



**INTERPRETING & GENERATING RIGHTS
IN MULTI-LEVEL JURISDICTIONS:
EXPLORING SOURCES OF LAWS & NORMS**

1 MAY 2012

PROGRAMME & PAPERS

UCL JUDICIAL INSTITUTE





Interpreting & Generating Rights in Multi-level Jurisdictions: Exploring Sources of Laws & Norms

UCL Judicial Institute and Yale Law School Collaborative Seminar

Tuesday 1 May 2012
The Athenaeum Club
Pall Mall, London

This half-day seminar brings together judges and academics from diverse jurisdictions to examine how courts deal with legal differences in the interpretation and application of constitutional and human rights obligations.

Federal constitutional courts regularly invoke federalism when determining the scope of national constitutional rights; at times, the national court defers to regional variations and tolerates legal regimes differing from national norms. The European Court of Justice and the European Court of Human Rights invoke the concepts of subsidiarity and the margin of appreciation to enable member states in some circumstances to vary the meaning and implementation of rights. The UK Supreme Court, operating in a devolved jurisdiction, is also called upon to apply the European Convention of Human Rights in regions such as Scotland and Northern Ireland which have their own distinct legal systems.

As its starting point, the seminar uses a set of illustrative cases and opinion pieces from a range of jurisdictions, which are designed to prompt discussion about how judges in different jurisdictions grapple with the sometimes competing demands of constitutional rights and regional autonomy. The Background Papers are aimed at generating a discussion around a number of questions:

- To what extent do constitutional structures dictate how courts approach competing demands for regional autonomy in law making and individual rights?
- Do doctrines such as the margin of appreciation and federalism function as a rationale for tolerating or authorising non-compliance - or as a mechanism for deciding what is compliance with legal rules?
- Are there particular issues (e.g., religion, language, gender, citizenship, criminal justice) where claims for regional variations in rights are particularly strong? And why might such claims arise in these areas and not others?
- What is the relevance of the degree to which a region is an "outlier" in pressing its interpretation of a particular right?
- What powers do courts (or other institutions) have to enforce their views? What range of judgments is left to member states for compliance? What kinds of "overrides" of court judgments might be available?
- To what extent do courts take account of sources outside of their jurisdiction, such as international conventions or interpretations from courts in other countries?

THE UCL JUDICIAL INSTITUTE

The UCL Judicial Institute (JI) is the first and only centre of excellence for research and teaching about the judiciary in the UK. The Institute's purpose is to provide evidence-based understanding and intellectual leadership about the judiciary as a critical social institution and about the process of judicial decision-making. The Institute carries out leading-edge research on the judiciary and provides outstanding educational opportunities for students, practitioners, judges and those performing quasi-judicial roles. The Judicial Institute is led by Co-Directors Professor Dame Hazel Genn and Professor Cheryl Thomas and guided by a distinguished Advisory Board. The Judicial Institute launched in November 2010 with a high profile debate on The Future of Judging between Lord Neuberger Master of the Rolls, Professor Richard Susskind and the Institute Directors. The launch seminar attracted an audience of over 200 including senior judiciary, policy makers, practitioners, third sector professionals and academics from a range of disciplines. For further information on the UCL Judicial Institute please see the JI website: www.ucl.ac.uk/laws/judicial-institute



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PROGRAMME

14:00	Welcome Picture Room The Athenaeum Club
14:10	Part 1: Constitutional Structures & Bills of Rights
15:00	Part 2: Interpretive Approaches
15:45	Tea
16:00	Part 3: Life, Citizenship and Justice
17:00	Part 4: Who are the Masters?
17:50	Closing Remarks
19:00	Dinner Picture Room The Athenaeum Club

PARTICIPANTS

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Professor Cheryl Thomas

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Professor Judith Resnik

The Rt Hon the Lord Phillips

The Rt Hon the Lord Hope

The Rt Hon the Lady Hale

The Rt Hon the Lord Kerr

The Rt Hon the Lord Mance

The Rt Hon the Lord Sumption

President of the UK Supreme Court

Deputy President of the UK Supreme Court

Justice of the UK Supreme Court

The Rt Hon Beverley McLachlin

Lady Justice Georgina Wood

Chief Justice, Supreme Court of Canada

Chief Justice, Supreme Court of Ghana

The Rt Hon the Lord Neuberger

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BACKGROUND PAPERS

Interpreting & Generating Rights in Multi-level Jurisdictions: Exploring Sources of Laws & Norms

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BACKGROUND PAPERS

Interpreting & Generating Rights in Multi-level Jurisdictions

Introduction

These Background Papers provide some illustrative cases and commentaries exploring legal systems that simultaneously embrace two commitments. The first is to regional governments (member states, states, provinces etc), which are recognised as having a degree of autonomy and identity (sometimes expressed as “sovereignty”) over a particular domain or issue. The second commitment is to individuals, who are understood to possess certain constitutional and human rights wherever they live within the larger jurisdiction.

The focus of the seminar and these Background Papers is on how courts deal with the conflicts generated by the intersection of these two commitments.

Organisation of the Papers and Seminar

In Part 1, ***Constitutional Structures and Bills of Rights***, the materials provide some background to the variety of constitutional structures that exist where courts must adjudicate between regional autonomy and individual rights claims. These initial materials explore several forms of federalism (national and supranational) as well as devolved government, and a range of approaches to incorporating bills of rights into such decentralised structures.

Part 2, ***Interpretive Approaches***, examines different judicial doctrines of deference to regional laws and whether those doctrines function as a rationale for authorising non-compliance and/or as a mechanism for deciding what qualifies as compliance with legal rules.

In Part 3, the Background Papers explore how courts in different jurisdictions deal with regional autonomy and rights claims in three specific areas: ***Life, Citizenship and Justice***.

Finally in Part 4, ***Who are the Masters?***, the materials explore questions of judicial sovereignty that can arise in these types of cases and jurisdictions. They examine what role courts play in promoting dialogue (between courts and between courts and elected institutions), as well as compliance, enforcement and internationalisation of rights adjudication.

Questions for consideration at the seminar

In each of the four Parts of the Background Papers, a set of “**Questions to Consider**” has been highlighted in relation to the materials in that section. These are meant to provide an indication of the types of issues to be discussed in each part of the seminar, but they are not meant to be exhaustive and it is hoped that they will prompt further questions and discussion.

Jurisdictions covered in the materials

This compilation of materials is grounded in an awareness of differences between jurisdictions: differences in the underlying constitutional documents and the distinctive historical experiences of jurisdictions, in the kinds of remedies available for noncompliance, and in the forms of implementation and oversight provided by constitutional or supra-national courts. Moreover, variations exist not only in the enforcement powers of courts but also in the mechanisms for overriding judicial decisions.

The jurisdictions highlighted in these background materials are varied in structure, scope and approach to this issue. The United States and Canada represent two contrasting national federal systems. While the US federation combines 50 individual states and a population of 300 million under a long established principle of constitutional supremacy, the Canadian federation binds 10 provinces and a population of 34 million in a relatively new constitutional arrangement that accommodates parliamentary government alongside a bill of rights.

Supra-national federalism is represented at two different European levels. The cases of the European Court of Human Rights (ECtHR) cover the 47 nation states of the Council of Europe (800 million inhabitants), while the cases of the Court of Justice of the European Union (ECJ) encompass the 27 member states of the European Union.

The United Kingdom is at one level a member state of both European supra-national federations (Council of Europe and European Union), and at the same time the UK has a devolved national constitutional structure encompassing three regions (Scotland, Wales and Northern Ireland) which fall within the jurisdiction of the UK Supreme Court.

The selection of Background Materials

These materials are necessarily a limited selection from a wide range of commentaries and cases. They have been selected in the hope that they will foster a discussion about how judges grapple with the sometimes competing demands of constitutional rights and of sovereignty or autonomy claims in different jurisdictions. The commentaries and cases present conflicting views about whether sovereign identity or individual rights should prevail and when some claim of fundamental right or of sovereign self-definition must give way. The materials also explore the frameworks on which courts rely to mediate these tensions. By including materials from differing jurisdictions and on differing policy issues, it is hoped that this will help to provide an understanding of the contributions that courts make when dealing with these challenges.

These materials were produced in collaboration between the UCL Judicial Institute and Yale Law School. Those contributing from Yale include Professor Judith Resnik and Professor Reva Siegel, along with Law Students Kevin Lamb and Travis Pantin. Contributors from UCL include Professor Cheryl Thomas and Professor Dame Hazel Genn, along with UCL Laws PhD student Anna Donovan.

PART 1
Constitutional Structures
and Bills of Rights

Part 1: Constitutional Structures and Bills of Rights

The materials in Part 1 provide some background to the variety of constitutional structures that exist where courts must adjudicate between regional autonomy and individual rights claims. These initial materials explore several forms of federalism (national and supra-national) as well as devolved government, and a range of approaches to incorporating bills of rights into such decentralised structures. The materials are grouped into 3 themes.

The materials on **federalism (national and supra-national)** examine some arguments made for and against a multiplicity and diversity of legal rules. **Sager**, for example, celebrates what he sees as American “cool federalism’s” ability to innovate by experimenting with new rights and building consensus or exploring differences over time, and the desirability of negotiating and renegotiating the meaning of membership in a political federation. Resnik, in contrast, sees attempts to categorise policy areas as belonging to individual geographical governments as misguided and as undervaluing individual liberty, dignity and equality rights. Two landmark cases, one from the US (***Planned Parenthood v Casey*** on abortion rights) and one from the ECtHR (***Lautsi v Italy*** on religion and education rights), illustrate judicial approaches in national and supra-national federations.

Part 1’s second group of materials on **a bill of rights in the UK’s devolved system** illustrates that these are not issues confined to federal systems alone. As Harvey explains, devolution and the Human Rights Act were both part of the constitutional restructuring which took place in the UK. Until 1999, Scottish criminal cases were not subject to scrutiny by any other UK court. With the devolution settlement, human rights were written into the constitutional framework through the Scotland Act, and the ultimate arbiter of these became the UK Supreme Court. This included criminal cases, as long as they involved “devolution issues”. Since October 2010, the UK Supreme Court has dealt only with a handful of Scottish criminal cases, although some have not been without controversy. The ***Cadder*** case illustrates the UK Supreme Court’s application of Strasbourg jurisprudence to Scotland’s distinct criminal justice system.

Materials in the third section of Part 1 are on **limits to legislative and judicial supremacy**. The adoption of a bill of rights in parliamentary democracies has generated interesting examples of limits on judicial supremacy, such as the “Notwithstanding Clause” in the Canadian constitution, and it has also raised questions about whether parliamentary supremacy can remain absolute. In the materials below **Axworthy** explores Canada’s adoption of a legislative override to certain judicial determinations of some Charter rights (the Notwithstanding Clause), and the materials include the ***Ford v Québec*** case - which resulted in an early (but still rare) exercise of this legislative override. In the UK, the introduction of the Human Rights Act 1998 has raised the question of whether parliament is inevitably and always supreme, which is explored from differing vantage points by **Lord Neuberger** and **Lord Hope**.

Questions to Consider in Part 1

- Why do jurisdictions that deem some rights to be fundamental permit regions to provide less than full protection or recognition of those rights?
- What are the perceived benefits that render such arrangements politically and socially desirable? What are the harms?
- To what extent do these issues revolve around whether regions are seen as morally progressive or regressive?
- What is the role for courts in making these judgments?
- How does the constitutional arrangement impact on the authority of the judiciary to resolve these issues?

Federalism (National and Supra-National)

Lawrence G. Sager

*Cool Federalism and the Life-Cycle of Moral Progress*¹

Hot and Cool Federalism

We can divide justifications for federalism-based structures of governance into hot federalism and cool federalism, with the distinction keyed to the reasons for resorting to a federal structure. By hot federalism, I mean the use of federal structures of governance to solve a type of problem that can arise when relatively settled and coherent social groups seek to create common structures of governance with other groups. Each group, we can imagine, is relatively homogeneous, with sufficient commonalities of experience, belief, commitment, language, and so on, to permit its members to enjoy a fair amount of trust and comfort with each other as members of a political community. But between or among the groups in question, there is substantially less commonality and substantially less trust and comfort with the prospect of becoming members of a single political community. The groups in question, nevertheless, wish to create or perpetuate some form of a trans- group union. This creates a problem in governance of the form: How can such groups work together in the face of the reluctance to concede full and ultimate authority to a trans-group governing entity? Hot federalism is very important in the contemporary world, and the prospects for its success in various modern contexts are remarkable and exciting.

There are reasons, however, to be a bit wary of the capacity of federal structures to overcome problems of the hot federalism variety. In the United States, we certainly began with hot federalism concerns, driven substantially by the issue of slavery. But our federal structure in this regard was a great failure, giving on to the tragedy of the Civil War. Recently, we have seen Canada nearly come apart, and the success of the federal structure there still seems a close question. Europe is moving rapidly to the embrace of a trans-national, federal structure of governance—far more rapidly than many would have imagined remotely possible; but it is still too early to assess the ultimate success of this extraordinary transition. The miracle of South Africa's constitutionalized revolution has made important use of a federal structure to permit wary groups to join under a national rule of law; but here too, it is a bit early to draw conclusive lessons. And Switzerland has always seemed too small and quirky to offer lessons for the rest of the world.

In any event, I mention hot federalism only to set it aside. It is cool federalism that interests me here. Cool federalism is substantially less ambitious. It aims not at making it possible for groups to coexist in governance structures that would otherwise be intolerably threatening, but at the more modest goal of making it possible for a political community to govern itself better—to get better, cheaper, or more widely accepted results than would otherwise be possible. The distinction is crude, but the rough idea is that cool federalism supports federal structures of governance in situations where it would be perfectly possible for a unitary structure to operate, but with the hope that a federal structure will improve governance in some salient way.

In this rough dichotomy, it seems reasonable to think in general of functional arguments for federal arrangements in the contemporary United States as claims in the domain of cool federalism. Indeed, I am inclined to the view that the only interesting arguments available to those who want to promote one or another view of contemporary federal arrangements in the United States are functional arguments of the cool federalism variety. Here, the more precise question I want to reflect upon is the connection between the shape of the overlapping authority of state and federal governments to enforce civil rights and the virtues of cool federalism.

1 Excerpted from Lawrence G. Sager, "Cool Federalism and the Life-Cycle of Moral Progress", *William and Mary Law Review*, Vol.46: 1385 (2005)

Let us begin with this speculation: It frequently will be the case that moral progress in the project of securing political justice in the United States will follow a common course with regard to the interplay between state and federal sensibilities and consensus. Things will go roughly like this:

- *Invention.* Initially, the ideas that we eventually come to see as representing moral progress will take hold in a small number of states; other states will be less moved by these ideas, or even stridently opposed to these ideas. The concrete form assumed by these maverick ideas in the states where they take hold may be that of state legislation, state constitutional revision, or judicial decision--quite possibly in the name of the state constitution or the United States Constitution. We have some obvious contemporary examples of this phase, the most prominent being the moves toward the normalization and acceptance of gay marital union in Vermont' and gay marriage in Massachusetts, Oregon's path-breaking concern with the right of the terminally ill to die with dignity' and California's experiment with the medical use of marijuana are other examples.
- *Propagation.* Over time, as these minority states begin to act on their commitments, some of these commitments will begin to have wider appeal. Perhaps experiment and experience will aid their cause; perhaps the political success of what was previously a minority view in the cutting edge states will encourage the spread of political activity elsewhere; perhaps the confluence of related but external events (scientific discoveries, geopolitical trends, governmental steps or missteps, etc.) will extend their influence beyond the boundaries of the cutting edge states; or, perhaps it will simply be a matter of better moral insights coming to prevail. This is merely a short, suggestive list of possibilities. It is not intended to approach an exhaustive rendition. The bottom line is that gradually support for these maverick projects grows even in the face of what may be active opposition.
- *Consolidation.* Eventually, after these once-maverick moral insights have come to occupy a place within mainstream national thought, the federal government may impose those insights on the remaining--now in some salient sense, *outlying-states*. This imposition may assume one of several recognized forms: federal legislation, federal judicial judgment in the name of the Constitution, or constitutional amendment.

Judith Resnik

*Categorical Federalism: Jurisdiction, Gender, and the Globe*²

"The Constitution requires a distinction between what is truly national and what is truly local." These words were used by the Chief Justice of the United States Supreme Court in 2000 to explain why a statute described by Congress as providing a "civil rights remedy" for victims of gender-biased assaults unconstitutionally entrenched on lawmaking arenas belonging to the states. Neither the phrase "truly local" nor "truly national" appears in the United States Constitution. Indeed, the Court's reliance on the modifier "truly" suggested that calling something local or national did not suffice to capture the constitutional distinction claimed—that the Violence Against Women Act (VAWA) impermissibly addressed activities definitional of and reserved to state governance.

This Essay considers the mode of analysis for which the phrases "truly national" and "truly local" are touchstones. Categorical federalism is the term I offer for this form of reasoning. Categorical federalism's method first assumes that a particular rule of law regulates a single aspect of human action: Laws are described as about "the family," "crime," or "civil rights" as if laws were univocal and human interaction similarly one-dimensional. Second, categorical federalism relies on such identification to locate authority in state or national governments and then uses the identification as if to explain why power to regulate resides within one or another governmental structure. Third, categorical federalism has a presumption of exclusive control—to wit, if it is family law, it belongs only to the states. Categories are thus constructed around two sets of human activities, the subject matter of regulation and the locus of governance, with each assumed to have intelligible boundaries and autonomous spheres.

Categorical federalism has appeal, particularly in a world as full of vivid changes as the one we inhabit. Proponents of categorical federalism argue that its virtue lies in its democracy-enhancing features. The Court's interventions, in the name of federalism, are supposed to engender responsibility on the part of government officials by promoting transparent lines of accountability. Categorical federalism posits and promises clearly delineated allocations of power by suggesting, comfortingly, that these delineations flow "naturally" through the United States's history from a topic to a geographically located government. . . . [Federal judges cast] their project as empirical rather than interpretive, a historical exercise aimed at describing and implementing agreements forged in 1789. . . .

But the search for meaning from 1789 cannot work because "the federal" had yet to be made. The issue then, and now, is what meaning and purposes to give to federal and state governments. In a world increasingly conscious that "the local" and "the national" are ideas as well as places, the quaint tidiness of categorical federalism ought to prompt skepticism. In international parlance, "local law" refers to what in the United States is termed "national law." Technology permits easy transgeographic exchanges that diminish the significance of physical boundaries. Transnational organizations promulgate worldwide legal norms, affecting practices within nation-states.

Moreover, national borders are not the only lines that are blurring. Boundaries of role are also shifting, as women and men explore the possibility that their genders offer less instruction on their life opportunities than has been claimed for thousands of years. Gender systems work through assumptions about the intelligibility of the categories of "women" and "men," which in turn depend upon demarcations of "the family" from "the market" and of "the private" from "the public." Currently, violence and money play different roles in the lives of women and men. Women live with threats to their physical safety from men within and outside their households; women's unpaid household labors facilitate men's market capacities. To diminish the categorical coherence of gender requires extricating women from the dominion, both physical and economic, of male-headed households. Efforts to do so are underway worldwide, as longstanding rules of politics (such as who can vote), of entrenched legal

2 Excerpted from Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001).

and social practices (such as who controls access to women's bodies), of markets (such as what work is remunerated), and even of war (such as whether victors may exercise sexual dominion over enemy civilian women) are all being revisited.

Given this context, categorical federalism ought to be understood as a political claim, advancing an argument that certain forms of human interactions should be governed by a particular locality, be it a nation-state or its subdivisions. Return then to the Chief Justice's locution—"truly national," "truly local"—and reread it to betray anxiety as well as insistence, as an effort to make meaningful a division that is not only elusive but increasingly inaccurate. Categorical federalism's attempt to buffer the states from the nation, and this nation from the globe, is faulty as a method and wrong as an aspiration.

Below, I sketch the empirical case against categorical federalism by showing that the very areas characterized in the VAWA litigation as "local"—family life and criminal law—have long been subjected to federal lawmaking. Decades of federal constitutional family law create substantive rights anchored in the Fourteenth Amendment for parents and children, just as decades of federal legislation—addressing welfare, pension, tax, bankruptcy, and immigration— have defined membership in and relationships within groupings denominated "families" by the national government.

The normative critique of categorical federalism stems from the political injuries caused by equating family life with state law. Categorical federalism is not only fictive but harmful, for it deflects attention from the many political and legal judgments made by the nation's judiciary, executive, and Congress as they regulate the lives of current and former householders. Federal actors ought not to be sheltered from accounting for their work in shaping the meaning of gendered family roles. And just as it cloaks the exercise of national powers from view, categorical federalism also provides a false sense of security from transnational lawmaking. United States laws of all kinds are increasingly altered, if not trumped, by practices stemming from quarters physically distant from Washington but not far in forms of space that globalization has come to represent. The United States government needs to develop means of interacting with these laws rather than to assume an ability to remain insular. In the twenty-first century, believing one can mandate the boundaries is seductive but wrong (a lesson all too powerfully brought home as this Essay was in press).

[C]ategories are endemic, in law as elsewhere, but what fills categories and their contours varies with context. Return to the issue of violence against women: If a man raped a woman and proclaims he did so because he likes to inflict such pain on women, what should law call that action? Should the description vary if the man and woman have been (or are) married instead of strangers? If they were employer and employee? Opponents in a war? Should the legal import vary if the man assaults the woman as she is about to leave the house on her way to school, work, or another shelter? Do understandings of the relevant legal norms shift upon concluding that many men rape women, many husbands beat wives, many employers sexually assault certain kinds of employees, and many soldiers rape women in countries at war? As these questions illustrate, in law, decisions to categorize are purposeful, consequentialist, and situational. . . .

[L]aws may be about both family and equality, about both economic capacity and violence [and] governance cannot accurately be described as residing at a single site. State, federal, and transnational laws are all likely to be relevant. And . . . any assignment of dominion can be transitory. One level of government may preside over a given set of problems for a given period rather than forever. Were one to use this lens, the assignment of regulatory authority would become a self-conscious act of power, exercised with an awareness that a sequence of interpretive judgments, made in real time and revisable in the future, undergirds any current designation of where power to regulate what activities rests. . . .

[E]xploration is needed of the rich veins of federalism beyond the boundaries of contemporary legal discourse, fixated on a bipolar vision of states acting singularly and of a predatory federal government. The contemporary debate about whether to prefer, a priori, the states or the federal government for certain forms of lawmaking misses dynamic interaction across levels of governance. In practice, federalism is a web of connections formed by transborder responses (such as interstate agreements and compacts) and through shared efforts by national organizations of state officials, localities, and private interests. Regional agreements among states are commonplace; coordinated judicial proceedings across state lines are increasing, and many state laws are made uniform through joint efforts. Moreover, localities routinely reach beyond the United States through, for example, resolutions about human rights and "sister cities" programs promoting trade. . . .

Planned Parenthood of Southeastern Pennsylvania v Casey

29 June 1992, Supreme Court of the United States

505 U.S. 833

Question

The question on appeal was whether five provisions of the Pennsylvania Abortion Control Act 1982 were unconstitutional following the decision in *Roe v Wade*, which recognised a constitutional right to an abortion pursuant to the Due Process clause of the Fourteenth Amendment.

Background

Five abortion clinics sought to have parts of the Pennsylvania Act declared unconstitutional: (i) the informed consent rule requiring doctors to provide women with information about the health risks of an abortion; (ii) the spousal notification rule, requiring women to give prior notice to husbands; (iii) the requirement for parental consent in the case of minors; (iv) the imposition of a 24-hour waiting period before the abortion; and (v) certain reporting requirements on facilities performing abortion services. It was widely seen as the first possible case in which Court might reverse *Roe v Wade*.

Decision

In a divided judgment the plurality decision of Justices Souter, O'Connor and Kennedy reaffirmed *Roe* and, in introducing an "undue burden" test, held that the spousal notification requirement was invalid as it imposed an undue burden on married women. However, requirements for parental consent, informed consent, a 24-hour waiting period and notification requirements (save relating to spousal notice) were held to be constitutionally valid, as these did not impose an undue burden.

From the judgment (Justices O'Connor, Kennedy and Souter):

[846] *Roe's* essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.

[849] it is settled ... that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood

[852] Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition, and so, unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture.

[857] ...cases since *Roe* accord with *Roe's* view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims.

[868-9] The Court's duty in the present case is clear. In 1973, it confronted the already-divisive issue of governmental power ... to limit personal choice to undergo abortion, for which it provided a new resolution based on the due process guaranteed by the Fourteenth Amendment. Whether or not a new social consensus is developing on that issue, its divisiveness is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense. A decision to overrule Roe's essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of Roe's original decision, and we do so today.

[869] The woman's liberty is not so unlimited, however, that, from the outset, the State cannot show its concern for the life of the unborn and, at a later point in fetal development, the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.

[871] Yet it must be remembered that Roe v. Wade speaks with clarity in establishing not only the woman's liberty but also the State's "important and legitimate interest in potential life." ... That portion of the decision in Roe has been given too little acknowledgment and implementation by the Court in its subsequent cases.

[874] The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.

[876] The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.

[877] A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.

Lautsi and Others v Italy

18 March 2011, ECtHR, Grand Chamber

Application No. 30814/06

Question

The question before the Grand Chamber was whether the display of crucifixes in Italian state-school classrooms was a violation of Article 9 (freedom of religion) and Article 2 of Protocol No. 1 (right to education) to the ECHR.

Background

The applicants were an Italian mother and her two sons, who attended an Italian state school where a crucifix was fixed to every classroom's wall. Ms Lautsi complained that the presence of the crucifixes was incompatible with the State's obligation to respect the right of parents to ensure that such education and teaching was in accordance with their own religious and philosophical convictions.

Previous ECtHR decision and controversy

The case was previously considered by the Second Section of the ECtHR, which issued a unanimous judgment on 9 November 2009 holding that the Italian law was incompatible with the Convention (finding a violation of Article 9 and A2P1) and awarding Mrs Lautsi €5,000 in damages. The judgment provoked a strong response, with the Strasbourg Court being criticised for illegitimate judicial legislation and failing to have appropriate regard to its subsidiary role as regards the balance struck between competing rights by individual Council of Europe member states. The backlash was not confined to political quarters. Shortly after the decision of the Second Section, the Italian Supreme Court issued a judgment containing dicta to the effect that decisions of the ECtHR which conflict with 'fundamental norms' of Italian law would lack inherent legitimacy and would not be enforced.

Decision

The Grand Chamber held by a majority (15 votes to 2) that there had not been a violation of Article 2 of Protocol No. 1 ECHR, reversing the Second Section's earlier decision. The Court held that the lack of European consensus on the display of crucifixes in state schools supported the idea that it fell within the margin of appreciation, and prescribing crucifixes in state school classroom did not lead to a form of indoctrination.

From the judgment:

26. In the great majority of member States of the Council of Europe the question of the presence of religious symbols in State schools is not governed by any specific regulations.

27. The presence of religious symbols in State schools is expressly forbidden only in a small number of member States: the former Yugoslav Republic of Macedonia, France (except in Alsace and the département of Moselle) and Georgia. It is only expressly prescribed – in addition to Italy – in a few member States, namely: Austria, certain administrative regions of Germany (*Länder*) and Switzerland (*communes*), and Poland. Nevertheless, such symbols are found in the State schools of some member States where the question is not specifically regulated, such as Spain, Greece, Ireland, Malta, San Marino and Romania.

28. The question has been brought before the supreme courts of a number of member States.

In Switzerland the Federal Court has held a communal ordinance prescribing the presence of crucifixes in primary school classrooms to be incompatible with the requirements of confessional neutrality enshrined in the Federal Constitution, but without criticising such a presence in other parts of the school premises (26 September 1990; ATF 116 1a 252).

In Germany the Federal Constitutional Court has ruled that a similar Bavarian ordinance was contrary to the principle of the State's neutrality and difficult to reconcile with the freedom of religion of children who were not Catholics (16 May 1995; BVerfGE 93,1). The Bavarian parliament then issued a new ordinance maintaining the previous measure, but enabling parents to cite their religious or secular convictions in challenging the presence of crucifixes in the classrooms attended by their children and introducing a mechanism whereby, if necessary, a compromise or a personalised solution could be reached.

In Poland the Ombudsman referred to the Constitutional Court an ordinance of 14 April 1992 issued by the Minister of Education prescribing in particular the possibility of displaying crucifixes in State-school classrooms. The Constitutional Court ruled that the measure was compatible with the freedom of conscience and religion and the principle of the separation of Church and State guaranteed by Article 82 of the Constitution, given that it did not make such display compulsory (20 April 1993; no. U 12/32).

In Romania the Supreme Court set aside a decision of the National Council for the Prevention of Discrimination of 21 November 2006 recommending to the Ministry of Education that it should regulate the question of the presence of religious symbols in publicly run educational establishments and, in particular, authorise the display of such symbols only during religious studies lessons or in rooms used for religious instruction. The Supreme Court held in particular that the decision to display such symbols in educational establishments should be a matter for the community formed by teachers, pupils and pupils' parents (11 June 2008; no. 2393).

In Spain the High Court of Justice of Castile and Leon, ruling in a case brought by an association militating in favour of secular schooling which had unsuccessfully requested the removal of religious symbols from schools, held that the schools concerned should remove them if they received an explicit request from the parents of a pupil (14 December 2009; no. 3250).

61. ... the Contracting States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals ...

66. The Court further considers that the crucifix is above all a religious symbol ... However, it is understandable that the first applicant might see in the display of crucifixes ... a lack of respect on the State's part for her right to ensure their education and teaching in conformity with her own philosophical convictions. Be that as it may, the applicant's subjective perception is not in itself sufficient to establish a breach ...

68. The Court takes the view that the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State. The Court must moreover take into account the fact that Europe is marked by a great diversity between the States of which it is composed, particularly in the sphere of cultural and historical development. It emphasises, however, that the reference to a tradition cannot relieve a Contracting State of its obligation to respect the rights and freedoms enshrined in the Convention and its Protocols ...

69. The fact remains that the Contracting States enjoy a margin of appreciation in their efforts to reconcile exercise of the functions they assume in relation to education and teaching with respect for the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions ... That applies to organisation of the school environment and to the setting and planning of the curriculum ... The Court therefore has a duty in principle to respect the Contracting States' decisions in these matters, including the place they accord to religion, provided that those decisions do not lead to a form of indoctrination ...

70. The Court concludes in the present case that the decision whether crucifixes should be present in State-school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State. Moreover, the fact that there is no European consensus on the question of the presence of religious symbols in State schools ... speaks in favour of that approach. This margin of appreciation, however, goes hand in hand with European supervision ...

71. ... it is true that by prescribing the presence of crucifixes in State-school classrooms – a sign which ... undoubtedly refers to Christianity – the regulations confer on the country's majority religion preponderant visibility in the school environment. That is not in itself sufficient, however, to denote a process of indoctrination on the respondent State's part and establish a breach of the requirements of Article 2 of Protocol No. 1 ...

72. Furthermore, a crucifix on a wall is an essentially passive symbol and this point is of importance in the Court's view, particularly having regard to the principle of neutrality ... It cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities...

74. Moreover, the effects of the greater visibility which the presence of the crucifix gives to Christianity in schools needs to be further placed in perspective by consideration of the following points. Firstly, the presence of crucifixes is not associated with compulsory teaching about Christianity ... Secondly, according to the indications provided by the Government, Italy opens up the school environment in parallel to other religions ... Moreover, there was nothing to suggest that the authorities were intolerant of pupils who believed in other religions, were non-believers or who held non-religious philosophical convictions. In addition, the applicants did not assert that the presence of the crucifix in classrooms had encouraged the development of teaching practices with a proselytising tendency, or claim that the second and third applicants had ever experienced a tendentious reference to that presence by a teacher in the exercise of his or her functions.

Bill of Rights in the UK's Devolved System

Colin Harvey

*Taking the Next Step? Achieving Another Bill of Rights*³

The Human Rights Act 1998 (HRA) has not had an easy childhood. Several tall tales were told before its eventual arrival and it has struggled to establish itself positively in the public imagination. The new legislation has been subjected to sustained and agonised citizenship testing, and its national origins questioned. Increasingly desperate attempts to prove its national status have not been persuasive to sceptics and even some supporters, and the treatment of the HRA oddly mirrors the attitude to those who rely on its protective embrace most. Defending the HRA therefore frequently feels like a plea also for all those who want us to acknowledge their *personhood* first. ...

The purpose of this article is to examine the question of what it might mean to achieve a Bill of Rights within the UK, and to raise questions for the future development of this debate. The intention is therefore to explore the discussion as it has progressed over the last decade, from giving further effect to selected aspects of the European Convention on Human Rights (ECHR) to the re-emergence of the idea of a constitutional Bill of Rights for the UK. Increasingly, the concept of responsibilities also features prominently in the discussions. There are many intriguing dimensions to this, but two will be drawn out in this article. First, how are notions of ownership deployed and how do they interact with rights-talk? The UK is a "union state" or plurinational state or quasi-federal state, within which a range of nationalisms (state and sub-state) currently co-exist. This should (but sometimes does not) complicate the use of rights as a mechanism for strategies which are explicitly aimed at national integration. There is a tendency to connect such talk only to sub-state "nationalist parties" within the UK's constituent parts (nationalism being akin to a virus that everyone else has but not the "British"). Yet the political language of rights used by two of the main parties in Britain (Conservative and Labour) has also been infused with "nationalism" (of the state-based variety) for at least the last decade. The current phase of the debate continues to dwell obsessively on the question of the perceived national ownership of rights.

[O]ne of the main arguments used to justify human rights legislation by the new Labour Government in 1997 was that it would "bring rights home," and this was part of its wider agenda of UK-wide constitutional reform. The HRA therefore combined a desire to achieve constitutional reform for the whole of the UK grounded in human rights (thus the view that the Act is a Bill of Rights for the UK) and give further effect domestically to Convention rights (promoting the view that the Act is merely a statute of "incorporation" like any other).

The role of the UK in helping to draft the Convention was consistently mentioned in the debate, as evidence of its national heritage, and this point is still underlined in discussions. . . . The issues were posed starkly in the White Paper:

The rights, originally developed with major help from the United Kingdom Government, are no longer actually seen as British rights . . . Bringing these rights home will mean that the British people will be able to argue for their rights in the British courts . . . And there will be another distinct benefit. British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe.

. . . Devolution was also a significant element of the constitutional reform programme, and in the human rights field the question arose of how to deal with Scotland, Wales and Northern Ireland. The approach to the devolution statutes has strong similarities (in the cases of Scotland and Northern Ireland in particular) but also subtle differences. In line with established constitutional practice these devolved contexts were treated as "subordinate," in the sense that the Convention rights would—in contrast to the Westminster Parliament—have (through the devolution statutes) more pointed

3 Excerpted from Colin Harvey, *Taking the Next Step? Achieving Another Bill of Rights*, 2011 EUR. HUM. RTS. L. REV. 24.

implications, and the HRA would remain untouchable by them. The model adopted is intriguing, if unsurprising given the current constitutional structure of the UK. What it meant, however, was that the “Convention rights” became a core feature of the architecture of the transforming “union state.” The new constitutional design that emerged in the late 1990s was therefore infused with notions of rights which had different implications even within the UK’s democratic structures. Again, the position is a state-based liberal nationalist one, anchored in an integrative vision of rights as part of the evolving “new union.” This embodied and embraced a more inclusive view of the state (at least for the purposes of these rights), as one which recognised the importance of human rights and the need for them to be embedded securely within a constitutional reform process rather than separated off from it.

The point is made because of the persistence of the view that the HRA lacks a firm “national basis,” or sense of ownership. This is despite repeated attempts by advocates to embed it within an essentially nationalist narrative. The top-down nature of the process did not assist, and the lack of consultation around its enactment in the late 1990s is also added as a reason why it has failed to capture a popular mood of support. Here the story is one of a national project that has not become sufficiently integrated politically (more than legally), raising the equally valid question of what test would have to be met before the rights were to be regarded as sufficiently “British,” or felt to be owned? From a purely outcome oriented perspective, and reflecting on the experience in, for example Northern Ireland, a stark point should be made here: the HRA exists in law and the process—however limited—led to the successful enactment of legislation. In the context of Bills of Rights processes this is an achievement not to be lightly dismissed.

There are several aspects to draw out. First, we need to ensure that central elements of this debate are not sidestepped. The process which resulted in the enactment of the HRA was driven by a liberal nationalist (British) narrative wedded to a grander (though still fairly piecemeal) project of constitutional renewal in the context of a state seeking to accommodate a range of sub-state nationalisms. In the last decade, the new Bill of Rights debate became bound up with questions of national identity. As is evident, nationalism (in all its forms) is not something that only resides in Scotland, Wales and Northern Ireland (with its two “state-based” forms of nationalism), and further reflection on the elements of integrative and liberal British nationalism (evident in the discussions of both the HRA and any new Bill of Rights) should become part of the legal and political conversation about constitutional futures. . . . [There is now] the emergence of a political debate about a new Bill of Rights and Responsibilities (or a separate Bill of Rights process emerging in Northern Ireland for very different reasons), and their now appears to be agreement that the Act has thus far “failed to fulfil the symbolic requirements of a Bill of Rights.” This springs from a sense that whatever a Bill of Rights might be, the HRA may still just not quite be it. The Labour Party itself—once it had committed to the path of legislating for human rights—did espouse incorporation of the Convention as merely the first step, with “our own Bill of Rights” being the ultimate objective; a commitment that, however, was gradually weakened (as a return to power became more likely). This Bill of Rights debate spanned decades and emerged pre-HRA in a context where no such constitutional protection existed in statute law. Many of the proposals and suggestions in these discussions did go beyond incorporation of the ECHR, and included a range of suggestions and a variety of models, and did reflect a commitment to other additional rights. . . .

The problems that emerged are also suggestive of wider constitutional confusions and ambiguities (some constructive, some not) within the UK, where so much remains constitutionally contested. It is still possible, for example, to mount a sound argument from within the British constitutional tradition that the HRA is simply another Act of Parliament, no more and no less. The HRA can be regarded as a Bill of Rights, but it appears to lack qualities that would secure its lasting status as such. The missing pieces are, however, locked inextricably into a more profound constitutional enterprise requiring sensitivity and respect for the UK in its modern form, extensive planning and preparation, and sustained engagement on the larger question of what it might mean to achieve a new constitutional settlement.

Cadder v Her Majesty's Advocate (Scotland)

[2010] UKSC 43

Question

The question on appeal was whether the failure by Scottish legislation (the Criminal Procedure (Scotland) Act 1995) to allow a detainee the right to access a lawyer prior to questioning contravened Article 6 (right to a fair trial) of the European Convention of Human Rights. Sections 14 and 15 of the CPA permit the detention of a person for up to 6 hours where there are reasonable grounds to suspect he has committed an offence. During this detention the detainee is entitled to have a solicitor informed of his detention but the CPA does not provide a right of access to a lawyer.

Background

Cadder was detained and informed of his rights pursuant to the CPA but did not exercise the right to inform a solicitor of his detention and was interviewed without a lawyer present. During this interview, Cadder made several admissions, which the Crown relied upon at trial. Cadder was convicted. The Supreme Court needed to consider the application of two earlier cases. In *Salduz v Turkey* the Grand Chamber of ECtHR unanimously held that there had been a violation of Articles 6(1) and 6(3)(c) ECHR because Salduz had not received legal advice in custody. However, considering the same question in *Her Majesty's Advocate v McLean* [2009] the Scottish High Court of Justiciary held there was not a violation of the ECHR because there were other guarantees available in the Scottish legal system to ensure a fair trial. In *Cadder*, the Scottish appeal court refused leave to appeal on the basis of *McLean* and this was in essence an appeal against that case.

Decision

The Supreme Court unanimously allowed the appeal (overruling *McLean*). The Court stated that case law has established that the UK Supreme Court should follow any clear and consistent jurisprudence of the Strasbourg court and therefore *Salduz* should be applied. The guarantees offered by the Scottish legal system are commendable but do not address the European Court's concern of self-incrimination.

From the judgment (Lord Hope):

1. This is, in effect, an appeal against the decision of the High Court of Justiciary in *HM Advocate v McLean* [2009] HCJAC 97, 2010 SLT 73, which was heard by a bench of seven judges....

3. In *Salduz v Turkey* (2008) 49 EHRR 421 the Grand Chamber of the European Court of Human Rights held unanimously that there had been a violation of article 6(3)(c) of the European Convention on Human Rights, in conjunction with article 6(1), because the applicant did not have the benefit of legal assistance while he was in police custody. In *McLean* the Appeal Court held, notwithstanding the decision in *Salduz*, that the fact that legal representation was not available to the minuter did not of itself constitute a violation of articles 6(1) and 6(3)(c) read in conjunction. In its opinion the guarantees otherwise available under the Scottish system were sufficient to avoid the risk of any unfairness. It approved its decisions in *Paton v Ritchie* 2000 JC 271 and *Dickson v HM Advocate* 2001 JC 203 (by a court of five judges) that the Crown's reliance on admissions made by a detainee while being interviewed in the absence of a solicitor was not incompatible with the right to a fair trial.

11. As the history which I have narrated in para 9 shows, the appellant's appeal to the High Court of Justiciary never reached the stage of a full hearing by the appeal court. It was dealt with on paper by means of the sift procedure under section 107(5) and (6) of the 1995 Act. But there is no doubt that this resulted in the refusal of the appeal and that ... it amounted to the determination of a devolution issue..

26. The situation in this appeal... as it was in *HM Advocate v McLean* 2010 SLT 73, is that no solicitor was present at any stage either before or during the interview. In *McLean*, having examined the decision of the Grand Chamber in *Salduz*, the appeal court took the view that it permitted "a certain flexibility in the application of the requirement": para 24, last sentence. It saw no reason to depart from the approach that had been laid down in *Paton v Ritchie* 2000 JC 271 and *Dickson v HM Advocate* 2001 JC 203. In para 31 the Lord Justice General (Hamilton), delivering the opinion of the court, said: "Even if, contrary to our view, the decision of the Grand Chamber in *Salduz* amounts to the expounding of a principle that article 6 requires that access to a lawyer should be provided as from the first interrogation of a suspect by the police, we are satisfied that that principle cannot and should not be applied without qualification in this jurisdiction. In particular, if other safeguards to secure a fair trial of the kind which we have described are in place, there is, notwithstanding that a lawyer is not so provided, no violation, in our view, of article 6. The decisions and reasoning in *Paton v Ritchie* and *Dickson v HM Advocate* are approved."

27. The other safeguards to secure a fair trial to which the Lord Justice General referred in para 31 are described in para 27 of his opinion in *McLean*. Detention is a form of limited or temporary apprehension on suspicion. The safeguards against its abuse include the detainee's right to be cautioned on his detention and on arrival at the police station; the right, if arrested, to have a solicitor informed of what has happened and to a subsequent interview with him before his appearance in court; the fact that he may not, after caution and charge, be further questioned by the police; the fact that in all serious cases the interview is tape recorded and in some cases recorded on video; the fact that police are not entitled to coerce the detainee or otherwise to treat him unfairly, and that if they do any incriminating answers will be rendered inadmissible; the fact that the accused has an absolute right to silence, and that the jury is expressly directed that it may not draw any inference adverse to the accused from the fact that he declined to answer police questions; the fact that an accused cannot be convicted on the basis of his own admission alone, as Scots law requires that there be corroboration by independent evidence; and the fact that a person may not be detained for more than six hours from the moment of his detention.

28. In para 28 of his opinion in *McLean* the Lord Justice General referred to my observations in *Brown v Stott* 2001 SC (PC) 43 at 73, where I said that the statutory rules to be found in sections 14 and 15 of the 1995 Act had been framed in such a way as to provide appropriate checks and balances in the interests of fairness to the accused. He referred also to a comment to the same effect by Lord Rodger of Earlsferry in *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 39, [2003] 1 WLR 1763, para 87, where he said, with reference to the different rights of detainees in Northern Ireland and England and Wales on the one hand and in Scotland on the other:

"This difference may well be explicable by reference to the much more restricted powers that are given to the police in Scotland to detain people for questioning... As it is entitled to do, Parliament has thus struck the balance differently and established two distinct systems of powers and rights within the same overall constitutional framework of the United Kingdom."

In para 88 Lord Rodger went on to say that, since detainees have no right to consult a solicitor in Scotland, it followed that at trial the Crown regularly leads evidence of incriminating statements made by the accused while he was detained and before he consulted a solicitor. The Lord Justice General said that by his remarks in that paragraph Lord Rodger implicitly approved of the decisions of the High Court of Justiciary in *Paton v Ritchie* and *Dickson v HM Advocate*.

29. There is no doubt that the appeal court's decision in *McLean* was entirely in line with, and fully supported by, previous authority. The question, however, is whether it can survive scrutiny in the light of what the Grand Chamber said in *Salduz v Turkey* (2008) 49 EHRR 421.

40. ... It has, of course, often been said by the Strasbourg court that it leaves to the contracting states the choice as to the means by which the manner of exercising the right to a fair trial is secured in their

judicial systems. Indeed the Grand Chamber said as much in para 51 of *Salduz*. The admissibility of evidence, for example, is primarily a matter for the domestic legal systems of the contracting states. But there is no hint anywhere in its judgment that it had in mind that the question whether or not a detainee who was interrogated without access to a lawyer has had a fair trial will depend on the arrangements the particular jurisdiction has made, including any guarantees otherwise in place there. Distinctions of that kind would be entirely out of keeping with the Strasbourg court's approach to problems posed by the Convention, which is to provide principled solutions that are universally applicable in all the contracting states. It aims to achieve a harmonious application of standards of protection throughout the Council of Europe area, not one dictated by national choices and preferences. There is no room in its jurisprudence for, as it were, one rule for the countries in Eastern Europe such as Turkey on the one hand and those on its Western fringes such as Scotland on the other.

41. The statement in para 55 that article 6(1) requires that, "as a rule", access to a lawyer should be provided as from the first interrogation of a suspect must be understood as a statement of principle applicable everywhere in the Council of Europe area. The statement that the rights of the defence will "in principle" otherwise be irretrievably prejudiced must be understood in the same way. It is true that the use of such expressions indicates that there is room for a certain flexibility in the application of the requirement, as the Lord Justice General said in *HM Advocate v McLean*, para 24. But they do not permit a systematic departure from it, which is what has occurred in this case under the regime provided for by the statute. The area within which there is room for flexibility is much narrower. It permits a departure from the requirement only if the facts of the case make it impracticable to adhere to it... It is the particular circumstances of the case, not other guarantees that are available in the jurisdiction generally, that will justify such a restriction.

45. The starting point is section 2(1) of the Human Rights Act 1998, which provides that a court which is determining a question which has arisen in connection with a Convention right must "take into account" any decision of the Strasbourg court. ... in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, para 26, Lord Slynn of Hadley said that the court should follow any clear and constant jurisprudence of the Strasbourg court. And in *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837, para 18, Lord Bingham of Cornhill said the court will not without good reason depart from the principles laid down in a carefully considered judgment of the court sitting as a Grand Chamber. In *R v Spear* [2002] UKHL 31, [2003] 1 AC 734, on the other hand, the House refused to apply a decision of the Third Section because, as Lord Bingham explained in para 12, they concluded that the Strasbourg court had materially misunderstood the domestic legal context in which courts martial were held under United Kingdom law. And in *R v Horncastle* [2009] UKSC 14, [2010] 2 WLR 47 this court declined to follow a line of cases in the Strasbourg court culminating in a decision of the Fourth Section because, as Lord Phillips explained in para 107, its case law appeared to have been developed largely in cases relating to the civil law without full consideration of the safeguards against an unfair trial that exist under the common law procedure.

93. ... On this matter Strasbourg has spoken: the courts in this country have no real option but to apply the law which it has laid down...

Limits to Judicial Supremacy

Thomas S. Axworthy

*The Notwithstanding Clause: Sword of Damocles or Paper Tiger?*⁴

In the January 2006 leaders' debate, Prime Minister Paul Martin stunned the country with his pledge that if reelected, the Liberal Party's first order of business would be to remove from the federal Parliament the ability to use section 33, the "notwithstanding clause," to override court rulings on Canada's Charter of Rights and Freedoms. Martin described section 33 as "a hammer that can only be used to pound away at the Charter and claw back any one of a number of individual rights." Martin's pledge, coming after a long and acrimonious national debate over same-sex marriage in which many had argued for use of the notwithstanding clause to overturn the Supreme Court's ruling that gay couples had the right to marry, remained moot since he lost the election. But debate over the notwithstanding clause rumbles on.... Twenty-five years after the introduction of the Charter, controversy still surrounds section 33.

Divisive at its birth, yet one of the key components of the 1981 political compromise that led to the Charter and amended the Constitution, section 33 is, writes Brian Slattery, "perhaps the most fundamental distinguishing feature of the Canadian Charter." And if not the most fundamental, it is certainly the best-known, the one feature of the Charter that has engaged public debate beyond judicial factums and legal scholarship. Robert Bourassa's use of the notwithstanding clause in 1988 in Bill 178, to overturn the Supreme Court's decision [Ford v Quebec] that prohibition of the use of languages other than French was an unreasonable limitation on the freedom of expression guaranteed by the Charter, was perhaps the single most important act in eroding support for the proposed Meech Lake package of amendments to the Constitution....

Desperate to salvage the Meech Lake Accord, Prime Minister Brian Mulroney attempted to deflect criticism of Bourassa by attacking section 33 and those leaders who had initially agreed to its inclusion. Mulroney described section 33 as "that major fatal flaw of 1981, which reduces your individual rights and mine." Any constitution, he concluded, "that does not protect the inalienable and imprescriptible individual rights of individual Canadians is not worth the paper it is written on." Eugene Forsey, perhaps Canada's foremost constitutional authority, also was driven by Bourassa's action to weigh in against section 33:

The notwithstanding clause is a dagger pointed at the heart of our fundamental freedoms, and it should be abolished. Although it does not apply to the whole Charter of Rights, it does apply to a very large number of the rights and freedoms otherwise guaranteed... Clearly, then, it gives federal and provincial legislators very wide powers to do as they see fit in limiting or denying those rights and freedoms. The Charter would not have protected the Japanese-Canadians who were forcibly interned during World War II. Nor will it protect anyone advocating against an unpopular cause today. Perhaps none of our legislatures will use the notwithstanding clause again. But it is there. And if this dagger is flung, the courts will be as powerless to protect our rights as they were before there was a Charter of Rights.

Twenty years later, this time over the threat that a legislature might use the notwithstanding clause to overturn the Supreme Court's ruling on same-sex marriage, Paul Martin invoked the same kind of warnings that Mulroney and Forsey had made. But if Canada's debates over language and sexual preference have led many — especially politicians — to attack section 33 robustly, Canada's legal scholars paint a very different picture. Some, like Anne F. Bayefsky, make the stark point that because of section 33, the Charter of Rights and Freedoms is not entrenched. She writes: "Entrenchment" is a term which in the long Canadian debate was consistently used to and freedoms beyond the reach

⁴ Excerpted from Thomas S Axworthy, "The Notwithstanding Clause: Sword of Damocles or Paper Tiger?" *Policy Options* (March 2007)

of ordinary legislatures by putting them in a Constitution whose provisions could only be avoided by Constitutional amendment... In Canada we have a Constitutional Charter of Rights, but not an entrenched one. Peter Russell makes a similar point, though he draws a different conclusion: "Perhaps only Canada, still teetering uncertainly between British and American models of government, could come up with legislative review of judicial review." Russell believes this is a strength because it combines the strengths of both legislatures and the judiciary: "Weird as such a system may seem to the purists on both sides, it just might help us wring the best that can be hoped for from a Charter of Rights without totally abandoning our reliance on the processes of parliamentary government to settle difficult issues of social policy."

Defence of the override as a desirable balance between judicial activism and majoritarian excess represents a consensus among Canadian legal scholars. Lorraine Weinrib, for example, declares that "our constitutionalism is a seamless web, made up of constitutional text, convention and judicial pronouncement. The override can be understood as intensifying and strengthening its patterns of respect for democracy, difference and individual dignity." Christopher Manfredi, now Dean of Arts at McGill, writes: The principal issue in an overwhelming majority of Charter cases is not legislative abrogation of rights, but the constitutional validity of a shifting balance in the relative importance attached to competing rights... Section 33 does not authorize legislatures to override rights per se, but to override the judicial interpretation of what constitutes a reasonable balance between competing rights.

Janet L. Hiebert and Peter W. Hogg have defended the override not as a threat to rights, but as part of an overall system that has promoted rights by creating a dialogue between courts and legislatures. Hiebert makes the valid point that "before the Charter was adopted in 1982, human rights were not often a focal point for Canadian political debates." The Charter, she argues, has introduced a new framework "for facilitating conversations between Parliament and courts about the importance that should be attached to rights claims and the justifications of state actions that conflict with protected rights." To improve that conversation, Hiebert has suggested a parliamentary Charter committee to review proposed legislation to assess compatibility with the Charter and improve the "conversation." Peter W. Hogg and Allison Bushell, in a famous 1997 article, surveyed 65 cases where legislation was invalidated for a breach of the Charter and found that in two-thirds of them, the "competent legislative body amended the impugned law." This "Charter dialogue," therefore, rarely blocks legislative objectives but helps influence the design of implementing legislation.

Defenders of the Canadian override also cite, approvingly, Jeremy Waldron's argument that political participation is "the right of rights," and therefore, a legislative override, which is eventually accountable to the people, is more legitimate in a democracy than the rulings of a handful of judges. For Peter Russell, "the attempt to remove rights issues, irretrievably, from the arena of popular politics is to give up on what democratic politics at its best should be — the resolution of questions of political justice through a process of public discussion... For me, the legislative override clause is a way of countering the flight from democratic politics." ...

The essence of entrenched bills of rights is that a society makes a pre-commitment to protecting minority rights by putting in place judicial barriers to prevent emotions from getting out of control. Like Odysseus lashing himself to the mast so he cannot be wooed by the songs of the sirens, societies that enact charters of rights lash themselves to the mast. But the notwithstanding clause is like giving Odysseus a dagger so he can cut his ropes when the sirens sing loudest. Better to keep the dagger.

Ford v Québec

15 December 1988, Supreme Court of Canada
[1988] 2 S.C.R. 712

Question

The question on appeal was whether the requirements in ss 58 and 69 of the Québec Charter of the French Language ("CFL"), which restricted the use of signs written in a language other than French and required that only the French version of a name be used in Québec, violated the freedom of expression guaranteed by s.2(b) Canadian Charter of Rights and Freedoms and s.3 Québec Charter of Human Rights and Freedoms (together the "Charters").

Background

The appeal consolidated numerous cases brought by retailers in the Montreal area who had been fined for violating the CFL and had been ordered to replace bilingual signs with French ones and to serve their customers in French.

Decision and Subsequent Events

The Supreme Court of Canada held that the provisions of the CFL violated both Charters without justification. Following the Court's decision, the Quebec government passed Bill 178 making minor amendments to the language law that did not follow the Court's decision in Ford, and invoked s.33 (the Notwithstanding Clause), shielding its new language law from review by the courts for 5 years. This exercise of the s.33 override was highly controversial (see discussion in Axworthy) and represents a rare legislative exercise of this power allowing legislatures to override some judicial determinations under the Charter (at least temporarily).

From the judgment (of The Court):

40. The conclusion of the Superior Court and Court of Appeal on this issue is correct. Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the *Charter of the French Language* itself indicates, a means by which a people may express its cultural identity. It is also the means by which the individual expresses his or her personal identity and sense of individuality. That the concept of "expression" in s.2(b) of the Canadian *Charter* and s.3 of the Quebec *Charter* goes beyond mere content is indicated by the specific protection accorded to "freedom of thought, belief [and] opinion" in s.2 and to "freedom of conscience" and "freedom of opinion" in s.3. That suggests that "freedom of expression" is intended to extend to more than the content of expression in its narrow sense.

54. It is apparent to this Court that the guarantee of freedom of expression in s.2(b) of the Canadian *Charter* and s.3 of the Quebec *Charter* cannot be confined to political expression, important as that form of expression is in a free and democratic society. The pre-*Charter* jurisprudence emphasized the importance of political expression because it was a challenge to that form of expression that most often arose under the division of powers and the "implied bill of rights", where freedom of political expression could be related to the maintenance and operation of the institutions of democratic government. But political expression is only one form of the great range of expression that is deserving of constitutional protection because it serves individual and societal values in a free and democratic society.

57. ... First, consideration will be given to the interests and purposes that are meant to be protected by the particular right or freedom in order to determine whether the right or freedom has been infringed in the context presented to the court ... the second step is to determine whether the infringement can be justified by the state within the constraints of s.1. It is within the perimeters of s.1 that courts will in most instances weigh competing values in order to determine which should prevail.

59. In our view, the commercial element does not have this effect. Given the earlier pronouncements of this Court to the effect that the rights and freedoms guaranteed in the Canadian *Charter* should be given a large and liberal interpretation, there is no sound basis on which commercial expression can be excluded from the protection of s.2(b) of the *Charter* . . . Over and above its intrinsic value as expression, commercial expression which, as has been pointed out, protects listeners as well as speakers plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy. The Court accordingly rejects the view that commercial expression serves no individual or societal value in a free and democratic society and for this reason is undeserving of any constitutional protection.

63. . . . the government has the onus of demonstrating on a balance of probabilities that the impugned means are proportional to the object sought. He also spoke of the necessity that the government show the absence of an irrational or arbitrary character in the limit imposed by law and that there is a rational link between the means and the end pursued. We are in general agreement with this approach. . . . The Attorney General of Quebec submitted that s. 9.1 left more scope to the legislature than s.1 and only conferred judicial control of "*la finalité des lois*", which this Court understands to mean the purposes or objects of the law limiting a guaranteed freedom or right, and not the means chosen to attain the purpose or object. What this would mean is that it would be a sufficient justification if the purpose or object of legislation limiting a fundamental freedom or right fell within the general description provided by the words "democratic values, public order and the general well-being of the citizens of Québec". It cannot have been intended that s. 9.1 should confer such a broad and virtually unrestricted legislative authority to limit fundamental freedoms and rights. Rather, it is an implication of the requirement that a limit serve one of these ends that the limit should be rationally connected to the legislative purpose and that the legislative means be proportionate to the end to be served. That is implicit in a provision that prescribes that certain values or legislative purposes may prevail in particular circumstances over a fundamental freedom or right. That necessarily implies a balancing exercise and the appropriate test for such balancing is one of rational connection and proportionality.

Limitations to Parliamentary Supremacy

Following the passage of the Human Rights Act by the United Kingdom in 1998, questions began to be raised about whether the European Convention of Human Rights and the Human Rights Act heightened the power of the judiciary and inevitably limited parliamentary supremacy.

In deciding the case of ***R (Jackson) v The Attorney General*** (Hunting Act appeal) some judges (albeit obiter) openly questioned the limits of parliamentary supremacy. For example, in **Lord Steyn's** view:

... the European Convention on Human Rights as incorporated into our law by the Human Rights Act, 1998, created a new legal order. One must not assimilate the ECHR with multilateral treaties of the traditional type. Instead it is a legal order in which the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction. The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.⁵

Professor Sir Jeffrey Jowell, writing on this issue in 2006, put forward the view that:

If a future Parliament were to pass a law which infringed the rule of law or other constitutional fundamentals, it may be that our judges will feel that they still lack sufficient authority to strike it down on the ground that it subverts the implied conditions - the essential features - of our constitutional democracy. However, some of those conditions, such as free and regular elections, underlie the legitimacy of the principle of parliamentary sovereignty itself. Others, such as access to justice, are necessary requirements of a modern hypothesis of constitutionalism. Some of the dicta in *Jackson* confirm the real possibility that, in the words of Lord Hope: "The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based".⁶

The excerpts in this section from recent speeches by **Lord Neuberger** and **Lord Hope** provide two differing perspectives on the implications of the ECHR and HRA on parliamentary sovereignty and the judicial role in the United Kingdom. The nature of the UK Supreme Courts role in relation to the European Court of Human Rights is explored further in Part 4 (*Who are the Masters?*).

5 *R (on the application of Jackson and Others) v Her Majesty's Attorney General* [2005] UKHL 56

6 Jeffrey Jowell, "Parliamentary Sovereignty under the New Constitutional Hypothesis" [2006] *Public Law* 562

Lord Neuberger of Abbotsbury

Who Are the Masters Now?⁷

9. This evening I intend to address Humpty Dumpty's question, as to who is to be master, in the context of our constitutional settlement, and in particular in relation to the legislature and the judiciary. The issue is self-evidently a matter of importance at any time. But it is, perhaps, of particular interest and significance now, for three interconnected reasons. First, there are suggestions in newspapers, articles, and even in one or two judgments, that the judiciary may, in some circumstances, be able to claim supremacy over Parliament. Secondly, some disquiet has been expressed in the press, and by others such as my erstwhile colleague, Lord Hoffmann, about the apparent creeping supremacy of the Strasbourg Court.

10. Thirdly, and most fundamentally, we live in a society governed by the rule of law, and there can be an inherent tension between the notion of the supremacy of a democratically elected legislature and the rule of law. The two concepts are, I suggest, sometimes confused by the Strasbourg court, which often justifies decisions by reference to what is required in a modern democratic society when it really means to rely on what is required in a modern society governed by the rule of law...

32. There is however a view that the constitutional significance of Parliamentary sovereignty has, in recent years, diminished; that it is no longer the cornerstone of our constitution. This view has led some to argue that Parliament needs to reassert its legal sovereignty; as it has been diminished by our membership of the European Union, by the enactment of the Human Rights Act 1998, by devolution of powers to Scotland, Wales and Northern Ireland, and by the growth of judicial review. In some quarters there has been a suggestion that the judiciary – the “unelected judges” – have somehow usurped Parliament's role and have set about placing impermissible limits on parliamentary sovereignty. As Adam Wagner asked in *The Guardian* earlier this year, *'Does Parliamentary sovereignty still reign supreme?'*

33. While our constitutional settlement has been in one of its periodic reform phases over the last two decades, the idea that Parliament is no longer legally sovereign and that the judiciary, whether at home or in Strasbourg, are the masters now is quite simply wrong.

55. ... neither the Convention nor the Human Rights Act goes nowhere near to imposing a limit on Parliamentary legal sovereignty.

56. It is true that membership of the Convention imposes obligations on the state to ensure that judgments of the Strasbourg court are implemented, but those obligations are in international law, not domestic law. And, ultimately, the implementation of a Strasbourg, or indeed a domestic court judgment is a matter for Parliament. If it chose not to implement a Strasbourg judgment, it might place the United Kingdom in breach of its treaty obligations, but as a matter of domestic law there would be nothing objectionable in such a course. It would be a political decision, with which the courts could not interfere.

57. While, in a sense, legal sovereignty is fettered so long as Parliament is required to implement a decision of the Strasbourg court, the fetter is however akin to that imposed by the European Communities Act 1972: neither is permanent. Any such fetter remains only so long as the Treaty obligation itself remains valid, but any country can withdraw from the Treaty, and that demonstrates that whatever limit membership imposes on legal sovereignty, it is a fetter which endures only whilst our membership endures – i.e. only while Parliament wants it to endure.

58. Secondly, under the 1998 Act the courts' role is to try and interpret every statute so as to comply with the Convention, and, if that is impossible, to warn Parliament that the statute does not comply – reflecting the alarm bell just mentioned. It is then for Parliament to decide whether to amend the legislation. If it chooses not to do so, that is an end to the matter from a legal point of view.

⁷ Excerpted from Lord Neuberger, *Who Are the Masters Now?* Second Lord Alexander of Weedon Lecture (6 April 2011)

59. The court's limited privilege to review, not strike down, legislation cannot therefore impinge on Parliamentary sovereignty. First, the court's power only arises because it has been bestowed by Parliament through the 1998 Act, and what Parliament gives it can take away. That is well demonstrated by the fact that the English courts had no power to apply the Convention for the first fifty years of its life – i.e. until the 1998. Secondly, where legislation does not comply with the Convention, the ultimate decision as to what to do about it is in the hands of Parliament, not the courts.

60. Having said that, there is no doubt but that the Human Rights Act has empowered the judiciary both in reality and in perception, in a number of respects. First, as just discussed, it has enabled judges to do what they previously could not – to review legislation in order to assess whether it infringes fundamental rights. Secondly, it has required the judges to develop the common law so as to ensure that our courts dispense justice which accords with human rights. For instance, the domestic law of confidentiality has had to be expanded to encompass respect for private and family life as contained in Article 8 of the Convention. Thirdly, the courts, which had already expanded their judicial review role enormously over the past forty years, have been required to examine the decisions and actions of public authorities more critically than before; such an examination is however an examination of executive act and not Parliamentary will.

62. Over the past forty years, the role of the Judges in this country has become more and more concerned with issues of public and even social policy. That is partly because of the welter of poorly drafted legislation, which the courts have had to interpret as best they can. It is also attributable to the need to have a counterweight to a very powerful executive, at a time when Parliament has suffered from successive Governments with large majorities. I suspect that it is also due to a change in judicial temperament: yesterday's judges were children of the conventional and respectful 40s and 50s, whereas today's judges are children of the questioning and sceptical 60s and 70s. But, above all, it is due to the introduction of Human Rights, the rule of law, into our law for the first time.

63. All these factors have substantially and inevitably increased not only the power, but also the profile, of the Judges. Bearing in mind its purpose, the Human Rights Act inevitably has a very broad sweep, and it is inevitable that it will occasionally produce a surprising result, even an apparently absurd result, in a particular case. It is all too easy to attack the Act or the Convention by concentrating on a questionable decision, and ignoring the many beneficial decisions which it has enabled. It is all too easy to attack it as a foreign import, but it was largely drafted by UK lawyers to reflect well-established English principles. Its noble aim is to protect individuals against an over- mighty state, reflecting the philosophy of Mill, by telling the state what it cannot do....

67. The fact remains though that when Strasbourg speaks, it is ultimately for Parliament to consider what action needs to be taken. The courts can only take account of its decisions insofar as they inform its consideration of legislation or the common law. This brings into sharp focus an important asset of our Parliamentary democracy. Because implementation lies in the hands of Parliament, the debate about fundamental rights, a debate on which vehement and legitimate disagreement can ensue, is conducted in Parliament. It's there that the ultimate decision lies – not with the judges. This requires Parliament to work effectively, it requires there to be effective scrutiny and debate of such issues; and that the public also engaged in an informed way in that debate. Placing such decisions in the hands of the judicial branch of the state poses a danger for the judiciary and for liberal democracy, because it removes the debate from the public and their elected representatives.

68. If the ultimate decision lay with the judiciary, the debate would be removed from the public and from Parliament there is the additional danger of judicial politicisation. . It is ironic that the country that sees itself as the beacon of democracy, the United States, is prepared to leave entire fundamental political issues such as gun control, abortion, and capital punishment, to unelected judges rather than to democratically elected representatives. It is inevitable that their judiciary has become politicised.

Lord Hope of Craighead

*Sovereignty in Question: A View from the Bench*⁸

... as a Scots lawyer I have been brought up to regard the issue of Parliamentary sovereignty from a distinctively Scottish viewpoint. So it is on that aspect of the issue of sovereignty in general that I wish to concentrate. And the view from the Bench which I shall be describing is a view which was fashioned north of the Border. It concerns the relationship between the courts and Parliament. What, so far as that relationship is concerned, is Parliamentary sovereignty? Where did it come from? What are its limits? What does it mean?

... There may now be grounds for thinking that a shift has taken place and that the possibility of judicial review, albeit only in the most extreme circumstances, needs to be re-examined.

As will be well known to most of you, the case of *R (Jackson) v The Attorney General*, in which the issue was whether the Hunting Act 2004 was a valid Act of Parliament, provided judges in the House of Lords with an opportunity of expressing views on the more general issue of Parliamentary sovereignty. The real issue in that case was one of statutory interpretation, as to the effect of the Parliament Acts. But some of us said things about the broader issue which have been regarded as controversial and, by two very distinguished judges, as quite wrong. Lord Steyn said that the classic account given by Dicey about the doctrine of the supremacy of Parliament can now be seen to be out of place in the modern United Kingdom. It was, he said, a construct of the common law. The judges had created the principle, and that it was not unthinkable that the courts might have to qualify a principle which had been established by the judges on a different hypothesis of constitutionalism. He took as an example an attempt to abolish judicial review or the ordinary role of the courts. Scottish lawyers, recalling the words of Lord President Cooper in *MacCormick v Lord Advocate*, would take as an example an attempt by the Westminster Parliament to abolish the Court of Session in Scotland and subject Scots law to the jurisdiction of the English courts. In my speech I said that the rule of law enforced by the courts was the ultimate controlling factor on which our constitution is based.

In a recent lecture, the Master of the Rolls, Lord Neuberger of Abbotsbury, took issue with these propositions. He concluded that the doctrine of Parliamentary sovereignty remains as it was declared to be by Dicey. Although he recognised that the judges have a vital role to play in protecting individuals against the abuses and excesses of an increasingly powerful executive, he said that we cannot go against Parliament's will as expressed through a statute. That, with respect, seems to be to a dangerous doctrine unless one can be absolutely confident that the increasingly powerful executive will not abuse the legislative authority of a Parliament which, ex hypothesi, it controls because of the absolute majority that it enjoys in the House of Commons. I think that he is right to regard a fundamental reordering of the constitution to limit Parliamentary sovereignty as a matter for a written constitution. But it is questionable whether it would require a fundamental re-ordering of the constitution for the judges to refuse to accept as law a statute which struck at the heart of the rule of law itself. ...

But I do not think that we can ignore the fact that times have changed since Dicey. It seems to me that there is a very real question as to whether we can continue to rely on Parliament to control an abuse of its legislative authority by the executive. It is an uncomfortable fact that Parliamentary sovereignty and the rule of law are not entirely in harmony with each other. So long as Parliament respects the rule of law there is no problem. But to assert that Parliament can enact whatever laws it pleases runs the risk that the rule of law will be subordinated to the will of the government. I think that Lord Bingham recognised this when he said that our constitutional settlement has become unbalanced by the fact that the power to restrain legislation favoured by a clear majority of the House of Commons has become

8 Excerpted from Lord Hope of Craighead, *Sovereignty in Question: A View from the Bench*, WG Hart Legal Workshop (28 June 2011)

much weakened. He accepted that this was not a problem that will go away if we ignore it. In the last paragraph of his book he wrote these words: "One may hope that the sovereignty of Parliament and its relationship with the rule of law may be seen as a matter worthy of consideration if, as I suggest, there are some rules which no government should be free to violate without legal restraint." But the solution to this problem, as he saw it, was the substitution of a codified and entrenched constitution, not a conflict between the judges and Parliament.

Of course, conflict between the judiciary and the legislature is undesirable. But circumstances could arrive where we are left with no alternative. A government which had no regard for the rule of law, seeing it as an impediment to the action it wished to take, would hardly be likely to facilitate the enactment of a constitution that gave the rule of law pre-eminence. Politicians with an absolute majority in a democratically elected legislature who regard the rule of law as an impediment to progress may be tempted to use the mandate that their majority gives them to override its effect under the umbrella of democracy.

My point in *Jackson*, and I think the point that Lord Steyn was making too, is that the ultimate safeguard against such abuses of the legislative power of Parliament lies in the power of the judges. After all, other countries such as the USA, Canada and Germany believe that rights are better protected when judges, rather than politicians, have the last word. It does no harm to our unwritten constitution for the judges to indicate to the executive arm of government that it should not assume that the sovereignty of Parliament, over which it has control, is entirely unlimited. The absence of a general power to strike down legislation which it has enacted does not mean that the courts could never fashion a remedy for use in an exceptional case where the survival of the rule of law itself was threatened because their role as the ultimate guardians of it was being removed from them. ...

I suppose that what lies between us in the end of the day is the extent to which we can be confident that those imperatives will always prevail. There is no need for a deterrent if the feared-for event will never happen. But I think that to make the assumption would be a hostage to fortune. Our constitutional arrangements are so uncertain and so fast moving that I would rather not make it.

PART 2

Interpretive Approaches

Part 2: Interpretive Approaches

The Margin of Appreciation and Counting

The materials in Part 2 consider how judges inquire into consensus when responding to competing claims of individual right and of state sovereignty. When deciding particular issues courts sometimes “count” or look for “consensus” in jurisdictional rules in order to assess whether a particular state practice represents the norm or an exception. Sometimes the position of a region as an exception or “outlier” is argued as a justification for recognition, while in other instances it is presented as the justification for refusing to accord that region the authority to deviate.

In Europe, the ECtHR has developed the doctrine of the “margin of appreciation.” But as Spielmann has noted:

The term “margin of appreciation” is not to be found either in the text of the Convention or in the preparatory work. However, the doctrine is well established in the case-law of the European Court of Human Rights. In applying this essentially judge-made doctrine, the Court imposes self-restraint on its power of review, accepting that domestic authorities are best placed to settle a dispute.⁹

In the materials in Part 2, **Wildhaber** argues that the **margin of appreciation** seeks to establish common minimum standards to provide Europe-wide framework for domestic human rights protection. **Petkova** claims that the ECtHR uses the margin of appreciation argument where there is a lack of regulatory similarities among the member states, and it shrinks the margin of appreciation where there is convergence of national regulatory approaches. She believes that this use of **consensus analysis** results in the court’s search for the lowest common denominator and resembles original intent interpretation. Commenting on the use of “**counting**” by the US Supreme Court, **Hills** acknowledges that sometimes the Court uses state counting as a basis for enforcing the consensus against an “outlier” state, but he sees counting primarily as the basis for the US Supreme Court to restrict its own interpretative role (ie, as a collective veto over judicial review).

The materials in Part 2 include a number of cases illustrating the use of these interpretive approaches by different courts.

S and Marper v UK appears to be a clear case of the use of counting by ECtHR, finding the UK government policy for retaining personal data out of step with the rest of Europe. But as **Lady Hale** has pointed out, the court’s restriction of the margin of appreciation in this case presented difficulties:

... sometimes we have been troubled by an apparent narrowing of the margin. *Hirst* is one example. *S and Marper v United Kingdom* may be another. It leaves the United Kingdom in the difficult position of being told that a ‘blanket and indiscriminate’ power to hold fingerprints, cellular samples and DNA profiles, as applied to the applicants in that case, overstepped the margin of appreciation. Yet beyond saying that it went too far in those cases, the decision gives little guidance on what rules would be proportionate to the admittedly legitimate and important aim of detecting and deterring crime. My particular concern is that the positive obligation to protect the vulnerable against rape and other attacks upon the right to respect for their bodily integrity should not be hindered or hampered by an unduly restrictive approach. It is no wonder that Parliament has taken different views about where the balance should be struck. The United Kingdom courts are in the same position as Strasbourg: they cannot draft a legislative scheme to remedy the problem. The most they can do is to decide whether the right balance has been struck in an individual case.¹⁰

9 Dean Spielmann, *Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?* (Centre for European Legal Studies, Working Paper, Feb. 2012)

10 Lady Hale of Richmond, *Beanstalk or Living Instrument? How Tall Can the ECHR Grow?* Barnard’s Inn Reading 2011

Letsas has highlighted the difficulties the ECtHR faces in employing the margin of appreciation:

Difficult times lie ahead for the European Court of Human Rights... When a human rights issue before it is controversial or sensitive - like the display of crucifixes in Italy or prisoners' right to vote in the United Kingdom - great pressure is put on the Court to grant a margin of appreciation and refrain from a rigorous assessment of the necessity of the restriction. The new Court has equivocated on the relevance and importance of consensus (or common ground) in interpreting the Convention and in assessing the necessity of the interference with the applicant's right. It has equivocated between the following two ideas: on one hand, the idea that it should perform the constitutional function of developing and applying consistently a fully fledged, liberal-egalitarian model of rights for the whole of Europe; and on the other hand the idea that, as an international court, it should compromise the consistent application of the principles it has developed in its case law, whenever the finding of a violation would meet the opposition of many or most contracting states...¹¹

To illustrate this, Part 2 includes two other ECtHR cases, *Lautsi v Italy* (from Part 1) and *Taxquet v Belgium*, that met strong opposition by numerous member states following a first decision by a section of the ECtHR. Both section decisions were then appealed to the Grand Chamber, which reversed the earlier decisions. In doing so the Grand Chamber relied heavily on counting and the margin of appreciation in both decisions. Numerous non-party member states also acted as interveners in both appeals to the Grand Chamber, and in this respect both cases also hint at the role of "dialogue" between member states and the court (discussed further in Part 4).

In *Atkins v Virginia* the majority and dissenting justices of the US Supreme Court disagreed sharply over how the court should "count" state legislative enactments on the use of the death penalty for those of diminished mental capacity and what was valid ground for determining a "consensus".

Questions to Consider in Part 2:

As the cases in Part 2 illustrate, there are numerous examples of courts counting or looking for "consensus." Counting may seem straightforward, yet it entails a series of decisions. For instance:

- How do courts decide what to "count"?
- What jurisdictions "count": only those within the larger federation or union or those outside it as well?
- In *Taxquet* and *Lautsi*, how could the sections of the ECtHR and the Grand Chamber both employ counting but come to different decisions?
- More generally, what work does "counting" do? Is it a doctrine in the service of judges or member states?

11 George Letsas, "Judge Rozakis's Separate Opinions and the Strasbourg Dilemma" in *The European Convention on Human Rights: A Living and Dynamic Instrument—Liber Amicorum in Honour of Judge Rozakis* (Dean Spielmann et al eds, 2011) p. 305

Luzius Wildhaber

*A Constitutional Future for the European Court of Human Rights?*¹²

[To the extent that] the national authorities are in a position to apply Convention case-law to the questions before [them], then much, if not all, of the Strasbourg Court's work is done. This is ultimately the objective underlying the system: to ensure that persons throughout the Convention community are able fully to assert their Convention rights within the domestic legal system.

Margin of appreciation

Another way of putting this is that fulfilment of the procedural obligation leaves room for the operation of what we call the margin of appreciation, for those Articles in respect of which a margin of appreciation is capable of existing and therefore excluding Articles 2 [right to life] and 3 [prohibition of torture]. This area of discretion is a necessary element inherent in the nature of international jurisdiction when applied to democratic States that respect the rule of law. It reflects on the one hand the practical matter of the proximity to events of national authorities and the sheer physical impossibility for an international court, whose jurisdiction covers 43 States with a population of some 800 million inhabitants, to operate as a tribunal of fact. Thus the Court has observed that it must be cautious in taking on the role of first instance tribunal of fact. Nor is it the Court's task to substitute its own assessment of the facts for that of the domestic courts. Though the Court is not bound by the findings of domestic courts, it requires cogent findings of fact to depart from findings of fact reached by those courts.

But the margin of appreciation also embraces an element of deference to decisions taken by democratic institutions. a deference deriving from the primordial place of democracy within the Convention system. It is not the role of the European Court systematically to second-guess democratic legislatures. What it has to do is to exercise an international supervision in specific cases to ensure that the solutions found do not impose an excessive or unacceptable burden on one sector of society or individuals. The democratically elected legislature must be free to take measures in the general interest even where they interfere with a given category of individual interests. The balancing exercise between such competing interests is most appropriately carried out by the national authorities. There must however be a balancing exercise, and this implies the existence of procedures which make such an exercise possible. Moreover the result must be that the measure taken in the general interest bears a reasonable relationship of proportionality both to the aim pursued and the effect on the individual interest concerned. In that sense the area of discretion accorded to States, the margin of appreciation, will never be unlimited and the rights of individuals will ultimately be protected against the excesses of majority rule. The margin of appreciation recognises that where appropriate procedures are in place a range of solutions compatible with human rights may be available to the national authorities. The Convention does not purport to impose uniform approaches to the myriad different interests which arise in the broad field of fundamental rights protection; it seeks to establish common minimum standards to provide an Europe-wide framework for domestic human rights protection.

12 Excerpted from Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights?*, 23 *HUM. RTS. L.J.* 161 (2002).

Roderick M. Hills
Counting States¹³

[S]tate counting involves two common elements: judicial use of state law to inform the content of federal constitutional doctrine, and judicial evaluation of states' laws collectively rather than singly to determine a state "consensus." When counting states, the Court treats the States as one large decision-making body whose members reach a single consensus

To understand why and how state counting might be valuable, it is important first to draw a distinction between two different ways in which the Court could be counting states. First, the Court could be using the state legislatures' consensus as a source of national law. Alternatively, the Court could be using the state legislatures' consensus as a limit on national law. In the first case, the Court would count the States' laws to determine the States' consensus position on an issue and then enforce that position against outlier states. In the second case, the Court would determine the States' consensus to place an outside limit on the judiciary's enforcement of its own view of the constitutional norm. In effect, the second version of state counting uses the States' consensus as a sort of collective veto over judicial review, not as an independent source of federal constitutional norms. . . .

[S]uppressing outlying states as an end in itself is not a coherent constitutional goal in a federal regime. The whole point of federalism is based on the premise that there is no harm in legal diversity as such. If a single state passed a statute, for instance, punishing a certain crime by ordering the offender to undergo intensive therapy and perform community service, it would not be sensible to strike down the law as "cruel and unusual" just because no other state had enacted such a reform. In a federal regime, merely being unusual (absent cruelty) is a virtue, not a vice.

It is more helpful and coherent to think of state laws as forming a limit on the Court's interpretation. . . . [Thus, c]ounting states. . . . is intended to function as a constraint on the judiciary, not on outlier states.

This judiciary-limiting character of state law explains why the Court does not require a more robust showing of state consensus. If the only purpose of the state counting exercise is to demonstrate the negative point that no clear consensus exists among the States that is inconsistent with the Court's point of view, then it is sufficient for the Court to show that its holding has not been rejected by a majority of the States. The Court need not show that the judicial position has actually been endorsed by a majority of the States because the States' consensus is not intended to supply the content of the federal norm. State counting merely provides assurance against a national popular backlash against the Court. Put differently, where there is no consensus one way or the other, the Court uses the indecision of the States as an opening for the Court to impose its own values on the nation.

Likewise, once one understands that state counting functions in practice as a purely negative, judiciary-limiting device, the Court's notorious casualness in how it tallies states becomes less mystifying. If the only point of the tally is to ensure that the Court's position has not been rejected by a majority of states, it is unnecessary to determine why the States have not rejected the judicial position. It suffices that, for whatever reason, most states have not adopted a position inconsistent with the Court's view. That these state legislatures might not perceive themselves as fixing a national standard of decency is immaterial, because the Court is not relying on them to define such a constitutional standard—it is relying on them only to demonstrate that it is not trampling on any well-defined majority opinion. . . .

13 Excerpted from Roderick M. Hills, Jr., *Counting States*, 32 HARV. J.L. & PUB. POL'Y 17 (2009).

There are certain parallels between this Court-restraining function of state counting in due process cases and what Professor Larry Sager calls “cool federalism.” Professor Sager describes cool federalism as the practice of allowing “maverick” states to “invent” new governmental norms that are then gradually “propagated” to other states and are eventually “consolidated” as federal norms by Congress or the federal courts once they have won sufficiently widespread support among the States. The period of state experimentation, according to Professor Sager, provides information to national decision makers about how the “maverick” norms will operate on the ground, allowing them to decide whether to nationalize the norms after they have proven themselves to be sound policies.

To the extent that the Court tallies states to assure itself that its decision will not offend a national majority, one could regard due process state counting as a way to glean information about public opinion from maverick state experiments. In effect, the States become the Court’s pollsters. Counting states helps the Court ensure that it will not experience *de novo* the widespread popular backlash it has incurred in the past for getting ahead of public opinion. But it is important to note the thinness of the information the Court obtains from state counting: The Court simply assures itself that the public is sufficiently divided on a controversial issue that the Court can weigh in without risking a popular backlash so great that it would have to reverse itself later. Such state counting, in other words, yields very little information about the actual merits of the position that the Court decides to endorse. Moreover, state counting as a device for restraining courts does very little to foster maverick states’ experiments because a bare majority of state legislatures has the power to stop the Court from imposing a uniform constitutional rule on the nation. Novel state policies that arguably impinge on the federal judiciary’s theories of liberty or equality—like covenant marriage—would need an additional and more robust restraint on judicial review....

State counting is more an assurance that a judicial opinion is consistent with the national majority’s current preferences than a protection of outlier states’ experimentation. If one assumes that the only function of federalism is to protect outlying states’ experiments, then state counting will not seem to be consistent with the spirit of federalism. But American federalism has more justification than protection of regulatory diversity. Since the Anti-Federalists’ attack on the proposed U.S. Constitution as a device for serving the interests of mercantile elites, supporters of state power have argued that state governments—whose officials are generally elected from small electoral districts—are more responsive to voters, more egalitarian, and less dominated by cultural and financial elites than the federal government. Uniting the States as a single force to counterbalance the federal government, therefore, is a venerable theme in American federalism. The Court’s device of counting states is essentially a judicially crafted version of this populist idea.

Bilyana Petkova

*The Role of Majoritarian Activism in Precedent Formation at the European Court of Human Rights*¹⁴

In general, majoritarian activism materialises through the ECtHR's recourse to 'emerging consensus,' 'common European approach,' 'common ground,' 'tendency' or a 'steady development' in the law, a formula that will be referred to for short as Consensus Analysis (CA). It has to be kept in mind that CA is not always connected to an actual count of legislative provisions and case law of national courts but can refer to international law conventions that the Member States have either ratified or merely signed. In certain cases, the Strasbourg Court finds it sufficient to look into European law. When an actual count is in place, it rarely includes all Council of Europe countries and can sometimes be extended to a survey of the U.S., Canadian, Australian, New Zealander, South African or Israeli practices and complemented by the level of expert or scientific consensus on a matter. . . . Based on the Court's own statement in the judgement or that of dissenting judges and/or comments found in secondary literature, from the 55 cases in the dataset where the ECtHR uses its CA formula, 6 can be regarded as either establishing or overruling a precedent. When the restriction is connected to a public interest that needs to be balanced out with the interest of the individual, the ECtHR's use of majoritarian activism arguably helps the Court shift the conception of public interest from national to one that transcends frontiers. This function of the ECtHR fits with an understanding of the Strasbourg Court that gives certain priority to its tasks as a constitutional rather than purely delivering 'individual' justice court, an understanding significantly reinforced after the adoption of Protocol 14. Especially in view of Protocol 14 and the provisions in the Lisbon Treaty that ensure EU accession to the Convention, the ECHR and the CJEU, together with national constitutional courts, can be regarded as explicitly sharing constitutional responsibility for adjudicating rights on a pan-European scale.

Generally, the practice of the ECtHR has been to shrink the margin of appreciation in an area where there is convergence of national regulatory approaches; au contraire, the Court leaves a broader scope of discretion to the national authorities if there is a lack of regulatory similarities. . . . In fact, the CA conceptualised by the ECtHR has never been a stand-alone construction. While it has been convincingly argued that the Court uses CA in order to mediate between the margin of appreciation doctrine and evolutive interpretation, it seems that the academic opinion is leaning toward the conclusion that consensus is rather embedded in the margin of appreciation doctrine to an extent that actually stalls the use of evolutive interpretation. At times the search for consensus is equalised with a minimalist approach advocating a search for a lowest common denominator. Furthermore, the use of CA is seen to resemble original intent type of interpretation, coming contrary to the development of autonomous concepts by the Court. . . . I argue that a closer and more systematic look at the ECtHR's use of the method in particular in the area of qualified rights and with regards recent case law reveals a pattern—the ECtHR, acting as a constitutional court, is using CA in order to gradually develop a new area of law in a progressive manner, levelling up the scope of protection. . . .

14 Excerpted from Bilyana Petkova, *The Role of Majoritarian Activism in Precedent Formation at the European Court of Human Rights* (Eur. Univ. Inst., Working Paper, 2012).

S and Marper v UK

4 December 2008, ECtHR, Grand Chamber

Applications nos. 30562/04 and 30566/04

Question

Whether the retention by the authorities of the applicants' fingerprints, DNA profiles and cellular samples constitutes an interference in their private life and cannot be justified in a democratic society under Article 8 of the ECHR?

Background

S was arrested and charged with robbery and his fingerprints and DNA samples were taken. He was later acquitted. Marper was arrested and charged with harassment of his partner and his fingerprints and DNA samples were taken. He later reconciled with his partner and the case was dismissed. Both applicants asked for their fingerprints and DNA samples to be destroyed and in both cases the police refused.

The UK Government argued that the retention of fingerprints, cellular samples and DNA profiles could not be regarded as excessive since they were kept for specific limited statutory purposes and stored securely and subject to the safeguards identified. The records were retained because the police had already been lawfully in possession of them, and their retention would assist in the future prevention and detection of crime in general by increasing the size of the database. Retention resulted in no stigma and produced no practical consequence for the applicants unless the records matched a crime-scene profile. A fair balance was thus struck between individual rights and the general interest of the community and fell within the State's margin of appreciation.

Decision

The Court ruled that the retention of fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences violated Article 8 of the ECHR.

From the judgment:

B. Law and practice in the Council of Europe member States

45. According to the information provided by the parties or otherwise available to the Court, a majority of the Council of Europe member States allow the compulsory taking of fingerprints and cellular samples in the context of criminal proceedings. At least 20 member States make provision for the taking of DNA information and storing it on national data bases or in other forms (Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, the Netherlands, Norway, Poland, Spain, Sweden and Switzerland). This number is steadily increasing.

46. In most of these countries (including Austria, Belgium, Finland, France, Germany, Hungary, Ireland, Italy, Luxembourg, the Netherlands, Norway, Poland, Spain and Sweden), the taking of DNA information in the context of criminal proceedings is not systematic but limited to some specific circumstances and/or to more serious crimes, notably those punishable by certain terms of imprisonment.

47. The United Kingdom is the only member State expressly to permit the systematic and indefinite retention of DNA profiles and cellular samples of persons who have been acquitted or in respect of whom criminal proceedings have been discontinued. Five States (Belgium, Hungary, Ireland, Italy and Sweden) require such information to be destroyed ex officio upon acquittal or the discontinuance of the criminal proceedings. Ten other States apply the same general rule with certain very limited exceptions: Germany, Luxembourg and the Netherlands allow such information to be retained where

suspicions remain about the person or if further investigations are needed in a separate case; Austria permits its retention where there is a risk that the suspect will commit a dangerous offence and Poland does likewise in relation to certain serious crimes; Norway and Spain allow the retention of profiles if the defendant is acquitted for lack of criminal accountability; Finland and Denmark allow retention for 1 and 10 years respectively in the event of an acquittal and Switzerland for 1 year when proceedings have been discontinued. In France DNA profiles can be retained for 25 years after an acquittal or discharge; during this period the public prosecutor may order their earlier deletion, either on his or her own motion or upon request, if their retention has ceased to be required for the purposes of identification in connection with a criminal investigation. Estonia and Latvia also appear to allow the retention of DNA profiles of suspects for certain periods after acquittal.

48. The retention of DNA profiles of convicted persons is allowed, as a general rule, for limited periods of time after the conviction or after the convicted person's death. The United Kingdom thus also appears to be the only member State expressly to allow the systematic and indefinite retention of both profiles and samples of convicted persons.

(b) Legitimate aim

100. The Court agrees with the Government that the retention of fingerprint and DNA information pursues the legitimate purpose of the detection, and therefore, prevention of crime. While the original taking of this information pursues the aim of linking a particular person to the particular crime of which he or she is suspected, its retention pursues the broader purpose of assisting in the identification of future offenders.

(c) Necessary in a democratic society

(i) General principles

101. An interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a "pressing social need" and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are "relevant and sufficient". While it is for the national authorities to make the initial assessment in all these respects, the final evaluation of whether the interference is necessary remains subject to review by the Court for conformity with the requirements of the Convention (see *Coster v. the United Kingdom* [GC], no. 24876/94, § 104, 18 January 2001).

102. A margin of appreciation must be left to the competent national authorities in this assessment. The breadth of this margin varies and depends on a number of factors including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights. ... Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted. ... Where, however, there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider. ...

103. The protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention. The domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of this Article... The need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned, not least when such data are used for police purposes. The domestic law should notably ensure that such data are

relevant and not excessive in relation to the purposes for which they are stored; and preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored (see Article 5 of the Data Protection Convention and the preamble thereto and Principle 7 of Recommendation R(87)15 of the Committee of Ministers regulating the use of personal data in the police sector). The domestic law must also afford adequate guarantees that retained personal data was efficiently protected from misuse and abuse (see notably Article 7 of the Data Protection Convention). The above considerations are especially valid as regards the protection of special categories of more sensitive data (see Article 6 of the Data Protection Convention) and more particularly of DNA information, which contains the person's genetic make-up of great importance to both the person concerned and his or her family (see Recommendation No. R(92)1 of the Committee of Ministers on the use of analysis of DNA within the framework of the criminal justice system).

104. The interests of the data subjects and the community as a whole in protecting the personal data, including fingerprint and DNA information, may be outweighed by the legitimate interest in the prevention of crime (see Article 9 of the Data Protection Convention). However, the intrinsically private character of this information calls for the Court to exercise careful scrutiny of any State measure authorising its retention and use by the authorities without the consent of the person concerned. ...

125. In conclusion, the Court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society.

Taxquet v Belgium

16 November 2010, ECtHR, Grand Chamber

Application No. 926/05

Question

The question on appeal was whether Taxquet's conviction for murder, based on evidence of an anonymous witness and a jury's guilty verdict that did not include reasons and which could not be appealed against to a body competent to hear all aspects of the case, was a breach of Article 6(1) and 6(3)(d) of the ECHR.

Background

Taxquet and seven others were charged with the murder of a government minister and attempted murder of the minister's partner. An anonymous witness had informed investigators that Taxquet, together with others, had planned the murder. The investigating judge never interviewed the witness, who feared for his safety. To reach verdicts the jury had to answer 32 questions put by the President of the Assize Court, four of which concerned Taxquet. The jury answered in the affirmative to all four questions and Taxquet was convicted. The Second Chamber of the ECtHR initially ruled that the lay jury's failure to give reasons for its verdicts was a violation of Article 6, ruling that it was essential for the jury to indicate the precise reasons why each of the questions had been answered in the affirmative or the negative. The decision was greeted with much concern in a number of European jurisdictions that use lay juries. Belgium appealed to the Grand Chamber and the UK, Irish and French government all acted as third party interveners.

Decision

The Grand Chamber unanimously held that Taxquet had not been afforded sufficient safeguards to understand why he had been found guilty and the proceedings were therefore unfair, violating Article 6. However, it ruled that lay juries were not required to give reasons for their verdicts – reversing the Second Chamber and addressing the key concern of the intervener governments.

From the judgment:

83. The Court notes that several Council of Europe member States have a lay jury system, guided by the legitimate desire to involve citizens in the administration of justice, particularly in relation to the most serious offences. The jury exists in a variety of forms in different States, reflecting each State's history, tradition and legal culture; variations may concern the number of jurors, the qualifications they require, the way in which they are appointed and whether or not any forms of appeal lie against their decisions (see paragraphs 43-60 above). This is just one example among others of the variety of legal systems existing in Europe, and it is not the Court's task to standardise them. A State's choice of a particular criminal justice system is in principle outside the scope of the supervision carried out by the Court at European level, provided that the system chosen does not contravene the principles set forth in the Convention.... Furthermore, in cases arising from individual petitions the Court's task is not to review the relevant legislation in the abstract. Instead, it must confine itself, as far as possible, to examining the issues raised by the case before....

84. Accordingly, the institution of the lay jury cannot be called into question in this context. The Contracting States enjoy considerable freedom in the choice of the means calculated to ensure that their judicial systems are in compliance with the requirements of Article 6. The Court's task is to consider whether the method adopted to that end has led in a given case to results which are compatible with the Convention, while also taking into account the specific circumstances, the nature and the complexity of the case. In short, it must ascertain whether the proceedings as a whole were fair. ...

90. It follows from the case-law cited above that the Convention does not require jurors to give reasons for their decision and that Article 6 does not preclude a defendant from being tried by a lay jury even where reasons are not given for the verdict. Nevertheless, for the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness. As the Court has often noted, the rule of law and the avoidance of arbitrary power are principles underlying the Convention.... In the judicial sphere, those principles serve to foster public confidence in an objective and transparent justice system, one of the foundations of a democratic....

91. In proceedings conducted before professional judges, the accused's understanding of his conviction stems primarily from the reasons given in judicial decisions. In such cases, the national courts must indicate with sufficient clarity the grounds on which they base their decision.... Reasoned decisions also serve the purpose of demonstrating to the parties that they have been heard, thereby contributing to a more willing acceptance of the decision on their part. In addition, they oblige judges to base their reasoning on objective arguments, and also preserve the rights of the defence. However, the extent of the duty to give reasons varies according to the nature of the decision and must be determined in the light of the circumstances of the case.... While courts are not obliged to give a detailed answer to every argument raised, it must be clear from the decision that the essential issues of the case have been addressed.

92. In the case of assize courts sitting with a lay jury, any special procedural features must be accommodated, seeing that the jurors are usually not required – or not permitted – to give reasons for their personal convictions. In these circumstances likewise, Article 6 requires an assessment of whether sufficient safeguards were in place to avoid any risk of arbitrariness and to enable the accused to understand the reasons for his conviction. Such procedural safeguards may include, for example, directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced, and precise, unequivocal questions put to the jury by the judge, forming a framework on which the verdict is based or sufficiently offsetting the fact that no reasons are given for the jury's answers. Lastly, regard must be had to any avenues of appeal open to the accused.

Atkins v Virginia

20 June 2002, Supreme Court of the United States

536 U.S. 304

Question

The question before the Supreme Court was whether a Virginia law permitting the execution of mentally handicapped individuals violated the Eighth Amendment's prohibition of cruel and unusual punishment.

Background

Atkins was charged, together with Jones, with abduction, armed robbery and capital murder. Although both Atkins and Jones gave similar evidence concerning the events of the crime, they each claimed the other had actually shot the victim. At trial, the defense presented evidence (based in part on an IQ test that showed Atkins had an IQ of 59), which suggested that Atkins was "mildly mentally retarded." Nevertheless, Atkins was convicted (the jury preferring the evidence of Jones) and was sentenced to death.

Decision

The Court held by a 6 to 3 majority that the Virginia law violated the Eighth Amendment. It was noted that the Eighth Amendment should be interpreted in accordance with the evolving standards of decency that mark a maturing society, and the Court described the emergence of a national consensus that the mentally handicapped should not be executed (noting the consistency of the direction of change of State legislation in this regard). However, the Court left it to individual States to determine the difficult question of what constitutes mental retardation.

From the judgment (Justice Stevens):

[306] Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. . . . Presumably for these reasons, in the 13 years since we decided *Penry v. Lynaugh*, the American public, legislators, scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations informs our answer to the question presented by this case: whether such executions are "cruel and unusual punishments" prohibited by the Eighth Amendment to the Federal Constitution.

[311-2] A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the "Bloody Assizes" or when the Bill of Rights was adopted, but rather by those that currently prevail. As Chief Justice Warren explained in his opinion in *Trop v. Dulles*. . . : "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" . . . We have pinpointed that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry*, 492 U. S., at 331

[313] Thus, in cases involving a consensus, our own judgment is "brought to bear" . . . by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.

[314] The parties have not called our attention to any state legislative consideration of the suitability of imposing the death penalty on mentally retarded offenders prior to 1986. In that year, the public reaction to the execution of a mentally retarded murderer in Georgia apparently led to the enactment of the first state statute prohibiting such executions. In 1988, when Congress enacted legislation reinstating the federal death penalty, it expressly provided that a "sentence of death shall not be carried

out upon a person who is mentally retarded.” In 1989, Maryland enacted a similar prohibition. It was in that year that we decided *Penry*, and concluded that those two state enactments, “even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus.”

[315] Much has changed since then. Responding to the national attention received by the Bowden execution and our decision in *Penry*, state legislatures across the country began to address the issue. In 1990, Kentucky and Tennessee enacted statutes similar to those in Georgia and Maryland, as did New Mexico in 1991, and Arkansas, Colorado, Washington, Indiana, and Kansas in 1993 and 1994. In 1995, when New York reinstated its death penalty, it emulated the Federal Government by expressly exempting the mentally retarded. Nebraska followed suit in 1998. There appear to have been no similar enactments during the next two years, but in 2000 and 2001 six more States—South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina—joined the procession. The Texas Legislature unanimously adopted a similar bill,¹⁶ and bills have passed at least one house in other States, including Virginia and Nevada.

[316] It is not so much the number of these States that is significant, but the consistency of the direction of change. Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal ... The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.

[317] To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded ... As was our approach in *Ford v. Wainwright* ... “we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.”

[319] With respect to retribution—the interest in seeing that the offender gets his “just deserts”—the severity of the appropriate punishment necessarily depends on the culpability of the offender. Since *Gregg*, our jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes. ... If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.

[321] Our independent evaluation of the issue reveals no reason to disagree with the judgment of “the legislatures that have recently addressed the matter” and concluded that death is not a suitable punishment for a mentally retarded criminal. We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our “evolving standards of decency,” we therefore conclude that such punishment is excessive and that the Constitution “places a substantive restriction on the State’s power to take the life” of a mentally retarded offender. *Ford*, 477 U. S., at 405.

Dissenting opinion of Chief Justice Rehnquist:

[321] The question presented by this case is whether a national consensus deprives Virginia of the constitutional power to impose the death penalty on capital murder defendants like petitioner, i. e., those defendants who indisputably are competent to stand trial, aware of the punishment they are about to suffer and why, and whose mental retardation has been found an insufficiently compelling reason to lessen their individual responsibility for the crime. The Court pronounces the punishment cruel and unusual primarily because 18 States recently have passed laws limiting the death eligibility

of certain defendants based on mental retardation alone, despite the fact that the laws of 19 other States besides Virginia continue to leave the question of proper punishment to the individualized consideration of sentencing judges or juries familiar with the particular offender and his or her crime [322] ... I write separately, however, to call attention to the defects in the Court's decision to place weight on foreign laws, the views of professional and religious organizations, and opinion polls in reaching its conclusion. The Court's suggestion that these sources are relevant to the constitutional question finds little support in our precedents and, in my view, is antithetical to considerations of federalism, which instruct that any "permanent prohibition upon all units of democratic government must [be apparent] in the operative acts (laws and the application of laws) that the people have approved."

Dissenting opinion of Justice Scalia:

[346] The Court's thrashing about for evidence of "consensus" includes reliance upon the *margins* by which state legislatures have enacted bans on execution of the retarded. Ante, at 316. Presumably, in applying our Eighth Amendment "evolving-standards-of-decency" jurisprudence, we will henceforth weigh not only how many States have agreed, but how many States have agreed by how much. Of course if the percentage of legislators voting for the bill is significant, surely the number of people *represented* by the legislators voting for the bill is also significant: the fact that 49% of the legislators in a State with a population of 60 million voted *against* the bill should be more impressive than the fact that 90% of the legislators in a State with a population of 2 million voted *for* it. ... This is quite absurd. What we have looked for in the past to "evolve" the Eighth Amendment is a consensus of the same sort as the consensus that *adopted* the Eighth Amendment: a consensus of the sovereign States that form the Union, not a nose count of Americans for and against.

PART 3
Life, Citizenship and Justice

Part 3: Life, Citizenship and Justice

The following materials in Part 3 look at three key areas of public and private life where rights and jurisdictional authority have frequently come into conflict - **life, citizenship and the justice process**. In the context of reproduction, disenfranchisement and criminal justice, claims for regional deviation are made in the name of "democracy" - that the majoritarian procedures of a particular polity have produced a particular version of a norm, and that this judgment should be left undisturbed. These examples make plain that the debates are generated through social and political movements that mark certain rights as central to the identity of individuals or nation-states at certain historical moments.

Reproduction

The two cases contrasted here are the ECtHR abortion decision in *A, B and C v Ireland* and the Court of Justice of the European Union (ECJ) embryonic stem cell patent decision in *Brüstle*. The approaches of the two different courts reflect a point raised recently by **Lord Mance** on the ECJ role in human rights issues and the relationship between the ECJ and ECtHR on rights issues¹⁵:

European Union law itself has acquired an increasing fundamental rights content. Under article 6(2) of the Treaty on the European Union (TEU), the EU is bound to respect fundamental rights as guaranteed by the European Convention on Human Rights (ECHR) as general principles of EU law, and the Lisbon Treaty confers legal status on the Charter of Fundamental Rights. The Court of Justice has been concerned to develop a significant fundamental rights jurisprudence. ... A recent Commission Opinion of 30.9.11 (COM(2011) 596) identifies as the highest growth rate area in the General Court appeals against sanctions imposed on people or entities based on mechanisms established under the Common Foreign and Security Policy. Issues of human rights are thus increasingly likely to become European Union issues.

There is an ancillary aspect to this. The relationship between the EU and the European Court of Human Rights has not yet been worked out. But, on the face of it, any decision taken by the Court of Justice on fundamental rights binds UK courts absolutely. The limited, but deliberate and potentially significant, flexibility provided by the Human Rights Act cannot in that context exist. As and when the Luxembourg Court determines the meaning and scope of what have hitherto been purely Strasbourg rights, British courts may become bound absolutely, albeit that this will strictly only be in the context of European Union law.

Siegal's commentary on the constitutionalisation of abortion highlights how jurisdictions approach abortion law from different starting points, reflecting deep divisions over the role of law (and courts) in regulating motherhood. **Lord Sumption** has recently questioned the ECtHR's consensus approach¹⁶ citing the *A, B and C v Ireland* abortion decision:

Extremes apart, political communities may and do legitimately differ on what rights should be recognised. Even where they recognise the same rights, they frequently differ on what those rights imply or how effect should be given to them. ... [Human rights issues] are issues between different groups of citizens, whose resolution by democratic processes will not necessarily lead to the same answer everywhere. Yet in the course of its admittedly obscure judgment in *A, B and C v Ireland* the Grand Chamber of the European Court of Human Rights appears to have thought that because the great majority of European states have since the 1970s given qualified primacy to the health and wellbeing of the mother over the interests of the unborn child, it was not necessarily open to Ireland to take a different view. It is clear from this judgment, so far as anything is, that if the Strasbourg Court had found a European consensus about when life can be said to begin, they would have declared abortion in the interest of the health and well-being of the mother to be a human right and imposed it on Ireland. As it was, the only reason why Ireland's highly restrictive abortion laws were judged compatible with the Convention was that they did not prevent Irish women from travelling to England for an abortion.

15 Lord Mance, *The Composition of the European Court of Justice*, speech to the UK Association for European Law (19 October 2011)

16 Jonathan Sumption, *Judicial and Political Decision-making: The Uncertain Boundary*, FA Mann Lecture (9 November 2011)

Citizenship (Voting)

The cases here address the question of the disenfranchisement of prisoners in the UK, US and Canada. The judgments reflect various judicial approaches to interpreting constitutional texts and the degrees of deference to be accorded to member states. The ECtHR decisions in *Hirst* and then in *Greens and MT* were extremely controversial in the UK, and have had repercussions for the UK government's relationship with the ECtHR. The *Sauve* decision reflects the Canadian approach to certain rights that cannot be overridden by the Notwithstanding Clause. The dissent in the US Supreme Court case of *Richardson* opens up two themes that run throughout these materials - the interpretive stance that justices adopt when reading foundational texts and the relevance of the method of interpretation to the deference accorded to regions.

Criminal Justice Process

This section highlights five judgments from different jurisdictions all of which address fundamental questions of fairness in the criminal justice process. Criminal law is often widely regarded as an area where regions have a substantial scope for variation in practice, but it is also an area where demands for individual and procedural rights inevitably arise. Several cases involving regional criminal justice policies have already been covered in Parts 1 and 2: *Taxquet* (jury trial), *Cadder* (right to legal counsel in police detention), *Atkins* (death penalty). Two additional cases presented in Part 3, *Horncastle* and *Al-Khawaja*, demonstrate the growing "dialogue" between the UK Supreme Court and the ECtHR in the area of criminal procedure. The final case, *Ambrose*, follows on from the UK Supreme Court decision in the Scottish case of *Cadder* covered in Part 1, but is an example of the UK Supreme Court exercising self-restraint in not applying Convention rights when the ECtHR has not adjudicated on a specific issue.

Questions to consider in Part 3:

- How does a court decide when to accord deference (eg, to Ireland in A, B and C)?
- In *Brüstle*, what factors militate in favor of or against imposing a single standard?
- Is the insistence on a uniform European norm in *Brüstle* the result of different jurisdictions, the nature of the body of law at issue ("patent"), the frame of "commerce" or that the rule is more conventional than innovative?
- What are the arguments for and against restraining member states' decisions about who votes?
- What happens when fundamental principles in a regional criminal justice system meet overarching rights guarantees (judicial interpretation of fair trial rights)?
- When are state identity or self-determination claims for a rule (access to abortion, voting rights, or trial by jury) seen as the kind of claim to which deference is owed?
- How are individual interests characterised and weighted by the courts?

A, B and C v Ireland

16 December 2010, ECtHR, Grand Chamber

Application No. 25579/05

Question

The question on appeal was whether the restrictions on abortion in Ireland stigmatised and humiliated the applicants, risked damaging their health and, in the case of C, her life, contrary to Article 8 (right to respect for private and family life) of the ECHR.

Background and Key Issues

The applicants all lived in Ireland and each travelled to England to have an abortion. A was living in poverty and already had four children in foster care, B did not wish to become a single parent and C was in remission from cancer and feared the pregnancy may cause a relapse. Abortion is illegal in Ireland (although women may travel to have an abortion elsewhere) and carries a penalty of life imprisonment. Following the Eighth Amendment to the Irish Constitution, domestic courts have held that abortion was lawful if there was a real and substantial risk to the life (not health) of the mother as a result of her pregnancy.

Decision

The Grand Chamber held by a majority (11 votes to 6) that there had been no violation of Article 8 ECHR in respect of A and B and held unanimously that there had been a violation of Article 8 in respect of C. In applying the margin of appreciation the State enjoyed in this context, it was held that the current prohibition struck a fair balance between the applicants' rights and those invoked on behalf of their unborn. However, with respect to C, Article 8 was violated, as there was no readily accessible method for C to determine whether the risk to her life was such to enable an abortion under domestic law.

From the judgment:

230. ... in the present cases the Court must examine whether the prohibition of abortion in Ireland for health and/or well-being reasons struck a fair balance between, on the one hand, the ... right to respect for their private lives under Article 8 and, on the other, profound moral values of the Irish people as to the ... life of the unborn.

231. The Court considers that the breadth of the margin of appreciation to be accorded to the State is crucial to its conclusion as to whether the impugned prohibition struck that fair balance ...

232. The Court recalls that a number of factors must be taken into account when determining the breadth of the margin of appreciation to be enjoyed by the State when determining any case under Article 8 of the Convention. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted ... Where, however, there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider ... by reason of their direct and continuous contact with the vital forces of their countries, the State authorities are, in principle, in a better position than the international judge to give an opinion, not only on the "exact content of the requirements of morals" in their country, but also on the necessity of a restriction intended to meet them ...

234. However, the question remains whether this wide margin of appreciation is narrowed by the existence of a relevant consensus. The existence of a consensus has long played a role in the development and evolution of Convention protections ... the Convention being considered a "living instrument" to be interpreted in the light of present-day conditions ...

235. In the present case ... the Court considers that there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law ...

236. However, the Court does not consider that this consensus decisively narrows the broad margin of appreciation of the State.

237. Of central importance is the finding ... that the question of when the right to life begins came within the States' margin of appreciation because there was no European consensus on the scientific and legal definition of the beginning of life... the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother ... even if it appears from the national laws referred to that most Contracting Parties may ... have resolved those conflicting rights and interests in favour of greater legal access to abortion, this consensus cannot be a decisive factor in the Court's examination of whether the impugned prohibition on abortion in Ireland ... struck a fair balance between the conflicting rights and interests...

241. ... having regard to the right to lawfully travel abroad for an abortion with access to appropriate information and medical care in Ireland, the Court does not consider that the prohibition in Ireland of abortion for health and well-being reasons, based as it is on the profound moral views of the Irish people as to the nature of life ... exceeds the margin of appreciation accorded in that respect to the Irish State...

249. [As to C] While a broad margin of appreciation is accorded to the State ... once that decision is taken the legal framework devised for this purpose should be "shaped in a coherent manner ..."

267. ... the authorities failed to comply with their positive obligation to secure to [C] effective respect for her private life by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which [C] could have established whether she qualified for a lawful abortion ...

Oliver Brüstle v Greenpeace e.V.
European Court of Justice (Grand Chamber)
Case C-34/10 [2011]

Question

In relation to the patentability of stem cell related inventions, what is the meaning of “human embryo” and what are “industrial or commercial purposes” within Article 6 of the European Union Directive 98/44/EC on the legal protection of biotechnological inventions?

Background

Professor Brüstle, a neuropathologist and expert in stem cell research, had invented a way to produce specialised cells for treating neurological conditions, such as Parkinson’s disease, from embryonic stem cells and obtained a German patent. Greenpeace challenged this in the Bundespatentgericht (Federal Patent Court), which ruled the patent invalid in so far as it covers precursor cells obtained from human embryonic stem cells and processes for the production of those cells. Brüstle appealed against that judgment to the Bundesgerichtshof (Federal Court of Justice), which referred the case to the European Court of Justice.

Decision

The Court gave a broad interpretation of the term “human embryo”. For a stem cell not to be regarded as a human embryo, it must not be capable of developing into a human being. And for a stem cell to be patentable, it should be obtained by a method which does not involve the destruction of a human embryo.

From the judgment:

7. [Directive 98/44/EC] provides:

Article 6

1. Inventions shall be considered unpatentable where their commercial exploitation would be contrary to public order or morality; however, exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation.

2. On the basis of paragraph 1, the following, in particular, shall be considered unpatentable:

(c) uses of human embryos for industrial or commercial purposes;

[Article 6 of the Directive was transposed by amendment to Paragraph 2 of the Patentgesetz (Law on Patents).]

28. The lack of a uniform definition of the concept of human embryo would create a risk of the authors of certain biotechnological inventions being tempted to seek their patentability in the Member States which have the narrowest concept of human embryo and are accordingly the most liberal as regards possible patentability, because those inventions would not be patentable in the other Member States. Such a situation would adversely affect the smooth functioning of the internal market which is the aim of the Directive.

29. That conclusion is also supported by the scope of the listing, in Article 6(2) of the Directive, of the processes and uses excluded from patentability. It is apparent from the case-law of the Court that, unlike Article 6(1) of the Directive, which allows the administrative authorities and courts of the Member States a wide discretion in applying the exclusion from patentability of inventions whose commercial exploitation would be contrary to ordre public and morality, Article 6(2) allows the Member States no discretion with regard to the unpatentability of the processes and uses which it sets out, since the very purpose of this provision is to delimit the exclusion laid down in Article 6(1). It follows that, by expressly excluding from patentability the processes and uses to which it refers, Article 6(2) of the Directive seeks to grant specific rights in this regard.

30. As regards the meaning to be given to the concept of 'human embryo' set out in Article 6(2)(c) of the Directive, it should be pointed out that, although, the definition of human embryo is a very sensitive social issue in many Member States, marked by their multiple traditions and value systems, the Court is not called upon, by the present order for reference, to broach questions of a medical or ethical nature, but must restrict itself to a legal interpretation of the relevant provisions of the Directive.

31. It must be borne in mind, further, that the meaning and scope of terms for which European Union law provides no definition must be determined by considering, *inter alia*, the context in which they occur and the purposes of the rules of which they form part.

32. In that regard, the preamble to the Directive states that although it seeks to promote investment in the field of biotechnology, use of biological material originating from humans must be consistent with regard for fundamental rights and, in particular, the dignity of the person. Recital 16 in the preamble to the Directive, in particular, emphasises that 'patent law must be applied so as to respect the fundamental principles safeguarding the dignity and integrity of the person'.

34. [T]he context and aim of the Directive thus show that the European Union legislature intended to exclude any possibility of patentability where respect for human dignity could thereby be affected. It follows that the concept of 'human embryo' within the meaning of Article 6(2)(c) of the Directive must be understood in a wide sense. . . . On those grounds, the Court (Grand Chamber) hereby rules:

1. Article 6(2)(c) of Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions must be interpreted as meaning that:
 - any human ovum after fertilisation, any non-fertilised human ovum into which the cell nucleus from a mature human cell has been transplanted, and any non-fertilised human ovum whose division and further development have been stimulated by parthenogenesis constitute a 'human embryo';
 - it is for the referring court to ascertain, in the light of scientific developments, whether a stem cell obtained from a human embryo at the blastocyst stage constitutes a 'human embryo' within the meaning of Article 6(2)(c) of Directive 98/44.
2. The exclusion from patentability concerning the use of human embryos for industrial or commercial purposes set out in Article 6(2)(c) of Directive 98/44 also covers the use of human embryos for purposes of scientific research, only use for therapeutic or diagnostic purposes which are applied to the human embryo and are useful to it being patentable.
3. Article 6(2)(c) of Directive 98/44 excludes an invention from patentability where the technical teaching which is the subject-matter of the patent application requires the prior destruction of human embryos or their use as base material, whatever the stage at which that takes place and even if the description of the technical teaching claimed does not refer to the use of human embryos.

Reva B. Siegel

*The Constitutionalization of Abortion*¹⁷

The body of constitutional law on abortion that has grown up since the 1970s is concerned with the propriety, necessity, and feasibility of controlling women's agency in decisions concerning motherhood. Some courts have insisted that government should respect women's decisions about motherhood, while many others have insisted that protecting unborn life requires government to control women's decisions about motherhood. Over the decades a growing number of courts have allowed government to protect life by persuading (rather than coercing) women to assume the role of motherhood. Across Europe, a growing number of jurisdictions are now giving women the final word in decisions about abortion—on the constitutional ground that it is the best way to protect unborn life. These remarkable developments suggest deep conflict about whether law should and can control women's agency in decisions about motherhood. Reading the cases with attention to this conflict identifies questions that courts are grappling with in the latest generation of abortion decisions, illuminating ambiguities in the normative basis of constitutional frameworks and in their practical architecture....

Some jurisdictions now require constitutional protections for women's dignity and welfare in government regulation of abortion of a kind unheard of before the modern women's movement. Many jurisdictions require constitutional protection for unborn life, entailing nested constitutional judgments about what legislatures may or must do in regulating women's conduct. Perhaps the most remarkable aspect of this story is how understanding of the constitutional duty to protect unborn life has evolved: Over time and across jurisdictions, it has been articulated in terms that acknowledge, accommodate, and even respect women citizens as autonomous agents—even in matters concerning motherhood....

In the mid-twentieth century, abortion laws around the world varied greatly. Some countries allowed abortion on request; others criminalized abortion except to save the life of the pregnant woman. Between these extremes, countries permitted abortion on various "indications" (therapeutic, eugenic, juridical (rape) and socio-economic), subject to different procedures and requirements. From 1967 to 1977, at least 42 jurisdictions changed their abortion laws, with the vast majority expanding the legal indications for abortion. It was during this same period that courts in the United States, Canada, and Europe began to review laws regulating abortion for conformity with their constitutions....

Today, we can see constitutionalization of abortion taking several forms. Some jurisdictions require government to respect women's dignity in making decisions about abortion, and consequently require legislators to provide women control, for all or some period of pregnancy, over the decision whether to become a mother. Many jurisdictions require constitutional protection for unborn life, criminalizing abortion while permitting exceptions on an indications basis to protect women's physical or emotional welfare, but not their autonomy. Yet other jurisdictions protect unborn life through counseling regimes that are result-open; these jurisdictions begin by recognizing women's autonomy for the putatively instrumental reason that it is the best method of managing the modern female citizen, and then come to embrace protecting women's dignity as a concurrent constitutional aim of depenalizing abortion. . . .

Yet other jurisdictions begin from a constitutional duty to protect life, and, like Germany, have begun to explore approaches for vindicating the duty to protect life that do not involve the threat of criminal prosecution. These jurisdictions constitutionally justify depenalization of abortion, coupled

17 Excerpted from Reva B. Siegel, "The Constitutionalization of Abortion" in *The Oxford Handbook of Comparative Constitutional Law* (M Rosenfeld and A Sajó eds, forthcoming 2012).

with abortion-dissuasive, result-open counseling, as more effective in protecting the unborn than the threat of criminal punishment. The justifications for life-protective counseling, as well as its form, are evolving over time, in ways that progressively incorporate values of women's autonomy. At a minimum, these jurisdictions recognize women as the type of modern citizens who possess autonomy of a kind that law must take into consideration if it hopes to affect their conduct; some go further and are beginning to embrace protecting women's dignity as a concurrent constitutional aim. . . .

After decades of conflict, a constitutional framework is emerging in Europe that allows legislators to vindicate the duty to protect unborn life by providing women dissuasive counseling and the ability to make their own decisions about abortion. Constitutionalization in this form values women as mothers first, yet addresses women as the kind of citizens who are autonomous in making decisions about motherhood, and may even warrant respect as such. The spread of constitutionalization in this form attests to passionate conflict over abortion and women's family roles; it also suggests increasing acceptance of claims the women's movement has advanced in the last forty years, however controverted they remain. Jurisdictions that permit result-open counseling in satisfaction of the duty to protect unborn life express evolving understandings of women as citizens, in terms that reflect community ambivalence and assuage community division, while continuing to engender change.

Hirst v United Kingdom (No.2)
6 October 2005, ECtHR, Grand Chamber
Application No. 74025/01

Question

The question on appeal was whether s.3 of the Representation of the People Act 1983 (RPA) prohibiting prisoners from voting in parliamentary or local elections was incompatible with Article 3 of Protocol No. 1 (right to free elections) of the ECHR.

Background

Hirst was serving a discretionary life sentence for manslaughter (having been released from prison on licence in respect of a previous life sentence). As such, Hirst (in common with approximately 48,000 other prisoners) was disenfranchised, which he argued arose not out of a reasoned decision but adherence to tradition. Hirst issued proceedings seeking a declaration that the RPA is incompatible with the ECHR.

Decision

The Grand Chamber held by a majority (12 votes to 5) that there had been a violation of Article 3 of Protocol No. 1 to the ECHR.

Response to the decision

The UK Parliament did not amend its legislation following this decision, and other applicants returned to the European court to seek relief (see following decision in *Greens and MT v UK*).

From the judgment:

59. As pointed out by the applicant, the right to vote is not a privilege ...

60. Nonetheless, the rights bestowed by Article 3 of Protocol No. 1 are not absolute. There is room for implied limitations and Contracting States must be allowed a margin of appreciation in this sphere.

61. There has been much discussion of the breadth of this margin in the present case. The Court reaffirms that the margin in this area is wide ...

62. It is, however, for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate ... In particular, any conditions imposed must ... reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage... Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 of Protocol No. 1 ...

70. There is no question, therefore, that a prisoner forfeits his Convention rights merely because of his status as a person detained following conviction. Nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion.

71. This standard of tolerance does not prevent a democratic society from taking steps to protect itself against activities intended to destroy the rights or freedoms set forth in the Convention. Article 3 of

Protocol No. 1 ... The severe measure of disenfranchisement must not, however, be resorted to lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned...

78. The breadth of the margin of appreciation has been emphasised by the Government who argued that, where the legislature and domestic courts have considered the matter and there is no clear consensus among Contracting States, it must be within the range of possible approaches to remove the right to vote from any person whose conduct was so serious as to merit imprisonment.

81. As regards the existence or not of any consensus among Contracting States ... it is undisputed that the United Kingdom is not alone among Convention countries in depriving all convicted prisoners of the right to vote ... However, the fact remains that it is a minority of Contracting States in which a blanket restriction on the right of convicted prisoners to vote is imposed or in which there is no provision allowing prisoners to vote ... Moreover, and even if no common European approach to the problem can be discerned, this cannot in itself be determinative of the issue.

82. ... while the Court reiterates that the margin of appreciation is wide, it is not all-embracing. Further, although the situation was somewhat improved by the 2000 Act which for the first time granted the vote to persons detained on remand, section 3 of the 1983 Act remains a blunt instrument. It strips of their Convention right to vote a significant category of persons and it does so in a way which is indiscriminate ... Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 ...

Greens and MT v United Kingdom
23 November 2010, ECtHR (Fourth Section)
Application Nos 60041/08 and 60054/08

Question

The question before the court was whether the refusal to enroll the applicants' on the electoral register constituted a violation of Article 3 of Protocol No. 1 (right to free elections) to the ECHR.

Background

The applicants were both prisoners in Scottish prisons who posted voter registration forms to the relevant electoral authorities. They argued that following the decision of the Grand Chamber in *Hirst v United Kingdom* (which held that the blanket disqualification of prisoners from voting was a violation of the ECHR) the electoral authorities were obliged to add their names to the electoral register. The electoral authorities, following the domestic legislation, which had not been amended since the Hirst decision, refused the applicants' applications for registration.

Decision

The Fourth Section of the ECtHR unanimously held that there had been a violation of Article 3 of Protocol No. 1 ECHR and that this originated in the failure of the United Kingdom to execute the Court's judgment in *Hirst*. Further, it was held that the United Kingdom was required within six months of the date of the final judgment to put forward legislative proposals to amend the relevant domestic legislation to ensure compliance with the ECHR.

Response to the decision

The decision in *Greens* met with considerable controversy, with the Prime Minister saying that it made him "physically ill to contemplate giving the vote to prisoners. They should lose some rights including the right to vote." In February 2011 MPs debated the issue and voted 234 to 22 in favour of a backbench motion to retain the ban on prisoner voting.

From the judgment:

73. The applicants complained that as convicted prisoners in detention they had been subject to a blanket ban on voting in elections and had accordingly been prevented from voting in elections to the European Parliament in June 2009 and in the general election of May 2010 and would potentially be banned from voting in the elections to the Scottish Parliament of May 2011, in violation of their rights guaranteed by art.3 of Protocol No.1 to the Convention, which reads as follows:

"The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

74. The Government accepted that, if the applications were declared admissible, then there had been a violation of art.3 of Protocol No.1 in the applicants' cases as a result of their ineligibility to vote in the European and general elections.

75. The EHRC criticised the Government's delay in implementing this Court's judgment in *Hirst*, pointing to the concerns expressed by the Joint Committee on Human Rights regarding the delay. According to statistics provided by the EHRC, there were approximately 70,000 serving prisoners in the United Kingdom in February 2009. They estimated that more than 100,000 prisoners were likely to have been affected by the ban at one time or another since the Court's judgment in *Hirst*.

76. The Court notes at the outset that the applicants have already been prevented from voting in the European elections of June 2009 and in the general election of May 2010 as a result of their status

as detained prisoners. However, Mr Greens became eligible for release on May 29, 2010 and MT is scheduled to be released in November 2010. The Court observes that both dates fall well before the elections to the Scottish Parliament on May 5, 2011. Accordingly, the Court will examine the applicants' complaints of a violation of art.3 of Protocol No.1 as a result of their ineligibility to vote in the European elections and the general election only.

77. The Court recalls that in *Hirst* it concluded that:

"82. ... [W]hile the Court reiterates that the margin of appreciation [applicable to art.3 of Protocol No.1] is wide, it is not all-embracing. Further, although the situation was somewhat improved by the 2000 Act which for the first time granted the vote to persons detained on remand, section 3 of the 1983 Act remains a blunt instrument. It strips of their Convention right to vote a significant category of persons and it does so in a way which is indiscriminate. The provision imposes a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1."

78. The legislation in question, namely s.3 of the 1983 Act, has not been amended since *Hirst*. As a result, the present applicants were ineligible to vote in the general election in the United Kingdom in May 2010. The blanket restriction introduced by s. 3 of the 1983 Act has been extended to elections to the European Parliament by s. 8 of the 2002 Act, which is parasitic upon the former section. As a result, the present applicants were ineligible to vote in the elections of June 2009 to the European Parliament.

79. These considerations are sufficient for the Court to conclude that there has been a violation of art.3 of Protocol No.1 to the Convention in both cases.

105. ... The Court considers that notwithstanding the wide margin of appreciation afforded to the respondent State by its judgment in *Hirst*, in light of the lengthy delay in implementing that decision and the significant number of repetitive applications now being received by the Court, it is appropriate to make findings under Article 46 of the Convention in the present cases.

110. The Court recalls the finding of the Grand Chamber in *Hirst* in its judgment of 2005 that the general, automatic and indiscriminate restriction on the right to vote imposed by section 3 of the 1983 Act must be seen as falling outside any acceptable margin of appreciation, however wide that margin may be. It emphasises that the finding of a violation of Article 3 of Protocol No. 1 in the present two cases was the direct result of the failure of the authorities to introduce measures to ensure compliance with the Grand Chamber's judgment in *Hirst*.

111. The failure of the respondent State to introduce legislative proposals to put an end to the current incompatibility of the electoral law with Article 3 of Protocol No. 1 is not only an aggravating factor as regards the State's responsibility under the Convention for an existing or past state of affairs, but also represents a threat to the future effectiveness of the Convention machinery (see *Broniowski*, cited above, § 193).

112. The Court recalls that in *Hirst*, while finding a violation of the right to vote, the Grand Chamber left to the discretion of the respondent State the decision as to how precisely to secure the rights afforded by the Convention. Pursuant to Article 46 §2, *Hirst* is currently under the supervision of the Committee of Ministers, which has regularly examined domestic developments and sought a speedy end to the prevailing situation of non-compliance. It is not disputed by the Government that general measures at national level are called for in order to ensure the proper execution of the *Hirst* judgment. It is further clear that legislative amendment is required in order to render the electoral law compatible with the requirements of the Convention....

115. However, while the Court does not consider it appropriate to specify what should be the content of future legislative proposals, it is of the view that the lengthy delay to date has demonstrated the need for a timetable for the introduction of proposals to amend the electoral law to be imposed. Accordingly, the Court concludes that the respondent State must introduce legislative proposals to amend section 3 of the 1983 Act and, if appropriate, section 8 of the 2002 Act, within six months of the date on which the present judgment becomes final, with a view to the enactment of an electoral law to achieve compliance with the Court's judgment in *Hirst* according to any time-scale determined by the Committee of Ministers.

Richardson v Ramirez

24 June 1974, Supreme Court of the United States

418 U.S. 24

Question

The question before the Court was whether the disenfranchisement of ex-felons violated the Equal Protection Clause of the Fourteenth Amendment.

Background

The three respondents were all convicted felons who had completed their sentences and paroles yet were refused registration to vote in three Californian counties because of their prior convictions. They brought a class petition on behalf of themselves and all other ex-felons challenging the constitutionality of their disenfranchisement on the basis that this denied them equal protection. The three county officials named by the respondents chose not to contest the action but the Court added another county election official who was the defendant in a similar action and held that the other officials' acquiescence did not render the case moot.

Decision

The Court held by a majority that California did not violate the Equal Protection clause by disenfranchising convicted felons. The majority considered that the understanding of the framers of the Fourteenth Amendment (reflected in the language of the Amendment, which exempts from sanction the reduced congressional representation resulting from criminal behavior) is of controlling significance in distinguishing such laws from other state limitations on the franchise that the Court has previously held invalid under the Equal Protection clause.

From the judgment (Justice Rehnquist):

[41-43] Unlike most claims under the Equal Protection Clause, for the decision of which we have only the language of the Clause itself as it is embodied in the Fourteenth Amendment, respondents' claim implicates not merely the language of the Equal Protection Clause of §1 of the Fourteenth Amendment, but also the provisions of the less familiar §2 of the Amendment:

"Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

Petitioner contends that the italicized language of §2 expressly exempts from the sanction of that section disenfranchisement grounded on prior conviction of a felony. She goes on to argue that those who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in §1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by §2 of the Amendment. This argument seems to us a persuasive one unless it can be shown that the language of §2, "except for participation in rebellion, or other crime," was intended to have a different meaning than would appear from its face.

[43] The problem of interpreting the "intention" of a constitutional provision is, as countless cases of this Court recognize, a difficult one . . . The legislative history bearing on the meaning of the relevant language of §2 is scant indeed; the framers of the Amendment were primarily concerned with the effect of reduced representation upon the States, rather than with the two forms of disenfranchisement which were exempted from that consequence by the language with which we are concerned here. Nonetheless, what legislative history there is indicates that this language was intended by Congress to mean what it says.

[53] This convincing evidence of the historical understanding of the Fourteenth Amendment is confirmed by the decisions of this Court which have discussed the constitutionality of provisions disenfranchising felons. Although the Court has never given plenary consideration to the precise question of whether a State may constitutionally exclude some or all convicted felons from the franchise, we have indicated approval of such exclusions on a number of occasions.

[54] Despite this settled historical and judicial understanding of the Fourteenth Amendment's effect on state laws disenfranchising convicted felons, respondents argue that our recent decisions invalidating other state-imposed restrictions on the franchise as violative of the Equal Protection Clause require us to invalidate the disenfranchisement of felons as well. . . . however, the exclusion of felons from the vote has an affirmative sanction in §2 of the Fourteenth Amendment, a sanction which was not present in the case of the other restrictions on the franchise which were invalidated in the cases on which respondents rely. We hold that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of §2 and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court.

[54] Pressed upon us by the respondents, and by *amici curiae*, are contentions that these notions are outmoded, and that the more modern view is that it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term. We would by no means discount these arguments if addressed to the legislative forum which may properly weigh and balance them against those advanced in support of California's present constitutional provisions. But it is not for us to choose one set of values over the other. If respondents are correct, and the view which they advocate is indeed the more enlightened and sensible one, presumably the people of the State of California will ultimately come around to that view. And if they do not do so, their failure is some evidence, at least, of the fact that there are two sides to the argument.

Dissenting opinions (Justice Marshall joined by Justices Brennan and Douglas):

All three argued that the Court should have deferred to the state judgment, based on an "independent and adequate state ground."

[73] The historical purpose for §2 itself is, however, relatively clear and, in my view, dispositive of this case. The Republicans who controlled the 39th Congress were concerned that the additional congressional representation of the Southern States which would result from the abolition of slavery might weaken their own political dominance. There were two alternatives available—either to limit southern representation, which was unacceptable on a long-term basis, or to insure that southern Negroes, sympathetic to the Republican cause, would be enfranchised; but an explicit grant of suffrage to Negroes was thought politically unpalatable at the time. . . . [T]he Fourteenth Amendment was the resultant compromise. It put Southern States to a choice—enfranchise Negro voters or lose congressional representation. The political motivation behind §2 was a limited one. It had little to do with the purposes of the rest of the Fourteenth Amendment. . . .

[74] It is clear that §2 was not intended and should not be construed to be a limitation on the other sections of the Fourteenth Amendment. . . . Rather, a discrimination to which the penalty provision of §2 is inapplicable must still be judged against the Equal Protection Clause of §1 to determine whether judicial or congressional remedies should be invoked. . . . Although §2 excepts from its terms denial of the franchise not only to ex-felons but also to persons under 21 years of age, we held that the Congress, under §5, had the power to implement the Equal Protection Clause by lowering the voting age to 18 in federal elections. . . .

[86] The disenfranchisement of ex-felons had 'its origin in the fogs and fictions of feudal jurisprudence and doubtless has been brought forward into modern statutes without fully realizing either the effect

of its literal significance or the extent of its infringement upon the spirit of our system of government. I think it clear that measured against the standards of this Court's modern equal protection jurisprudence, the blanket disenfranchisement of ex-felons cannot stand.

Sauvé v Attorney General of Canada

[2002] 3 S.C.R. 519

Question

Does s. 51(e) of the *Canada Elections Act*, which denies the right to vote to “[e]very person who is imprisoned in a correctional institution serving a sentence of two years or more”, infringe the guarantee of the right of all citizens to vote under s. 3 of the *Charter* and if so, is the infringement justified under s. 1 of the *Charter* as a reasonable limit demonstrably justified in a free and democratic society?

Background

Sauvé, a prisoner serving a life sentence for first-degree murder challenged the constitutionality of the provision in the *Canada Elections Act*, which denied prison inmates the right to vote. The Ontario High Court of Justice agreed that the legislation infringed the section 3 rights of prisoners, but accepted that it could be saved as a reasonable limit on that right under section 1 of the *Charter*. Three years later, another prisoner serving a life sentence brought the same issue before the Federal Court, which ruled that taking the right to vote from all prisoners was not a reasonable limitation that could save the legislation and was declared invalid. The Ontario Court of Appeal then issued a ruling that reversed the trial decision in *Sauvé*. The Federal Court of Appeal subsequently upheld the constitutionality of s. 51(e), finding that the infringement of the s.3 right to vote was justifiable in a free and democratic society and did not infringe the equality rights guaranteed by the *Charter*.

Decision

In a 5 to 4 decision, the Court reversed the Federal Court of Appeal decision, finding that denying the right to vote to penitentiary inmates was not a reasonable limitation of rights justified in a free and democratic society. The majority ruled that the framers of the *Charter* signaled the special importance of the right to vote not only by its broad, untrammelled language, but by exempting it from legislative override under s.33 (the Notwithstanding Clause). The Court rejected the government’s argument that the philosophically based or symbolic nature of the objectives in the law commanded deference – stating that Parliament cannot use lofty objectives to shield legislation from *Charter* scrutiny.

From the judgment (McLachlin C.J.):

10. The *Charter* distinguishes between two separate issues: whether a right has been infringed, and whether the limitation is justified. The complainant bears the burden of showing the infringement of a right (the first step), at which point the burden shifts to the government to justify the limit as a reasonable limit under s.1 (the second step). These are distinct processes with different burdens. Insulating a rights restriction from scrutiny by labeling it a matter of social philosophy, as the government attempts to do, reverses the constitutionally imposed burden of justification. It removes the infringement from our radar screen, instead of enabling us to zero in on it to decide whether it is demonstrably justified as required by the *Charter*.

11. At the first stage, which involves defining the right, we must follow this Court’s consistent view that rights shall be defined broadly and liberally. ... A broad and purposive interpretation of the right is particularly critical in the case of the right to vote. The framers of the *Charter* signaled the special importance of this right not only by its broad, untrammelled language, but by exempting it from legislative override under s. 33’s notwithstanding clause. I conclude that s.3 must be construed as it reads, and its ambit should not be limited by countervailing collective concerns, as the government appears to argue. These concerns are for the government to raise under s. 1 in justifying the limits it has imposed on the right.

12. At the s.1 stage, the government argues that denying the right to vote to penitentiary inmates is a matter of social and political philosophy, requiring deference. Again, I cannot agree. This Court has

repeatedly held that the “general claim that the infringement of a right is justified under s.1 “does not warrant deference to Parliament Section 1 does not create a presumption of constitutionality for limits on rights; rather, it requires the state to justify such limitations.

13. The core democratic rights of Canadians do not fall within a “range of acceptable alternatives” among which Parliament may pick and choose at its discretion. Deference may be appropriate on a decision involving competing social and political policies. It is not appropriate, however, on a decision to limit fundamental rights. This case is not merely a competition between competing social philosophies. It represents a conflict between the right of citizens to vote — one of the most fundamental rights guaranteed by the *Charter*— and Parliament’s denial of that right. Public debate on an issue does not transform it into a matter of “social philosophy”, shielding it from full judicial scrutiny. It is for the courts, unaffected by the shifting winds of public opinion and electoral interests, to safeguard the right to vote guaranteed by s.3 of the *Charter*.

14. *Charter* rights are not a matter of privilege or merit, but a function of membership in the Canadian polity that cannot lightly be cast aside. This is manifestly true of the right to vote, the cornerstone of democracy, exempt from the incursion permitted on other rights through s. 33 override. Thus, courts considering denials of voting rights have applied a stringent justification standard. . . .

15. The *Charter* charges courts with upholding and maintaining an inclusive, participatory democratic framework within which citizens can explore and pursue different conceptions of the good. While a posture of judicial deference to legislative decisions about social policy may be appropriate in some cases, the legislation at issue does not fall into this category. To the contrary, it is precisely when legislative choices threaten to undermine the foundations of the participatory democracy guaranteed by the *Charter* that courts must be vigilant in fulfilling their constitutional duty to protect the integrity of this system.

16. Nor can I concur in the argument that the philosophically based or symbolic nature of the government’s objectives in itself commands deference. To the contrary, this Court has held that broad, symbolic objectives are problematic. . . . Parliament cannot use lofty objectives to shield legislation from *Charter* scrutiny. Section 1 requires valid objectives and proportionality.

17. Finally, the fact that the challenged denial of the right to vote followed judicial rejection of an even more comprehensive denial, does not mean that the Court should defer to Parliament as part of a “dialogue”. Parliament must ensure that whatever law it passes, at whatever stage of the process, conforms to the Constitution. The healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of “if at first you don’t succeed, try, try again”.

18. While deference to the legislature is not appropriate in this case, legislative justification does not require empirical proof in a scientific sense. While some matters can be proved with empirical or mathematical precision, others, involving philosophical, political and social considerations, cannot. In this case, it is enough that the justification be convincing, in the sense that it is sufficient to satisfy the reasonable person looking at all the evidence and relevant considerations, that the state is justified in infringing the right at stake to the degree it has. . . . What is required is “rational, reasoned defensibility”. Common sense and inferential reasoning may supplement the evidence. . . . However, one must be wary of stereotypes cloaked as common sense, and of substituting deference for the reasoned demonstration required by s.1.

19. Keeping in mind these basic principles of *Charter* review, I approach the familiar stages of the Oakes test. I conclude that the government’s stated objectives of promoting civic responsibility and respect for the law and imposing appropriate punishment, while problematically vague, are capable in principle of justifying limitations on *Charter* rights. However, the government fails to establish

proportionality, principally for want of a rational connection between denying the vote to penitentiary inmates and its stated goals.

Dissenting opinion Gonthier J (joined by L’Heureux-Dubé, Major and Bastarache JJ):

E) *“Dialogue” and Deference*

104. Linden J.A., in the Federal Court of Appeal below, stressed the importance of deference to Parliament. In para. 56 of his reasons, he stated:

This case is another episode in the continuing dialogue between courts and legislatures on the issue of prisoner voting. In 1992 and 1993, two appeal courts and the Supreme Court of Canada held that a blanket disqualification of prisoners from voting, contained in earlier legislation which was challenged, violated section 3 of the Charter and could not be saved by section 1 of the Charter. Parliament responded to this judicial advice by enacting legislation aimed at accomplishing part of its objectives while complying with the Charter. That legislation, which is being challenged in this case, disqualifies from voting only prisoners who are serving sentences of two years or more.

This Court has stressed the importance of “dialogue” in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at paras. 138-39, and in *Mills*, supra, at paras. 20, 57 and 125. (See also P.W. Hogg and A. A. Bushell, “The Charter Dialogue Between Courts and Legislatures” (1997), 35 *Osgoode Hall L.J.* 75.) I am of the view that since this case is about evaluating choices regarding social or political philosophies and about shaping, giving expression, and giving practical application to values, especially values that may lie outside the *Charter* but are of fundamental importance to Canadians, “dialogue” is of particular importance. In my view, especially in the context of the case at bar, the heart of the dialogue metaphor is that neither the courts nor Parliament hold a monopoly on the determination of values. Importantly, the dialogue metaphor does not signal a lowering of the s. 1 justification standard. It simply suggests that when, after a full and rigorous s. 1 analysis, Parliament has satisfied the court that it has established a reasonable limit to a right that is demonstrably justified in a free and democratic society, the dialogue ends; the court lets Parliament have the last word and does not substitute Parliament’s reasonable choices with its own.

R v Horncastle and others

[2009] UKSC 14

Question

Whether a conviction based “solely or to a decisive extent” on the statement of a witness whom the defendant has had no chance of cross-examining necessarily infringes the defendant’s right to a fair trial under articles 6(1) and 6(3)(d) of the ECHR.

Background

The appellants were convicted of serious criminal offences after trials in which the victims of the offences did not give evidence - in one case because he had since died and in the other because she had run away in fear when the trial was about to commence. In each case a statement from the victim was admitted pursuant to s.116 Criminal Justice Act 2003 and placed before the jury. The Act provides for a general presumption that hearsay evidence should not be allowed in criminal trials, but does allow for hearsay evidence when witnesses are unavailable for a number of reasons, including the witness having died before the trial or being unavailable due to fear.

At the time of the *Horncastle* judgment, the Fourth Section of the ECtHR had recently ruled in the case of *Al-Khawaja* and *Tahery v UK* that, while it was justifiable to allow hearsay evidence in some circumstances, it was likely never permissible for a conviction to be based “solely or decisively” on such evidence. The *Al-Khawaja* decision was strongly objected to by UK and was on appeal to the Grand Chamber at the time the UK Supreme Court issued this judgment in *Horncastle*. The Court of Appeal in *Horncastle* had previously and unanimously affirmed the convictions of the appellants, declining to follow the “sole or decisive” rule found in ECtHR cases.

Decision

The UK Supreme Court, sitting as a panel of 9 (including the Lord Chief Justice and Master of the Rolls), unanimously dismissed the appeals, holding that the appellants’ trials were fair notwithstanding the ECtHR’s decision in *Al-Khawaja*. The court issued a single judgment written by the President of the Court, Lord Phillips.

From the judgment (Lord Phillips):

10. Mr Tim Owen QC, for Mr Horncastle and Mr Blackmore, submitted that we should treat the judgment of the Chamber in *Al-Khawaja* as determinative of the success of these appeals. He submitted that this was the appropriate response to the requirement of section 2(1) of the Human Rights Act 1998 that requires a court to “take into account” any judgment of the European Court of Human Rights in determining any question to which such judgment is relevant. He submitted that the decision of the House of Lords in *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28; [2009] 3 WLR 74 exemplified the correct approach to a decision of the European Court. In that case the Committee held itself bound to apply a clear statement of principle by the Grand Chamber in respect of the precise issue that was before the Committee. Mr Owen submitted that we should adopt precisely the same approach to the decision of the Chamber in *Al-Khawaja*.

11. I do not accept that submission. The requirement to “take into account” the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court. This is such a case.

12. In recognition of the importance of these appeals for English criminal procedure the Criminal Division of the Court of Appeal sat five strong in a composition that included the Vice-President and other senior judges with extensive experience of the criminal process. The court was thus particularly well qualified to consider the questions at the heart of these appeals. These questions are: (i) whether the regime enacted by Parliament in relation to the admission of the evidence of an absent witness at a criminal trial will result in an unfair trial and, if not, (2) whether the Strasbourg jurisprudence none the less requires the court to apply that regime in a manner contrary to the intention of Parliament. ...

46. Article 6(3)(d) has not been interpreted by the Strasbourg Court in the same way that the US Supreme Court has now interpreted the Sixth Amendment. The Strasbourg Court has accepted that there are circumstances that justify the admission of statements of witnesses who have not been subject to "confrontation" with the defendant. The possibility remains, however, that by propounding the "sole or decisive test" the Strasbourg Court has condemned as rendering a trial unfair the admission of hearsay evidence in circumstances where the legislature and courts of this jurisdiction and of other important Commonwealth jurisdictions (Canada, Australia and New Zealand) have determined that the evidence can fairly be received. This is a startling proposition and one that calls for careful analysis of the Strasbourg jurisprudence.

...

105. The sole or decisive rule was first propounded in *Doorson* as an obiter observation, without explanation or qualification. It has since frequently been repeated, usually in circumstances where there has been justification for finding breaches of article 6(1) and (3)(d) without reliance on the test. If applied rigorously it will in some cases result in the acquittal, or failure to prosecute, defendants where there is cogent evidence of their guilt. This will be to the detriment of their victims and will result in defendants being left free to add to the number of those victims. 106. The Court of Appeal in this case, comprising five senior judges with great experience of the criminal jurisdiction, referred to the manner in which the 2003 Act is working in practice and concluded that provided its provisions are observed there will be no breach of article 6 and, in particular, article 6(3)(d), if a conviction is based solely or decisively on hearsay evidence – paragraph 81. The court thus differed from the doubt expressed in *Al-Khawaja* as to whether there could be any counterbalancing factors sufficient to justify the introduction of an untested statement which was the sole or decisive basis for a conviction.

107. I concur in these conclusions reached by the Court of Appeal and the reasons for those conclusions so clearly and compellingly expressed. The jurisprudence of the Strasbourg Court in relation to article 6(3)(d) has developed largely in cases relating to civil law rather than common law jurisdictions and this is particularly true of the sole or decisive rule. In the course of the hearing in *Al-Khawaja*, Sir Nicolas Bratza observed that both parties had accepted the sole or decisive test which appears in *Lucà* and other cases as an accurate summary of the Court's case law. He asked whether there was any authority of the Court which gave any scope for counterbalancing factors in a sole or decisive case. Mr Perry for the Government conceded that he was not aware of any direct authority on the point. The Court then applied the sole or decisive rule in reliance on the pre-existing case law. But as I have shown that case law appears to have developed without full consideration of the safeguards against an unfair trial that exist under the common law procedure. Nor, I suspect, can the Strasbourg Court have given detailed consideration to the English law of admissibility of evidence, and the changes made to that law, after consideration by the Law Commission, intended to ensure that English law complies with the requirements of article 6(1) and (3)(d).

108. In these circumstances I have decided that it would not be right for this court to hold that the sole or decisive test should have been applied rather than the provisions of the 2003 Act, interpreted in accordance with their natural meaning. I believe that those provisions strike the right balance between the imperative that a trial must be fair and the interests of victims in particular and society in general that a criminal should not be immune from conviction where a witness, who has given critical evidence in a statement that can be shown to be reliable, dies or cannot be called to give evidence for some other reason. In so concluding I have taken careful account of the Strasbourg jurisprudence. I hope that in due course the Strasbourg Court may also take account of the reasons that have led me not to apply the sole or decisive test in this case.

Al-Khawaja and Tahery v The United Kingdom

15 December 2011, ECtHR, Grand Chamber

Applications Nos. 26766/05 and 22228/06

Question

The question before the Grand Chamber was whether a conviction based “solely or decisively” on the evidence of an absent witness would automatically result in a breach of Article 6(1) of the European Convention on Human Rights.

Background

Al-Khawaja, a consultant physician, was convicted of indecent assault on two patients, one of whom (ST) had died before the trial. Her statement to the police was read to the jury. Evidence was also given by the other patient and two of ST’s friends, with whom ST had confided to shortly after the incident. Tahery had allegedly stabbed S during a gang fight. Witness T told police he had seen Tahery stab S but was too afraid to give evidence. T’s statement was read to the jury and Tahery was convicted.

In January 2009, the Fourth Section of the ECtHR had ruled that in both Al-Khawaja’s and Tahery’s cases the statements admitted at trial were “the sole or, at least, the decisive basis” for the applicants’ convictions and therefore constituted an infringement of the appellants’ rights under both articles 6(1) and 6(3)(d). The UK appealed this decision by the Fourth Section of the ECtHR to the Grand Chamber, and in December 2009 the UK Supreme Court issued its judgment in *Horncastle* – addressing the same issue – in which it chose not to follow the Fourth Chamber’s decision.

Decision

The Grand Chamber held by a majority decision (15 votes to 2) that there had not been a violation of the ECHR in respect of Al-Khawaja but held unanimously that there had been an ECHR violation in respect of Tahery. A conviction based solely or decisively on the evidence of an absent witness would not automatically result in a breach of the ECHR but strong counterbalancing factors (including procedural safeguards) had to be in place. In coming to its decision, the Grand Chamber held that the sole or decisive rule should not be applied in an inflexible way, ignoring the specificities of the particular legal system concerned.

From the judgment:

146. The Court is of the view that the sole or decisive rule should also be applied in a similar manner [that is, it should be left to the domestic courts to decide whether the rights of the defence should cede to the public interest]. It would not be correct, when reviewing questions of fairness, to apply this rule in an inflexible manner. Nor would it be correct for the Court to ignore entirely the specificities of the particular legal system concerned and, in particular its rules of evidence, notwithstanding judicial dicta that may have suggested otherwise ...

147. ... The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place ...

148. ... The Court observes that under the terms of the 1988 and 2003 Acts [Criminal Justice Act 1988 and 2003] the absence of witnesses must be justified and fall within one of the defined categories ... Whatever the reasons for the absence of a witness, the admission of statements of a witness who is not only absent but anonymous is not admissible. Moreover, where the absence is due to fear, under the 2003 Act, the trial judge may only give leave if he considers the admission of the statement to be in the interests of justice and he must decide whether special measures can be put in place to allow the witness to give live evidence. In such a case, the trial judge must have regard to the difficulty faced by the defendant in challenging the witness statement if the maker of the statement is not called.

149. The 2003 Act also provides that, whatever the reason for the absence of a witness, evidence relevant to the credibility or consistency of the maker of the statement may be admitted even where the evidence would not have been admissible had the witness given evidence in person. The trial judge retains a specific discretion to refuse to admit a hearsay statement if satisfied that the case for its exclusion substantially outweighs the case for admitting it. Of particular significance is the requirement under the 2003 Act that the trial judge should stop the proceedings if satisfied at the close of the case for the prosecution that the case against the accused is based “wholly or partly” on a hearsay statement...

150. The Court also notes that, in addition to the safeguards contained in each Act, section 78 of the Police and Criminal Evidence Act 1984 provides a general discretion to exclude evidence if its admission would have such an adverse effect on the fairness of the trial that it ought not to be admitted. Finally, the common law requires a trial judge to give the jury the traditional direction on the burden of proof, and direct them as to the dangers of relying on a hearsay statement.

151. The Court considers that the safeguards contained in the 1988 and 2003 Acts, supported by those contained in section 78 of the Police and Criminal Evidence Act and the common law, are, in principle, strong safeguards designed to ensure fairness...

156. The interests of justice were obviously in favour of admitting in evidence the statement of ST ... The reliability of the evidence was supported by the fact that ST had made her complaint to two friends ... promptly after the events in question, and that there were only minor inconsistencies between her statement and the account given by her to the two friends, who both gave evidence at the trial. Most importantly, there were strong similarities between ST’s description of the alleged assault and that of the other complainant, VU, with whom there was no evidence of any collusion...

161. Such untested evidence weighs heavily in the balance and requires sufficient counterbalancing factors to compensate for the consequential difficulties caused to the defence by its admission. Reliance is placed by the Government on two main counterbalancing factors: the fact that the trial judge concluded that no unfairness would be caused by the admission of T’s statement since the applicant was in a position to challenge or rebut the statement by giving evidence himself or calling other witnesses who were present...and the warning given by the trial judge to the jury that it was necessary to approach the evidence given by the absent witness with care.

162. ...the Court considers that neither of these factors, whether taken alone or in combination, could be a sufficient counterbalance to the handicap [to] the defence...

Ambrose v Harris (Procurator Fiscal, Oban) (Scotland)
HMA v G (Scotland), HMA v M (Scotland)
[2011] UKSC 43

Question

The questions on appeal were: (i) whether the right of access to a lawyer prior to police questioning (established by *Salduz v Turkey* and followed in *Cadder v HM Advocate*) applies only to questioning that occurs when a person has been taken into police custody; and (ii) if the rule applies at some earlier stage, from what moment does it apply?

Background

Ambrose was prosecuted for being in charge of a vehicle whilst over the alcohol limit. He was questioned by police at the roadside and admitted he was in possession of the car keys and may be intending to drive (breath tests indicating he was over the prescribed limit). M was charged with assault and was visited by police at his home where he confirmed his involvement in the fight. G was indicted with offences including the possession of controlled drugs and prohibited firearms and was questioned in his flat (having been handcuffed) following forced entry by the police. In each case the Crown relied on these statements at trial and all three were convicted.

Previous decision and controversy

One year earlier, the UK Supreme Court's judgment in *Cadder* (see Part 1) caused debate about the future of Scots criminal law. The then Lord Advocate, Elish Angiolini, told the Scottish Parliament "...there is a real danger that we will not just have harmonisation of our criminal law, procedure and evidence, through that process, but that there will be a complete loss of identity for Scots law ...".

Decision

The Supreme Court held (by a 4 to 1 majority) that in the cases of Ambrose and M reliance on the evidence was not incompatible with the ECHR, whereas in the case of G it was incompatible as there was a significant curtailment of his freedom of action. Lord Kerr dissented.

From the judgment (Lord Hope):

17. In *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, para 20 Lord Bingham of Cornhill said that Lord Slynn's observations in that case reflected the fact that the Convention is an international instrument, the correct interpretation of which can be expounded only by the Strasbourg court. From that it followed that a national court should not without strong reason dilute or weaken the effect of the Strasbourg case law. It was its duty to keep pace with it as it evolved over time. There is, on the other hand, no obligation on the national court to do more than that. As Lord Bingham observed, it is open to member states to provide for rights more generous than those guaranteed by the Convention. But such provision should not be the product of interpretation of the Convention by national courts.

20. That is why, the court's task in this case, as I see it, is to identify as best it can where the jurisprudence of the Strasbourg court clearly shows that it stands on this issue. It is not for this court to expand the scope of the Convention right further than the jurisprudence of the Strasbourg court justifies.

35. It seems to me that the Grand Chamber's judgment, when taken as a whole, does not indicate with a sufficient degree of clarity – or indeed, I would suggest, in any way at all – that the ruling in para 55 about incriminating statements made without access to a lawyer applies to questions put by the police before the accused is taken into custody. The context would have required this to be stated expressly if it was what was intended, as the rule which the judgment laid down can be departed from only where there are compelling reasons to justify its restriction. It would have had to have been stated precisely to what situations outside police custody the rule was to apply, and it was not.

100. I accept, however, that there is no “clear and constant” Strasbourg jurisprudence on the point. So the obligation in section 2 of the Human Rights Act 1998 to take account of judgments of the ECtHR does not compel a decision one way or the other... Nor is this a case where, although Strasbourg has not expressly decided the point, it can nevertheless clearly be deduced or inferred from decisions of the ECtHR how the court will decide the point if and when it falls to be determined.

104. The position here is that Strasbourg has decided a case which is directly in point (Zaichenko). The most that can be said on behalf of the accused in these three cases is that by reason of (i) the broad terms in which para 55 of the judgment in *Salduz* is expressed and (ii) the decision in *Zaichenko*, it is arguable that there are mixed messages in the Strasbourg case law as to whether the *Salduz* principle applies to evidence obtained from a suspect who has been interrogated without access to a lawyer outside the police station. To use the words of Lord Mance, it follows that there is a real judicial choice to be made. Whether fairness requires the *Salduz* principle to apply in both situations raises questions of policy and judgment on which opinions may reasonably differ and as to which there is no inevitable answer...

105. In these circumstances, I consider that caution is particularly apposite and that the domestic court should remind itself that there exists a supranational court whose purpose is to give authoritative and Europe-wide rulings on the Convention. If it were clear, whether from a consideration of the Strasbourg jurisprudence or otherwise, that the *Salduz* principle applies to statements made by suspects who are not detained or otherwise deprived of their freedom of action in any significant way, then it would be our duty so to hold. But for the reasons that I have given, it is not clear that this is the case. In these circumstances, we should hold that the *Salduz* principle is confined to statements made by suspects who are detained or otherwise deprived of their freedom in any significant way.

Lord Kerr dissenting:

128. ... I believe that, in the absence of a declaration by the European Court of Human Rights as to the validity of a claim to a Convention right, it is not open to courts of this country to adopt an attitude of agnosticism and refrain from recognising such a right simply because Strasbourg has not spoken.

129. It is to be expected, indeed it is to be hoped, that not all debates about the extent of Convention rights will be resolved by Strasbourg. As a matter of practical reality, it is inevitable that many claims to Convention rights will have to be determined by courts at every level in the United Kingdom without the benefit of unequivocal jurisprudence from ECtHR. Moreover, as a matter of elementary principle, it is the court’s duty to address those issues when they arise, whether or not authoritative guidance from Strasbourg is available...

130. If the much vaunted dialogue between national courts and Strasbourg is to mean anything, we should surely not feel inhibited from saying what we believe Strasbourg ought to find in relation to those arguments. Better that than shelter behind the fact that Strasbourg has so far not spoken and use it as a pretext for refusing to give effect to a right that is otherwise undeniable. I consider that not only is it open to this court to address and deal with those arguments on their merits, it is our duty to do so.

PART 4
Who are the Masters?

Part 4: Who are the Masters?

Judicial Sovereignty: Dialogue, Compliance, Enforcement and Internationalisation

Judicial Sovereignty & Dialogue

In Part 4 the materials address the nature of the relationship and the impact of dialogue between courts in decentralised jurisdictions. Two specific issues are explored. First, must courts of member states always follow the decisions of supra-national courts? Second, should courts adjudicate on issues that have not been addressed by the overarching court?

Lord Phillips, writing for the UK Supreme Court in *Horncastle* (covered in Part 3), has recently addressed the first issue. Picking up from his dissent in *Ambrose* (see Part 3), **Lord Kerr**, in a recent speech excerpted here in Part 4, also addresses the second issue – specifically challenging how the UK Supreme Court has come to interpret the statement by Lord Bingham in the *Ullah* case that: “The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.”¹⁸

Both issues raise the question of the appropriate level, nature and effect of “dialogue” between courts. Lord Neuberger, in his 2011 *Who are the Masters Now?* speech (see Part 1) welcomed the possibility of dialogue between the UK courts and the ECtHR:

... [M]any people, including some Judges, think that there is something in the view that Strasbourg is getting rather too interventionist in some areas; that it has strayed too far from the alarm bell intention behind the Convention and too far towards the European Bill of Rights end of the spectrum. However, it is fair to say that Strasbourg is prepared to listen to domestic courts and to change its mind. ... The notion of a dialogue between our court and the Strasbourg court is to be welcomed. Indeed, it is fundamental to the whole relationship between national courts and the Strasbourg court.

In an open letter published in *The Independent* newspaper in January 2012 and reproduced below, the current President of the ECtHR, **Sir Nicholas Bratza**, points to judicial dialogue as a key element in the proper functioning of the European Convention. But both his letter and the language used by **Judge Bonello**, Italian member of the ECtHR, in his concurring opinion in the *Lautsi* decision are a response to the marked level of open and political opposition to some recent ECtHR decisions.

The materials in Part 4 also explore the related issue of the **enforcement of judicial determinations** with the statement by the **UK Parliament’s Joint Committee on Human Rights** in relation to the government’s failure to address the ECtHR ruling of a violation of voting rights in *Hirst*.

The final materials in Part 4 examine the **internationalisation** of judicial rights interpretation. **Cohen** questions the ultimate impact of “global constitutionalism”, while the decision by the **Inter-American Commission on Human Rights** against the United States government policy on voting rights for residents of the District of Columbia also raises wider questions of dialogue and enforcement in international rights adjudication.

18 *R v Special Adjudicator ex parte Ullah* [2004] UKHL 26

Questions to Consider in Part 4

- What is the reality of “dialogue” between regional and national (or supra-national) courts? What role do judges play in initiating that dialogue in decisions?
- What are the considerations when regions adjudicate on rights issues that have not been addressed by national or supra-national courts or go beyond guarantees recognised at the national or supra-national level?
- What is the role of elected institutions in the enforcement of judicial determinations of rights?
- When is it appropriate for courts to take into account decisions of courts from other jurisdictions?
- When should a member state abide by (or depart from) a supra-national ruling?

Judicial Sovereignty and Dialogue

Lord Kerr

*The UK Supreme Court: The modest underworker of Strasbourg?*¹⁹

You will perhaps not be surprised to learn that it will be the central thesis of tonight's talk that we are not the modest underworker of Strasbourg. Like every cautious pleader, of course, I have an alternative defence – a sub-text. And that is that, if we have been the modest underworker, we should stop it at once. We should kick the habit. We should stiffen our sinews and stride forward confidently. And, it will also be my claim that, even if a case can be made that in the past we were excessively deferential to Strasbourg, there are recently clear and vigorous signals that we are no longer. . . .

So, where were we when the Bill became HRA? The courts had to have regard to relevant Strasbourg jurisprudence. They were emphatically not bound by it. They should strive to interpret Convention rights consistently with the way that they had been interpreted in Strasbourg but, again, they were not bound to do that. All seemed tolerably clear.

But was it? I am afraid that, despite Lord Irvine's view that this was a fairly simple provision, there lurked beneath it the potential for a fairly marked difference of approach to its application, depending on the disposition of the court that had to consider Strasbourg case-law. On the one hand, a court might take the view that the duty to strive to reach a decision consistent with decided European jurisprudence should be conscientiously, even if unwillingly, discharged. On the other hand, if I as a judge, did not especially like a particular trend of Strasbourg case-law, if I considered it inimical to or out of step with the common law or if I apprehended that it would create problems if translated to the domestic setting, I might well say, that's all very well; I have regard to Strasbourg case law but I do not have a great regard for where it has led and I am not going to follow it.

And I believe that it may very well have been apprehension that this latter approach could become widespread which underlay Lord Bingham's comments in *Ullah* about the nature of the obligation arising under section 2. The facts of that case are not material. But what Lord Bingham said at para 20 most certainly is. This is what he said:

"... the House is required by UUs 2(1) of the HumRights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, [2001] 2 All ER 929, para 26. This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by s 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under s 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."

... let me turn to the really critical question and, of course, it arises from the last sentence of the passage that I have quoted. What does the statement that "the duty of the national courts is to keep pace with Strasbourg" mean? Does it mean that we should not lag behind or does it mean that we should not stride ahead or does it mean both? Let us suppose that it means both and move on. The next question is the truly crucial one. Where Strasbourg has not taken a pace which would allow us to fall into step beside them, must we remain stationary?

¹⁹ Excerpted from Lord Kerr, *The UK Supreme Court: The Modest Underworker of Strasbourg?* Clifford Chance Lecture (25 January 2012)

I cannot believe that this is what Lord Bingham intended. The whole thrust of the earlier parts of the passage is that national courts must not weaken or dilute the effect of Strasbourg case-law. Lord Bingham was not concerned with the situation where Strasbourg had not yet pronounced. He was not addressing the question as to what a national court should – or, more pertinently, must - do when confronted by a claim to a Convention right where ECtHR had not dealt with a similar claim in the past. But, on one view, little by little, and case by case, his statement has been interpreted and developed and used as a justification and support for the proposition that, if Strasbourg has not spoken, it is not open to us to pronounce on a Convention right.

Let me say immediately that, although I have not found it possible to agree with it, the view that we should not anticipate Strasbourg has a plausible foundation. I recognise the argument that Convention rights should bear the same meaning throughout the Council of Europe and I also acknowledge the opinion, expressed by Lord Hope in the recent case of *Ambrose v Harris (Procurator Fiscal)*⁴, that Parliament did not intend to confer on the courts of this country the power to give a more generous scope to Convention rights than that found in the jurisprudence of the Strasbourg court. I do not agree with this proposition but I can at least understand why it might be said to be tenable. ...

Where a court of the UK is faced with a claim to a Convention right, it seems to me clear that it cannot refuse to examine its viability, simply because there is no relevant Strasbourg jurisprudence. As I said in *Ambrose* there are three reasons for this: the first practical, the second a matter of principle and the third the requirement of statute.

The practical reason is that many claims to Convention rights will have to be determined by courts at every level in the United Kingdom without the benefit of unequivocal jurisprudence from ECtHR. It is simply not a practical option to adopt an attitude of agnosticism just because Strasbourg has not yet spoken.

The second reason, the reason of principle, is elementary. The Human Rights Act gives citizens of this country direct access to the rights which the Convention enshrines through their enforcement by our courts. It is therefore the duty of every court not only to ascertain “where the jurisprudence of the Strasbourg court clearly shows that it currently stands” (which is how Lord Hope characterised it in *Ambrose*); it is also, in my view, the court’s duty to resolve the question whether a claim to a Convention right is viable where there is no clear current view from Strasbourg to be seen. The duty to adjudicate on a claim to a Convention right cannot be extinguished or avoided by the fact that the jurisprudence of the ECtHR has so far failed to supply the answer.

The final reason, the statutory imperative, is also elementary. Section 6 of the Human Rights Act leaves no alternative to courts when called upon to adjudicate on claims to a Convention right. This section makes it unlawful for a public authority, including a court, to act in a way which is incompatible with a Convention right. That statutory obligation, to be effective, must carry with it the requirement that the court determine if the Convention right has the effect claimed for, whether or not Strasbourg has pronounced upon it.

By complying with that statutory injunction, the courts of this country do not leap ahead of Strasbourg. We may be stepping into what was hitherto unknown but, if that calls for courage, then we must be brave. And we must be brave, because, as I have said, we simply have no alternative. ...

There seems to me also to be something of an inconsistency between, on the one hand, our current preparedness to question and indeed to refuse to follow decisions of the ECtHR, and, on the other hand, evincing a reluctance to reach an independent view where Strasbourg has yet to pronounce on a particular subject. It is entirely healthy that we should be ready to decline to be bound by decisions of ECtHR that we believe to be wrong. The Strasbourg court in the person of its President has expressly

said so. It is equally healthy, in my opinion, that we should not feel ourselves constrained from forming our own judgment on a contested Convention right where Strasbourg has not yet expressed a view. And we should be prepared to make that judgment forthrightly and to state it with clarity. After all, the decision of the House of Lords in *R v Horncastle*¹⁰ not to follow the judgment of the fourth section of ECtHR in *Al-Khawaja and Tahery v United Kingdom*¹¹, and, particularly, the explanation that Lord Phillips gave in *Horncastle* as to why it was considered that the decision of the fourth section was wrong were heavily influential in the Grand Chamber's decision to reverse the outcome in the *Al-Khawaja* case. There is no reason to suppose that a pre-emptive, properly reasoned opinion by our courts should not have the same effect. For a dialogue to be effective, both speakers should be prepared, when the occasion demands it, to utter the first word.

Sir Nicholas Bratza

Britain Should be Defending European Justice, Not Attacking It²⁰

The United Kingdom's contribution to the European Convention on Human Rights has been immense. British parliamentarians and lawyers played a key role in its conception and its drafting. British lawyers and, since the entry into force of the Human Rights Act, British courts have exerted a major influence on the way in which the convention evolves. This judicial dialogue is a key element in the proper operation of the convention, in which the role of national courts is critical.

At the same time, the influence of the Strasbourg court on the development of fundamental rights protection in the UK has been overwhelmingly positive. It would, however, be surprising if all its decisions were popular with the Government of the day, or indeed understood and accepted by public opinion.

Yet, looking back at the landmark cases concerning Britain, few people today would dispute Strasbourg's 1978 ruling that the birching of a Manx schoolboy as a criminal sanction was unacceptable. Few would contest that the rules on contempt of court in operation at the time of the Thalidomide case were unsatisfactory, or deny that a journalist's right to protect his sources is a cornerstone of a free press.

Nor does it seem strange in 2011 to suggest that child perpetrators, even of the most heinous offences, like the Jamie Bulger killers, should not be tried in an adult court. Rulings on the legal recognition of transsexuals and the lifting of the ban on homosexuals in the armed forces meanwhile, are surely examples of where domestic UK law was lagging behind societal changes and was brought up to date as a direct consequence of the court's judgments. More recently, the finding that the indefinite retention of DNA samples of persons never convicted of an offence violated the right to private life, was widely applauded in British political and legal circles.

There are many other examples concerning the UK, but, of course, the court's jurisdiction extends to 46 other European states, covering a total population of 800 million. The court has overseen the slow but steady consolidation of the rule of law and democracy in Central and Eastern Europe. Much remains to be done, but the court can be proud of what it has achieved over the past 10 years. It has all but eliminated practices in many former communist countries which undermined the rule of law, such as the power of the executive to reopen court proceedings ad infinitum until the "right" result was achieved. The freedom of association of minority groups in the Balkans has been upheld. Its judgments have prompted greater awareness of the problems facing Roma and their right to be protected against pogroms and police brutality are now being addressed. Freedom of religion has been established in many previously intolerant countries. Journalists no longer face criminal sanctions when they criticise politicians. Homosexuality has been decriminalised across Europe. The victims of domestic violence and trafficking are increasingly receiving enhanced protection.

Two principal criticisms of the court have been voiced in Britain in recent years – that it has allowed a backlog of cases to grow to the point that it has currently more than 150,000 pending cases; and that it has shown itself too ready to interfere with domestic decision-making by substituting its own view for that of national courts and authorities. ...

The criticism relating to interference is simply not borne out by the facts. The Strasbourg court has been particularly respectful of decisions emanating from courts in the UK since the coming into effect of the Human Rights Act, and this because of the very high quality of those judgments. To take 2011 as the most recent example: of the 955 applications against the UK decided, the court found a violation of the convention in just eight cases....

²⁰ Sir Nicholas Bratza, "Britain should be defending European justice, not attacking it" *The Independent* (24 January 2012)

Against this background, it is disappointing to hear senior British politicians lending their voices to criticisms more frequently heard in the popular press, often based on a misunderstanding of the court's role and history, and of the legal issues at stake. It is particularly unfortunate that a single judgment of the court on a case relating to UK prisoners' voting rights, which was delivered in 2005 and has still not been implemented, has been used as the springboard for a sustained attack on the court and has led to repeated calls for the granting of powers of Parliament to override judgments of the court against the UK, and even for the withdrawal of the UK from the convention.

The European Court of Human Rights is an institution of inestimable value not just for Europeans, but for all those who throughout the world look to its judgments for guidance, and particularly those who do not have the benefit of democratic institutions operating within the rule of law. The UK can be proud of its real contribution to this unique system and its influence in bringing about effective human rights protection throughout the European continent. It would be deeply regrettable if it were to allow its commitment to that system to be called into question by a failure to defend it against its detractors or to offer its strong support for the vital work of the court.

**Lautsi v Italy (Grand Chamber final decision):
Concurring opinion of Judge Bonello**

1.1 A court of human rights cannot allow itself to suffer from historical Alzheimer's. It has no right to disregard the cultural continuum of a nation's flow through time, nor to ignore what, over the centuries, has served to mould and define the profile of a people. No supranational court has any business substituting its own ethical mock-ups for those qualities that history has imprinted on the national identity. On a human rights court falls the function of protecting fundamental rights, but never ignoring that "customs are not passing whims. They evolve over time, harden over history into cultural cement. They become defining, all-important badges of identity for nations, tribes, religions, individuals".

1.2 A European court should not be called upon to bankrupt centuries of European tradition. No court, certainly not this Court, should rob the Italians of part of their cultural personality.

1.4 Until relatively recently, the "secular" State had hardly bothered with education, and, by default, had delegated that primary function to Christian institutions. Only slowly did the State start assuming its responsibilities to educate and to offer the population some alternatives to a virtual religious monopoly on education. The presence of the crucifix in Italian schools only testifies to this compelling and millennial historical reality – it could loosely be said that it has been there since schools have been there. Now, a court in a glass box a thousand kilometres away has been engaged to veto overnight what has survived countless generations. The Court has been asked to be an accomplice in a major act of cultural vandalism. I believe William Faulkner went to the core of the issue: the past is never dead. In fact it is not even past. Like it or not, the perfumes and the stench of history will always be with you.

1.5 It is uninformed nonsense to assert that the presence of the crucifix in Italian schools bears witness to a reactionary fascist measure imposed, in between gulps of castor oil, by Signor Mussolini. His circulars merely took formal notice of a historical reality that had predated him by several centuries and, pace Ms Lautsi's anti-crucifix vitriol, may still survive him for a long time. This Court ought to be ever cautious in taking liberties with other peoples' liberties, including the liberty of cherishing their own cultural imprinting. Whatever that is, it is unrepeatable. Nations do not fashion their histories on the spur of the moment....

2.1 The issues in this controversy have been fudged by a deplorable lack of clarity and definition. The Convention enshrines the protection of freedom of religion and of conscience (Article 9). Nothing less, obviously, but little more.

2.2 In parallel with freedom of religion, there has evolved in civilised societies a catalogue of noteworthy (often laudable) values cognate to, but different from, freedom of religion, like secularism, pluralism, the separation of Church and State, religious neutrality, religious tolerance. All of these represent superior democratic commodities which Contracting States are free to invest in or not to invest in, and many have done just that. But these are not values protected by the Convention, and it is fundamentally flawed to juggle these dissimilar concepts as if they were interchangeable with freedom of religion. Sadly, traces of such all but rigorous overspill appear in the Court's case-law too.

2.3 The Convention has given this Court the remit to enforce freedom of religion and of conscience, but has not empowered it to bully States into secularism or to coerce countries into schemes of religious neutrality. It is for each individual State to choose whether to be secular or not, and whether, and to what extent, to separate Church and governance. What is not for the State to do is to deny freedom of religion and of conscience to anyone. An immense, axiomatic chasm separates one prescriptive concept from the other non-prescriptive ones.

Enforcement of judicial determinations

Joint Committee on Human Rights

*Enhancing Parliament's Role in Relation to Human Rights Judgments*²¹

116. It is now almost 5 years since the judgment of the Grand Chamber in *Hirst v UK* (2005). The Government consultation was finally completed in September 2009. Since then, despite the imminent general election, the Government has not brought forward proposals for consideration by Parliament. We reiterate our view, often repeated, that the delay in this case has been unacceptable.

118. [T]he Government, in its recent correspondence with us and the Committee of Ministers has been keen to emphasise that the ongoing breach of the Convention cannot affect the legality of the forthcoming election. In his recent letter, the Human Rights Minister said:

Whilst the Government is bound under Article 46 of the ECHR to implement decisions of the European Court of Human Rights, such decisions do not have the effect of striking down the national law to which they relate. The UK is a dualist legal system in which international law obligations must be translated into domestic law via Parliament. Therefore, whilst the Government accepts that the Court in *Hirst v UK* (No 2) found that section 3 of the Representation of the People Act 1983 is not compliant with its international law obligations under the Convention, the domestic law continues in force. Similarly, this decision does not have any impact on the continuing validity of our current body of domestic election law.

119. The Government's analysis is legally accurate. The continuing breach of international law identified in *Hirst* will not affect the legality of the forthcoming election for the purposes of domestic law. However, without reform the election will happen in a way which will inevitably breach the Convention rights of at least part of the prison population. This is in breach of the Government's international obligation to secure for everyone within its jurisdiction the full enjoyment of those rights. We consider that the Government's determination to draw clear distinctions between domestic legality and the ongoing breach of Convention rights shows a disappointing disregard for our international law obligations.

21 Excerpted from the UK Parliamentary Joint Committee on Human Rights, *Enhancing Parliament's Role in Relation to Human Rights Judgments* 2009-10, HC 455, at 35-37 (UK).

Internationalisation

Jean L. Cohen

*Whose Sovereignty? Empire Versus International Law*²²

[T]alk of legal and constitutional pluralism, societal constitutionalism, transnational governmental networks, cosmopolitan human rights law enforced by “humanitarian intervention,” and so on are all attempts to conceptualize the new global legal order that is allegedly emerging before our eyes. The general claim is that the world is witnessing a move to cosmopolitan law, which we will not perceive or be able to influence if we do not abandon the discourse of sovereignty. The debates from this perspective are around how to conceptualize the juridification of the new world order. Despite their differences, what seems obvious to those seeking to foster legal cosmopolitanism is that sovereignty talk and the old forms of public international law based on the sovereignty paradigm have to go.

I agree that we are in the presence of something new. But I am not convinced that one should abandon the discourse of sovereignty in order to perceive and conceptualize these shifts. Nor am I convinced that the step from an international to a cosmopolitan legal world order without the sovereign state has been or should be taken. The two doubts are connected: I argue that if we drop the concept of sovereignty and buy into the idea that the state has been disaggregated, and that international treaty organizations are upstaged by transnational governance, we will misconstrue the nature of contemporary international society and the political choices facing us. If we assume that a constitutional, cosmopolitan legal order already exists, which has replaced or should replace international law and its core principles of sovereign equality, territorial integrity, nonintervention, and domestic jurisdiction with cosmopolitan right, and if we construe the evolving doctrine of “humanitarian intervention” as the enforcement of that right, we risk becoming apologists for imperial projects. Under current conditions, this path leads to the political instrumentalization of “law” (cosmopolitan right) and the moralization of politics rather than to a global rule of law. I will argue that we face the following political choice today: We can either opt for strengthening international law by updating it, making explicit the particular conception of sovereignty on which it is now based and showing that this is compatible with cosmopolitan principles inherent in human rights norms; or we can abandon the principle of sovereign equality and the present rules of international law for the sake of human rights, thus relinquishing an important barrier to the proliferation of imperial projects and regional attempts at Grossraum ordering (direct annexation or other forms of control of neighboring smaller polities) by twenty-first-century great powers, who invoke (and instrumentalize) cosmopolitan right as they proceed. Clearly I opt for the former over the latter.

This new world order is a world full of law, but to perceive the nature of the new global law, proponents of the disaggregated state argue that we need a concept of legalization that drops the idea that law is produced or enforced by a sovereign. Accordingly, one must also finally relinquish the myth of formalism, accept the legal realist critique, shift to an external sociological perspective, and acknowledge a wide range of norms and regulations in the global system as law. Instead of a bright line between legalized and nonlegalized institutions in the global order, there is a continuum between legal and nonlegal obligations and a broad spectrum of norms that ranges from soft to hard law. The point is that as sovereignty breaks down, as the state becomes disaggregated transnationally, and as global transgovernmental (and nongovernmental) networks produce more and more norms to regulate their own interaction, “the dynamic of a politically oriented law will no longer tolerate formalism.” Indeed, compared with interstate cooperation and the slow collective action (and inaction) by formal international institutions such as the UN, coordinated action by networks of regulators, judges, and other government officials is fast, flexible, and effective. . . .

22 Excerpted from Jean L. Cohen, *Whose Sovereignty? Empire Versus International Law*, ETHICS & INT'L AFF, Dec 2004.

This brings me to the second version of the thesis that we have entered a postsovereign, decentered world order—namely, the claim that a cosmopolitan legal system regulating global politics actually exists and that it is already constitutionalized. . .

Relying on H.L.A. Hart's criteria, this approach points to several indicia of global constitutionalism. The transnational judicial networks described above are construed as a "heterarchical" organization of courts, which provide *global remedies* and are at the center of global political constitutionalism. These involve various levels of communication, ranging from the citation of decisions of foreign courts by national courts, to organized meetings of supreme court justices, such as those held triennially (since 1995) by the Organization of Supreme Courts of the Americas, to the most advanced forms of judicial cooperation involving partnership between national courts and a supranational tribunal, such as the ECJ and more recently the ICC. The proliferation of supranational courts must be seen as providing *global remedies* for violations of *cosmopolitan law* despite the fact that they originate in treaty organizations. Even national courts can double as elements of this cosmopolitan legal system, insofar as they participate in the interpretation and judgment of violations of global law. Thus, despite the fact that states are the primary agents responsible for delivering on individual rights, what they enforce are cosmopolitan legal norms, and their failure to do so may expose them to "cosmopolitan justice." . . .

There are several problems on the empirical level. First, the existence of a global, networked, constitutionalized political order, even an incomplete one, is vastly overstated. States have yielded some powers to supra- and transnational organizations, transgovernmental networking is an important new phenomenon, there is a good deal of nonstate governance and rule making, and certainly there are trends in a cosmopolitan direction, especially regarding human rights. . . . But it is not clear that these constitutional elements are the sign of a cosmopolitan legal order that has replaced instead of *supplemented* international law based on the consent of states, which remain sovereign, albeit in an altered way.

I argue that the core of the world political system remains the "international society of states," although it has undergone important transformations. The global political system is dualistic, composed of sovereign states and international law along with non-state actors, new legal subjects, and consensual, cosmopolitan elements. Segmental differentiation persists alongside the new functional differentiation. There can be collisions between the principles expressed in each aspect of the global political order. It is hardly news that the principles of human rights can clash with the principles of nonintervention and "domestic jurisdiction." What is needed today is the articulation of new legal rules that anticipate and regulate these clashes. . . .

Cosmopolitan moral and legal theorists, along with many human rights advocates, are eager to abandon the concept of sovereignty because it signifies to them a claim to power unrestrained by law and a bulwark against legal, political, and military action necessary to enforce human rights.

I contend that this view is profoundly mistaken and that the discourse of sovereignty involves normative principles and symbolic meanings worth preserving. . . . The theory and practice of modern constitutionalism demonstrates that limited sovereignty is not an oxymoron, and that sovereignty, constitutionalism, and the rule of law are not incompatible. It also shows that functions or prerogatives once ascribed to the unitary sovereign can be divided and/or ascribed to other bodies (such as the EU or the UN) without the abolition of sovereignty or the disaggregation of the state.

[T]he concept of sovereignty is a reminder not only of the political context of law but also of the ultimate dependence of political power and political regimes on a valid, public, normative legal order for their authority. Sovereignty is thus a dynamic principle of the mutual constitution and mutual containment of

law and politics. From a purely juridical perspective, sovereignty refers to a valid, public legal order that allocates authority and jurisdictional competence. . . .

Constitutionalization of the global political system is a work in progress, not a *fait accompli*. The dualistic model I have in mind would involve the articulation of public power and public law on multiple levels of the world political system. It would seek to harmonize the core principles of international relations today—sovereign equality and human rights—not abandon one in favor of the other. At issue is a shift of the culture of sovereignty from one of impunity to one of accountability and responsibility of states in light of their obligation to protect. This entails reformulating, not abandoning, the default position of sovereignty and its correlate, the principle of nonintervention, in the international system. . . .

Statehood Solidarity Committee v. United States

Inter-American Commission on Human Rights

Case 11.204, Report No. 98/03 (2003)

Background

In 1993, citizens of the District of Columbia petitioned the Inter-American Commission and argued that the United States violated the rights of residents of the District who were not able to vote in congressional elections.

84. Articles II and XX of the American Declaration provide:

Article II. All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

Article XX. Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.

87. The Commission is . . . of the view that those provisions of the system's human rights instruments that guarantee political rights, including Article XX of the American Declaration, must be interpreted and applied so as to give meaningful effect to exercise of representative democracy in this Hemisphere. The Commission also considers that insights regarding the specific content of Article XX of the Declaration can properly be drawn from Article 23 of the American Convention and the Commission's previous interpretation of that provision, which parallels in several fundamental respects Article XX of the Declaration. Article 23 provides as follows:

1. Every citizen shall enjoy the following rights and opportunities:

- a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
- b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
- c. to have access, under general conditions of equality, to the public service of his country.

2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

90. [T]he Commission has held that its role in evaluating the right to participate in government is to ensure that any differential treatment in providing for this right lacks any objective and reasonable justification. In this connection, in securing the equal protection of human rights, states may draw distinctions among different situations and establish categories for certain groups of individuals, so long as it pursues a legitimate end, and so long as the classification is reasonably and fairly related to the end pursued by the legal order. And as with other fundamental rights, restrictions or limitations upon the right to participate in government must be justified by the need of them in the framework of a democratic society, as demarcated by the means, their motives, reasonability and proportionality. At the same time, in making these determinations, the Commission must take due account of the State's degree of autonomy in organizing its political institutions and should only interfere where the State has curtailed the very essence and effectiveness of a petitioner's right to participate in his or her government.

92. According to the European Court, any electoral system must also be assessed in the light of the political evolution of the country concerned, for, in its view, "features that would be unacceptable in the context of one system may accordingly be justified in the context of another, at least so long as the chosen system provides for conditions which will ensure the "free expression of the opinion of the people on the choice of the legislature." In ultimately dismissing the applicants' complaint, the Court emphasized that "[i]n any consideration of the electoral system in issue, its general context must not be forgotten. The system does not appear unreasonable if regard is had to the intentions it reflects and

to the respondent State's margin of appreciation within the Belgian parliamentary system—a margin that is all the greater as the system is incomplete and provisional”.

96. [N]evertheless, the United States appears to suggest that District residents are afforded an adequate right to participate in the government of the United States and to take part in popular elections in compliance with Article XX of the Declaration, by reason of other political activities that are open to them. According to the State, these include their ability to vote in Presidential elections, to elect a mayor and city council, and the presence of one non-voting delegate in the House of Representatives and three “shadow” representatives in Congress. The State also points to the fact that the District's status is freely and openly debated in the government through, for example the presentation of statehood bills in Congress. The State therefore contends that by any measure, District residents have been able to take part in “healthy and robust debate” concerning all issues of national concern, including the status of the District itself. . . .

101. In entering into this stage of its analysis, the Commission acknowledges the degree of deference that must properly be afforded to states in organizing their political institutions so as to give effect to the right to vote and to participate in government. The Commission should only interfere in cases where the State has curtailed the very essence and effectiveness of an individual's right to participate in his or her government. After considering the information on the record, however, the Commission finds that the restrictions on the Petitioners' rights under Article XX to participate in their national legislature have been curtailed in such a manner as to deprive the Petitioners of the very essence and effectiveness of that right, without adequate justification being shown by the State for this curtailment. . . .

109. Based upon the foregoing analysis, the Commission concludes that the State has failed to justify the denial to the Petitioners of effective representation in their federal government, and consequently that the Petitioners have been denied an effective right to participate in their government, directly or through freely chosen representatives and in general conditions of equality, contrary to Articles XX and II of the American Declaration. . . .

118. In accordance with the analysis and conclusions in the present report, the **Inter-American Commission on Human Rights reiterates the following recommendations to the United States:**

119. Provide the Petitioners with an effective remedy, which includes adopting the legislative or other measures necessary to guarantee to the Petitioners the effective right to participate, directly or through freely chosen representatives and in general conditions of equality, in their national legislature. . . .

Approved on the 29th day of the month of December, 2003. Clare K. Roberts, First Vice-President; Susan Villarán, Second Vice-President; and Julio Prado Vallejo, Commissioner. President José Zalaquett adopted a dissenting opinion, which was presented on October 24, 2003 and is included immediately after this report.

Dissenting opinion of Commissioner Jose Zalaquett

17. [I] believe it is . . . pertinent to express my position on the scope of the principle of progressivity, or pro-rights principle, often invoked as a criterion for guiding international rights bodies in their interpretation of human rights standards. In my view, such standards should be interpreted so as to best protect the rights which they enshrine. In cases of doubt or ambiguity, the interpretation should favor the right rather than the restrictions. Finally, it should take into account changes of all types brought about by historical evolution, seeking to understand the content and scope of rights in a living and dynamic way, a way that preserves their essence and even strengthens them. I am not unaware that the interpreter may go so far in this direction as to usurp the role of the legislator, but this is not the place to rehearse an ancient and hard-fought debate of legal theory. Suffice it to say that in my opinion, this interpretive role is a necessary and even inevitable one, but that, in carrying out

an interpretation that updates the law or addresses it from a progressive stance, special care must be taken to proceed on a firm basis, advancing only to the very next logical step.

18. It does not seem to me that a violation of the rights of the petitioners can be established today, either under Article II or Article XX of the American Declaration of the Rights and Duties of Man on the basis of an interpretation like the one indicated in the last lines of the paragraph above. Nevertheless, I do not dismiss the possibility that the evolution of international law and political practice in the Hemisphere may advance to a point where, had it had been reached today, it would have permitted us to come to a different conclusion. Thus, I am of the view that the type of issues dealt with in the present case can and should be dealt with by the Commission and other organs of the Organization of American States through their promotional functions rather than by deciding on a claim or communication. I believe such an approach to be more promising and constructive.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C., on the 24th day of the month of October, 2003.

Biographies of Participants

The Rt Hon Lady Justice Arden DBE

Lady Justice Arden is a member of the Court of Appeal of England and Wales and has been Head of International Judicial Relations for England and Wales since 2005. She became a QC in 1986, and was appointed to the High Court of Justice, Chancery Division, in 1993. She was Chair of the Law Commission of England and Wales from 1996 to 1999. In 2000 she was appointed as an ad hoc judge at the European Court of Human Rights, and from 2004-6 she was Chair of the Judges' Council Working Party on Constitutional Reform. She has travelled extensively to help promote the rule of law and further her personal interest in meeting judges in other jurisdictions and in comparative human rights and constitutional law. She has given numerous lectures and written on human rights, company law, terrorism and other subjects.

Professor Dennis Curtis

Dennis Curtis is Professor of Law Emeritus at the Yale Law School, where he teaches courses on sentencing and professional responsibility and directs a clinical course in which students work with Connecticut's State Disciplinary Counsel to prosecute lawyers who violate rules of professional conduct. Professor Curtis shaped new course on clinical education, the legal profession, post-conviction justice, and sentencing. He recently completed a book, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (Yale University Press, 2011, co-author Professor Judith Resnik) that addresses the relationship between adjudication and democracy. Professor Curtis received his B.S. from the U.S. Naval Academy and his LL.B. from Yale.

Secretary-General Antoine Garapon

Antoine Garapon is Secretary- General of the Institut des Hautes Etudes sur la Justice (IHEJ) in Paris. He served as a juvenile judge for many years, and has written: *Le Gardien des promesses, le juge et la démocratie* (Odile Jacob, 1996), *Juger en Amérique et en France. Culture juridique française et common law* (co-authored by Ioannis Papadopoulos), *Les juges dans la mondialisation* (co-authored by Julie Allard). Antoine Garapon also manages the collection *Bien commun* at Michalon Publishing co. and hosts a weekly radio program, "Le bien commun", on France-culture.

Professor Dame Hazel Genn

Dame Hazel Genn is Dean of Laws and Co-Director of the UCL Judicial Institute in the Faculty of Laws at University College London, where she is also an Honorary Fellow. She is a leading authority on civil justice and dispute resolution and has published widely in the field. Dame Hazel's research has focused on the experiences of citizens and businesses caught up in legal problems and the responsiveness of the justice system to those needs. Her original studies have had a major influence on policy-makers around the world and she is regularly invited to lecture and provide advice abroad.

Judge Nancy Gertner

A graduate of Yale Law School, Judge Gertner was appointed to the federal bench in 1994 by President Clinton. In 2011, she retired and joined the faculty at the Harvard Law School. Judge Gertner taught sentencing at Yale Law School during her judicial career. In 2008 she received the Thurgood Marshall Award from the American Bar Association, only the second woman to receive it (Justice Ginsburg was the first). In 2010, she received the Morton A. Brody Distinguished Judicial Service Award. She has written and spoken widely on various legal issues and has appeared as a keynote speaker, panelist or lecturer at many conferences concerning civil rights, civil liberties, employment, criminal justice and procedural issues, throughout the U.S., Europe and Asia. Her autobiography, *In Defense of Women: Memoirs of an Unrepentant Advocate*, was released in 2011.

Lady Hale

Brenda Hale is the United Kingdom's most senior woman judge. After a varied career as an academic lawyer at the University of Manchester, a Law Commissioner and part time judge, she was appointed a Judge of the Family Division of the High Court in 1994, a Lord Justice of Appeal in 1999, and a Lord of Appeal in Ordinary in 2004. In 2009, the Lords of Appeal left the House of Lords and became Justices in the newly established Supreme Court of the United Kingdom, where she now sits. She retains her links with the academic world, as Chancellor of the University of Bristol, Visitor of Girton College Cambridge and Visiting Professor at Kings College London.

The Honourable Justice Elizabeth Hollingworth

After studying law at the Universities of Western Australia and Oxford, Elizabeth Hollingworth worked as a solicitor for 4 years. She joined the Victorian Bar in 1991, and was appointed Senior Counsel in 2002, practising primarily in commercial, equity and administrative law. Since her appointment to the Supreme Court of Victoria in 2004, she has sat in all criminal and civil trial divisions, as well as in the Court of Appeal. A Senior Fellow at the University of Melbourne and an Adjunct Professor at Victoria University, she has particular teaching interests in civil procedure, advocacy and legal writing.

Lord Hope

Lord Hope is Deputy President of the United Kingdom Supreme Court. He practised for 24 years at the Scottish Bar and was an Advocate Depute from 1978 to 1982. He was Dean of the Faculty of Advocates (Chairman of the Scottish Bar) from 1986 to 1989, and he was appointed direct from the Bar to be Lord President of the Court of Session and Lord Justice General of Scotland in 1989. He was a Lord of Appeal in Ordinary from 1996 to 2009, Second Senior Law Lord in 2009 and has been Deputy President of the UK Supreme Court since 1 October 2009.

Professor Vicki Jackson

Vicki Jackson taught for 26 years at Georgetown University before joining the Harvard faculty in 2011 as the Thurgood Marshall Professor of Constitutional Law. Her most recent book is *Constitutional Engagement in a Transnational Era* (Oxford University Press, 2010). She is co-author with Mark Tushnet of *Comparative Constitutional Law* (Foundation Press 2nd ed. 2006) and with Judith Resnik of *Federal Courts Stories* (Foundation Press 2010). Her scholarship is in U.S. and comparative constitutional law, federal courts, federalism, gender equality, and related topics.

Professor Sir Jeffrey Jowell QC

Jeffrey Jowell is the Director of the Bingham Centre for the Rule of Law, and a practising barrister at Blackstone Chambers. He is Emeritus Professor of Public Law at University College London, where he was a former Dean and Vice Provost. One of the UK's leading public law scholars, and a recipient of a number of honorary degrees, he has assisted with the constitutions and public law of countries in Africa, Asia, the Caribbean, the Middle East and, as the recent UK Member on the Council of Europe's Commission for Democracy Through Law (the "Venice Commission"), in East and Central Europe.

Lord Kerr

Lord Kerr is a Justice of the United Kingdom Supreme Court. He was appointed a judge of the High Court of Northern Ireland in 1993. He has sat as an ad hoc judge in the European Court of Human Rights. He was an Eisenhower fellow in 1999. He became Lord Chief Justice of Northern Ireland on Monday 12 January 2004 and remained in that position until his appointment as a Lord of Appeal in Ordinary on 29 June 2009. He became a Justice of the Supreme Court in October 2009.

Lord Mance

Lord Mance is a Justice of the UK Supreme Court. He became a Law Lord in 2005, sat in the Court of Appeal of England and Wales from 1999 and the High Court from 1993, specialising in commercial work. He represented the UK on the Council of Europe's Consultative Council of European Judges

and sat on the House of Lords European Union Select Committee. He is now chair of the Executive Council of the International Law Association and the Lord Chancellor's Advisory Committee on Private International Law, as well as a member of the Judicial Integrity Group and the Senate of the European Law Institute. He is also a member of the panel established, under the Treaty of Lisbon, to consider the suitability of candidates to act as judges or advocates-general of the European Court of Justice.

The Hon Margaret McKeown

Judge McKeown was appointed to the U.S. Court of Appeals for the Ninth Circuit in 1998. In 1975, she received her J.D. from Georgetown University Law Center, which also awarded her an honorary doctorate. She served as a White House Fellow in 1980-1981, and a Japan Society Leadership Fellow in 1993. She is president-elect of the Federal Judges Association and chair of the ABA Latin America Rule of Law Initiative. She previously chaired the Codes of Conduct Committee, the ethics committee for federal judges. She frequently lectures in the US and abroad, and has published on judicial ethics, constitutional law, international law, and intellectual property law. She is jurist-in-residence at the University of San Diego School of Law and on the adjunct faculty at Georgetown Law School.

The Right Honourable Beverley McLachlin, P.C.,

Chief Justice McLachlin practised law in Alberta and British Columbia, and taught in the Faculty of Law, University of British Columbia. Her judicial career began in 1981 when she was appointed to the Vancouver County Court and then Supreme Court of British Columbia. She was elevated to the British Columbia Court of Appeal in 1985 and was appointed Chief Justice of the Supreme Court of British Columbia in 1988. Seven months later, in April 1989, she was sworn in as a Justice of the Supreme Court of Canada. In 2000, she was appointed Chief Justice of Canada, the first woman in Canada to hold this position. She also chairs the Canadian Judicial Council, Advisory Council of the Order of Canada and Board of Governors of the National Judicial Institute, and is author of numerous articles and publications.

Lord Neuberger

Lord Neuberger of Abbotsbury has been Master of the Rolls and Head of Civil Justice (second most senior English judicial post after the Lord Chief Justice) since 2009. Before that, he was a Law Lord (2007), a Court of Appeal Judge and Judge in charge of IT (2004), High Court Judge in the Chancery Division (1996), Queen's Counsel (1987), and practising barrister (1975). He was called to the Bar (Lincoln's Inn) in 1974, and his first judicial appointment was as a Recorder in 1990. Lord Neuberger led an investigation for the Bar Council into widening access to the bar in 2007, and a committee on super-injunctions in 2011.

Mr. Colm O'Cinneide

Colm O'Cinneide is a Reader in Law at UCL, specialising in human rights, comparative constitutional and anti-discrimination law. He is also currently Vice-President of the European Committee of Social Rights and a member of the Blackstone Chambers Academic Panel. Colm has served as specialist legal adviser to the UK Joint Committee on Human Rights and has also acted as consultant to a range of organisations, including the European Commission, the Northern Irish Human Rights Commission, the UK Equality and Human Rights Commission and the Irish Equality Authority.

Lord Phillips

Lord Phillips is President of the Supreme Court of the United Kingdom. He was called to the Bar in 1962. In 1978 he became a QC and a Recorder in 1982. He became a Judge of the High Court, Queen's Bench Division in 1987 and presided over the Barlow Clowes and Maxwell prosecutions. Appointed to the Court of Appeal in 1995 and in 1999 became Lord of Appeal in Ordinary. He became Master of the Rolls and Head of Civil Justice in 2000 and Lord Chief Justice of England and Wales in 2005. Appointed Senior Law Lord in October 2008 and is currently President of the Supreme Court of the United Kingdom.

Professor Judith Resnik

Judith Resnik is the Arthur Liman Professor of Law at Yale Law School and an Honorary Professor, Faculty of Laws, University College London. Her books include *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (with Dennis Curtis, Yale University Press, 2011); *Federal Courts Stories* (co-edited with Vicki C. Jackson, Foundation Press 2010); and *Migrations and Mobilities: Citizenship, Borders, and Gender* (co-edited with Seyla Benhabib, NYU, 2009). She is also a Managerial Trustee of the International Association of Women Judges, the current Chair of Yale Law School's Global Constitutionalism Seminar, and an occasional litigator.

Lord Sumption

Lord Sumption is a Justice of the United Kingdom Supreme Court. Lord Sumption was a Fellow in History at Magdalen College, Oxford from 1971-5. He was called to Bar in 1975 and appointed a QC in 1986. He served as a Judicial Appointments Commissioner from 2005-11, and was appointed a Justice of the United Kingdom Supreme Court in 2012. He is author of *Pilgrimage: An image of medieval religion* (1975), *The Albigensian Crusade* (1979) and *The Hundred Years War* (3 volumes to date: 1989, 1999, 2010).

Professor John Tasioulas

John Tasioulas is Quain Professor of Jurisprudence at University College London. He was previously Reader in Moral and Legal Philosophy at the University of Oxford and Lecturer in Jurisprudence at the University of Glasgow. He works in moral, legal and political philosophy and in recent years his research has focussed on human rights, punishment and the philosophy of international law. His is the co-editor of *The Philosophy of International Law* (Oxford University Press, 2010) and is writing a monograph on the philosophy of human rights.

Professor Cheryl Thomas

Cheryl Thomas is Professor of Judicial Studies in the UCL Faculty of Laws; this is the first chair in judicial studies in the United Kingdom. She is Co-Director of the UCL Judicial Institute and Director of the UCL Jury Project. A specialist in judicial studies, she has conducted ground-breaking research on juries, judicial decision-making, the role of diversity in the justice system, and the appointment and training of judges. She has served as a specialist consultant on judicial affairs to the Ministry of Justice, Lord Chancellor, Crown Prosecution Service Inspectorate, Judicial College, European Commission and Council of Europe.

Dr Angela Ward

Angela Ward is a Référendaire, Court of Justice of the European Union, Adjunct Professor in EU and Human Rights Law, University College Dublin. Formerly a practicing barrister with appearances at all levels of the UK judiciary and the Court of Justice of the European Union. She has held academic posts at the University of Cambridge and the University of New South Wales in Sydney, and is a co-founding editor of the Cambridge Yearbook of European Legal Studies. She is the author of *Judicial Review and the Rights of Private Parties in EU Law* (OUP, 2001 and 2007) and around 30 further publications.

The Honourable Lady Chief Justice Georgina Theodora Wood

The Honourable Lady Chief Justice, Mrs. Georgina Theodora Wood is the first woman to head Ghana's Judiciary, an institution to which she has devoted nearly forty years of her life. Chief Justice Wood is a judicial reformer committed to improving access to justice and enhancing public trust and confidence in the court system. She has and continues to serve on a number of national and international bodies and has written extensively on various topics related to the rule of law in emergent democracies, law and development and gender rights and adjudication. In October 2009, she was a member of the special team that went to Kenya to assess the legal aftermath of the post election crisis in that country, under the auspices of the International Bar Association's Human Rights Institute (IBAHRI), International Legal Assistance Consortium (ILAC) and Kenya Law Society on Judicial Reforms.



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