6 D 0	P 14 M 13 D 0	P 6 M 5 D 1	P 2 M 2 D 0		P 10 M 8 D 1	P 3 M 3 D 0	P 1 M 1 D 0	P 0 M 0 D 0
Lord Rodger	P 16 M 12 D 3	P 21 M 17 D 4	P 15 M 13 D 1	P 20 M 14 D 5	P 23 M 17 D 1	P 10 M 10 D 0	P 13 M 8 D 5	P 12 M 11 D 1	P 17 M 14 D 3	P 0 M 0 D 0	P 10 M 8 D 1		P 0 M 0 D 0	P 1 M 1 D 0	P 2 M 0 D 1
Lord Saville	P 0 M 0 D 0	P 3 M 3 D 0	P 2 M 1 D 0	P 1 M 1 D 0	P 0 M 0 D 0	P 3 M 3 D 0	P 2 M 1 D 0	P 4 M 2 D 0	P 2 M 2 D 0	P 0 M 0 D 0	P 3 M 3 D 0	P 0 M 0 D 0		P 0 M 0 D 0	P 0 M 0 D 0
Lord Neu-berger	P 1 M 1 D 0	P 2 M 2 D 0	P 2 M 2 D 0	P 2 M 2 D 0	P 1 M 1 D 0	P 1 M 1 D 0	P 0 M 0 D 0	P 1 M 1 D 0	P 0 M 0 D 0	P 0 M 0 D 0	P 1 M 1 D 0	P 1 M 1 D 0	P 0 M 0 D 0		P 0 M 0 D 0
Lord Judge	P 2 M 1 D 1	P 1 M 0 D 1	P 1 M 0 D 0	P 2 M 1 D 1	P 2 M 0 D 0	P 0 M 0 D 0	P 2 M 1 D 1	P 1 M 0 D 1	P 1 M 1 D 0	P 0 M 0 D 0	P 0 M 0 D 0	P 2 M 0 D 0	P 0 M 0 D 0	P 0 M 0 D 0	

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