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Sources of Law and of Rights

Surveillance and National Security

Religion as a Source of Law

Judicial Enforcement of International Human Rights

Equality in Democracy: Legislatures, Courts, and
Quotas

Constitutional Constraints on the Power to Punish

Editor
Judith Resnik





Gruber Program for Global Justice and Women's Rights

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and Allan Rosas

Religion as a Source of Law

Robert Post and Rosalie Abella

Judicial Enforcement of International Human Rights

Alec Stone Sweet and Helen Keller

Equality in Democracy: Legislatures, Courts, and Quotas

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PREFACE

Constitutional democracies have had a challenging year, as the chapters in this year's volume, *Sources of Law and of Rights*, reflect. For each subject, we had the sense that the news was breaking as we wrote, and that major decisions at national and transnational levels would inform the discussions when we meet in September.

In Chapter I, *Surveillance and National Security*, the focus is on how new technologies and concerns for national security affect constitutional commitments to privacy. After Edward Snowden began disseminating information about how the U.S. National Security Agency's data collection reaches around the globe, a host of legal questions emerged. What law (of which country or of transnational systems) could and should regulate domestic and cross-border surveillance? To facilitate the discussion of these questions, Kim Lane Scheppele, Amy Kapczynski, and Allan Rosas offer a brief overview of how different jurisdictions have protected individual rights of autonomy, free expression, and free association by imposing barriers to the unfettered collection of information by governments. The Chapter editors also detail some of the many innovations—produced through the interaction of public and private sectors—that vastly expand the capacities to gather information. The result is a host of new practices and terms (“Prism,” “Bullrun,” “Co-Traveler”) that may soon be as familiar as Google. The Chapter editors map recent case law, directives, statutes, and resolutions, as they make plain the complexity of adapting theories of the state and of personal autonomy and privacy to new terrains.

In Chapter II, the question is whether claims of right sourced in religion have a distinctive status in constitutional democracies. In secular constitutional states, the law is presumptively independent from religious authority and therefore does not use religious doctrine as a source of law. At the same time, courts aim to respect freedom of association and of expression, and judges aspire to avoid discriminating against individuals by burdening their observance of religious beliefs. The challenges of doing so vary, as some faiths segregate observances by assigning particular days or places for religious expression, and other religions call upon adherents to express commitments through daily practices related to clothing, food, and prayer. Non-secular constitutional orders, in contrast, embrace religion as a source for jurists to use when rendering judgments. Yet, as the commentary and cases excerpted by Robert Post and Rosalie Abella in *Religion as a Source of Law* illuminate, judges in neither kind of constitutional order have simple tasks. Non-secular courts have choices to make about which religious doctrines are central to their judgments. Further, in secular orders, when courts seek to respect individuals' religious freedom, courts

encounter difficulties in abstaining from and avoiding involvement with religious doctrine.

Sources of law are likewise at issue in Chapter III but, rather than religion, examples come from the law of international human rights. In their discussion of *Judicial Enforcement of International Human Rights*, Alec Stone Sweet and Helen Keller address the interaction between national law and human rights conventions. Their focus is on “incorporation,” as national and supranational courts give direct effect to claims predicated on international human rights. As in the inquiry about religion as a source of law, courts have to face questions about the methods for, the hierarchies of, and the interaction among norms. Excerpting materials from many parts of the globe, Stone Sweet and Keller map the expansive opportunities judges have to interpret both national and international law in the process of domesticating international rights.

Chapter IV, *Equality in Democracies: Legislatures, Courts, and Quotas*, examines efforts in many jurisdictions to make good on the promise of equal citizenship through measures, known as “positive action,” aiming to promote the inclusion of groups that have, historically, been disadvantaged. The breadth of the aspirations is impressive; examples of positive action appear in domains ranging from employment, the household, and education to politics and the judiciary. Quotas are both popular and deeply contested. Individuals have argued that such positive action violates the very norm—equality—that positive action seeks to instantiate. The Chapter considers the reasons democracies are drawn to positive action, as well as the threats to democracy that opponents argue such programs pose. As Judith Resnik, Reva Siegel, and Susanne Baer explore, courts have rendered decisions upholding, rejecting, and limiting forms of positive action. In addition to examining the debates among proponents and critics, the Chapter focuses on how the interactions between courts and legislatures have shaped and have shifted understandings of the purposes and forms of permissible positive action.

Chapter V, *Constitutional Constraints on the Power To Punish*, edited by Kate Stith, Dennis Curtis, Nancy Gertner, and Sabino Cassese, takes up questions of sentencing. They ask about what boundaries, if any, constitutions place on sentencing decisions crafted by legislative and executive branches and imposed by judges. As the excerpted case law details, in both national and supranational courts, judges have explored when concepts such as human dignity, prohibitions on cruel and degrading treatment, prescriptions against unusual, disproportionate, or arbitrary punishments, and equality precepts limit the authority of the state to punish. The question of deference—to legislatures, as well as to state and national judgments—is ever-present, as are issues of separation of powers. Constitutional questions are also raised when evaluating the range and quality of information

used at sentencing, the sources of knowledge, and the obligations to test its accuracy.

In short, across these five chapters, common questions emerge about the limits on, as well as the licenses for, government authority and about whether the power to decide about limits and licenses rests with domestic courts and legislatures or with national and supranational bodies. When seeking protection from courts, both governments and individuals argue that their vulnerabilities and needs justify court assistance. And, in each of the contexts explored, judges interrogate the bases of their own exercises of authority.

In addition to this brief preview of the sessions, this preface provides the opportunity to thank those who make the Seminar possible. The readings for each of this year's sessions were selected and edited by the colleagues mentioned above, who gave generously of their time and were patient with dozens of editorial suggestions. As in the past, other Seminar participants provided suggestions of cases and materials, and some commentary has been drafted specifically for this volume. Yale Law Librarians Michael VanderHeijden and Sarah Kraus identified and gathered sources that would otherwise have been unavailable. The annual reminder is also in order. As is the custom, the materials in this volume have been relentlessly pruned—including essays by participants—and most footnotes and citations have been omitted.

Special thanks are due to our student-colleagues. Each year, we—the members of this Seminar—are in debt to these editors; but for their work, the volume would not exist. The unusually able students include the Executive and Managing Editor, Travis Pantin, who has generously agreed to continue serving in that role and thereby bringing the threads of the work together; Senior Managing Editor Andrea Scoseria Katz, who has again taken a leading role on several chapters and worked extensively on administration, and Julie Veroff, who returned to serve as a Senior Editor. Those joining the group and lending their talents include Joshua Braver, David Louk, Sarafina Midzik, Bilyana Petkova, Mara Revkin, and Zayn Siddique. These student-colleagues have worked across time zones and continents to bring this volume to completion. In addition to thorough research, editing, rechecking, and management, they provided thoughtful and insightful guidance.

The Seminar comes to fruition because of the work of Renee DeMatteo, Yale Law School's Senior Conference and Events Services Manager; her advice, attention, and kindness guides each stage of the process. Other Yale staff, including Bonnie Posick and Kelly Mangs-Hernandez, lent able support. And of course, we all follow in the footsteps of the founding leadership of Paul Gewirtz

and Anthony Kronman, and of Robert Post, Bruce Ackerman, and Jed Rubenfeld, chairing the Seminar thereafter.

As is now familiar, the Yale Global Constitutional Seminar is part of the Gruber Program for Global Justice and Women's Rights at the Yale Law School. In this, as in the many other activities enabled by the Gruber Program at Yale, we are reminded of the vision of Peter and Patricia Gruber. Their support makes possible this sharing of ideas, actions, and aspirations, as we hope we can forward their goals and work toward a more humane, egalitarian, and just environment than the one we currently inhabit.

Judith Resnik
Arthur Liman Professor of Law, Yale Law School
June, 2014

SURVEILLANCE AND NATIONAL SECURITY

DISCUSSION LEADERS

KIM LANE SCHEPPELE, AMY KAPCZYNSKI,
AND ALLAN ROSAS

I. SURVEILLANCE AND NATIONAL SECURITY

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Constraining the Collection of Personal Data: Theories of Privacy

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Recent years have seen unprecedented advances in the tracking, compiling, and exchanging of personal data. Everything that we do on digital networks—using a search engine, perusing a website, reading a few pages on Google Books, plugging an appliance into a smart grid, making a phone call, watching television—can be readily tracked. As importantly, advances in computing power mean that it is increasingly easy to archive, search, exchange, integrate, and compile such data into dossiers with ever more comprehensive information about individuals.¹

This chapter considers the relationship between surveillance undertaken for national security purposes and constitutional limits on information gathering about individuals. The revelations about the extensive data collection conducted by the U.S. National Security Agency (NSA) have raised questions about whether and how law—and whose law—should or could regulate domestic and cross-border surveillance.

The chapter begins with a brief overview of the general claims on behalf of privacy, autonomy, free communication, and expression that limit government authority to gather information. We then turn to the new technologies that enable both public and private sectors to gather data about individuals and organizations in the national security context. We focus on the developing law that aims to balance personal concerns (rights to privacy that might block retention of personal data) with other interests (particularly national security) as these new technologies come to be widely used.

Our questions are about how concepts, developed in earlier eras with different technologies and for the ordinary purposes of criminal law enforcement, relate (or not) to efforts undertaken in the name of national security. Now that governments have the technical capacity to collect massive amounts of personally identifiable data in real time, what should the limits on this power be? Because the questions, the technologies, and legal regimes are so new, we use a somewhat different format for materials, providing more by way of background on both the forms of data collection and the developing national and transnational frameworks seeking to protect data privacy.

¹ Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970, 1010 (2012).

At issue are competing obligations of governments. On one hand, governments have the obligation to protect their citizens and residents from terrorist attacks. On the other hand, governments also have the obligation to respect the rights of those who are subject to their actions. Also at issue is the role of national law and of national borders, as regulation of surveillance in one part of the world has implications for other jurisdictions.

The shorthand for these issues is “Snowden.” After 9/11, the United States and its allies developed programs to intercept, store, and analyze almost all remote communications. While investigative reporters had written stories that hinted at the extent of the data-gathering operations, the documents leaked by U.S. national security contractor Edward Snowden during 2013 and into 2014 revealed a far wider web of interdiction of personal communication than had been thought to exist or even to be possible. Almost all long-distance communications anywhere in the world, regardless of how the information travels, appears to be—and is probably still currently being—collected and stored for further analysis, often by multiple state security services.

The focus on NSA disclosures is not an American story, for much of that surveillance reaches beyond American national borders and is directed at governments, entities, and individuals assumed to be friends as well as enemies wherever they are in the world. Moreover, the United States is not alone in developing broad-scale surveillance programs, as many of its allies also engage in extensive surveillance. Because many intelligence services work together, communications intercepted by one state may be shared with another even when that government might not have given its own security services the legal authority to intercept these particular communications directly.

Snowden’s revelations have demonstrated that national borders and national law (and transnational proposals coming into being) are not likely able to constrain the global flow of information and its interception. Torrents of data routinely cross legal jurisdictions as the internet routes communications without regard to the legal regime through which the messages will pass. It is also difficult to tell in which legal jurisdiction the senders and receivers are because computers can mask the countries in which they are operating. Data flowing from one country to another may pass through multiple countries along the way without a connection to the parties on either end of the message. Therefore, laws that limit the powers of security services by relying on a sharp distinction between those inside the country and those outside the country are bound to raise as many questions as they answer.

In short, a host of legal questions arise about whether, how, and whose law should or could regulate domestic and cross-border surveillance and whether distinctions drawn between the privacy interests of nationals and non-nationals retain any relevance. Whether joint action or harmonization are possible are yet other issues, given that different jurisdictions vary in how and why to protect data privacy.

CONSTRAINING THE COLLECTION OF PERSONAL DATA: THEORIES OF PRIVACY

Manuel José Cepeda-Espinosa

*Privacy**

. . . Privacy in comparative constitutional law is associated in some countries with specific legal ideas, such as inviolability of domicile and the secrecy of correspondence, whereas in others it is related to broad concepts such as freedom, dignity, and autonomy. Some jurisdictions provide an all-encompassing idea of “privacy,” whereas others provide different sets of compartmentalized rights. The US conception sees privacy as a “right of the individual to decide for himself,” found in the “penumbras” of several provisions of the Bill of Rights. In contrast, the French Constitutional Council sees it as a form of “liberty,” as does the Indian Supreme Court. Other jurisdictions, such as Germany, Colombia, and South Africa, in turn, derive the right to privacy from a basic conception of human dignity, notwithstanding the fact that their constitutions already provide specific protections for informational privacy.

. . . [The scope of the right to privacy also depends on the] subject matter of the conduct or communication being protected. Privacy comprises, first and foremost, information, conduct, and situations which are typically classified as intimate, such as entries in a private diary, confidential communication between spouses, sexuality, abnormal social behavior, and illnesses. The U.S. Supreme Court has allowed the government to regulate cannabis in order to make it more difficult to acquire, but has struck down as a breach of privacy a provision . . . for the acquisition of contraceptives by unmarried couples. The underlying notion is

*Excerpted from Manuel José Cepeda Espinosa, *Privacy*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 966 (Michel Rosenfeld & Andrés Sajó, eds., 2012).

that certain acts, such as consensual sex, are so personal and so fundamental for the construction of identity that they cannot in principle be interfered with by the state. Controversial areas exist in other subject matter. In Colombia, Congress cannot criminalize the personal consumption of narcotics or punish pietistic homicide if the will of a terminally ill patient is clear. Other jurisdictions regard euthanasia as not protected by the realm of intimate decision-making.

The same is true for data protection. Medical records and personal health information, even of public figures, enjoy a higher degree of protection than data on commercial activity, even of ordinary citizens. The German Federal Constitutional Court devised a three-tier constitutional protection of privacy (the so-called “theory of spheres”), depending on the subject matter of the information at issue. At the core of privacy are the intimate details of a person's life which enjoy absolute protection, not subject to public interest limitations or balancing considerations (the “intimate sphere”). In the outer circle are conduct and behavior that should not be disclosed if occurring in a secluded space (the “private sphere”). Information such as recorded conversations, not necessarily including personal data, but carried out on a confidential basis, would be *prima facie* protected by the right to privacy but subject to disclosure in accordance with public interest concerns. Finally, there is information which is not of a personal nature, and has not been generated on a confidential basis. This includes information regarding “the relation of the person to the world around him,” which would not be protected by the right to privacy at all (the “public sphere”).

The Colombian Constitutional Court has . . . fixed more strict conditions on the gathering and processing of private data. “Sensitive data” dealing with aspects such as sexual orientation or religious or political affiliation may not be gathered in some jurisdictions without appropriate safeguards, and in others may not be gathered if its recollection could lead directly or indirectly to a discriminatory policy.

The Australian, British, and French debates about the risk to privacy of citizen ID cards illustrate that subject matter can be very specific, as are concerns with customer loyalty cards, sensitive consumer data, and security in business databases.

The nature of the information or decision cannot be established without considering the will of the individual concerned. When the informational and decisional aspects of privacy concur, the decisional aspect has more importance. The obvious case is intimate information that the individual chooses to make public. Thus, subject matter can move from the intimate sphere to the public sphere by the autonomous decision of the interested individual. On the other side,

the question arises whether information which was once public may become private because the interested individual so decides at a later point in time. This issue can be narrowly tailored to the idea of an individual's control over her past personal information or broadly framed, in the case of sanctions, as a right to be forgotten. . . .



Microcensus Case
Federal Constitutional Court of Germany
27 BVerfGE 1 (July 16, 1969)*

[In 1960, a federal census statute, which provided for the periodic collection of household and employment statistics, was amended to ask for additional information about the vacation and recreational activities of household residents. A householder was fined DM 100 for refusing to supply this information. He contested the fine and argued that the compulsory disclosure of private information, even for statistical purposes, violated his constitutional right to human dignity under Article 1 of the Basic Law.]

Judgment of the First Senate

I. The statute is compatible with the Basic Law. . . .

C.II. A statistical survey on the subject of “vacations and recreational trips” based on a random sample of the population does not violate Article 1 (1), Article 2 (1), or any other provision of the Basic Law.

1.a. According to Article 1 (1) of the Basic Law, the dignity of man is inviolable and must be respected and protected by all state authority. Human dignity is at the very top of the value order of the Basic Law. This commitment to the dignity of man dominates the spirit of Article 2 (1), as it does all other provisions of the Basic Law. The state may take no measure, not even by law, that violates the dignity of the person beyond the limits specified by Article 2 (1), . . .

* Excerpted from DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* (2012).

[which] guarantees to each citizen an inviolable sphere of privacy beyond the reach of public authority.**

b. In the light of this image of man, every human being is entitled to social recognition and respect in the community. The state violates human dignity when it treats persons as mere objects. It would thus be inconsistent with the principle of human dignity to require a person to record and register all aspects of his or her personality, even though such an effort is carried out anonymously in the form of a statistical survey; [the state] may not treat a person as an object subject to an inventory of any kind. The state has no right to pierce the [protected] sphere of privacy by thoroughly checking into the personal matters of its citizens. [It] must leave the individual with a personal/private sphere for the purpose of the free and responsible development of his or her personality. Within this space the individual is his or her own master. [The individual] can thus “withdraw into himself or herself, alone, to the total exclusion of the outside world, and enjoy the right to solitude.” The state invades this realm when in certain circumstances it takes an action—however value neutral—that tends to inhibit the free development of one’s personality because of the psychological pressure of general public compliance.

c. However, not every statistical survey requiring the disclosure of personal data violates the dignity of the individual or impinges upon the right to self-determination in the innermost private areas of life. As a member of society, every person is bound to respond to an official census and to answer certain questions about [oneself], because such information is necessary for government planning.

[One] can regard a statistical questionnaire as demeaning and as a threat to one’s right of self-determination when it intrudes into that intimate realm of personal life that, but its very nature, is confidential in character. In a modern industrial society there are restrictions against such administrative depersonalization. Yet, where an official survey is concerned only with the relation of the person to the world, it does not generally intrude on personal privacy. This is true . . . when the information loses its personal character by virtue of its anonymity. The prerequisite for [this conclusion] is that anonymity be adequately preserved. In the present case [two factors] guarantee [anonymity]: a statutory prohibition against the publication of information obtained from

** Article 2(1) of the German Basic Law provides: “Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.”

individuals, as well as the fact that census takers are bound under penalty of law to maintain the confidentiality of the information. [The census taker] has no statutory duty to report data to internal revenue agencies; moreover, responsible officials may not convey any [census] information to their superiors in an official capacity if they have not been expressly given this power under the law.

d. The collection of census data regarding vacations and recreational trips does not violate Article 1 (1) of the Basic Law. The questionnaire at issue does implicate the sphere of privacy, but it does not force the individual to reveal intimate details of his or her personal life. Nor does it allow the state to monitor individual relationships that are not otherwise accessible to the outside world and are consequently of a private nature. [The state] could have obtained data regarding the destination and length of vacation trips, lodging, and transportation without a census, although with much more difficulty. The information solicited does not, therefore, involve that most intimate realm into which the state may not intrude. [The state] may [therefore] use the questionnaire for statistical purposes without violating the individual's dignity or right to self-determination. . . .

Rotaru v. Romania

European Court of Human Rights (Grand Chamber)

App. No. 28341/95 (May 4, 2000)

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges Mr L. Wildhaber, *President*, Mrs E. Palm, Mr A. Pastor Ridruejo, Mr G. Bonello, Mr J. Makarczyk, Mr R. Türmen, Mr J.-P. Costa, Mrs F. Tulkens, Mrs V. Strážnická, Mr P. Lorenzen, Mr M. Fischbach, Mr V. Butkevych, Mr J. Casadevall, Mr A.B. Baka, Mr R. Maruste, Mrs S. Botoucharova, Mrs R. Weber, *ad hoc judge*, and also of Mr M. de Salvia, *Registrar*, . . .

Delivers the following judgment[:]

2. . . . The applicant alleged a violation of his right to respect for his private life on account of the holding and use by the Romanian Intelligence Service of a file containing personal information [In 1948, the applicant had been tried and convicted of “insulting behaviour” for seeking to publish two political pamphlets that contained anti-government sentiments. After 1989, a new law permitted those who had been convicted of political crimes during the

communist era to apply for restitution. The applicant applied and was rejected because the RIS—the Romanian Intelligence Service—produced information that the applicant had been a member of the Romanian legionnaire movement during his student days.]

14. . . . The applicant brought proceedings against the RIS, stating that he had never been a member of the Romanian legionnaire movement, . . . and that some of the other information provided by the RIS in its letter of 19 December 1990 was false and defamatory. Under the Civil Code provisions on liability in tort he claimed damages from the RIS for the non-pecuniary damage he had sustained. He also sought an order . . . that the RIS should amend or destroy the file containing the information on his supposed legionnaire past. . . .

17. On 18 January 1994 the Bucharest County Court found that the information that the applicant had been a legionnaire was false. However, it dismissed the appeal on the ground that the RIS could not be held to have been negligent as it was merely the depositary of the impugned information, and that in the absence of negligence the rules on tortious liability did not apply. The court noted that the information had been gathered by the State's security services, which, when they were disbanded in 1949, had forwarded it to the *Securitate* (the State Security Department), which had in its turn forwarded it to the RIS in 1990.

18. On 15 December 1994 the Bucharest Court of Appeal dismissed an appeal by the applicant against the judgment of 18 January 1994

41. The applicant complained that the RIS held and could at any moment make use of information about his private life, some of which was false and defamatory. He alleged a violation of Article 8 of the Convention, which provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

42. The Government denied that Article 8 was applicable, arguing that the information in the RIS's letter of 19 December 1990 related not to the applicant's private life but to his public life. . . .

43. The Court reiterates that the storing of information relating to an individual's private life in a secret register and the release of such information come within the scope of Article 8 § 1. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings: furthermore, there is no reason of principle to justify excluding activities of a professional or business nature from the notion of "private life" [P]ublic information can fall within the scope of private life where it is systematically collected and stored in files held by the authorities. That is all the truer where such information concerns a person's distant past.

44. . . . [T]he Court notes that the RIS's letter of 19 December 1990 contained various pieces of information about the applicant's life, in particular his studies, his political activities and his criminal record, some of which had been gathered more than fifty years earlier. . . . [S]uch information, when systematically collected and stored . . . by agents of the State, falls within the scope of "private life" for the purposes of Article 8 § 1 of the Convention. That is all the more so in the instant case as some of the information has been declared false and is likely to injure the applicant's reputation. . . .

46. . . . [B]oth the storing by a public authority of information relating to an individual's private life and the use of it and the refusal to allow an opportunity for it to be refuted amount to interference with the right to respect for private life secured in Article 8 § 1 of the Convention. . . .

47. The cardinal issue that arises is whether the interference so found is justifiable under paragraph 2 of Article 8. That paragraph, since it provides for an exception to a right guaranteed by the Convention, is to be interpreted narrowly. While the Court recognises that intelligence services may legitimately exist in a democratic society, it reiterates that powers of secret surveillance of citizens are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions

48. If it is not to contravene Article 8, such interference must have been "in accordance with the law," pursue a legitimate aim . . . and, furthermore, be necessary in a democratic society in order to achieve that aim. . . .

52. . . . [T]he expression "in accordance with the law" not only requires that the impugned measure should have some basis in domestic law, but also

refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects

55. . . . [A] rule is “foreseeable” if it is formulated with sufficient precision to enable any individual—if need be with appropriate advice—to regulate his conduct. The Court has stressed the importance of this concept with regard to secret surveillance in the following terms :

The Court would reiterate its opinion that the phrase “in accordance with the law” does not merely refer back to domestic law but also relates to the quality of the “law,” requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention The phrase thus implies—and this follows from the object and purpose of Article 8—that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident

. . . . Since the implementation of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference. . . .

57. The Court notes in this connection that [the Romanian law] provides that information affecting national security may be gathered, recorded and archived in secret files. No provision of domestic law, however, lays down any limits on the exercise of those powers. . . . [The] [l]aw does not define the kind of information that may be recorded, the categories of people against whom surveillance measures such as gathering and keeping information may be taken, the circumstances in which such measures may be taken or the procedure to be followed. Similarly, the Law does not lay down limits on the age of information held or the length of time for which it may be kept. . . . The Court notes that this section contains no explicit, detailed provision concerning the persons authorised

to consult the files, the nature of the files, the procedure to be followed or the use that may be made of the information thus obtained. . . .

59. The Court must also be satisfied that there exist adequate and effective safeguards against abuse, since a system of secret surveillance designed to protect national security entails the risk of undermining or even destroying democracy on the ground of defending it In order for systems of secret surveillance to be compatible with Article 8 of the Convention, they must contain safeguards established by law which apply to the supervision of the relevant services' activities. Supervision procedures must follow the values of a democratic society as faithfully as possible, in particular the rule of law, which is expressly referred to in the Preamble to the Convention. The rule of law implies, *inter alia*, that interference by the executive authorities with an individual's rights should be subject to effective supervision, which should normally be carried out by the judiciary, at least in the last resort, since judicial control affords the best guarantees of independence, impartiality and a proper procedure

61. . . . [The] domestic law does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities.

62. The Court concludes that the holding and use by the RIS of information on the applicant's private life were not "in accordance with the law," a fact that suffices to constitute a violation of Article 8. Furthermore, . . . that fact prevents the Court from reviewing the legitimacy of the aim pursued by the measures ordered and determining whether they were—assuming the aim to have been legitimate—"necessary in a democratic society."

63. There has consequently been a violation of Article 8

Concurring Opinion of Judge WILDHABER, joined by Judges MAKARCZYK, TÜRMEN, COSTA, TULKENS, CASADEVALL and WEBER.

. . . I wish to add that in the instant case—irrespective of the adequacy of the legal basis—I have serious doubts whether the interference with the applicant's rights pursued a legitimate aim under Article 8 § 2. There is moreover no doubt in my mind that the interference was not necessary in a democratic society.

As regards the legitimate aim, the Court has regularly been prepared to accept that the purpose identified by the Government is legitimate provided it falls within one of the categories set out in paragraph 2 of Articles 8 to 11. However, in

my view, in respect of national security as in respect of other purposes, there has to be at least a reasonable and genuine link between the aim invoked and the measures interfering with private life for the aim to be regarded as legitimate. To refer to the more or less indiscriminate storing of information relating to the private lives of individuals in terms of pursuing a legitimate national security concern is, to my mind, evidently problematic.

In the *Rotaru* case, data collected under a previous regime in an unlawful and arbitrary way, concerning the activities of a boy and a student, going back more than fifty years and in one case sixty-three years, some of the information being demonstrably false, continued to be kept on file without adequate and effective safeguards against abuse. It is not for this Court to say whether this information should be destroyed or whether comprehensive rights of access and rectification should be guaranteed, or whether any other system would be in conformity with the Convention. But it is hard to see what legitimate concern of national security could justify the continued storing of such information in these circumstances. I therefore consider that the Court would have been entitled to find that the impugned measure in the present case did not pursue a legitimate aim within the meaning of Article 8 § 2. . . .

In the United States, the Fourth Amendment's prohibition on "unreasonable searches and seizures" has been the font of law limiting and authorizing the government's collection and search authority. The classic statement, from *Katz v. United States* (U.S. 1967), is that

What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Two issues are ever-present: the authority to search and the need for a warrant, issued by an independent member of the judicial branch. Excerpted below is a 2013 decision in which five Justices on the U.S. Supreme Court agreed that a dog/police search, without a warrant, of a person's front porch and lawn (his home's curtilage) was impermissible but disagreed about whether to center the discussion on property or privacy.

Florida v. Jardines
Supreme Court of the United States
133 S. Ct. 1409 (2013)

[Police officers brought a drug-sniffing dog—Franky—to Joelis Jardines’ front porch, where the dog responded in a fashion that the police took to be evidence of narcotics. Based on the dog’s “alert,” the officers then obtained a warrant for a search, which revealed marijuana plants. Jardines was charged with drug violations. The Florida Supreme Court held that the police-dog sniffing, without a warrant to go to the front porch or yard, “was an unreasonable government intrusion into the sanctity of the home and violated the Fourth Amendment.” The U.S. Supreme Court affirmed.]

Justice SCALIA delivered the opinion of the Court.

In 2006, Detective William Pedraja . . . approached Jardines’ home accompanied by . . . a trained canine handler [and] . . . [a] dog on a six-foot leash . . . After sniffing the base of the front door, the dog sat, which is the trained behavior upon discovering the odor

The Fourth Amendment provides in relevant part that the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” The Amendment establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When “the Government obtains information by physically intruding” on persons, houses, papers, or effects, “a ‘search’ within the original meaning of the Fourth Amendment” has “undoubtedly occurred.” . . .

That principle renders this case a straightforward one. The officers were gathering information in an area belonging to Jardines and immediately surrounding his house—in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner.

. . . [A]n officer may . . . gather information in what we have called “open fields”—even if those fields are privately owned—because such fields are not enumerated in the Amendment’s text. But when it comes to the Fourth Amendment, the home is first among equals. At the Amendment’s “very core” stands “the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.” This right would be of little practical value if the State’s agents could stand in a home’s porch or side garden and trawl for

evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.

We therefore regard the area “immediately surrounding and associated with the home”—what our cases call the curtilage—as “part of the home itself for Fourth Amendment purposes.” . . .

Since the officers' investigation took place in a constitutionally protected area, we turn to the question of whether it was accomplished through an unlicensed physical intrusion. . . .

“A license may be implied from the habits of the country,” notwithstanding the “strict rule of the English common law as to entry upon a close.” . . . This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. . . .

. . . [I]ntroducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*.

Just last Term, we . . . held that tracking an automobile's whereabouts using a physically-mounted GPS receiver is a Fourth Amendment search. . . .

The government's use of trained police dogs to investigate the home and its immediate surroundings is a “search” . . . [which occurred prior to the issuance of the warrant, and therefore the evidence was suppressed.]

Justice KAGAN, with whom Justice GINSBURG and Justice SOTOMAYOR join, concurring.

. . . The Court today treats this case under a property rubric; I write separately to note that I could just as happily have decided it by looking to Jardines' privacy interests. A decision along those lines would have looked . . . well, much like [the decision of the majority.] It would have talked about “the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.” It would have insisted on maintaining the “practical value” of that right by preventing police officers from standing in an adjacent space and “trawl[ing] for evidence with impunity.” It would have explained that “privacy expectations are most heightened” in the home and the surrounding area. And it would have determined that police officers invade those shared

expectations when they use trained canine assistants to reveal within the confines of a home what they could not otherwise have found there.

It is not surprising that in a case involving a search of a home, property concepts and privacy concepts should so align. The law of property “naturally enough influence[s]” our “shared social expectations” of what places should be free from governmental incursions. And so the sentiment “my home is my own,” while originating in property law, now also denotes a common understanding—extending even beyond that law’s formal protections—about an especially private sphere. Jardines’ home was his property; it was also his most intimate and familiar space. The analysis proceeding from each of those facts, as today’s decision reveals, runs mostly along the same path. . . .

. . . [T]he dissent’s argument that the device is just a dog cannot change the equation. As *Kyllo* [*v. U.S.* (2001)] made clear, the “sense-enhancing” tool at issue may be “crude” or “sophisticated,” may be old or new . . . may be either smaller or bigger than a breadbox; still, “at least where (as here)” the device is not “in general public use,” training it on a home violates our “minimal expectation of privacy”—an expectation “that exists, and that is acknowledged to be reasonable.” . . .

With these further thoughts, suggesting that a focus on Jardines’ privacy interests would make an “easy cas[e] easy” twice over, I join the Court’s opinion in full.

Justice ALITO, with whom THE CHIEF JUSTICE, Justice KENNEDY, and Justice BREYER join, dissenting.

The Court’s decision in this important Fourth Amendment case is based on a putative rule of trespass law that is nowhere to be found in the annals of Anglo–American jurisprudence. . . .

According to the Court, . . . the police officer in this case, Detective Bartelt, committed a trespass because he was accompanied during his otherwise lawful visit to the front door of respondent’s house by his dog, Franky. Where is the authority evidencing such a rule? Dogs have been domesticated for about 12,000 years; they were ubiquitous in both this country and Britain at the time of the adoption of the Fourth Amendment; and their acute sense of smell has been used in law enforcement for centuries. Yet the Court has been unable to find a single case—from the United States or any other common-law nation—that supports the rule on which its decision is based. Thus, trespass law provides no support for the Court’s holding today. . . .

In an attempt to show that respondent had a reasonable expectation of privacy in the odor of marijuana wafting from his house, the concurrence argues that this case is just like *Kyllo*, which held that police officers conducted a search when they used a thermal imaging device to detect heat emanating from a house. . . .

Contrary to the interpretation propounded by the concurrence, *Kyllo* is best understood as a decision about the use of new technology. The *Kyllo* Court focused on the fact that the thermal imaging device was a form of “sense-enhancing technology” that was “not in general public use,” and it expressed concern that citizens would be “at the mercy of advancing technology” if its use was not restricted. A dog, however, is not a new form of “technology” or a device.” . . .

The question of constraints on data gathering, storage and retrieval is not one for the public sector alone. Not only do private sector actors aid government surveillance, but corporations keep and make data available in ways unrelated to national security. In 2014, the Court of Justice of the European Union (CJEU) issued a ruling on what the petitioners had argued was the “right to be forgotten”: the Court found that Google had violated privacy rights when it allowed its search engines to find and display information that was too old to be relevant to evaluating a person’s current status, in the Court’s view.

Google’s search was linked to information published in a newspaper (and related to government files). The question focused on individuals’ rights to prevent Google from displaying links to such information when individuals’ names are used as the search query. The Court provided an interpretation of the Directive 95/46/EC on Data Protection, particularly Article 12(b) which provides a right to appeal to the national data protection authority to compel the correction, removal, or blocking of false and inaccurate information that does not comply with the Directive, and Article 14, first paragraph, part a, which provides the right to object to the inclusion of false information in a database and, when the objection is justified, requires the controller of the database to omit the objectionable data. The Court extended the Directive’s protection of private information in government databases to include a private company’s links to the information, by way of a news article reporting on the underlying data. In practice, then, the decision creates a direct effect of the public sector regulation into the private sector.

Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD)
European Court of Justice
C-131/12 (May 13, 2014)

. . . 14. On 5 March 2010, Mr Costeja González, a Spanish national resident in Spain, lodged with the AEPD [Agencia Española de Protección de Datos, the Spanish Data Protection Agency] a complaint against La Vanguardia Ediciones SL, which publishes a daily newspaper with a large circulation, in particular in Catalonia (Spain) ('La Vanguardia'), and against Google Spain and Google Inc. The complaint was based on the fact that, when an internet user entered Mr Costeja González's name in the search engine of the Google group ('Google Search'), he would obtain links to two pages of La Vanguardia's newspaper, of 19 January and 9 March 1998 respectively, on which an announcement mentioning Mr Costeja González's name appeared for a real-estate auction connected with attachment proceedings for the recovery of social security debts.

15. By that complaint, Mr Costeja González requested, first, that La Vanguardia be required either to remove or alter those pages so that the personal data relating to him no longer appeared or to use certain tools made available by search engines in order to protect the data. Second, he requested that Google Spain or Google Inc. be required to remove or conceal the personal data relating to him so that they ceased to be included in the search results and no longer appeared in the links to La Vanguardia. Mr Costeja González stated in this context that the attachment proceedings concerning him had been fully resolved for a number of years and that reference to them was now entirely irrelevant. . . .

18. Google Spain and Google Inc. brought separate actions against that decision before the Audiencia Nacional (National High Court). The Audiencia Nacional joined the actions [and referred them to the CJEU, asking what the obligations of the operators of search engines are for the content of third-party websites containing personal information].

19. . . . The answer to that question depends on the way in which Directive 95/46 must be interpreted in the context of these technologies, which appeared after the directive's publication. . . .

66. First of all, it should be remembered that . . . Directive 95/46 seeks to ensure a high level of protection of the fundamental rights and freedoms of natural persons, in particular their right to privacy, with respect to the processing of personal data

69. Article 7 of the Charter guarantees the right to respect for private life, whilst Article 8 of the Charter expressly proclaims the right to the protection of personal data. Article 8(2) and (3) specify that such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law, that everyone has the right of access to data which have been collected concerning him or her and the right to have the data rectified, and that compliance with these rules is to be subject to control by an independent authority. . . .

80. It must be pointed out at the outset that . . . processing of personal data . . . carried out by the operator of a search engine is liable to affect significantly the fundamental rights to privacy and . . . the protection of personal data when the search by means of that engine is carried out on the basis of an individual's name, since that processing enables any internet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the internet—information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty—and thereby to establish a more or less detailed profile of him. . . . Furthermore, the effect of the interference with those rights of the data subject is heightened on account of the important role played by the internet and search engines in modern society, which render the information contained in such a list of results ubiquitous. . . .

81. In the light of the potential seriousness of that interference, it is clear that it cannot be justified by merely the economic interest which the operator of such an engine has in that processing. However, inasmuch as the removal of links from the list of results could, depending on the information at issue, have effects upon the legitimate interest of internet users potentially interested in having access to that information, in situations such as that at issue in the main proceedings a fair balance should be sought in particular between that interest and the data subject's fundamental rights under Articles 7 and 8 of the Charter. Whilst it is true that the data subject's rights protected by those articles also override, as a general rule, that interest of internet users, that balance may however depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life. . . .

97. As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public by its inclusion in such a list of results, it should be held . . . that those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject's name. . . .

98. . . . [S]ince in the case in point there do not appear to be particular reasons substantiating a preponderant interest of the public in having, in the context of such a search, access to that information, a matter which is, however, for the referring court to establish, the data subject may, by virtue of . . . Directive 95/46, require those links to be removed from the list of results.

99. It follows . . . that . . . Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as meaning that, when appraising the conditions for the application of those provisions, it should *inter alia* be examined whether the data subject has a right that the information in question relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question. . . .

TECHNOLOGIES OF SURVEILLANCE AND REGIMES OF RIGHTS IN AN ERA OF BIG DATA

After 9/11, governments around the world increased their powers, both technical and legal, to step up surveillance of those who might be involved in terrorism. A variety of national laws were enacted to accomplish this, encouraged by the passage in 2001 of U.N. Security Council Resolution 1373 that required states to “take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information.”

In 2006, the European Union enacted a new Directive permitting the retention of data by telephone companies and internet service providers. In 2008, the U.S. Foreign Intelligence Surveillance Act (FISA) was amended to permit monitoring of communications as long as one side of the conversation was outside the United States. Previously, the National Security Agency (NSA) had been allowed to monitor only those conversations that occurred wholly outside the United States among “non US persons” (“US persons” includes both citizens and permanent residents). In the U.S., a number of human rights NGOs, lawyers for Guantánamo detainees, and human rights activists, and journalists working on terrorism-related issues brought a case against the Director of National Intelligence challenging the constitutionality of the FISA amendment.

Clapper v. Amnesty International USA
Supreme Court of the United States
133 S. Ct. 1138 (2013)

Justice ALITO delivered the opinion of the Court.

Section 702 of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1881a [as amended in 2008,]* allows the Attorney General and the Director of National Intelligence to acquire foreign intelligence information by

* 50 U.S.C. § 1881a [as amended in 2008]:

(a) *Authorization*: Notwithstanding any other provision of law, . . . the Attorney General and the Director of National Intelligence may authorize jointly, for a period of up to 1 year from the effective date of the authorization, the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information.

(b) *Limitations*: An acquisition authorized under subsection (a)—

(1) may not intentionally target any person known at the time of acquisition to be located in the United States;

(2) may not intentionally target a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States;

(3) may not intentionally target a United States person reasonably believed to be located outside the United States;

(4) may not intentionally acquire any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States; and (5) shall be conducted in a manner consistent with the fourth amendment to the Constitution of the United States. . . .

jointly authorizing the surveillance of individuals who are not “United States persons” and are reasonably believed to be located outside the United States. Before doing so, the Attorney General and the Director of National Intelligence normally must obtain the Foreign Intelligence Surveillance Court’s approval. Respondents are United States persons whose work, they allege, requires them to engage in sensitive international communications with individuals who they believe are likely targets of surveillance under § 1881a. Respondents seek a declaration that § 1881a is unconstitutional, as well as an injunction against § 1881a-authorized surveillance. The question before us is whether respondents have Article III standing to seek this prospective relief.

Respondents assert that they can establish injury in fact because there is an objectively reasonable likelihood that their communications will be acquired under § 1881a at some point in the future. But respondents’ theory of *future* injury is too speculative to satisfy the well-established requirement that threatened injury must be “certainly impending.” And even if respondents could demonstrate that the threatened injury is certainly impending, they still would not be able to establish that this injury is fairly traceable to § 1881a. As an alternative argument, respondents contend that they are suffering *present* injury because the risk of § 1881a-authorized surveillance already has forced them to take costly and burdensome measures to protect the confidentiality of their international communications. But respondents cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending. We therefore hold that respondents lack Article III standing [and therefore the case cannot proceed to judgment on the merits].

In 1978, after years of debate, Congress enacted the Foreign Intelligence Surveillance Act (FISA) to authorize and regulate certain governmental electronic surveillance of communications for foreign intelligence purposes. . . .

In constructing such a framework for foreign intelligence surveillance, Congress created two specialized courts. In FISA, Congress authorized judges of the Foreign Intelligence Surveillance Court (FISC) to approve electronic surveillance for foreign intelligence purposes if there is probable cause to believe that “the target of the electronic surveillance is a foreign power or an agent of a foreign power,” and that each of the specific “facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power.” Additionally, Congress vested the Foreign Intelligence Surveillance Court of Review [FISCR] with jurisdiction to review any denials by the FISC of applications for electronic surveillance.

In the wake of the September 11th attacks, President George W. Bush authorized the National Security Agency (NSA) to conduct warrantless wiretapping of telephone and e-mail communications where one party to the communication was located outside the United States and a participant in “the call was reasonably believed to be a member or agent of al Qaeda or affiliated terrorist organization.” In January 2007, the FISC issued orders authorizing the Government to target international communications into or out of the United States where there was probable cause to believe that one participant to the communication was a member or agent of al Qaeda or an associated terrorist organization. These FISC orders subjected any electronic surveillance that was then occurring under the NSA’s program to the approval of the FISC. After a FISC Judge subsequently narrowed the FISC’s authorization of such surveillance, however, the Executive asked Congress to amend FISA so that it would provide the intelligence community with additional authority to meet the challenges of modern technology and international terrorism. . . .

The present case involves a constitutional challenge to § 1881a [of the FISA Amendments Act of 2008]. Surveillance under § 1881a is subject to statutory conditions, judicial authorization, congressional supervision, and compliance with the Fourth Amendment. Section 1881a provides that, upon the issuance of an order from the Foreign Intelligence Surveillance Court, “the Attorney General and the Director of National Intelligence may authorize jointly, for a period of up to 1 year . . . , the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information.” Surveillance . . . may not be intentionally targeted at any person known to be in the United States or any U.S. person reasonably believed to be located abroad. Additionally, acquisitions under § 1881a must comport with the Fourth Amendment. Moreover, surveillance under § 1881a is subject to congressional oversight and several types of Executive Branch review.

Section 1881a mandates that the Government obtain the Foreign Intelligence Surveillance Court’s approval of “targeting” procedures, “minimization” procedures, and a governmental certification regarding proposed surveillance. Among other things, the Government’s certification must attest that (1) procedures are in place “that have been approved, have been submitted for approval, or will be submitted with the certification for approval by the [FISC] that are reasonably designed” to ensure that an acquisition is “limited to targeting persons reasonably believed to be located outside” the United States; (2) minimization procedures adequately restrict the acquisition, retention, and dissemination of nonpublic information about unconsenting U.S. persons, as appropriate; (3) guidelines have been adopted to ensure compliance with targeting

limits and the Fourth Amendment; and (4) the procedures and guidelines referred to above comport with the Fourth Amendment.

The Foreign Intelligence Surveillance Court's role includes determining whether the Government's certification contains the required elements. Additionally, the Court assesses whether the targeting procedures are "reasonably designed" (1) to "ensure that an acquisition . . . is limited to targeting persons reasonably believed to be located outside the United States" and (2) to "prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known . . . to be located in the United States." . . . The Court also assesses whether the targeting and minimization procedures are consistent with the statute and the Fourth Amendment. . . .

On the day when the FISA Amendments Act was enacted, respondents filed this action seeking (1) a declaration that § 1881a, on its face, violates the Fourth Amendment, the First Amendment, Article III, and separation-of-powers principles and (2) a permanent injunction against the use of § 1881a. Respondents assert what they characterize as two separate theories of Article III standing. First, they claim that there is an objectively reasonable likelihood that their communications will be acquired under § 1881a at some point in the future, thus causing them injury. Second, respondents maintain that the risk of surveillance under § 1881a is so substantial that they have been forced to take costly and burdensome measures to protect the confidentiality of their international communications; in their view, the costs they have incurred constitute present injury that is fairly traceable to § 1881a. . . .

. . . [R]espondents have no actual knowledge of the Government's § 1881a targeting practices. Instead, respondents merely speculate and make assumptions about whether their communications with their foreign contacts will be acquired under § 1881a. . . . Respondents . . . have set forth no specific facts demonstrating that the communications of their foreign contacts will be targeted. Moreover, because § 1881a at most *authorizes*—but does not *mandate* or *direct*—the surveillance that respondents fear, respondents' allegations are necessarily conjectural. Simply put, respondents can only speculate as to how the Attorney General and the Director of National Intelligence will exercise their discretion in determining which communications to target. . . .

[O]ur holding today [that the respondents lack standing] by no means insulates § 1881a from judicial review. As described above, Congress created a comprehensive scheme in which the Foreign Intelligence Surveillance Court evaluates the Government's certifications, targeting procedures, and minimization

procedures—including assessing whether the targeting and minimization procedures comport with the Fourth Amendment. . . .

Finally, any electronic communications service provider that the Government directs to assist in § 1881a surveillance may challenge the lawfulness of that directive before the FISC. Indeed, at the behest of a service provider, the Foreign Intelligence Surveillance Court of Review previously analyzed the constitutionality of electronic surveillance directives issued pursuant to a now-expired set of FISA amendments. . . .

Justice BREYER, with whom Justice GINSBURG, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

The plaintiffs' standing depends upon the likelihood that the Government . . . will harm them by intercepting at least some of their private, foreign, telephone, or e-mail conversations. In my view, this harm is not "speculative." Indeed it is as likely to take place as are most future events that commonsense inference and ordinary knowledge of human nature tell us will happen. . . .

. . . [U]sing the authority of § 1881a, the Government can obtain court approval for its surveillance of electronic communications between places within the United States and targets in foreign territories by showing the court (1) that "a significant purpose of the acquisition is to obtain foreign intelligence information," and (2) that it will use general targeting and privacy-intrusion minimization procedures of a kind that the court had previously approved.

. . . Plaintiff Scott McKay, for example, says in an affidavit (1) that he is a lawyer; (2) that he represented "Mr. Sami Omar Al-Hussayen, who was acquitted in June 2004 on terrorism charges"; (3) that he continues to represent "Mr. Al-Hussayen, who, in addition to facing criminal charges after September 11, was named as a defendant in several civil cases"; (4) that he represents Khalid Sheik Mohammed, a detainee, "before the Military Commissions at Guantánamo Bay, Cuba"; (5) that in representing these clients he "communicate[s] by telephone and email with people outside the United States, including Mr. Al-Hussayen himself," "experts, investigators, attorneys, family members . . . and others who are located abroad"; and (6) that prior to 2008 "the U.S. government had intercepted some 10,000 telephone calls and 20,000 email communications involving [his client] Al-Hussayen." . . .

[Another] plaintiff, Joanne Mariner, says in her affidavit (1) that she is a human rights researcher, (2) that "some of the work [she] do[es] involves trying to track down people who were rendered by the CIA to countries in which they were

tortured”; (3) that many of those people “the CIA has said are (or were) associated with terrorist organizations”; and (4) that, to do this research, she “communicate[s] by telephone and e-mail with . . . former detainees, lawyers for detainees, relatives of detainees, political activists, journalists, and fixers” “all over the world, including in Jordan, Egypt, Pakistan, Afghanistan, [and] the Gaza Strip.” . . .

[T]he plaintiffs have a strong *motive* to engage in, and the Government has a strong *motive* to listen to, conversations of the kind described. A lawyer representing a client normally seeks to learn the circumstances surrounding the crime (or the civil wrong) of which the client is accused. A fair reading of the affidavit of Scott McKay, for example, taken together with elementary considerations of a lawyer’s obligation to his client, indicates that McKay will engage in conversations that concern what suspected foreign terrorists, such as his client, have done; in conversations that concern his clients’ families, colleagues, and contacts; in conversations that concern what those persons (or those connected to them) have said and done, at least in relation to terrorist activities; in conversations that concern the political, social, and commercial environments in which the suspected terrorists have lived and worked; and so forth. Journalists and human rights workers have strong similar motives to conduct conversations of this kind.

At the same time, the Government has a strong motive to conduct surveillance of conversations that contain material of this kind. The Government, after all, seeks to learn as much as it can reasonably learn about suspected terrorists (such as those detained at Guantanamo), as well as about their contacts and activities, along with those of friends and family members. . . .

Fourth, the Government has the *capacity* to conduct electronic surveillance of the kind at issue. To some degree this capacity rests upon technology available to the Government. This capacity also includes the Government’s authority to obtain the kind of information here at issue from private carriers such as AT & T and Verizon. . . .

Of course, to exercise this capacity the Government must have intelligence court authorization. But the Government rarely files requests that fail to meet the statutory criteria. (In 2011, of the 1,676 applications to the intelligence court, two were withdrawn by the Government, and the remaining 1,674 were approved, 30 with some modification). As the intelligence court itself has stated, its review under § 1881a is “narrowly circumscribed.” There is no reason to believe that the communications described would all fail to meet the conditions necessary for approval. Moreover, compared with prior law, § 1881a simplifies

and thus expedites the approval process, making it more likely that the Government will use § 1881a to obtain the necessary approval. . . .

Consequently, we need only assume that the Government is doing its job (to find out about, and combat, terrorism) in order to conclude that there is a high probability that the Government will intercept at least some electronic communication to which at least some of the plaintiffs are parties. The majority is wrong when it describes the harm threatened plaintiffs as “speculative.” . . .

While I express no view on the merits of the plaintiffs’ constitutional claims, I do believe that at least some of the plaintiffs have standing to make those claims. I dissent, with respect, from the majority’s contrary conclusion.

As is now known, within months, the majority’s view of the “speculative” nature of the fear of surveillance were put to rest by the disclosure that metadata from all US phone calls and the content of most email between the US and a foreign destination are being collected by the US government. The documents released by former NSA contractor Edward Snowden brought to light numerous surveillance programs that went beyond what the plaintiffs in *Amnesty* could possibly have envisioned. Some of what we know about the programs from the Snowden files is detailed below.

Kim Lane Scheppele

*The Global Panopticon: The Reversal of Transparency in the Anti-Terror Campaign**
(Part I, 2014)

. . . The NSA may be the biggest and best funded of the security services engaged in mass surveillance, but Snowden’s revelations have shown that many other security services are networked together, feeding and being fed from this global trough of data. . . . The global division of labor between the NSA and other

* Paper given at the annual meetings of the Law and Society Association, May 2014.

security services . . . are crucial for understanding how mass surveillance has escaped the reach of law.

The NSA has a vast array of different surveillance programs that, together, show that no method of online communication (and [few] methods of offline communication) can escape its purview. Here are the main programs, identified where possible by the NSA's code word for its operation:

PRISM: allows the NSA to collect and store the content of emails and other communications from the servers of the world's largest internet companies, including Microsoft, AOL, YouTube, Apple, Paltalk, Facebook, Google, Yahoo and Skype. . . . The Internet companies have denied that they cooperate with [the] NSA in these programs, but internal NSA documents seem to show otherwise. . . .

X-KEYSCORE: enables the NSA "to track every keystroke on a computer, permitting the agency to monitor in real time all of a user's e-mail, social-media and web-browsing activity. In a single month in 2012, X-KEYSCORE collected 41 billion records for one NSA unit."

BULLRUN: allows the NSA to break encryption codes for many of the most-used encryption programs (like SSL) for data transmitted on the internet, enabling the NSA to read secure documents.

MUSCULAR: intercepts unencrypted communications that pass among an internet company's own servers when crossing from one jurisdiction to the next. . . .

CO-TRAVELER: is a program that collects data about the geo-location of cell phones around the world enabling the NSA to track not only suspects, but those who are moving in the vicinity of suspects. "CO-TRAVELER and related tools require the methodical collection and storage of location data on what amounts to a planetary scale. The government is tracking people from afar into confidential business meetings or personal visits to medical facilities, hotel rooms, private homes and other traditionally protected spaces. . . . The NSA cannot know in advance which tiny fraction of 1 percent of the records it may need, so it collects and keeps as many as it can—27 terabytes, by one account, or more than double the text content of the Library of Congress's print collection." . . .

TARMAC: is a program designed to intercept satellite communications. . . .

BLARNEY: is a program joint with AT&T to gain data from AT&T's partners and subsidiaries in Brazil, France, Germany, Greece, Israel, Italy, Japan,

Mexico, South Korea, and Venezuela, with ability to tap into communications of the European Union and the United Nations. . . . [A number of other programs involve different corporate partners and different sets of countries intercepting the same sorts of data.]

STORMBREW: is a program joint with the US FBI that intercepts both telephone and internet communications at various chokepoints as data enter and leave the US. Working with two US telecom providers, each with their own codenames, STORMBREW accesses submarine cable landing access sites on both the east and west coasts.

SQUEAKY DOLPHIN: conducts mass surveillance of social media including YouTube views, Facebook likes, blog site visits and Twitter activity.

Computer Network Exploitation (CNE): is a program run . . . to place malware on targeted computers designed to collect every keystroke. [C]alled Quantum Insertion, . . . it has been reportedly installed in about 100,000 computers around the world.

Hardware Interception: involves the NSA physically diverting shipments of . . . routers, servers and other networking equipment made in the US and destined for overseas locations. NSA agents physically open the boxes and implant chips and beacons that enable the NSA to track information flowing through the networks onto which these machines are placed. . . .

David Cole . . . highlight[ed] the enormous amount of data that these programs have produced:

In a one-month period last year, for example, a single unit of the NSA, the Global Access Operations unit, collected data on more than 97 billion e-mails and 124 billion phone calls from around the world; more than 3 billion of those calls and e-mails were collected as they passed through the United States. As of 2012, the agency was processing more than 20 billion telecommunications per day. In a single month in 2011, the NSA collected 71 million calls and e-mails from Poland alone—not a major hub of terrorist activity, the last time I checked. The NSA has admitted that “it collects far more content than is routinely useful to analysts.”

. . . But NSA does not act alone. In many of its activities, it works with global partners. Britain’s NSA equivalent, the Government Communications Headquarters (GCHQ), was a full participant in PRISM, BULLRUN, . . . and

TARMAC and, given the general closeness of the two agencies, no doubt more. . . . There are hints, not yet fully documented, that many other intelligence services are engaged in elaborate collaboration with the NSA in the NSA's key programs. . . .

The NSA not only works with foreign intelligence services but also pays them as well. The US government provided at least \$100m over three years to the GCHQ to enable it to work on the US's behalf. . . . As Glenn Greenwald explained in his new book: "The Fiscal Year 2012 'Foreign Partner Review' reveals numerous countries that have received such payment, including Canada, Israel, Japan, Jordan, Pakistan, Taiwan and Thailand." . . .

Evidence is starting to emerge that many of the US's partners have their own spying programs that supplement those of the NSA. . . . Many of the programs are jointly coordinated and much of the data is shared.

One of the most ambitious programs of the British GCHQ is TEMPORA, which permits the interception and storage of huge volumes of data passing through the transatlantic fiber-optic cables that emerge from the sea in the UK. This data includes "recordings of phone calls, the content of email messages, entries on Facebook and the history of any internet user's access to websites." . . .

. . . Sweden is the place where undersea fiber-optic cables carrying internet traffic from Russia and the Baltic states hit land after traveling under the Baltic Sea. Sweden's National Defense Radio Establishment (FRA) has undertaken to intercept both metadata and content from these streams of data . . .

France's Direction générale de la sécurité extérieure (DGSE) has also beefed up its internet-interception capacity in recent years and experts claim that France now ranks fifth in the world in the amount of internet traffic it intercepts, after the US, UK, Israel and China. Both domestic and overseas territories host interception stations capable of capturing satellite and fiber-optic undersea cable traffic. . . .

The German government has developed the capacity to intercept internet traffic as well, primarily through operations of the Bundesnachrichtendienst (BND), the Federal Intelligence Service tasked with conducting foreign intelligence analysis. . . . The BND, according to public sources, . . . intercept[s] foreign communications passing through Germany by making direct connection to the key traffic nodes. . . . Snowden's documents reveal that the German-American collaboration may be . . . extensive . . . since 500 million pieces of metadata passed from Germany to the US in December 2012 alone. In addition,

the NSA has allegedly given the BfV [Bundesamt für Verfassungsschutz or Federal Office for the Protection of the Constitution] access to XKeyscore, which enables the German internal security agency to track internet users' every keystroke in real time. . . .

Communications Security Establishment Canada (CSEC) had its own programs that are also part of this mix. Following the lead of the NSA, CSEC developed its own telephony metadata program to spy on the communications of Canadians under an order from the defense minister. The program was so aggressive and raised so many legal questions that it was suspended in 2008 for a year before being resumed under new legal authority. But what attracted even more attention was a program to capture data from travellers' cell phones when they passed through Canadian airports and used the free wi-fi service on offer. . . .

Even beyond these numerous examples, other countries' security services are also involved in the web of NSA spying as well, sometimes running their own programs gathering data that they share with NSA and each other, sometimes aiding and abetting the operation of NSA programs on their home turf. Revelations continue to be forthcoming from the Snowden trove, and so the picture is not yet complete.

The Privacy and Civil Liberties Oversight Board (PCLOB) is an independent, bipartisan agency within the US federal government's Executive Branch; it was established in 2007 by the Implementing Recommendations of the 9/11 Commission Act. The Board is comprised of four part-time members and a full-time chairman. According to the Board's mission statement, it has two purposes: "(1) To review and analyze actions the executive branch takes to protect the Nation from terrorism, ensuring the need for such actions is balanced with the need to protect privacy and civil liberties and (2) To ensure that liberty concerns are appropriately considered in the development and implementation of laws, regulations, and policies related to efforts to protect the Nation against terrorism."

On January 23, 2014, the Board released a report on an NSA program that collected "telephony metadata"—information on the caller and receiver, plus the time date and duration of the call—on nearly all phone calls within the United States.

United States Privacy and Civil Liberties Oversight Board
*Report on the Telephone Records Program Conducted Under Section
215 of the USA PATRIOT Act and on the Operations of the Foreign
Intelligence Surveillance Court*
Part I, January 23, 2014

[In the United States,] [t]he NSA’s telephone records program is operated under an order issued by the FISA [Foreign Intelligence Surveillance Act] Court (FISC) pursuant to Section 215 of the Patriot Act, an order that is renewed approximately every ninety days. The program is intended to enable the government to identify communications among known and unknown terrorism suspects, particularly those located inside the United States. When the NSA identifies communications that may be associated with terrorism, it issues intelligence reports to other federal agencies, such as the FBI, that work to prevent terrorist attacks. The FISC order authorizes the NSA to collect nearly all call detail records generated by certain telephone companies in the United States, and specifies detailed rules for the use and retention of these records. . . .

After collecting these telephone records, the NSA stores them in a centralized database. . . . Before any specific number is used as the search target or “seed” for a query, one of twenty-two designated NSA officials must first determine that there is a reasonable, articulable suspicion (“RAS”) that the number is associated with terrorism. Once the seed has been RAS-approved, NSA analysts may run queries that will return the calling records for that seed, and permit “contact chaining” to develop a fuller picture of the seed’s contacts. Contact chaining enables analysts to retrieve not only the numbers directly in contact with the seed number (the “first hop”), but also numbers in contact with all first hop numbers (the “second hop”), as well as all numbers in contact with all second hop numbers (the “third hop”).

The Section 215 telephone records program has its roots in counterterrorism efforts that originated in the immediate aftermath of the September 11 attacks. The NSA began collecting telephone metadata in bulk as one part of what became known as the President’s Surveillance Program. From late 2001 through early 2006, the NSA collected bulk telephony metadata based upon presidential authorizations issued every thirty to forty-five days. In May 2006, the FISC first granted an application by the government to conduct the telephone records program under Section 215. The government’s application relied heavily on the reasoning of a 2004 FISA court opinion and order approving the bulk collection of Internet metadata under a different provision of FISA.

On June 5, 2013, the British newspaper *The Guardian* published an article based on unauthorized disclosures of classified documents by Edward Snowden, a contractor for the NSA, which revealed the telephone records program to the public. . . .

The disclosure of the telephony metadata program generated a number of lawsuits from people who now knew that their phone records were collected and stored. Excerpted below are the differing views from two U.S. trial level judges about the constitutionality of the NSA telephony metadata surveillance program.

American Civil Liberties Union v. Clapper

United States District Court for the Southern District of New York
959 F. Supp. 2d 724 (S.D.N.Y. 2013)

WILLIAM H. PAULEY III, District Judge:

. . . Prior to the September 11th attacks, the National Security Agency (“NSA”) intercepted seven calls made by hijacker Khalid al-Mihdhar, who was living in San Diego, California, to an al-Qaeda safe house in Yemen. The NSA intercepted those calls using overseas signals intelligence capabilities that could not capture al-Mihdhar’s telephone number identifier. Without that identifier, NSA analysts concluded mistakenly that al-Mihdhar was overseas and not in the United States. Telephony metadata would have furnished the missing information and might have permitted the NSA to notify the Federal Bureau of Investigation (“FBI”) of the fact that al-Mihdhar was calling the Yemeni safe house from inside the United States.

The Government learned from its mistake and adapted to confront a new enemy: a terror network capable of orchestrating attacks across the world. It launched a number of counter-measures, including a bulk telephony metadata collection program—a wide net that could find and isolate gossamer contacts among suspected terrorists in an ocean of seemingly disconnected data.

This blunt tool only works because it collects everything. Such a program, if unchecked, imperils the civil liberties of every citizen. Each time someone in the United States makes or receives a telephone call, the telecommunications provider makes a record of when, and to what telephone number the call was placed, and how long it lasted. The NSA collects that telephony metadata. If

plumbed, such data can reveal a rich profile of every individual as well as a comprehensive record of people's associations with one another.

The natural tension between protecting the nation and preserving civil liberty is squarely presented by the Government's bulk telephony metadata collection program. Edward Snowden's unauthorized disclosure of Foreign Intelligence Surveillance Court ("FISC") orders has provoked a public debate and this litigation. While robust discussions are underway across the nation, in Congress, and at the White House, the question for this Court is whether the Government's bulk telephony metadata program is lawful. This Court finds it is. But the question of whether that program should be conducted is for the other two coordinate branches of Government to decide. . . .

The Fourth Amendment guarantees that all people shall be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." . . .

In *Smith v. Maryland* (1979), the Supreme Court held individuals have no "legitimate expectation of privacy" regarding the telephone numbers they dial because they knowingly give that information to telephone companies when they dial a number. *Smith's* bedrock holding is that an individual has no legitimate expectation of privacy in information provided to third parties.

Smith arose from a robbery investigation by the Baltimore police. Without a warrant, the police requested that the telephone company install a device known as a pen register, which recorded the numbers dialed from Smith's home. After Smith's arrest, he moved to suppress evidence derived from the pen register. Noting it had consistently "held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties," the Court found that telephone customers have no subjective expectation of privacy in the numbers they dial because they convey that information to the telephone company knowing that the company has facilities to make permanent records of the numbers they dial.

The privacy concerns at stake in *Smith* were far more individualized than those raised by the ACLU. *Smith* involved the investigation of a single crime and the collection of telephone call detail records collected by the telephone company at its central office, examined by the police, and related to the target of their investigation, a person identified previously by law enforcement. Nevertheless, the Supreme Court found there was no legitimate privacy expectation because "[t]elephone users . . . typically know that they must convey numerical information to the telephone company; that the telephone company has facilities

for recording this information; and that the telephone company does in fact record this information for a variety of legitimate business purposes.”

The ACLU argues that analysis of bulk telephony metadata allows the creation of a rich mosaic: it can “reveal a person’s religion, political associations, use of a telephone-sex hotline, contemplation of suicide, addiction to gambling or drugs, experience with rape, grappling with sexuality, or support for particular political causes.” But that is at least three inflections from the Government’s bulk telephony metadata collection. First, without additional legal justification—subject to rigorous minimization procedures—the NSA cannot even query the telephony metadata database. Second, when it makes a query, it only learns the telephony metadata of the telephone numbers within three “hops” of the “seed.” Third, without resort to additional techniques, the Government does not know who any of the telephone numbers belong to. In other words, all the Government sees is that telephone number A called telephone number B. It does not know who subscribes to telephone numbers A or B. Further, the Government repudiates any notion that it conducts the type of data mining the ACLU warns about in its parade of horrors. . . .

The ACLU’s pleading reveals a fundamental misapprehension about ownership of telephony metadata. In its motion for a preliminary injunction, the ACLU seeks to: (1) bar the Government from collecting “Plaintiffs’ call records” under the bulk telephony metadata collection program; (2) quarantine “all of Plaintiffs’ call records” already collected under the bulk telephony metadata collection program; and (3) prohibit the Government from querying metadata obtained through the bulk telephony metadata collection program using any phone number or other identifier associated with Plaintiffs.

First, the business records created by Verizon are not “Plaintiffs’ call records.” Those records are created and maintained by the telecommunications provider, not the ACLU. Under the Constitution, that distinction is critical because when a person voluntarily conveys information to a third party, he forfeits his right to privacy in the information. Second, the Government’s subsequent querying of the telephony metadata does not implicate the Fourth Amendment—any more than a law enforcement officer’s query of the FBI’s fingerprint or DNA databases to identify someone. . . .

The collection of breathtaking amounts of information unprotected by the Fourth Amendment does not transform that sweep into a Fourth Amendment search.

. . . [T]he Supreme Court [has] not overrule[d] *Smith*. And the Supreme Court has instructed lower courts not to predict whether it would overrule a precedent even if its reasoning has been supplanted by later cases. . . . Clear precedent applies because *Smith* held that a subscriber has no legitimate expectation of privacy in telephony metadata created by third parties. Inferior courts are bound by that precedent.

Some ponder the ubiquity of cellular telephones and how subscribers' relationships with their telephones have evolved since *Smith*. While people may "have an entirely different relationship with telephones than they did thirty-four years ago," this Court observes that their relationship with their telecommunications providers has not changed and is just as frustrating. Telephones have far more versatility now than when *Smith* was decided, but this case only concerns their use as telephones. The fact that there are more calls placed does not undermine the Supreme Court's finding that a person has no subjective expectation of privacy in telephony metadata. Importantly, "what metadata is has not changed over time," and "[a]s in *Smith*, the types of information at issue in this case are relatively limited: [tele]phone numbers dialed, date, time, and the like." Because *Smith* controls, the NSA's bulk telephony metadata collection program does not violate the Fourth Amendment. . . .

The right to be free from searches and seizures is fundamental, but not absolute. . . . Whether the Fourth Amendment protects bulk telephony metadata is ultimately a question of reasonableness. . . .

There is no evidence that the Government has used any of the bulk telephony metadata it collected for any purpose other than investigating and disrupting terrorist attacks. . . . The bulk telephony metadata collection program is subject to executive and congressional oversight, as well as continual monitoring by a dedicated group of judges who serve on the Foreign Intelligence Surveillance Court.

No doubt, the bulk telephony metadata collection program vacuums up information about virtually every telephone call to, from, or within the United States. That is by design, as it allows the NSA to detect relationships so attenuated and ephemeral they would otherwise escape notice. As the September 11th attacks demonstrate, the cost of missing such a thread can be horrific. Technology allowed al-Qaeda to operate decentralized and plot international terrorist attacks remotely. The bulk telephony metadata collection program represents the Government's counter-punch: connecting fragmented and fleeting communications to re-construct and eliminate al-Qaeda's terror network.

“Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.” [*Boumediene v. Bush* (2008)] . . . The success of one helps protect the other. Like the 9/11 Commission observed: The choice between liberty and security is a false one, as nothing is more apt to imperil civil liberties than the success of a terrorist attack on American soil. A court’s solemn duty is “to reject as false, claims in the name of civil liberty which, if granted, would paralyze or impair authority to defend [the] existence of our society, and to reject as false, claims in the name of security which would undermine our freedoms and open the way to oppression.” *American Comm’cns Ass’n, C.I.O. v. Douds* (1950).

For all of these reasons, the NSA’s bulk telephony metadata collection program is lawful. Accordingly, the Government’s motion to dismiss the complaint is granted and the ACLU’s motion for a preliminary injunction is denied. . . .

Klayman v. Obama

United States District Court for the District of Columbia
957 F. Supp. 2d 1 (D.D.C. 2013)

RICHARD J. LEON, United States District Judge:

. . . These related cases are two of several lawsuits arising from public revelations over the past six months that the federal government, through the [NSA] and with the participation of certain telecommunications and internet companies, has conducted surveillance and intelligence-gathering programs that collect certain data about the telephone and internet activity of American citizens within the United States. Plaintiffs—five individuals . . . —bring these suits as U.S. citizens who are subscribers or users of certain telecommunications and internet firms. . . .

. . . [P]laintiffs seek an injunction “that, during the pendency of this suit, (i) bars [d]efendants from collecting [p]laintiffs’ call records under the mass call surveillance program; (ii) requires [d]efendants to destroy all of [p]laintiffs’ call records already collected under the program; and (iii) prohibits [d]efendants from querying metadata obtained through the program using any phone number or other identifier associated with [p]laintiffs

The NSA’s Bulk Telephony Metadata Program involves two potential searches: (1) the bulk collection of metadata and (2) the analysis of that data through the NSA’s querying process. . . . [A]s to the collection, the Supreme

Court decided *Clapper* just months *before* the June 2013 news reports revealed the existence and scope of certain NSA surveillance activities. Thus, whereas the plaintiffs in *Clapper* could only speculate as to whether they would be surveilled at all, plaintiffs in this case can point to strong evidence that, as Verizon customers, their telephony metadata has been collected for the last seven years (and stored for the last five) and will continue to be collected barring judicial or legislative intervention. In addition, the Government has declassified and authenticated an April 25, 2013 FISC Order signed by Judge Vinson, which confirms that the NSA has indeed collected telephony metadata from Verizon. . . .

The threshold issue that I must address, then, is whether plaintiffs have a reasonable expectation of privacy that is violated when the Government indiscriminately collects their telephony metadata along with the metadata of hundreds of millions of other citizens without any particularized suspicion of wrongdoing, retains all of that metadata for five years, and then queries, analyzes, and investigates that data without prior judicial approval of the investigative targets. If they do—and a Fourth Amendment search has thus occurred—then the next step of the analysis will be to determine whether such a search is “reasonable.” . . .

The analysis of this threshold issue of the expectation of privacy must start with the Supreme Court’s landmark opinion in *Smith v. Maryland* (1979), which the FISC has said “squarely control[s]” when it comes to “[t]he production of telephone service provider metadata.” . . .

The question before me is *not* the same question that the Supreme Court confronted in *Smith*. To say the least, “whether the installation and use of a pen register constitutes a ‘search’ within the meaning of the Fourth Amendment” . . . is a far cry from the issue in this case.

Indeed, the question in this case can more properly be styled as follows: When do present-day circumstances—the evolutions in the Government’s surveillance capabilities, citizens’ phone habits, and the relationship between the NSA and telecom companies—become so thoroughly unlike those considered by the Supreme Court thirty-four years ago that a precedent like *Smith* simply does not apply? The answer, unfortunately for the Government, is now.

. . . I am convinced that the surveillance program now before me is so different from a simple pen register that *Smith* is of little value in assessing whether the Bulk Telephony Metadata Program constitutes a Fourth Amendment search. To the contrary, for the following reasons, I believe that bulk telephony

metadata collection and analysis almost certainly does violate a reasonable expectation of privacy.

First, the pen register in *Smith* was operational for only a matter of days between March 6, 1976 and March 19, 1976, and there is no indication from the Court's opinion that it expected the Government to retain those limited phone records once the case was over This short-term, forward-looking (as opposed to historical), and highly-limited data collection is what the Supreme Court was assessing in *Smith*. The NSA telephony metadata program, on the other hand, involves the creation and maintenance of a historical database containing five years' worth of data. And I might add, there is the very real prospect that the program will go on for as long as America is combatting terrorism, which realistically could be forever!

Second, the relationship between the police and the phone company in *Smith* is nothing compared to the relationship that has apparently evolved over the last seven years between the Government and telecom companies. . . . In *Smith*, the Court considered a one-time, targeted request for data regarding an individual suspect in a criminal investigation . . . which in no way resembles the daily, all-encompassing, indiscriminate dump of phone metadata that the NSA now receives as part of its Bulk Telephony Metadata Program. It's one thing to say that people expect phone companies to occasionally provide information to law enforcement; it is quite another to suggest that our citizens expect all phone companies to operate what is effectively a joint intelligence-gathering operation with the Government.

Third, the almost-Orwellian technology that enables the Government to store and analyze the phone metadata of every telephone user in the United States is unlike anything that could have been conceived in 1979. In *Smith*, the Supreme Court was actually considering whether local police could collect one person's phone records for calls made after the pen register was installed and for the limited purpose of a small-scale investigation of harassing phone calls. The notion that the Government could collect similar data on hundreds of millions of people and retain that data for a five-year period, updating it with new data every day in perpetuity, was at best, in 1979, the stuff of science fiction

Finally, and most importantly, not only is the Government's ability to collect, store, and analyze phone data greater now than it was in 1979, but the nature and quantity of the information contained in people's telephony metadata is much greater, as well. . . . It is now safe to assume that the vast majority of people reading this opinion have at least one cell phone within arm's reach (in addition to other mobile devices). . . .

. . . Whereas some may assume that these cultural changes will force people to “reconcile themselves” to an “inevitable” “diminution of privacy that new technology entails,” I think it is more likely that these trends have resulted in a greater expectation of privacy and a recognition that society views that expectation as reasonable.

. . . [T]he question that I will ultimately have to answer when I reach the merits of this case someday is whether people have a reasonable expectation of privacy that is violated when the Government, without any basis whatsoever to suspect them of any wrongdoing, collects and stores for five years their telephony metadata for purposes of subjecting it to high-tech querying and analysis without any case-by-case judicial approval. For the many reasons set forth above, it is significantly likely that on that day, I will answer that question in plaintiffs’ favor.

. . .

. . . [T]he Government does *not* cite a single instance in which analysis of the NSA’s bulk metadata collection actually stopped an imminent attack, or otherwise aided the Government in achieving any objective that was time-sensitive in nature. . . . Given the limited record before me at this point in the litigation—most notably, the utter lack of evidence that a terrorist attack has ever been prevented because searching the NSA database was faster than other investigative tactics—I have serious doubts about the efficacy of the metadata collection program as a means of conducting time-sensitive investigations in cases involving imminent threats of terrorism. . . . “Notably lacking in respondents’ presentation is any indication of a concrete danger demanding departure from the Fourth Amendment’s main rule.” Thus, plaintiffs have a substantial likelihood of showing that their privacy interests outweigh the Government’s interest in collecting and analyzing bulk telephony metadata and therefore the NSA’s bulk collection program is indeed an unreasonable search under the Fourth Amendment.

I realize, of course, that such a holding might appear to conflict with other trial courts. Nevertheless, in reaching this decision, I find comfort in the statement in the Supreme Court’s recent majority opinion in [*United States v. Jones* (2012)] that “[a]t bottom, we must ‘assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.’” Indeed, as the Supreme Court noted more than a decade before *Smith*, “[t]he basic purpose of th[e Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.” . . . I cannot imagine a more “indiscriminate” and “arbitrary invasion” than this systematic and high-tech collection and retention of personal data on virtually every single citizen for purposes of querying and

analyzing it without prior judicial approval. Surely, such a program infringes on “that degree of privacy” that the Founders enshrined in the Fourth Amendment. Indeed, I have little doubt that the author of our Constitution, James Madison, who cautioned us to beware “the abridgement of freedom of the people by gradual and silent encroachments by those in power,” would be aghast. . . .

This case is yet the latest chapter in the Judiciary’s continuing challenge to balance the national security interests of the United States with the individual liberties of our citizens. The Government, in its understandable zeal to protect our homeland, has crafted a counterterrorism program with respect to telephone metadata that strikes the balance based in large part on a thirty-four year old Supreme Court precedent, the relevance of which has been eclipsed by technological advances and a cell phone-centric lifestyle heretofore inconceivable. In the months ahead, other Article III courts, no doubt, will wrestle to find the proper balance consistent with our constitutional system. But in the meantime, for all the above reasons, I will grant Larry Klayman’s and Charles Strange’s requests for an injunction and enter an order that (1) bars the Government from collecting, as part of the NSA’s Bulk Telephony Metadata Program, any telephony metadata associated with their personal Verizon accounts and (2) requires the Government to destroy any such metadata in its possession that was collected through the bulk collection program.

[The court granted the requested injunction but stayed the order, “in view of the significant national security interests at stake in this case and the novelty of the constitutional issues,” pending appeal.]

The Privacy and Civil Liberties Oversight Board, excerpted above, also reviewed the telephony metadata program for its legality.

United States Privacy and Civil Liberties Oversight Board
Report on the Telephone Records Program
(Part II, 2014)

. . . Section 215 [of the USA PATRIOT Act]* is designed to enable the FBI to acquire records that a business has in its possession, as part of an FBI

* The USA PATRIOT Act, Sec. 215 (a)(1) (as amended 2008) provides:

investigation, when those records are relevant to the investigation. Yet the operation of the NSA's bulk telephone records program bears almost no resemblance to that description. While the Board believes that this program has been conducted in good faith to vigorously pursue the government's counterterrorism mission and appreciates the government's efforts to bring the program under the oversight of the FISA court, the Board concludes that Section 215 does not provide an adequate legal basis to support the program.

There are four grounds upon which we find that the telephone records program fails to comply with Section 215. First, the telephone records acquired under the program have no connection to any specific FBI investigation at the time of their collection. Second, because the records are collected in bulk—potentially encompassing all telephone calling records across the nation—they cannot be regarded as “relevant” to any FBI investigation as required by the statute without redefining the word relevant in a manner that is circular, unlimited in scope, and out of step with the case law from analogous legal contexts involving the production of records. Third, the program operates by putting telephone companies under an obligation to furnish new calling records on a daily basis as they are generated (instead of turning over records already in their possession)—an approach lacking foundation in the statute and one that is inconsistent with FISA as a whole. Fourth, the statute permits only the FBI to obtain items for use in its investigations; it does not authorize the NSA to collect anything.

In addition, we conclude that the program violates the Electronic Communications Privacy Act. That statute prohibits telephone companies from sharing customer records with the government except in response to specific enumerated circumstances, which do not include Section 215 orders. . . .

The Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution. . . .

Each application under this section— . . .

(2) shall include—

(A) a statement of facts showing that there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation (other than a threat assessment) . . .

The NSA's telephone records program also raises concerns under both the First and Fourth Amendments to the United States Constitution. . . . [W]hile government officials are entitled to rely on existing Supreme Court doctrine in formulating policy, the existing doctrine does not fully answer whether the Section 215 telephone records program is constitutionally sound. In particular, the scope and duration of the program are beyond anything ever before confronted by the courts, and as a result of technological developments, the government possesses capabilities to collect, store, and analyze data not available when existing Supreme Court doctrine was developed. . . .

The threat of terrorism faced today by the United States is real. The Section 215 telephone records program was intended as one tool to combat this threat However, we conclude that the Section 215 program has shown minimal value in safeguarding the nation from terrorism. Based on the information provided to the Board, including classified briefings and documentation, we have not identified a single instance involving a threat to the United States in which the program made a concrete difference in the outcome of a counterterrorism investigation. Moreover, we are aware of no instance in which the program directly contributed to the discovery of a previously unknown terrorist plot or the disruption of a terrorist attack. And we believe that in only one instance over the past seven years has the program arguably contributed to the identification of an unknown terrorism suspect. . . .

The Board's review suggests that where the telephone records collected by the NSA under its Section 215 program have provided value, they have done so primarily in two ways: by offering additional leads regarding the contacts of terrorism suspects already known to investigators, and by demonstrating that foreign terrorist plots do *not* have a U.S. nexus. The former can help investigators confirm suspicions about the target of an inquiry or about persons in contact with that target. The latter can help the intelligence community focus its limited investigatory resources by avoiding false leads and channeling efforts where they are needed most. But with respect to the former, our review suggests that the Section 215 program offers little unique value but largely duplicates the FBI's own information gathering efforts. And with respect to the latter, while the value of proper resource allocation in time-sensitive situations is not to be discounted, we question whether the American public should accept the government's routine collection of all of its telephone records because it helps in cases where there is no threat to the United States.

The Board also has analyzed the Section 215 program's implications for privacy and civil liberties and has concluded that they are serious. Because telephone calling records can reveal intimate details about a person's life,

particularly when aggregated with other information and subjected to sophisticated computer analysis, the government's collection of a person's entire telephone calling history has a significant and detrimental effect on individual privacy. The circumstances of a particular call can be highly suggestive of its content, such that the mere record of a call potentially offers a window into the caller's private affairs. Moreover, when the government collects *all* of a person's telephone records, storing them for five years in a government database that is subject to high-speed digital searching and analysis, the privacy implications go far beyond what can be revealed by the metadata of a single telephone call.

Beyond such individual privacy intrusions, permitting the government to routinely collect the calling records of the entire nation fundamentally shifts the balance of power between the state and its citizens. With its powers of compulsion and criminal prosecution, the government poses unique threats to privacy when it collects data on its own citizens. Government collection of personal information on such a massive scale also courts the ever-present danger of "mission creep." An even more compelling danger is that personal information collected by the government will be misused to harass, blackmail, or intimidate, or to single out for scrutiny particular individuals or groups. To be clear, the Board has seen no evidence suggesting that anything of the sort is occurring at the NSA and the agency's incidents of non-compliance with the rules approved by the FISC have generally involved unintentional misuse. Yet, while the danger of abuse may seem remote, given historical abuse of personal information by the government during the twentieth century, the risk is more than merely theoretical.

Moreover, the bulk collection of telephone records can be expected to have a chilling effect on the free exercise of speech and association, because individuals and groups engaged in sensitive or controversial work have less reason to trust in the confidentiality of their relationships as revealed by their calling patterns. Inability to expect privacy vis-à-vis the government in one's telephone communications means that people engaged in wholly lawful activities—but who for various reasons justifiably do not wish the government to know about their communications—must either forgo such activities, reduce their frequency, or take costly measures to hide them from government surveillance. . . . The telephone records program thus hinders the ability of advocacy organizations to communicate confidentially with members, donors, legislators, whistleblowers, members of the public, and others. For similar reasons, awareness that a record of all telephone calls is stored in a government database may have debilitating consequences for communication between journalists and sources.

To be sure, detailed rules currently in place limit the NSA's *use* of the telephone records it collects. These rules offer many valuable safeguards designed

to curb the intrusiveness of the program. But in our view, they cannot fully ameliorate the implications for privacy, speech, and association that follow from the government's ongoing *collection* of virtually all telephone records of every American. Any governmental program that entails such costs requires a strong showing of efficacy. We do not believe the NSA's telephone records program conducted under Section 215 meets that standard. . . .

Recommendation 1: The government should end its Section 215 bulk telephone records program. The Section 215 bulk telephone records program lacks a viable legal foundation under Section 215, implicates constitutional concerns under the First and Fourth Amendments, raises serious threats to privacy and civil liberties as a policy matter, and has shown only limited value. . . .

Once the Section 215 bulk collection program has ended, the government should purge the database of telephone records that have been collected and stored during the program's operation, subject to limits on purging data that may arise under federal law or as a result of any pending litigation.

The Board also recommends against the enactment of legislation that would merely codify the existing program or any other program that collects bulk data on such a massive scale regarding individuals with no suspected ties to terrorism or criminal activity.

Moreover, the Board's constitutional analysis should provide a message of caution, and as a policy matter, given the significant privacy and civil liberties interests at stake, if Congress seeks to provide legal authority for any new program, it should seek the least intrusive alternative and should not legislate to the outer bounds of its authority. . . .

Recommendation 2: The government should immediately implement additional privacy safeguards in operating the Section 215 bulk collection program. . . .

Recommendation 11: The Board urges the government to begin developing principles and criteria for transparency. The Board urges the Administration to commence the process of articulating principles and criteria for deciding what must be kept secret and what can be released as to existing and future programs that affect the American public.

Recommendation 12: The scope of surveillance authorities affecting Americans should be public. . . .

In addition to the evaluation conducted by the Privacy and Civil Liberties Oversight Board, the President constituted a Review Group on Intelligence and Communications Technologies to evaluate the various NSA surveillance programs as well. But, despite being composed largely of constitutional lawyers, the Review Group did not undertake a substantial constitutional analysis of the program. Bruce Ackerman argued, as detailed below, that surveillance must be put in its constitutional context:

Bruce Ackerman

*The White House Begg the Question on Mass Surveillance**

The White House report on surveillance makes an important contribution to the escalating debate, but it begs a big question. It finds that the NSA’s massive collection of American telephone records “was not essential to preventing attacks and could readily have been obtained in a timely manner.” This finding powerfully reinforces the virtually simultaneous publication of the first judicial opinion, written by federal judge Richard Leon, challenging mass surveillance on constitutional grounds.

In contrast to Judge Leon's constitutional critique, [President Obama’s] advisors took on a narrower task: “Our charge is not to interpret the Fourth Amendment, but to make recommendations about sound public policy.” The report then declares that telephone companies should continue the massive collection of meta-data. On their view, the aim is to reform, not eliminate, the practice of pervasive surveillance.

But if the dragnet is unconstitutional, it can’t be “sound policy” for it to continue. Two centuries ago, King George's agents pursued a similar policy against the American revolutionaries. His officers obtained “general warrants” to engage in massive document sweeps without any proof that they belonged to members of the anti-British conspiracy—folks we might now call terrorists. As the Supreme Court has repeatedly remarked, this use of general warrants was “abhorred by the colonists” (See, e.g., *US v. Kahn* (1973)), and motivated the Fourth Amendment's demand that “no Warrants shall issue, but upon probable

* Excerpted from Bruce Ackerman, *The White House Begg the Question on Mass Surveillance*, THE HUFFINGTON POST, Dec. 26, 2013.

cause . . . describing the place to be searched, and the persons or things to be seized.”

In my view, Judge Leon makes a compelling case that modern bulk collection is simply a high-tech version of the royalist general warrant: a paradigmatic violation of the Fourth Amendment.

Others will disagree. But at the very least, they should explain where the judge went wrong. Yet the president’s advisors avoided this task.

It’s not hard to figure out why. Their report is dated December 12; Leon's decision was published on December 16. Before that day, Leon’s [view of this issue was one] only shared by some scholars and civil libertarians in Congress and the larger community. Nobody with real power had publicly challenged the narrow view of the Fourth Amendment developed by the secret FISA court. So the report was simply following conventional wisdom in begging the big constitutional question.

Judge Leon has shattered this false appearance of constitutional consensus. President Obama should bring the judge’s opinion along with his advisors’ report for holiday reading. He should also ask his Office of Legal Counsel to wrestle with the original understanding of the Fourth Amendment, and its enduring significance. Even if the president and his lawyers reject the judge’s ultimate conclusion, they can’t help but recognize that the case against bulk collection is, at the very least, very substantial.

This minimalist conclusion should make a big difference when the president makes his final decision on his advisors’ recommendations in January. In supporting the report’s recommendation to continue a modified form of bulk collection, Obama would already be making a big constitutional concession to the intelligence community. He should not go further and gut the main reform proposals advanced by his advisors to prevent the clear and present dangers of abuse.

Their 46 point reform program is far more comprehensive than anything under consideration in Congress. It not only transfers mass collection from the NSA to private phone companies, but requires the NSA to persuade a FISA court judge before it can gain access to particular phone records (except in a true emergency). It also calls for similar legislative restrictions on other dragnet powers granted by Congress after the panic provoked by September 11th.

The report takes the same systematic approach in reconstructing the FISA court, vindicating the individual's right to protect privacy through encryption technology, and reasserting the principle of civilian control over the military's relentless effort to expand the scope of its control over cyberspace.

President Obama should not allow the NSA to convince him that this comprehensive program is merely an idealistic wishlist that ignores the endless threats of the twenty-first century. He should treat the reform initiative as the constitutional minimum required to keep the high-tech dynamo from spinning entirely out of control.

The president, in short, is at a moment of truth. If he fails to take constitutional leadership, the courts and Congress will try to fill the gap, generating familiar scenes of conflict with a reluctant executive branch. . . .

Allan Rosas

Overview of European Law on Data Protection and National Security
(2014)

The protection of privacy with regard to the processing of personal data is an important issue in the European Union guaranteed by Article 7 and 8* of the

* Excerpted from the EU Charter of Fundamental Rights:

Article 7:
Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8
Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

Charter of Fundamental Rights of the European Union. Therefore, EU legislative instruments have been established to ensure a high standard of protection of personal data. The main legal acts are the following two EU directives.

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data [Directive on Data Protection] sets up the data protection framework at the European level and intends to guarantee the free movement of data within and outside the EU. The Directive obliges Member States to provide for an independent public authority responsible for monitoring the application of its provisions and to guarantee the right for every individual facing a breach of their right to privacy to an effective judicial remedy. . . .

A second instrument is *Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector* [Directive on Privacy and Electronic Communications, as amended in 2009]. . . . which complements [the Directive on Data Protection]. It “*harmonises the provisions of the Member States required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the European Union*” (Article 1, par. 1). Directive 2002/58/EC sets out strong guarantees in order to ensure the confidentiality of communications and the related traffic data by means of a public communications network and publicly available electronic communications services. . . .

Article 6 of Directive 2002/58/EC requires Member States and electronic communications service providers to erase or make anonymous all traffic data when they are no longer required for the conveyance of a communication or for billing. However, Article 15 introduces an exemption to the protection offered by the Directive, stating that Member States may withdraw the protection of data “when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences.” Given this derogation, Member States were able to adopt specific measures to safeguard national security.

As a result, the European legislative framework on data protection aims to be strong but remains incomplete. On 25 January 2012, the European Commission unveiled the draft of the “Data Protection Reform,” a new general

European legislative framework that will replace the Data Protection Directive, provide more uniformity in data protection across the EU and strengthen data protection authorities. . . . At the time of writing, the legislative process is ongoing and the reform has already been voted by the European Parliament [but it must still be adopted by the European Council of Ministers].

After 9/11, the EU took a number of legal measures to combat terrorism and organized crime. . . . Within the European Union, several Member States had unilaterally adopted specific legislation providing for the retention of data by service providers. Following the terrorist attacks in London, the European Council reaffirmed the need to adopt common measures on the retention of telecommunications data. Hence, the European Parliament and the Council passed *Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the Retention of Data Generated or Processed in connection with the Provision of Publicly Available Electronic Communications Services or of Public Communications Networks* [The Directive on Data Retention], which amended Directive 2002/58/EC in order both to harmonize the existing national legislations and to strengthen the fight against terrorism and organized crime. The Data Retention Directive requires EU Member States' electronic communications service providers to store all citizens' telecommunications traffic data for periods of no less than six months and no more than two years for the purpose of investigation, detection and prosecution of serious crime. Relevant parts of Directive 2006/24/EC are reproduced below

Member States faced difficulties to implement Directive 2006/24/EC and several procedures have been introduced before domestic constitutional courts claiming the unconstitutionality of national transpositions of the Directive (the Constitutional Courts did not rule on the legality of Directive 2006/24 itself).

By Decision of 8 October 2009 . . . , the Romanian Constitutional Court found that the provisions of Law No.298/2008 and Law No. 506/2004 transposing Directive 2006/24/EC violated article 28 of Romania's Constitution on right to secrecy of correspondence. On 2 March 2010, The German Federal Constitutional Court also found that the implementation of the Data Retention Directive 2006/24/EC on the duty of storage was not in conformity with the proportionality principle under Article 10.1 of the German Basic Law Finally, the Constitutional Court of the Czech Republic found that the national implementation of the Directive violated the proportionality principle

Also, the Austrian and the Slovenian Constitutional Courts have dealt with questions concerning the conformity of Directive 2006/24/EC with fundamental rights. While the Datenschutzkommission (Austria) sent a request for a

preliminary ruling to the CJEU, the Slovenian Constitutional Court decided to suspend its decision until the CJEU, which has exclusive competence to assess the validity of the above-mentioned Directive, decides on its validity in Cases C-293/12 and C-594/12. . . .

Finally, the insufficient protection of data and the lack of guarantees offered by the Directive with regard to the massive amount of data collected raised concerns about its validity. First of all, in Case C-301/06 *Ireland v Parliament and Council* [2009] the validity of the Directive was upheld as far as its legal basis was concerned. However, this judgment did not rule on the validity of the Directive with respect to fundamental rights. The latter question is addressed in [the] judgment of 8 April 2014, in . . . *Digital Rights Ireland and Seitlinger and others*, where the Court found that Directive 2006/24/EC is invalid.

European Union Directive on Data Retention

Directive 2006/24/EC, European Union

(March 15, 2006)

. . . Article 1: Subject matter and scope

1. This Directive aims to harmonise Member States' provisions concerning the obligations of the providers of publicly available electronic communications services or of public communications networks with respect to the retention of certain data . . . in order to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law

Article 3: Obligation to retain data

1. . . . Member States shall adopt measures to ensure that the data specified in Article 5 of this Directive are retained in accordance with the provisions thereof, to the extent that those data are generated or processed by providers of publicly available electronic communications services or of a public communications network within their jurisdiction in the process of supplying the communications services concerned. . . .

Article 4: Access to data

Member States shall adopt measures to ensure that data retained in accordance with this Directive are provided only to the competent national authorities in specific cases and in accordance with national law. The procedures to be followed and the conditions to be fulfilled in order to gain access to retained data in accordance with necessity and proportionality requirements shall be defined by each Member State in its national law, subject to the relevant provisions of European Union law or public international law, and in particular the ECHR as interpreted by the European Court of Human Rights.

Article 5: Categories of data to be retained

1. Member States shall ensure that the following categories of data are retained under this Directive: (a) data necessary to trace and identify the source of a communication: . . . (b) data necessary to identify the destination of a communication: . . . (c) data necessary to identify the date, time and duration of a communication: . . . (d) data necessary to identify the type of communication: . . . (e) data necessary to identify users' communication equipment or what purports to be their equipment: . . . (f) data necessary to identify the location of mobile communication equipment: . . .

2. No data revealing the content of the communication may be retained pursuant to this Directive.

Article 6: Periods of retention

Member States shall ensure that the categories of data specified in Article 5 are retained for periods of not less than six months and not more than two years from the date of the communication. . . .

Article 13: Remedies, liability and penalties

1. Each Member State shall take the necessary measures to ensure that the national measures implementing Chapter III of Directive 95/46/EC providing for judicial remedies, liability and sanctions are fully implemented with respect to the processing of data under this Directive.

2. Each Member State shall, in particular, take the necessary measures to ensure that any intentional access to, or transfer of, data retained in accordance with this Directive that is not permitted under national law adopted pursuant to this Directive is punishable by penalties, including administrative or criminal penalties, that are effective, proportionate and dissuasive.

Digital Rights Ireland and Seitlinger and Others
Court of Justice of the European Union
Joined Cases C-293/12 and C-594/12 (April 8, 2014)

[In his opinion delivered on December 12, 2013 Advocate General Pedro Cruz Villalón held that “Directive 2006/24/EC of the European Parliament and of Council of 15 March 2006 . . . is as a whole incompatible with Article 52(1) of the Charter of Fundamental Rights of the European Union* since the limitations on the exercise of fundamental rights which that directive imposes because of the obligation to retain data are not accompanied by the necessary principles for governing the guarantees needed to regulate access to the data and their use [and] Article 6 of Directive 2006/24 is incompatible with Articles 7 and 52(1) of the Charter of Fundamental Rights of the European Union in that it requires Member States to ensure that the data specified in Article 5 of that directive are retained for a period whose upper limit is set at two years.”

By judgment of April 8, 2014, the CJEU declared Directive 2006/24/EC invalid.]

25. The obligation, under Article 3 of Directive 2006/24, on providers of publicly available electronic communications services or of public communications networks to retain the data listed in Article 5 of the directive for the purpose of making them accessible, if necessary, to the competent national authorities raises questions relating to respect for private life and communications under Article 7 of the Charter, the protection of personal data under Article 8 of the Charter** and respect for freedom of expression under Article 11*** of the Charter.

* Article 52(1) of the EU Charter of Fundamental Rights provides:

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

** Articles 7 and 8 of the EU Charter of Fundamental Rights, are excerpted at p. II-50, *supra*.

*** Article 11 of the EU Charter of Fundamental Rights provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

26. In that regard, it should be observed that the data which providers of publicly available electronic communications services or of public communications networks must retain, pursuant to Articles 3 and 5 of Directive 2006/24, include data necessary to trace and identify the source of a communication and its destination, to identify the date, time, duration and type of a communication, to identify users' communication equipment, and to identify the location of mobile communication equipment, data which consist, *inter alia*, of the name and address of the subscriber or registered user, the calling telephone number, the number called and an IP address for Internet services. Those data make it possible, in particular, to know the identity of the person with whom a subscriber or registered user has communicated and by what means, and to identify the time of the communication as well as the place from which that communication took place. . . .

27. Those data, taken as a whole, may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them.

28. In such circumstances, even though, . . . the directive does not permit the retention of the content of the communication or of information consulted using an electronic communications network, it is not inconceivable that the retention of the data in question might have an effect on the use, by subscribers or registered users, of the means of communication covered by that directive and, consequently, on their exercise of the freedom of expression guaranteed by Article 11 of the Charter.

29. The retention of data for the purpose of possible access to them by the competent national authorities, as provided for by Directive 2006/24, directly and specifically affects private life and, consequently, the rights guaranteed by Article 7 of the Charter. Furthermore, such a retention of data also falls under Article 8 of the Charter because it constitutes the processing of personal data within the meaning of that article

32. By requiring the retention of the data listed in Article 5(1) of Directive 2006/24 and by allowing the competent national authorities to access those data, Directive 2006/24 . . . derogates from the system of protection of the right to privacy established by Directives 95/46 and 2002/58 with regard to the processing of personal data in the electronic communications sector, directives which provided for the confidentiality of communications and of traffic data as well as the obligation to erase or make those data anonymous where they are no longer

needed for the purpose of the transmission of a communication, unless they are necessary for billing purposes and only for as long as so necessary.

33. To establish the existence of an interference with the fundamental right to privacy, it does not matter whether the information on the private lives concerned is sensitive or whether the persons concerned have been inconvenienced in any way.

34. As a result, the obligation imposed by Articles 3 and 6 of Directive 2006/24 on providers of publicly available electronic communications services or of public communications networks to retain, for a certain period, data relating to a person's private life and to his communications, . . . constitutes in itself an interference with the rights guaranteed by Article 7 of the Charter.

35. Furthermore, the access of the competent national authorities to the data constitutes a further interference with that fundamental right . . . Accordingly, Articles 4 and 8 of Directive 2006/24 laying down rules relating to the access of the competent national authorities to the data also constitute an interference with the rights guaranteed by Article 7 of the Charter.

36. Likewise, Directive 2006/24 constitutes an interference with the fundamental right to the protection of personal data guaranteed by Article 8 of the Charter because it provides for the processing of personal data.

37. . . . [T] interference caused by Directive 2006/24 with the fundamental rights laid down in Articles 7 and 8 of the Charter . . . must be considered to be particularly serious. . . . [T]he fact that data are retained and subsequently used without the subscriber or registered user being informed is likely to generate in the minds of the persons concerned the feeling that their private lives are the subject of constant surveillance. . . .

38. Article 52(1) of the Charter provides that any limitation on the exercise of the rights and freedoms laid down by the Charter must be provided for by law, respect their essence and, subject to the principle of proportionality, limitations may be made to those rights and freedoms only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

39. So far as concerns the essence of the fundamental right to privacy and the other rights laid down in Article 7 of the Charter, it must be held that, even though the retention of data required by Directive 2006/24 constitutes a particularly serious interference with those rights, it is not such as to adversely

affect the essence of those rights given that, as follows from Article 1(2) of the directive, the directive does not permit the acquisition of knowledge of the content of the electronic communications as such.

40. Nor is that retention of data such as to adversely affect the essence of the fundamental right to the protection of personal data enshrined in Article 8 of the Charter, because Article 7 of Directive 2006/24 provides, in relation to data protection and data security, that, without prejudice to the provisions adopted pursuant to Directives 95/46 and 2002/58, certain principles of data protection and data security must be respected by providers of publicly available electronic communications services or of public communications networks. . . .

41. As regards the question of whether that interference satisfies an objective of general interest, it should be observed that, whilst Directive 2006/24 aims to harmonise Member States' provisions concerning the obligations of those providers with respect to the retention of certain data which are generated or processed by them, the material objective of that directive is, as follows from Article 1(1) thereof, to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law. The material objective of that directive is, therefore, to contribute to the fight against serious crime and thus, ultimately, to public security.

42. It is apparent from the case-law of the Court that the fight against international terrorism in order to maintain international peace and security constitutes an objective of general interest Furthermore, it should be noted, in this respect, that Article 6 of the Charter* lays down the right of any person not only to liberty, but also to security. . . .

44. It must therefore be held that the retention of data for the purpose of allowing the competent national authorities to have possible access to those data, as required by Directive 2006/24, genuinely satisfies an objective of general interest.

45. In those circumstances, it is necessary to verify the proportionality of the interference found to exist.

46. In that regard, according to the settled case-law of the Court, the principle of proportionality requires that acts of the EU institutions be appropriate

* The EU Charter of Fundamental Rights, Art. 6, provides: "Everyone has the right to liberty and security of the person."

for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is appropriate and necessary in order to achieve those objectives

48. In the present case, in view of the important role played by the protection of personal data in the light of the fundamental right to respect for private life and the extent and seriousness of the interference with that right caused by Directive 2006/24, the EU legislature's discretion is reduced, with the result that review of that discretion should be strict. . . .

51. As regards the necessity for the retention of data required by Directive 2006/24, it must be held that the fight against serious crime, in particular against organized crime and terrorism, is indeed of the utmost importance in order to ensure public security and its effectiveness may depend to a great extent on the use of modern investigation techniques. However, such an objective of general interest, however fundamental it may be, does not, in itself, justify a retention measure such as that established by Directive 2006/24 being considered to be necessary for the purpose of that fight.

52. So far as concerns the right to respect for private life, the protection of that fundamental right requires, according to the Court's settled case-law, in any event, that derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary

53. In that regard, it should be noted that the protection of personal data resulting from the explicit obligation laid down in Article 8(1) of the Charter is especially important for the right to respect for private life enshrined in Article 7 of the Charter.

54. Consequently, the [European Directive] legislation in question must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards so that the persons whose data have been retained have sufficient guarantees to effectively protect their personal data against the risk of abuse and against any unlawful access and use of that data.

55. The need for such safeguards is all the greater where, as laid down in Directive 2006/24, personal data are subjected to automatic processing and where there is a significant risk of unlawful access to those data.

56. As for the question of whether the interference caused by Directive 2006/24 is limited to what is strictly necessary, it should be observed that . . . the

directive requires the retention of all traffic data concerning fixed telephony, mobile telephony, Internet access, Internet e-mail and Internet telephony. It therefore applies to all means of electronic communication, the use of which is very widespread and of growing importance in people's everyday lives. Furthermore, . . . the directive covers all subscribers and registered users. It therefore entails an interference with the fundamental rights of practically the entire European population.

57. In this respect, . . . Directive 2006/24 covers, in a generalised manner, all persons and all means of electronic communication as well as all traffic data without any differentiation, limitation or exception being made in the light of the objective of fighting against serious crime.

58. Directive 2006/24 affects, in a comprehensive manner, all persons using electronic communications services, but without the persons whose data are retained being, even indirectly, in a situation which is liable to give rise to criminal prosecutions. It therefore applies even to persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious crime. Furthermore, it does not provide for any exception, with the result that it applies even to persons whose communications are subject, according to rules of national law, to the obligation of professional secrecy.

59. Moreover, whilst seeking to contribute to the fight against serious crime, Directive 2006/24 does not require any relationship between the data whose retention is provided for and a threat to public security

60. Secondly, not only is there a general absence of limits in Directive 2006/24 but Directive 2006/24 also fails to lay down any objective criterion by which to determine the limits of the access of the competent national authorities to the data and their subsequent use for the purposes of prevention, detection or criminal prosecutions concerning offences that, in view of the extent and seriousness of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, may be considered to be sufficiently serious to justify such an interference. . . .

61. Furthermore, Directive 2006/24 does not contain substantive and procedural conditions relating to the access of the competent national authorities to the data and to their subsequent use. . . .

62. In particular, Directive 2006/24 does not lay down any objective criterion by which the number of persons authorised to access and subsequently

use the data retained is limited to what is strictly necessary in the light of the objective pursued. Above all, the access by the competent national authorities to the data retained is not made dependent on a prior review carried out by a court or by an independent administrative body whose decision seeks to limit access to the data and their use to what is strictly necessary for the purpose of attaining the objective pursued and which intervenes following a reasoned request of those authorities submitted within the framework of procedures of prevention, detection or criminal prosecutions. Nor does it lay down a specific obligation on Member States designed to establish such limits.

63. Thirdly, so far as concerns the data retention period, Article 6 of Directive 2006/24 requires that those data be retained for a period of at least six months, without any distinction . . . on the basis of their possible usefulness for the purposes of the objective pursued or according to the persons concerned. . . .

65. It follows from the above that Directive 2006/24 does not lay down clear and precise rules governing the extent of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter. It must therefore be held that Directive 2006/24 entails a wide-ranging and particularly serious interference with those fundamental rights in the legal order of the EU, without such an interference being precisely circumscribed by provisions to ensure that it is actually limited to what is strictly necessary.

66. Moreover, as far as concerns the rules relating to the security and protection of data retained by providers of publicly available electronic communications services or of public communications networks, it must be held that Directive 2006/24 does not provide for sufficient safeguards, as required by Article 8 of the Charter, to ensure effective protection of the data retained against the risk of abuse and against any unlawful access and use of that data. . . .

68. . . . [I]t should be added that that directive does not require the data in question to be retained within the European Union, with the result that it cannot be held that the control, explicitly required by Article 8(3) of the Charter, by an independent authority of compliance with the requirements of protection and security . . . is fully ensured. Such a control, carried out on the basis of EU law, is an essential component of the protection of individuals with regard to the processing of personal data

69. Having regard to all the foregoing considerations, it must be held that, by adopting Directive 2006/24, the EU legislature has exceeded the limits imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52(1) of the Charter. . . .

On those grounds, the Court (Grand Chamber) hereby rules:

Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC is invalid. . . .

THE INTER-JURISDICTIONAL ISSUES: TRANSNATIONAL PRIVACY PROTECTION

Different national and transnational legal regimes protect the right to data privacy in different ways. For some, collection and storage of personal data infringes the right; for others, only the use of personal data constitutes an infringement. For some, mass collection of private data can only be justified under extraordinary circumstances; for others, mass collection of private data does not run afoul of constitutional protections, as long as there is no abuse of this information and it is used only for legitimate purposes. Perhaps more than any other constitutional right, the right to data privacy reveals so much national and regional variation among constitutional democratic regimes that there is little transnational agreement on the boundaries of the right and what would constitute an intrusion substantial enough to justify court intervention, except at the extremes.

This international diversity means that relations among jurisdictions that protect privacy rights differently are bound to be fraught in an era when personal data moves without regard to jurisdictional boundaries. Moreover, the sheer diversity of legal regimes regulating data privacy and the ease of moving data across national borders invites legal arbitrage. With the revelations of widespread surveillance, the cross-border issues are giving rise to difficult legal questions. Does collaboration with an international partner that has different standards for the protection of data privacy create an actionable offense in the jurisdiction with the stronger standards?

Allan Rosas

Interjurisdictional Data Privacy Regimes (2014)

Some bilateral agreements and arrangements between the EU and the US touch upon the issue of data collection and transfer: The best known is probably the so-called *Safe Harbour* established between the US Department of Commerce and the EU in November 2000 to regulate the way that companies export EU citizens' personal data. To comply with Directive 95/46/EC on the protection of personal data, registered companies operating in the EU have the obligation to guarantee an adequate level of protection of personal data sent to countries outside the European Economic Area. The weakness of the conferred protection has been pointed out and the recent revelations on the PRISM program run by the NSA confirmed the necessity to reconsider this arrangement.

Two other EU-US agreements regulate the transfer and use of EU citizens' personal data for the purpose of the fight against serious crime and terrorism. The *PNR (Passenger Name Record) Agreement* between the European Union and the United States of America on the use and transfer of passenger name records to the United States Department of Homeland Security organizes the transfer of passenger name records from [European] air carriers to the United States Another powerful instrument against terrorism is the *TFTP (Terrorist Finance Tracking Programme) Agreement* on the processing and transfer of Financial Messaging Data from the European Union to the United States . . . , which, according to the European Commission, "yields great benefits in assisting the efforts of the European Union, the United States, and their allies to thwart terrorists and increase global security." After a first interim agreement had been rejected by the European Parliament, a new TFTP Agreement offering more data protection guarantees took effect on 1 August 2010. . . .

Kim Lane Scheppelle
The Global Panopticon^{**}
(Part II, 2014)

. . . While the NSA is the 500-pound gorilla in the global security zoo, we have seen that it has many other companions who are actively engaged in adding

^{**} Paper given at the annual meetings of the Law and Society Association, May 2014.

to its mountain of information. Some of NSA's partners have the responsibilities they do for obvious geographical reasons: for example, the UK is the site where transatlantic cables enter Europe

But there is another reason why the NSA needs these partners to assist its massive data collection efforts. Different security services have different legal constraints and arbitrating these different legal rules enables the NSA and its partner agencies to evade the domestic legal constraints to which each of these agencies are subject. . . .

The most obvious legal workaround solves the "here-there" dilemma. Most security services of democratic states have one set of rules that allow them to spy domestically ("here") and another set of rules that allow them to spy abroad ("there"). . . . In democracies, the domestically directed agencies typically operate under substantially tighter constraints, usually needing warrants that require specific proof that an individual to be put under surveillance has done something wrong. . . . The foreign-directed agencies, however, usually dispense with a warrant requirement and they operate with far less oversight and many fewer legal controls than the domestic-directed agencies. . . . So any particular countries' set of security services will have a "here-there" dilemma that gives them less access to the information that might be of most interest, information from within their own borders.

But one agency's "here" is another agency's "there." Or, to make it more concrete, what is domestic spying to the Canadians is foreign spying to the Americans; what is domestic spying to the Brits is foreign spying to the French. And so on. The networked web of programs across a range of countries allow comprehensive electronic surveillance and involves a complex division of labor in which every agency is allowed to spy more aggressively on its partners' citizens that it is allowed to spy on its own. But there are rarely legal rules that regulate what information a foreign-directed security service is allowed to *pass on* or *accept* from another security service. As a result, interlinked spy agencies can target each other's citizens and then swap the data, all without violating a single law. The "here-there" constraint imposed by domestic legal regulation vanishes in an internationally coordinated division of labor. . . .

In addition to the "here-there" workaround, the division of labor among security services may allow other aspects of domestic law to be evaded because each country regulates around different distinctions. For example, both US and Canadian law require differentiating metadata—data about parties to and timing of communications which requires no warrant no intercept—from content of communications, which does require a warrant. But executive branch

interpretation of UK law apparently makes no such distinction . . . , making it unnecessary to collect the two through separate programs. . . .

TEMPORA [the UK program that intercepts internet traffic through transatlantic cables], then, gathers both content and metadata while the equivalent US and Canadian programs must differentiate the two. Tapping into the TEMPORA database allowed US and Canadian security personnel to have all of the information in one place, regardless of their domestic legal constraints. And since TEMPORA includes many communications of Americans and Canadians, access to the British data provides an almost complete workaround of the domestic legal constraints. . . .

Snowden's revelations have been greeted with strong criticism of pervasive surveillance by parliaments and representative assemblies around the world. While legislation to rein in security surveillance is just now starting to be introduced, the first stage of legislative action has involved the passage of resolutions condemning the surveillance. Two resolutions are of particular importance because of their geographically sweeping consequences and their assertion that there is a right of personal data privacy that parliamentarians will take a stand to protect. Excerpted below is a resolution of the European Parliament that calls for a European Digital Habeas Corpus, followed by an excerpt from the resolution of the UN General Assembly asserting a global right to data privacy. Both provisions challenge policies of online data interception and collection, and announce a far-reaching right to privacy.

European Parliament

Resolution of 12 March 2014 on the US NSA Surveillance Programme, Surveillance Bodies In Various Member States and Their Impact on EU Citizens' Fundamental Rights and on Transatlantic Cooperation in Justice and Home Affairs 2013/2188(INI)

A. [W]hereas data protection and privacy are fundamental rights; whereas security measures, including counterterrorism measures, must therefore be pursued through the rule of law and must be subject to fundamental rights obligations, including those relating to privacy and data protection;

B. whereas the ties between Europe and the United States of America are based on the spirit and principles of democracy, the rule of law, liberty, justice and solidarity;

C. whereas cooperation between the US and the European Union and its Member States in counter-terrorism remains vital for the security and safety of both partners; . . .

E. whereas following 11 September 2001, the fight against terrorism became one of the top priorities of most governments; whereas the revelations based on documents leaked by the former NSA contractor Edward Snowden put political leaders under the obligation to address the challenges of overseeing and controlling intelligence agencies in surveillance activities and assessing the impact of their activities on fundamental rights and the rule of law in a democratic society;

F. whereas the revelations since June 2013 have caused numerous concerns within the EU as to:

- the extent of the surveillance systems revealed both in the US and in EU Member States;
- the violation of EU legal standards, fundamental rights and data protection standards;
- the degree of trust between the EU and the US as transatlantic partners;
- the degree of cooperation and involvement of certain EU Member States with US surveillance programmes or equivalent programmes at national level as unveiled by the media;
- the lack of control and effective oversight by the US political authorities and certain EU Member States over their intelligence communities;
- the possibility of these mass surveillance operations being used for reasons other than national security and the fight against terrorism in the strict sense, for example economic and industrial espionage or profiling on political grounds; . . .
- the undermining of press freedom and of communications of members of professions with a confidentiality privilege, including lawyers and doctors;
- the respective roles and degree of involvement of intelligence agencies and private IT and telecom companies;
- the increasingly blurred boundaries between law enforcement and intelligence activities, leading to every citizen being treated as a suspect and being subject to surveillance;
- the threats to privacy in a digital era; . . .

K. whereas it is the duty of the European institutions to ensure that EU law is fully implemented for the benefit of European citizens and that the legal force of the EU Treaties is not undermined by a dismissive acceptance of extraterritorial effects of third countries' standards or actions; . . .

S. whereas fundamental rights, notably freedom of expression, of the press, of thought, of conscience, of religion and of association, private life, data protection, as well as the right to an effective remedy, the presumption of innocence and the right to a fair trial and non-discrimination, as enshrined in the Charter of Fundamental Rights of the European Union and in the European Convention on Human Rights, are cornerstones of democracy; whereas mass surveillance of human beings is incompatible with these cornerstones

AC.* whereas the transfer of personal data by EU institutions, bodies, offices or agencies or by the Member States to the US for law enforcement purposes in the absence of adequate safeguards and protections for the respect of the fundamental rights of EU citizens, in particular the rights to privacy and the protection of personal data, would make that EU institution, body, office or agency or that Member State liable, . . . for breach of EU law—which includes any violation of the fundamental rights enshrined in the EU Charter; . . .

AP. whereas large-scale access by US intelligence agencies has seriously eroded transatlantic trust and negatively impacted on trust as regards US organisations acting in the EU; whereas this is further exacerbated by the lack of judicial and administrative redress for EU citizens under US law, particularly in cases of surveillance activities for intelligence purposes;

AQ. whereas according to the information revealed and to the findings of the inquiry conducted by the LIBE [Civil Liberties] Committee, the national security agencies of New Zealand, Canada and Australia have been involved on a large scale in mass surveillance of electronic communications and have actively cooperated with the US under the so-called 'Five Eyes' programme, and may have exchanged with each other personal data of EU citizens transferred from the EU; . . .

BQ. whereas mass surveillance activities give intelligence agencies access to personal data stored or otherwise processed by EU individuals under cloud services agreements with major US cloud providers; whereas the US intelligence authorities have accessed personal data stored or otherwise processed in servers

* Paragraph numbers are reproduced according to the original.

located on EU soil by tapping into the internal networks of Yahoo and Google; whereas such activities constitute a violation of international obligations and of European fundamental rights standards including the right to private and family life, the confidentiality of communications, the presumption of innocence, freedom of expression, freedom of information, freedom of assembly and association and the freedom to conduct business; whereas it is not excluded that information stored in cloud services by Member States' public authorities or undertakings and institutions has also been accessed by intelligence authorities; . .

BW. whereas the fact that a certain level of secrecy is conceded to intelligence services in order to avoid endangering ongoing operations, revealing *modi operandi* or putting at risk the lives of agents, such secrecy cannot override or exclude rules on democratic and judicial scrutiny and examination of their activities, as well as on transparency, notably in relation to the respect of fundamental rights and the rule of law, all of which are cornerstones in a democratic society; . . .

BY. whereas democratic oversight of intelligence activities is still only conducted at national level, despite the increase in exchange of information between EU Member States and between Member States and third countries; whereas there is an increasing gap between the level of international cooperation on the one hand and oversight capacities limited to the national level on the other, which results in insufficient and ineffective democratic scrutiny; . . .

Main findings . . .

2. Points specifically to US NSA intelligence programmes allowing for the mass surveillance of EU citizens

4. Emphasises that trust has been profoundly shaken: trust between the two transatlantic partners, trust between citizens and their governments, trust in the functioning of democratic institutions on both sides of the Atlantic, trust in the respect of the rule of law, and trust in the security of IT services and communication; . . .

5. Notes that several governments claim that these mass surveillance programmes are necessary to combat terrorism; strongly denounces terrorism, but strongly believes that the fight against terrorism can never be a justification for untargeted, secret, or even illegal mass surveillance programmes; takes the view that such programmes are incompatible with the principles of necessity and proportionality in a democratic society; . . .

7. Considers that data collection of such magnitude leaves considerable doubts as to whether these actions are guided only by the fight against terrorism, since it involves the collection of all possible data of all citizens; points, therefore, to the possible existence of other purposes including political and economic espionage, which need to be comprehensively dispelled; . . .

11. Considers it crucial that the professional confidentiality privilege of lawyers, journalists, doctors and other regulated professions is safeguarded against mass surveillance activities; stresses, in particular, that any uncertainty about the confidentiality of communications between lawyers and their clients could negatively impact on EU citizens' right of access to legal advice and access to justice and the right to a fair trial;

12. Sees the surveillance programmes as yet another step towards the establishment of a fully-fledged preventive state, changing the established paradigm of criminal law in democratic societies whereby any interference with suspects' fundamental rights has to be authorised by a judge or prosecutor on the basis of a reasonable suspicion and must be regulated by law, promoting instead a mix of law enforcement and intelligence activities with blurred and weakened legal safeguards, often not in line with democratic checks and balances and fundamental rights, especially the presumption of innocence; . . .

13. Is convinced that secret laws and courts violate the rule of law; . . .

16. Strongly rejects the notion that all issues related to mass surveillance programmes are purely a matter of national security and therefore the sole competence of Member States; reiterates that Member States must fully respect EU law and the ECHR while acting to ensure their national security; . . .

Priority Plan: A European Digital Habeas Corpus - protecting fundamental rights in a digital age . . .

132. Decides to launch 'A European Digital Habeas Corpus' protecting fundamental rights in a digital age;

The distress about surveillance crosses continents. The UN General Assembly passed a strong resolution in December 2013, initiated by Germany and Brazil. Reactions in those countries came from disclosures that their leaders' phones were tapped, and their concerns have been channelled through

international organizations to reach a more comprehensive ban on mass collection of personal data. Brazil, for example, is seeking to develop the capacity to ensure that Brazilian internet traffic is not routed through US servers. Germany has initiated discussions within the EU about building internet architecture which would also avoid data transiting the US. Many other countries have also been outraged by the extent of global surveillance emanating from the US. The UN General Assembly adopted the following resolution by consensus creating an international right to privacy.

United Nations General Assembly
Resolution 68/167: The Right to Privacy in the Digital Age
(Dec. 18, 2013)

. . . [R]ecognizing that the exercise of the right to privacy is important for the realization of the right to freedom of expression and to hold opinions without interference, and is one of the foundations of a democratic society, . . .

Emphasizing that unlawful or arbitrary surveillance and/or interception of communications, as well as unlawful or arbitrary collection of personal data, as highly intrusive acts, violate the rights to privacy and to freedom of expression and may contradict the tenets of a democratic society,

Noting that while concerns about public security may justify the gathering and protection of certain sensitive information, States must ensure full compliance with their obligations under international human rights law,

1. Reaffirms the right to privacy, according to which no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, and the right to the protection of the law against such interference, as set out in article 12 of the Universal Declaration of Human Rights and article 17 of the International Covenant on Civil and Political Rights; . . .

3. Affirms that the same rights that people have offline must also be protected online, including the right to privacy;

4. Calls upon all States:

(a) To respect and protect the right to privacy, including in the context of digital communication;

(b) To take measures to put an end to violations of those rights and to create the conditions to prevent such violations, including by ensuring that relevant national legislation complies with their obligations under international human rights law;

(c) To review their procedures, practices and legislation regarding the surveillance of communications, their interception and the collection of personal data, including mass surveillance, interception and collection, with a view to upholding the right to privacy by ensuring the full and effective implementation of all their obligations under international human rights law;

(d) To establish or maintain existing independent, effective domestic oversight mechanisms capable of ensuring transparency, as appropriate, and accountability for State surveillance of communications, their interception and the collection of personal data;

5. Requests the United Nations High Commissioner for Human Rights to submit a report on the protection and promotion of the right to privacy in the context of domestic and extraterritorial surveillance and/or the interception of digital communications and the collection of personal data, including on a mass scale, to the Human Rights Council . . . with views and recommendations, to be considered by Member States

RELIGION AS A SOURCE OF LAW

DISCUSSION LEADERS

ROBERT POST AND ROSALIE ABELLA

II. RELIGION AS A SOURCE OF LAW

DISCUSSION LEADERS:
ROBERT POST AND ROSALIE ABELLA

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We accept the definition of the secular state offered later in this chapter by Dieter Grimm: The secular state “no longer derives its legitimacy from God, but instead bases its power on worldly grounds.”* A secular constitutional state derives its legitimacy from the consent of the governed.

In this chapter, we explore the dilemmas faced by modern secular constitutional states when dealing with religious sources of law. It is an understatement to say that constitutional secular states have never been easy with religious law. They aspire to an independence from religious law that they can never quite seem quite to achieve. At root this is because modern secular constitutional states fear that by interpreting religious doctrine they will undermine the exercise of freedom of religion. As a consequence, religious law in many jurisdictions comes to be treated as though it still retains a kind of sacred power capable of overwhelming secular adjudication.

In the first section, we explore the fundamental values that are at issue in the relationship between modern secular constitutional states and religious law. We discuss the origins and ideals associated with the secular state. We then examine two modern states, Israel and Pakistan. Pakistan repudiates the ideal of secularism, while Israel struggles to balance its commitment to Jewish law against its essentially secular framework. The cases we read make clear the stakes involved in a commitment to secular law. The first section concludes by examining why modern secular courts have often sought assiduously to avoid interpreting the meaning of religious doctrine. We examine the dramatic example of the Indian *Shah Bano* case in which the Supreme Court of India sought to interpret Islamic doctrine.

The second section addresses the question of how avowedly secular courts try to avoid entanglement with religious doctrine. We read cases in which secular courts are asked to determine the ownership of church property, or in which secular courts are asked to compel parties to obtain a Jewish religious divorce known as a “get.” In such contexts, courts struggle to ascertain how they may best avoid interpreting and enforcing religious law in the manner of the *Shah Bano* case.

The third section turns to the topic of religious accommodation, frequently understood as a doctrine designed to protect religious minorities against discrimination. But the readings we provide suggest that an important and unique dimension of the topic concerns the need of modern courts to avoid interpreting religious doctrine. In the United States, where this need is widely accepted, courts

* *Infra*, at II-8.

veer between being extremely hostile to claims of religious accommodation, as in the *Smith* case, and being unduly accepting of such claims, as is now becoming apparent in the various state versions of the Religious Freedom Restoration Act, which was designed to repudiate *Smith*. Outside the United States, where courts can use the technique of proportionality to adjudicate claims of religious accommodation, courts can evaluate claims of religious accommodation in a more nuanced fashion. This may be because proportionality analysis can sometimes authorize courts independently to determine the significance of religious practices.

THE STAKES OF USING RELIGIOUS DOCTRINE AS A SOURCE OF LAW

The Origin and the Ideals of the Secular State

Jürgen Habermas

Notes on Post-Secular Society *

. . . The secularization of the state was the appropriate response to the confessional wars of early modernity. The principle of “separating church and state” was only gradually realized and took a different form in each national body of law. To the extent that the government assumed a secular character, step-by-step the religious minorities (initially only tolerated) received further rights—first the freedom to practice their own religion at home, then the right of religious expression and finally equal rights to exercise their religion in public. An historical glance at this tortuous process, and it reached into the 20th century, can tell us something about the *preconditions* for this precious achievement, the inclusive religious freedom that is extended to all citizens alike.

After the Reformation, the state initially faced the elementary task of having to pacify a society divided along confessional lines, in other words, to achieve peace and order. . . .

As regards peace and order, governments had to assume a neutral stand even where they remained bound up with the religion prevailing in the country. In countries with confessional strife the state had to disarm the quarrelling parties,

* Excerpted from Jürgen Habermas, *Notes on Post-Secular Society*, 25 *NEW PERSPECTIVES* Q. 17 (2008).

invent arrangements for a peaceful coexistence of the inimical confessions and monitor their precarious existence alongside each other. In confessionally split countries such as Germany or the Netherlands, the opposing subcultures then each nested in niches of their own and subsequently *remained foreign* to one another in society. Precisely this *modus vivendi* (and this is what I would like to stress) proved to be insufficient when the constitutional revolutions of the late 18th century spawned a new political order that subjected the completely secularized powers of the state to both the rule of law and the democratic will of the people.

This constitutional state is only able to guarantee its citizens equal freedom of religion under the proviso that they no longer barricade themselves within their religious communities and seal themselves off from one another. All subcultures, whether religious or not, are expected to free their individual members from their embrace so that these citizens can *mutually recognize* one another in civil society as members of *one and the same* political community. As democratic citizens they give themselves laws which grant them the right, as private citizens, to preserve their identity in the context of their own particular culture and worldview. This new relationship of democratic government, civil society and subcultural self-maintenance is the key to correctly understanding the two motives that today struggle with each other although they are meant to be mutually complementary. For the universalist project of the political Enlightenment by no means contradicts the particularist sensibilities of a correctly conceived multiculturalism.

The *liberal rule of law* already guarantees religious freedom as a basic right, meaning that the fate of religious minorities no longer depends on the benevolence of a more or less tolerant state authority. Yet it is the democratic state that first enables the impartial application of this principled religious freedom. When Turkish communities in Berlin, Cologne or Frankfurt seek to get their prayer houses out of the backyards in order to build mosques visible from afar, the issue is no longer the principle per se, but its fair application. However, evident reasons for defining what should or should not be tolerated can only be ascertained by means of the deliberative and inclusive procedures of democratic will formation. The principle of tolerance is first freed of the suspicion of expressing mere condescension, when the conflicting parties meet as equals in the process of reaching an agreement with one another. How the lines between positive freedom of religion (i.e., the right to exercise your own faith) and the negative freedom (i.e., the right to be spared the religious practices of people of other faiths) should be drawn in an actual case is always a matter of controversy. But in a democracy those affected, however indirectly, are themselves involved in the decision-making process. . . .

The so-called multiculturalists fight for an unprejudiced adjustment of the legal system to the cultural minorities' claim to equal treatment. They warn against a policy of enforced assimilation with uprooting consequences. The secular state, they say, should not push through the incorporation of minorities into the egalitarian community of citizens in such a manner that it tears individuals out of their identity-forming contexts. From this communitarian view, a policy of abstract integration is under suspicion of subjecting minorities to the imperatives of the majority culture. . . .

On the other hand, the *secularists* fight for a colorblind inclusion of all citizens, irrespective of their cultural origin and religious belonging. This side warns against the consequences of a "politics of identity" that goes too far in adapting the legal system to the claims of preserving the intrinsic characteristics of minority cultures. From this "laicistic" viewpoint, religion must remain an exclusively private matter. Thus, Pascal Bruckner rejects cultural rights because these would give rise to parallel societies—to "small, self-isolated social groups, each of which adheres to a different norm." Bruckner condemns multiculturalism roundly as an "anti-racist racism," though his attack at best applies to those ultra-minded multiculturalists who advocate the introduction of collective cultural rights. Such protection for entire cultural groups would in fact curtail the right of their individual members to choose a way of life of their own. . . .

Certainly, the domain of a state, which controls the means of legitimate coercion, should not be opened to the strife between various religious communities, otherwise the government could become the executive arm of a religious majority that imposes its will on the opposition. In a constitutional state, all norms that can be legally implemented must be formulated and *publicly justified* in a language that all the citizens understand. Yet the state's neutrality does not preclude the permissibility of religious utterances within the political public sphere, as long as the institutionalized decision-making process at the parliamentary, court, governmental and administrative levels remains clearly separated from the informal flows of political communication and opinion formation among the broader public of citizens. The "separation of church and state" calls for a filter between these two spheres—a filter through which only "translated," i.e., secular, contributions may pass from the confused din of voices in the public sphere into the formal agendas of state institutions. . . .

Dieter Grimm

*Conflicts Between General Laws and Religious Norms**

. . . The secular constitutional state . . . is part of a long process whose beginnings date back to the Middle Ages. The decisive turn occurred, however, in the wake of the Reformation of the sixteenth century. Far from being a spiritual event only, it destroyed the religious foundation of the existing social and political order—not because the relevance of God’s revelation for the worldly order and for individual behavior was now questioned, but because the content of the revelation and of God’s will was no longer uncontested. The immediate consequences of the dispute about the truth were the devastating religious wars of the sixteenth and seventeenth centuries.

. . . [T]he restoration of internal peace became the most important political task of the time. The solution was the secular constitutional state. This is not to say that the three elements of the notion of a “secular constitutional state” came about simultaneously. Neither were they necessarily linked with each other. But only together did they form the achievement that enabled the peaceful coexistence of persons of different beliefs in one polity and the recognition of the diversity as legitimate. All in all, it was a protracted process, full of deviations and setbacks, producing different solutions from country to country. . . .

The *state*—By “state” we understand a political entity in which the various prerogatives that had been dispersed in medieval times among many independent bearers and that did not refer to a territory, but to persons, were united in one hand (historically in that of the prince) and condensed into the public power in the singular to which all inhabitants of a territory were subjected. In order to fulfill his pacifying function, the bearer of this unprecedented public power claimed the right to make law regardless of divine revelation and to enforce it against everybody, a right that presupposed the monopoly of legitimate force, the consequence of which was the privatization of civil society. In short, an autonomous political system emerged.

The *secular* state—The secular state is the state that dissolves its bonds with religion and claims independence from religious truths. This state no longer derives its legitimacy from God, but instead bases its power on worldly grounds. It does not serve a divine destination and does not feel responsible for the eternal salvation of its subjects. Rather, it pursues a common good of a worldly nature

* Excerpted from Dieter Grimm, *Conflicts Between General Laws and Religious Norms*, in CONSTITUTIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL (Susanna Mancini & Michel Rosenfeld eds., 2014).

whose core consists in the security and welfare of its inhabitants. This does not mean that religious truths lose their right to exist, but they are privatized. They become a matter for the individual and the associations that the individual chooses to join. They are regarded as compatible with the secular state as long as they do not claim absolute validity for society as a whole and stay within the framework of the public order.

The secular constitutional state . . . derives its legitimacy from a consent of the governed. In short, it is the democratic state, in which a paramount law regulates the establishment and exercise of political power. Political power is regarded as a mandate, limited in time and scope, the bearers of which are accountable to the people for the way they use their power. Moreover, it is the state in which the legal order is determined in a discursive public process, subject to change, and in which participation of the citizens in the formation of the collective will is guaranteed, as well as is their individual liberty and equality *vis-a-vis* government.

One of these liberties is freedom of religion, yet, not understood as freedom of one single religion with the exclusion of others. For in this case, it would be a privilege instead of equal freedom for all religious beliefs. Freedom of religion is an essential part of the constitutional state. The secular constitutional state should therefore not be confused with a secular society. Both are not in contradiction. The more multi-religious a society, the more important it is that the state remain neutral in religious matters. A state that would take sides in religious matters would lose its capability to guarantee liberty for all religious faiths.

However, different secular constitutional states may have quite different attitudes toward religion. There is a militant secularism that denies religious beliefs any public role and insists on their belonging strictly to the private sphere. There is also a secularism that separates church and state: the state accepts the role religion plays in society, but is prohibited from promoting religious activities or giving material or immaterial subsidies to religious communities. There is finally a type of secularism that recognizes religion as an elementary human urge that seeks public expression, an urge that the state not only has to respect, but also must protect and maybe even promote—altogether the opposite of a secular fundamentalism.

Adjudication in Non-Secular States

Shefer v. State of Israel Supreme Court of Israel CA 506/88, 170 (1993)

Facts [as summarized by the Court]:

The appellant, Yael, a minor, was born with the incurable Tay-Sachs disease. When she was two, her mother applied to the District Court for a declaratory judgment that when Yael's condition worsened, she would be entitled not to receive treatment against her will. The District Court denied the application. An appeal was filed to the Supreme Court, and in September 1988, the Supreme Court denied the appeal, without giving its reasons. When Yael was three years old, she died. The following judgment sets forth the reasons for the aforesaid decision of the Supreme Court, and discusses the right of a patient to refuse medical treatment, and the right of a parent to refuse medical treatment for a child.

Vice-President Elon, joined by Justice Malz:

The subject before us is difficult, very difficult. It touches the foundations of human values and ethics and the heights of the philosophy of generations past and present. It concerns the basis of the cultural and spiritual fabric of our society. Therefore we delayed giving our reasons, so that we might fully examine their nature, substance and value. By so doing, we have fulfilled what we were commanded: Be cautious in judgment (Mishnah, Avot (Ethics of the Fathers), 1, 1 [58]).

Against your will you are created, and against your will you are born; against your will you live and against your will you die (Mishnah, Avot (Ethics of the Fathers), 4, 22 (58)). This is stated in the teaching of the Sages. With regard to the first two—creation and birth—it is hard to conceive that these are disputed. The subject of our deliberation is the last two, which contain a clue to the heart of our matter.

. . . As stated, the purpose of the basic rights protected in the Basic Law: Human Dignity and Liberty is to incorporate the values of the State of Israel as a Jewish and democratic State. . . . This examination of the values of the State of Israel as a Jewish and democratic State and the direction of this dual-value purpose is of great significance. The basic rights, provisions and rules in the Basic

Law: Human Dignity and Liberty were not intended to explain themselves but they were intended to explain the whole legal system in Israel, since they constitute the fundamental values of the Israeli legal system, with all that this implies. In view of the constitutional status and importance of the Basic Law: Human Dignity and Liberty, the provisions of this law are not merely the fundamental values of the Israeli legal system, but they constitute the very foundations of the Israeli legal system, and therefore the statutes and laws of this system must be interpreted in accordance with the said purpose of this Basic Law, i.e., in accordance with the values of a Jewish and democratic State. . . .

The interpretation of the concept values of a Jewish State was discussed by the chairman of the Constitution, Law and Justice Committee when the Basic Law: Human Dignity and Liberty reached its final reading in the Knesset. . . .

The law opens with a declarative statement, a pronouncement that it is designed to protect human dignity and liberty in order to incorporate into statute the values of the State of Israel as a Jewish and democratic State. In this sense, the law, in its very first section, stipulates that we regard ourselves as bound by the values of Jewish tradition and Judaism, for the law expressly stipulates—the values of the State of Israel as a Jewish and democratic State. The Law defines some of the basic freedoms of the individual, *none of which conflict with Jewish tradition or the set of values that prevails and is currently accepted in the State of Israel by all the parties of the House.* . . .

Interpretation of the values of the State of Israel as a Jewish State is therefore in accordance with the values of Jewish tradition and Judaism, namely in accordance with what arises from an examination of the interpretation of fundamental values in the sources of Jewish tradition and Judaism. By this method of interpretation, we will be fulfilling the legislator's statement with regard to the proper interpretation of the values of the State of Israel as a Jewish State.

. . . The basic approach of Judaism with regard to the obligation of the doctor to heal and the obligation of the patient to be healed has major ramifications on the issue before us with respect to the refusal of a patient to receive medical treatment and the permission and entitlement of the doctor to accede to this refusal of the patient. . . . The creation of man in G-d's image is a cardinal principle for the value of the life of every person, and it is a source of basic rights human dignity and liberty. . . . Judaism has derived additional implications from the principle that in the image of G-d He made man. Thus, for

example, just as man is commanded not to harm the Divine image of his fellow man, so too is he commanded not to harm his own Divine image, by harming his own life, body and dignity.

. . . A major rule and fundamental principle in Jewish law is that human life is one of those things that are of immeasurable importance, both with regard to its value and with regard to its duration. Human life cannot be measured and calculated, and each second of human life has an unique value just like many long years of life. Thus Jewish law rules that:

A dying person is like a living person in all respects . . . whoever harms him is a spiller of blood. To what can this be compared? To a flickering candle; if someone touches it, it is extinguished. And anyone who closes the dying person's eyes as he is dying is a spiller of blood, but he should wait a little in case the dying man has merely fainted (Babylonian Talmud, Tractate Shabbat, 151b (127); Maimonides, Mishneh Torah, Hilechot Evel (Laws of Mourning) 4 5 (128); Rabbi Yosef Karo, Shulhan Aruch, Yoreh Deah 339, 1 (87)).

Even a flickering candle burns, and it too can give light.

. . . Now that we have reached this point, and we have considered the values of a Jewish State on the case before us, we must consider and study the details of this issue according to the values of a democratic State . . . the court has chosen the approach that is consonant with our moral and cultural beliefs, i.e., those of Jewish tradition—that are deeply entrenched in the Jewish consciousness. This is a synthesis between Jewish values and democratic values, which entered Israeli law not by means of a binding mandate of the legislator, but from wise and correct interpretation according to the cultural-historical principles of the legal system.

. . . It is in the nature of such a synthesis that it seeks what is common to both systems, the Jewish and the democratic, the principles that are common to both, or at least that can be reconciled with them. . . .

Justice H. Ariel, dissenting in part:

With all respect, I do not accept the argument that such an application by the guardians is contrary to any provision of the Legal Capacity and Guardianship Law. . . . I also do not accept that one of the parents may not make the application on behalf of the minor without the other parent. . . .

The minor may himself apply in any manner or through any proper person or organization, and certainly he may do so through his mother, in this or other situations of distress, to the proper court. . . .

We should not lock the door in the face of a minor in distress, as long as he does not abuse this method It is incumbent upon the court, in this and other cases, to leave a door open in order to prevent injustice and distress to minors when their application is a genuine one, including a need of a terminal patient as in the case before us, according to the principle: “Open for us a gate, at the time of locking the gate, for the day is passing” (the Closing Prayer on the Day of Atonement).

Yuval Sinai

Jewish Law in Israel: Law, Religion, and State *

. . . Israel’s constitutional system is based on two tenets: (1) that the state is Jewish and (2) that the state is democratic.

It is this commitment to the creation of a synthesis between particularistic (Jewish) and universalistic (democratic) values that has proved to be the major constitutional challenge faced by Israel since its foundation. Reaching such a synthesis is especially problematic given that approximately 20% of Israel’s citizenry consists of non-Jews, primarily Muslims, Christians, and Druzes. Even within the Jewish population itself, the exact meaning of Israel as a Jewish state has been highly contested, not only do opinions differ as to whether Jews are citizens of a nation, members of a people, participants in a culture, or co-religionists, but even within the latter there are widely divergent beliefs and degrees of practice.

. . . As a rule, it is common today in the world that the public life of the state is not neutral and in many ways cannot be neutral. . . . [T]he state cannot avoid promoting certain cultural identities. Every country, even if it defines itself as nationally neutral, reflects in practice a certain culture, and in a democratic country this is generally the culture of the majority group. Indeed, Israel, as the Jewish nation-state, promotes largely the cultural identity of the Jewish majority, which constitutes almost 80% of the population. Nevertheless, in recent decades,

* Excerpted from Yuval Sinai, *Jewish Law in Israel: Law, Religion and State*, Yale Lecture Council of Middle East Studies Colloquium (2013).

owing to large waves of immigration and to internal social processes, there is increasing talk about an Israeli multicultural society within the framework of a Jewish and democratic state.

. . . In 1980, the Foundations of Law Act (Sec. 2) decreed that “Where the court, faced with a legal issue requiring determination, finds no answer thereto in the statutes or case law or by analogy”—there is lacunae in the law and that shall be filled “in the light of the principles of freedom, justice, equity, and peace of Israel’s heritage.”

The Foundations of Law Act legislation of 1980 adopted the vague concept of “Israel heritage,” which was naturally interpreted differently by secular liberal judges than by religious ones, and in light of the interpretation of the Israel supreme court, which as we said often reflect the views of the Israeli secular liberals, the use of this law as a basis for incorporating Jewish law principles by the Israeli courts is quite rare.

In 1992, two basic laws decreed that the basic principles must be interpreted in light of the values of a Jewish and democratic state. Enactment of the two basic laws of 1992 marks a significant change in the balance of power between liberalism and Judaism in the law created and applied by the courts. Both basic laws determined that henceforth the law shall draw its inspiration not only from one pole, that of liberalism, but from two opposite poles, liberalism and Judaism. . . .

A difficult problem that many Israeli jurists faced is how to express the Jewish values in the State of Israel . . . [and] the most difficult question of all: What are these “Jewish values” that the Jewish state is expected to advance?

What is the content of “the values of the Jewish state”? Most of the controversy on this issue arose between judges Barak and Elon in the debate following the enactment of two basic laws of 1992. The two judges represent two competing fundamental concepts in Israeli society. Justice Aharon Barak . . . clearly represents the secular-liberal position, which strives to make the State of Israel as similar as possible to other Western countries.

By contrast, Justice Menachem Elon, . . . [was] the principal supporter among the justices of basing Israeli law on the sources of Jewish law. Even Barak grants a central position to Jewish law as a source for shaping the character of the State of Israel as a Jewish state. But whereas Barak spoke of applying the Halakha at the level of values, worldviews, and basic principles, and not of a direct application of the specifics of the Halakha, Elon talked about applying the

Halakha directly within the framework of the term “Jewish state.” And what about the relationship between a “Jewish state” and “democratic state?”

Justices Barak and Elon agree that the terms “Jewish state” and “democratic state” should be interpreted as harmoniously as possible. Both spoke about striving to find the reality of the “common denominator” between the concepts, and creating a “synthesis.” But a serious problem arises when there is conflict between the terms “Jewish” and “democratic.” . . .

Solodkin v. Beit Shemesh Municipality
Supreme Court of Israel
HCJ 953/01, 41(2) (2004)

President A. Barak:

Tiberias Municipality prohibited, in a bylaw, the sale of pig meat and meat products in all areas within the Municipal boundaries. Beit Shemesh Municipality and Carmiel Municipality prohibited, in a bylaw, the sale of pig meat and meat products in some of the areas within the Municipal boundaries, while permitting the sale of pig meat and meat products in other areas. Were these bylaws passed lawfully? That is the question before us. . . .

Since the nineteen-fifties, the question of the sale of pig meat and meat products within the boundaries of local authorities has remained constantly on the political, legal and judicial agenda in Israel. At first, local authorities made a license to run a business conditional upon not selling pig meat and meat products within its boundaries. When the legality of this condition was brought before the High Court of Justice, it was held that a local authority does not have the power to make a business license conditional upon not selling pig meat and meat products.

. . . In addition to refusing a license to open a business that sold pig meat and meat products pursuant to general powers, several local authorities adopted a direct measure: they enacted bylaws that expressly prohibited the sale of pig meat within the boundaries of the local authority. The legality of these bylaws came before the Supreme Court in the middle of the nineteen-fifties. It was held that a local authority does not have the power to prohibit the sale of pig meat by means of subordinate legislation. . . . “[T]he power to enact subordinate legislation of a local nature should not be allowed to regulate religious problems under the cloak

of regulating the sale of meat in a certain place. The Knesset, rather than the municipality, should regulate matters of religion.”

... [T]he Knesset... enacted the Local Authorities (Special Authorization) Law, 5717-1956. . . .

1. Notwithstanding what is stated in any other law, a local authority shall be competent to enact a bylaw that will restrict or prohibit the sale of pig meat and meat products that are intended for consumption.
2. A local authority may impose a restriction or prohibition as stated in section 1 on the whole area of its jurisdiction or on a specific part thereof, provided that they shall apply to the whole of the population in that area or in that part.

On the basis of the enabling law, many local authorities enacted bylaws restricting the sale of pig meat and meat products. Frequently the bylaw imposed a complete prohibition of the sale of pig meat and meat products within the boundaries of the local authority. Sometimes the prohibition was limited to a certain area within its jurisdiction. Attempts were made in the Knesset to replace the arrangement in the Local Authorities (Special Authorization) Law with a general prohibition (see, for example, the draft Prohibition against Raising Pigs Law (Amendment), 5785-1985). These attempts did not become legislation. . . .

[T]he petitioners argued before us that the bylaws . . . prejudice the basic right of the secular public that consumes non-kosher meat to freedom of conscience and freedom from religion. In the opinion of the petitioners, the enabling law should be given a meaning that is consistent with the Basic Law: Human Dignity and Liberty and with the Basic Law: Freedom of Occupation. . . . [T]he real motive for enacting the bylaws that prohibit the sale of pig meat and meat products is a national-religious one. The bylaws seek to compel all the residents of the local authorities to comply with religious laws. . . .

... [T]he enabling law refrained from imposing a national prohibition (whether total or restricted) on the consumption of pig meat and meat products, but it provided . . . an arrangement of its own, which authorizes the local authority to determine local arrangements with regard to the sale of pig meat and meat products. . . .

The *first* purpose that underlies the enabling law concerns the desire to protect the feelings of Jews who regard the pig as the symbol of impurity. This

outlook is, of course, religious in origin. “The pig has always been considered a symbol of abhorrence, abomination and disgust by the Jewish person.” A similar approach is accepted also by the Islamic religion. . . . The purpose of the enabling law is to protect the feelings of Jews (believers and non-believers) who are seriously injured by the sale of pig meat and meat products.

The *second* purpose that the enabling law was intended to achieve concerns the desire to realize the liberty . . . to determine his own lifestyle and consequently the freedom to decide what food he will buy and eat, and what food he will not buy or eat. The prohibition of the sale of pig meat harms this liberty. . . . Because the prohibition is motivated by religious considerations, it also harms freedom of conscience and “freedom from religion.”

. . . Compromise is required by the values of the State of Israel as a Jewish and democratic state. . . .

. . . In this balance, on one pan of the scales lies the consideration of religious and national sensibilities. These jointly reflect, in a broad sense, considerations of public interest. These considerations have great social importance, and they may, in certain conditions, reduce the protection given to human rights. On the other hand lie considerations associated with the liberty of the individual . . . [t]hey jointly reflect considerations of human rights. The (vertical) balance between them is made in accordance with the tests of proportionality and reasonableness. . . .

This interpretation provides criteria for a balance between the injury to religious and national sensibilities, on the one hand, and the violation of human rights, on the other. This interpretation directly affects the scope of the discretion of the local authority when enacting a bylaw concerning the sale of pig meat and meat products. . . . Now they must reconsider, against the background of the criteria that balance the conflicting values, as it emerges from the interpretation of the enabling law. The Minister of the Interior shall also reconsider his position. We ourselves are not expressing any position with regard to the compliance of the bylaws that are the subject of the petitions before us with the criteria required by the enabling law. In order to allow the reconsideration to take place, we are suspending the Tiberias bylaw, the Carmiel (Pig Meat) Bylaw, 5738-1978, and the Carmiel (Pig Meat) Bylaw, 5761-2001, and the Beit Shemesh bylaw.

Vice-President Emeritus Or, Vice-President Mazza, Justice Cheshin, Justice Türkel, Justice Beinisch, Justice Procaccia, Justice Levy, and Justice Naor, concurring in the judgment of President Barak.

Martin Lau

*Sharia and National Law in Pakistan**

. . . The Objectives Resolution was the first product of the Constituent Assembly of Pakistan and was meant to guide the drafting of Pakistan's first constitution. In structure and tone it mirrored that of India's Objectives Resolution, but its references to Islam were regarded controversial, especially amongst the non-Muslim members of the Constituent Assembly. From today's perspective, the discussions surrounding the adoption of the Objectives Resolution have a certain air of déjà vu, given that the principle arguments, and tensions, have remained the same over the past 60 years: is Pakistan's legal order a secular one, with the state taking no interest in the religions of its citizens apart from allowing them to practice them? Or is Pakistan an Islamic state, which gives preferential treatment to its Muslim citizens? . . .

The main concern for non-Muslims was not the promise that Muslims should be enabled to order their lives in accordance with Islam—after all this had been the colonial practice as visible in the system of personal laws for both Muslims and Hindus—but the Objectives Resolution's opening sentence which provided that

Whereas sovereignty over the entire universe belongs to God Almighty alone and the authority which He has delegated to the State of Pakistan through its people for being exercised within the limits prescribed by Him is a sacred trust; This Constituent Assembly representing the people of Pakistan resolves to frame a constitution for the sovereign independent State of Pakistan.

The non-Muslim members of the Constituent Assembly claimed that the Objectives Resolution envisaged the creation of an Islamic state and was in breach of the promises made by the founder of Pakistan, Mohammed Ali Jinnah. His vision, they charged, had been to create a secular state in which religion was to be regarded as an entirely private matter. . . .

* Excerpted from Martin Lau, *Sharia and National Law in Pakistan*, in *SHARIA INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT* (Jan Michiel Otto ed., 2011).

The concerns of the Hindu members of the Constituent Assembly were to prove entirely correct, albeit that the erosion of the rights of minorities and the creation of an Islamic state took place over a long period of time.

At first glance the Constitution 1973 replicated the approach taken by its predecessors. . . . However, the increasing influence of Islamic parties is visible in the constitution's additional references to Islam, which had been missing from the previous constitutions. Both the Prime Minister and the President had to be Muslims but the oath to be taken by them included a statement to the effect that they believed in "the Prophethood of Muhammad (peace be upon him) as the last of the Prophets and that there can be no Prophet after him." . . . This provision was intended to prevent Ahmadis* from assuming these offices. In a further affirmation of the religious foundation of the constitutional order Islam was declared the state religion.

. . . Article 2A, added to the Constitution in 1985, has been used extensively by Pakistan courts in the context of constitutional cases. Article 2A stipulates that "[t]he principles and provisions set out in the Objectives Resolution are reproduced in the Annex and hereby made substantial part of the Constitution and to have effect accordingly." . . . Once incorporated into the main body of the Constitution of 1973 the Objectives Resolution's provision that "Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah" was taken up by judges in order to review the validity of laws on the basis of Islam, and, throughout the 1990s, to justify an expansive interpretation of the constitutionally guaranteed fundamental rights. . . .



* The Ahmadi community, a part of the Islamic tradition, follows the teachings of the nineteenth century religious leader Mirza Ghulam Ahmad. Approximately 4 million Ahmadis live in Pakistan, and the minority community has historically experienced prejudice and discrimination due to the perception, and eventually the legal determination, that they are non-Muslims under Pakistan's official definition of Islam.

Tayyab Mahmud

*Freedom of Religion and Religious Minorities in Pakistan: A Study of
Judicial Practice*^{*}

. . . This Article focuses upon the remarkably divergent pronouncements of Pakistan's judiciary regarding the religious status and freedom of religion of one particular religious minority, the Ahmadis. The superior judiciary of Pakistan has visited the issue of religious freedom for the Ahmadis repeatedly since the establishment of the State, each time with a different result. The point of departure for this examination is furnished by the recent pronouncement of the Supreme Court of Pakistan in *Zaheeruddin v. State* (1993), wherein the Court decided that Ordinance XX of 1984 ("Ordinance XX" or "Ordinance"), which amended Pakistan's Penal Code to make the public practice by the Ahmadis of their religion a crime, does not violate freedom of religion as mandated by the Pakistan Constitution. . . .

Pakistan's political and constitutional framework during the first phase of its existence as an independent country furnished the context within which the superior judiciary was able to fashion a posture of robust protection of freedom of religion of religious minorities. . . . The Objectives Resolution was a statement of intent regarding Pakistan's future Constitution and contained a deliberately vague pledge to incorporate Islamic principles. . . . Pakistan's first constitution, adopted in 1956, guaranteed the fundamental rights of all citizens to profess, practice, and propagate any religion. While the following years saw the rise and demise of constitutional orders, the ruling elites remained committed to religious freedom and the protection of religious minorities. As early as 1952, the Chief Court of Sind held that:

[I]t is well-settled law, and one of the fundamental principle[s] of the Muhammadan Law itself, that no Court can test or g[a]uge the sincerity of religious belief, and in order to hold that a person was Sunni Muslim, it was sufficient for a Court to be satisfied that he professed to be a Sunni Muslim. It is not permissible [for] any Court to enquire further into the state of the mind and the beliefs of a person who professed to belong to a particular faith and inquire whether his actual beliefs conformed to the orthodox tenets of that particular faith. . . .

^{*} Excerpted from Tayyab Mahmud, *Freedom of Religion and Religious Minorities in Pakistan: A Study of Judicial Practice*, 19 *FORDHAM INT'L L.J.* 40 (1995).

Following the coup d'état in 1958, the Constitution of 1956 was abrogated. The new Constitution of 1962 initially omitted fundamental rights. However, the First Amendment Act of 1964, reinstated the fundamental rights, including freedom of religion, identical to the ones in the Constitution of 1956. In 1969, the Lahore High Court enforced this constitutional guarantee by specifically rejecting the right of anybody to call Ahmadis non-Muslim, and held that there were no grounds for either a declaration that the Ahmadis are non-Muslims or for an injunction against Ahmadis calling themselves Muslims.

The Lahore High Court surveyed a wide range of primary and secondary sources of Islamic law, quoted relevant passages from the Qur'an, and concluded that "[f]reedom of thought and conscience could not have been guaranteed in clearer terms." The Lahore High Court designated instances of dubbing Ahmadis as apostates and of violence against them as "sad instances of religious persecution against which human conscience must revolt, if any decency is left in human affairs." . . .

The third phase of judicial conduct regarding religious freedom and religious minorities unfolded in the context of the institutionalization of praetorianism and "Islamization" of society and politics under the martial law regime of General Zia-ul-Haq. . . . The judicial system furnished a particularly fertile ground for "Islamization." Salient changes included the introduction of the hudood penal code, curtailment of the scope of judicial review, dismantling of the tenurial system of the superior judiciary, establishment of military courts, and establishment of Shari'at courts. . . .

It was in this context that a third round of anti-Ahmadi agitation unfolded. A resurgent Tehrik i-Khatm-i-Nabuwat [End of Prophethood Movement] raised new demands of sanctions against the Ahmadis, announced plans for an All-Pakistan Conference to be held on April 27, 1984, and issued a warning that if the demands were not met, "direct action" would be launched after April 30, 1984. The martial law regime complied with the demands, and on April 26, 1984, Ordinance XX of 1984 was issued. . . .

In *Zaheeruddin v. State* (1993), the Supreme Court of Pakistan voted to uphold the constitutionality of Pakistan's anti-blasphemy laws. At issue was a challenge to the statutes by members of the Ahmadi minority group, who had been charged with blasphemy for declaring themselves to be Muslim and displaying the "Kalima," or Islamic creed, on their persons and buildings.

Zaheeruddin v. State
Supreme Court of Pakistan
26 S.C.M.R. 1718 (1993)

Justice Abdul Qadeer CHAUDHRY, delivering the opinion of the Court:

It was for the first time in the Constitutional history of Pakistan, that the Objective Resolution, which hence-forth formed part of every constitution as a preamble, was adopted and incorporated in the Constitution, in 1985, and made its effective part. . . .

This was the stage, when the chosen representatives of people, for the first time accepted the sovereignty of Allah, as the operative part of the Constitution, to be binding on them and vowed that they will exercise only the delegated powers, within the limits fixed by Allah. The power of judicial review of the superior courts also got enhanced.

. . . It is thus clear that the Constitution has adopted the Injunctions of Islam as contained in Quran and Sunnah of the Holy Prophet as the real and the effective law. In that view of the matter, the Injunctions of Islam as contained in Quran and Sunnah of the Holy Prophet are now the positive law. The Article 2A, made effective and operative the sovereignty of Almighty Allah and it is because of that Article that the legal provisions and principles of law, as embodied in the Objectives Resolution, have become effective and operative. Therefore, every manmade law must now conform to the Injunctions of Islam as contained in Quran and Sunnah of the Holy Prophet (pbuh). Therefore, even the Fundamental Rights as given in the Constitution must not violate the norms of Islam.

It was also argued that the phrase ‘glory of law’ as used in Article 19 of the Constitution cannot be availed with regard to the rights conferred in Article 20. Article 19 which guarantees freedom of speech, expression and press makes it subject to reasonable restrictions imposed by law in the interest of glory of Islam etc., and decency or morality. The restrictions given therein cannot, undoubtedly, be imported into any other fundamental right. Anything, in any fundamental right, which violates the Injunctions of Islam thus must be repugnant. It must be noted here that the Injunctions of Islam, as contained in Quran and the Sunnah, guarantee the rights of the minorities also in such a satisfactory way that no other legal order can offer anything equal. It may further be added that no law can violate them.

. . . It is the cardinal faith of every Muslim to believe in every Prophet and praise him. Therefore, if anything is said against the Prophet, it will injure the

feelings of a Muslim and may even incite him to the breach of peace, depending on the intensity of the attack . . . the Ahmadis like other minorities are free to profess their religion in this country and no one can take away that right of theirs, either by legislation or by executive orders. They must, however, honor the Constitution and the law and should neither desecrate or defile the pious personage of any other religious including Islam, nor should they use their exclusive epithets, descriptions and titles and also avoid using the exclusive names like mosque and practice like ‘Azan,’ so that the feelings of the Muslim community are not injured and the people are not misled or deceived as regard the faith.

Senior Justice Shafiur RAHMAN, dissenting:

. . . [C]lause (3) of Article 260 of the Constitution is of importance . . . :

“In the Constitution and all enactments and other legal instruments, unless there is anything repugnant in the subject or context,

(a) “Muslim” means a person on who believes in the unity and oneness of Almighty Allah, in the absolute and unqualified finality of the Prophethood of Muhammad (peace be upon him), the last of the prophets, and does not believe in, or recognize as a prophet or religious reformer, any person who claimed or claims to be, a prophet, in any sense of the word or of any description whatsoever, after Muhammad (peace be upon him); and

(b) “non-Muslim” means a person who is not a Muslim and includes a person belonging to the Christian, Hindu, Sikh, Buddhist or Parsi community, a person of the Qadiani group or the Lahori group (who call themselves ‘Ahmadis’ or by any other name), or a Bahai, and a person belonging to any of the scheduled castes.

Article 20 of the Constitution in the Chapter of Fundamental Rights . . . :

20. Freedom to profess religion and to manage religious institutions - Subject to law, public order and morality, —

(a) every citizen shall have the right to profess, practice and propagate his religion; and

(b) every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions.

. . . [F]ar as the five appeals arising out of criminal trial are concerned . . . three of them have originated in the complaint of Nazir Ahmad Taunsvi directly concerned with the Khatm-e-Nabuwat movement who made a grievance of the fact that certain persons were roaming about in the Bazar with the badges of 'Kalma Tayyabba' exhibited on their chest. They were known to be Quadiani. Some of them on being questioned said that they were Muslim. This act of theirs of wearing a badge of the 'Kalma Tayyabba' was taken to be their posing as Muslim. This conviction is defective because in view of the discussion and findings already recorded for an Ahmadi to wear a badge having 'Kalma Tayyabba' inscribed on it does not per se amount to outraging the feelings of Muslims nor does it amount to his posing as a Muslim. . . .

Secular Interpretations of Religious Law: India and the *Shah Bano* Case

In India, state courts are given authority to interpret religious doctrine. But with what authority can a secular court proclaim the "official" meaning of religious doctrines? This question became famous in the *Shah Bano* case.

Pratibha Jain

Balancing Minority Rights and Gender Justice: The Impact of Multiculturalism on Women's Rights In India^{*}

. . . The task of creating a democratic system of governance after India's independence was enormous. The sheer linguistic, ethnic, religious, racial, and cultural diversity of the Indian populace posed special challenges to the constitutional framers, who understood that national unity and inter-group harmony would require protection for minority groups. While the members of the Constituent Assembly agreed on the need for a solid framework of fundamental rights, they did not agree on how to blend a scheme of civil and political rights

^{*} Excerpted from Pratibha Jain, *Balancing Minority Rights and Gender Justice: The Impact of Protecting Multiculturalism on Women's Rights in India*, 23 BERKELEY J. INT'L L. 201 (2005).

with the concurrent challenges of forging structures for economic and social governance. . . .

. . . Post-independence India followed a policy of cultural pluralism by maintaining systems of separate personal laws for Hindu, Muslim, and Christian communities, while concurrently assigning itself the goal of working towards a uniform civil code. Including a Declaration of Rights was very important to the early drafters. As Granville Austin noted: “India was a land of communities, of minorities, racial, religious, linguistic, social and caste. . . . Indians believed that in their ‘federation of minorities’ a declaration of rights was as necessary as it had been for the Americans.” . . .

[T]he Indian Constitution exhorts the state to create a uniform civil code. . . . Historians have noted that the institutionalization of separate laws reinforced the boundaries between minority communities and solidified identities along religious affiliations. Instead of moving toward a secular, equality-based legal system, the recognition of personal laws under the guise of protecting minorities from a dominant majority culture helped institutionalize patriarchal traditional practices that disadvantage Indian women. In particular, support for personal laws relating to polygamy, divorce, property inheritance, and maintenance, all of which directly impact the lives of women, lies at the center of the historical resistance to the implementation of a uniform civil code.

At present, India does not have a uniform civil code that would apply to all citizens irrespective of their religious or cultural identity. However, all Indians can choose a civil marriage under the Special Marriage Act of 1954 irrespective of their religion. Should a couple register under this Act, they are bound by the Act’s provisions, along with the provisions of the Indian Succession Act, which relates to the succession of property, instead of their respective personal laws. If a couple does not register under the Special Marriage Act, their respective personal laws apply. Thus the Special Marriage Act is an “opt out” provision for individuals who do not want to be bound to the marriage rules of their religious communities. . . .

Mohammed Ahmed Khan v. Shah Bano Begum
Supreme Court of India
1 S.C.S. 96 (1985)

The Judgment of the Court was delivered by CHANDRACHUD, C.J.:

This appeal, arising out of an application filed by a divorced Muslim woman for maintenance under Section 125 of the Code of Criminal Procedure, raises a straightforward issue which is of common interest not only to Muslim women, not only to women generally but, to all those who, aspiring to create an equal society of men and women, lure themselves into the belief that mankind has achieved a remarkable degree of progress in that direction. The appellant, who is an advocate by profession, was married to the respondent in 1932. Three sons and two daughters were born of that marriage. In 1975, the appellant drove the respondent out of the matrimonial home. In April 1978, the respondent filed a petition against the appellant under Section 125 of the Code . . . asking for maintenance at the rate of Rs. 500 per month. On November 6, 1978 the appellant divorced the respondent by an irrevocable talaq, or Islamic divorce. His defense to the respondent's petition for maintenance was that she had ceased to be his wife by reason of divorce granted by him, that he was therefore under no obligation to provide maintenance for her, that he had already paid maintenance to her at the rate of Rs. 200 per month for about two years, and that he had deposited a sum of Rs. 3000 in the court by way of dower during the period of iddat. In August, 1979 the learned Magistrate directed the appellant to pay a princely sum of Rs. 25 per month to the respondent by way of maintenance. . . . [R]espondent had alleged that the appellant earns a professional income of about Rs. 60,000 per year. . . .

Does the Muslim Personal Law impose no obligation upon the husband to provide for the maintenance of his divorced wife? Undoubtedly the Muslim husband enjoys the privilege of being able to discard his wife whenever he chooses to do so, for reason good, bad or indifferent. Indeed, or no reason at all. But, is the only price of that privilege the dole of a pittance during the period of iddat? And, is the law so ruthless in its inequality that, no matter how much the husband pays for the maintenance of his divorced wife during the period of iddat, the mere fact that he has paid something, no matter how little, absolves him for ever from the duty of paying adequately so as to enable her to keep her body and soul together? Then again, is there any provision in the Muslim Personal Law under which a sum is payable to the wife "on divorce?" These are some of the important, though agonising, questions which arise for our decision.

. . . The contention of the husband and of the interveners who support him is that, under the Muslim Personal Law, the liability of the husband to maintain a

divorced wife is limited to the period of iddat. In support of this proposition, they rely upon the statement of law on the point contained in certain text books. . . . [Appellant cited from Mulla's *Mahomedan Law*, Tyabji's *Muslim Law*, and Dr. Paras Diwan.]

These statements in the text books are inadequate to establish the proposition that the Muslim husband is not under an obligation to provide for the maintenance of his divorced wife, who is unable to maintain herself. One must have regard to the entire conspectus of the Muslim Personal Law in order to determine the extent, both in quantum and in duration, of the husband's liability to provide for the maintenance of an indigent wife who has been divorced by him. Under that law, the husband is bound to pay Mahr to the wife as a mark of respect to her. True, that he may settle any amount he likes by way of dower upon his wife, which cannot be less than 10 Dirhams, which is equivalent to three or four rupees. But, one must have regard to the realities of life. Mahr is a mark of respect to the wife. The sum settled by way of Mahr is generally expected to take care of the ordinary requirements of the wife, during the marriage and after. But these provisions of the Muslim Personal Law do not countenance cases in which the wife is unable to maintain herself after the divorce. We consider it not only incorrect but unjust, to extend the scope of the statements extracted above to cases in which a divorced wife is unable to maintain herself. We are of the opinion that the application of those statements of law must be restricted to that class of cases, in which there is no possibility of vagrancy or destitution arising out of the indigence of the divorced wife. . . . The true position is that, if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the expiration of the period of iddat. If she is unable to maintain herself, she is entitled to take recourse of Section 125 of the Code. The outcome of this discussion is that there is no conflict between the provisions of Section 125 and those of the Muslim Personal Law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself.

There can be no greater authority on this question than the Holy Quran, "The Quran, the Sacred Book of Islam, comprises in its 114 Suras or chapters, the total of revelations believed to have been communicated to Prophet Muhammed, as a final expression of God's will." Verses (Aiyats) 241 and 242 of the Quran show that there is an obligation on Muslim husbands to provide for their divorced wives. . . .

The English version of the two Aiyats in Muhammed Zafrullah Khan's *The Quran* reads thus:

For divorced women also there shall be provision according to what is fair. This is an obligation binding on the righteous. Thus does Allah make His Commandments clear to you that you may understand.

The translation of Aiyats 240 to 242 in *The Meaning of the Quran* reads thus:

Those of you, who shall die and leave wives behind them, should make a will to the effect that they should be provided with a year's maintenance and should not be turned out of their homes. But if they leave their homes of their own accord, you shall not be answerable for whatever they choose for themselves in a fair way; Allah is All-Powerful, All-wise. Like-wise, the divorced women should also be given something in accordance with the known fair standard. This is an obligation upon the God-fearing people.

Thus Allah makes clear His commandments for you: It is expected that you will use your commonsense. . . .

These Aiyats leave no doubt that the Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the teachings of the Quran.

. . . The written submissions of the All India Muslim Personal Law Board have gone to the length of asserting that it is irrelevant to inquire as to how a Muslim divorcee should maintain herself. The facile answer of the Board is that the Personal Law has devised the system of Mahr to meet the requirements of women and if a woman is indigent, she must look to her relations, including nephews and cousins, to support her. This is a most unreasonable view of law as well as life. . . .

It is also a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that: "The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India." There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so. A counsel in the case

whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that competence is quite another. We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But, a beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.

For these reasons, we dismiss the appeal and confirm the judgment of the High Court. The appellant will pay the costs of the appeal, . . . which we quantify at rupees ten thousand. It is needless to add that it would be open to the respondent to make an application under Section 127(1) of the Code for increasing the allowance of maintenance granted to her on proof of a change in the circumstances as envisaged by that section.

Martha C. Nussbaum

*India: Implementing Sex Equality Through Law**

. . . Up to [the *Shah Bano* case], there was broad support in the Muslim community for sex equality and even for the goal of a Uniform Civil Code. Women had been winning grants of maintenance with no interference from the Ulema. But now much of the Muslim community, feeling its honor slighted and its civic position threatened, rallied round the cause of denying women maintenance. Women were barely consulted when statements were made about what Indian Muslims wished and thought; an impression was created by the Ulema that all Muslims disagreed with the judgment. Shah Bano herself was ultimately led to recant her views and to state (in a pitiful statement signed with her thumbprint) that she now understands that her salvation in the next world depends on her not pressing her demand for maintenance.

* Excerpted from Martha C. Nussbaum, *India: Implementing Sex Equality Through Law*, 2 CHI. J. INT'L L. 35 (2001). For a longer treatment of these issues, see MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000), and MARTHA C. NUSSBAUM, *THE CLASH WITHIN: DEMOCRACY, RELIGIOUS VIOLENCE, AND INDIA'S FUTURE* (2007).

Meanwhile the Muslim leadership persuaded the government of Rajiv Gandhi to pass a law, the Muslim Women's (Protection after Divorce) Act of 1986, which deprives all, and only, Muslim women of the opportunity to win maintenance under the Criminal Code. The Government never consulted with other segments of the community; they treated the Ulema as the voice of the whole community. Muslim women expressed outrage. One activist stood on the steps of Parliament the day the 1986 law was passed and said, "If by making separate laws for Muslim women, you are trying to say that we are not citizens of this country, then why don't you tell us clearly and unequivocally that we should establish another country—not Hindustan or Pakistan but Auratstan (women's land)." Hindu men, meanwhile, complained that the new law discriminates against Hindus, giving Muslim males "special privileges." In the aftermath of the Muslim Women's Bill, many divorced Muslim women are leading lives of poverty. Worse still, the destitution of these women has had the effect of crippling their children's education, as children who would otherwise be in school are put to work supporting their mothers. . . .

Siobhán Mullally

*Feminism and Multicultural Dilemmas in India: Revisiting the Shah Bano Case**

. . . In the *Danial Latifi* case, the Supreme Court was finally given the opportunity to review the constitutional validity of the 1986 Act. The case arose from a series of petitions claiming that the Act violated the constitutional guarantees of equality, life and liberty and that it undermined the secular principles underpinning India's constitutional text. The Solicitor General, defending the constitutionality of the Act . . . argued that in assessing the fairness and reasonableness of the Act, the Court should take account of the distinct personal laws of the Muslim community. . . . [R]eligion-based personal laws could not be subject to the same tests of justice as applied to other legislation. That there was no right of exit for Muslim women, no "opt out" of the personal laws that applied to them was not considered problematic. . . .

In its judgment on the competing claims brought to it, the Supreme Court adopted what might be viewed as a quintessentially universalist stance. Questions

* Excerpted from Siobhán Mullally, *Feminism and Multicultural Dilemmas in India: Revisiting the Shah Bano Case*, 24 OXFORD J. LEGAL STUD. 671 (2004).

relating to basic human rights and the pursuit of social justice, it held, should be decided on considerations other than religion or other “communal constraints.” In the Court’s view, the duty to secure social justice was one that was universally recognized by all religions. Vagrancy and destitution were societal problems of universal magnitude and had to be resolved within a framework of basic human rights. Applying a literal interpretation to the 1986 Act, the Court concluded, would deny Muslim women the remedy claimed by Shah Bano under section 125 of the Criminal Procedure Code. The Court concluded that this reading of the 1986 Act would lead to a discriminatory application of the criminal law, excluding Muslim women from the protection afforded to Christian, Hindu or Parsi women, simply because of their religious membership. Applying the presumption of constitutionality to the Act, the Court concluded that this reading could not have been intended by the legislature as it would be contrary to the constitutional guarantees of equality and non-discrimination. The Court concluded, therefore, that while the duty to pay maintenance was limited to the iddat period, the requirement to make fair and reasonable provision for a divorced Muslim woman extended to arrangements for her future well-being. Adopting this interpretation . . . enabled the Court to uphold the constitutionality of the Act and to avoid the communal triumphalism that might have accompanied a finding of unconstitutionality. It also enabled the Supreme Court to go beyond the limited remedy provided for in the Code of Criminal Procedure under which a statutory amount is set out for the payment of maintenance. The duty to make reasonable provision for a divorced woman allowed for much greater flexibility and attention to the particular needs of divorced women. . . .

DIFFERENTIATING BETWEEN RELIGIOUS AND SECULAR SOURCES OF LAW

Even if it is assumed that the modern state should be “secular,” it is often extremely difficult to know whether or not courts are adopting religious doctrine as a source of law. In the following examples, modern secular courts debate how they may best maintain their “independence” from religious doctrine. As you read these cases, you may ask why secular courts take such extreme measures to avoid interpreting religious doctrine. What are the stakes in this avoidance? Is this avoidance possible to maintain?

Jones v. Wolf
Supreme Court of the United States
443 U.S. 595 (1979)

Justice BLACKMUN delivered the opinion of the Court:

This case involves a dispute over the ownership of church property following a schism in a local church affiliated with a hierarchical church organization. The question for decision is whether civil courts, consistent with the First and Fourteenth Amendments to the Constitution, may resolve the dispute on the basis of “neutral principles of law,” or whether they must defer to the resolution of an authoritative tribunal of the hierarchical church.

The Vineville Presbyterian Church of Macon, Ga., was organized in 1904, and first incorporated in 1915. Its corporate charter lapsed in 1935, but was revived and renewed in 1939, and continues in effect at the present time.

The property at issue and on which the church is located was acquired in three transactions, and is evidenced by conveyances to the “Trustees of [or “for”] Vineville Presbyterian Church and their successors in office,” or simply to the “Vineville Presbyterian Church.” The funds used to acquire the property were contributed entirely by local church members. Pursuant to resolutions adopted by the congregation, the church repeatedly has borrowed money on the property. This indebtedness is evidenced by security deeds variously issued in the name of the “Trustees of the Vineville Presbyterian Church,” or, again, simply the “Vineville Presbyterian Church.”

In the same year it was organized, the Vineville church was established as a member church of the Augusta-Macon Presbytery of the Presbyterian Church in the United States (PCUS). The PCUS has a generally hierarchical or connectional form of government, as contrasted with a congregational form. . . .

On May 27, 1973, at a congregational meeting of the Vineville church attended by a quorum of its duly enrolled members, 164 of them, including the pastor, voted to separate from the PCUS. Ninety-four members opposed the resolution. The majority immediately informed the PCUS of the action, and then united with another denomination, the Presbyterian Church in America. Although the minority remained on the church rolls for three years, they ceased to participate in the affairs of the Vineville church and conducted their religious activities elsewhere.

In response to the schism within the Vineville congregation, the Augusta-Macon Presbytery appointed a commission to investigate the dispute and, if possible, to resolve it. The commission eventually issued a written ruling declaring that the minority faction constituted “the true congregation of Vineville Presbyterian Church,” and withdrawing from the majority faction “all authority to exercise office derived from the [PCUS].” The majority took no part in the commission’s inquiry, and did not appeal its ruling to a higher PCUS tribunal.

Representatives of the minority faction . . . brought this class action in state court, seeking declaratory and injunctive orders establishing their right to exclusive possession and use of the Vineville church property as a member congregation of the PCUS. The trial court, purporting to apply Georgia’s “neutral principles of law” approach to church property disputes, granted judgment for the majority. The Supreme Court of Georgia, holding that the trial court had correctly stated and applied Georgia law, and rejecting the minority’s challenge based on the First and Fourteenth Amendments, affirmed. . . .

Georgia’s approach to church property litigation has evolved in response to *Presbyterian Church v. Hull Church*, (1969) (*Presbyterian Church I*). That case was a property dispute between the PCUS and two local Georgia churches that had withdrawn from the PCUS. The Georgia Supreme Court resolved the controversy by applying a theory of implied trust, whereby the property of a local church affiliated with a hierarchical church organization was deemed to be held in trust for the general church, provided the general church had not “substantially abandoned” the tenets of faith and practice as they existed at the time of affiliation. This Court reversed, holding that Georgia would have to find some other way of resolving church property disputes that did not draw the state courts into religious controversies. The Court did not specify what that method should be, although it noted in passing that “there are neutral principles of law, developed for use in all property disputes, which can be applied without ‘establishing’ churches to which property is awarded.” . . .

The only question presented by this case is which faction of the formerly united Vineville congregation is entitled to possess and enjoy the property located at 2193 Vineville Avenue in Macon, Ga. There can be little doubt about the general authority of civil courts to resolve this question. The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively.

It is also clear, however, that “the First Amendment severely circumscribes the role that civil courts may play in resolving church property

disputes.” Most importantly, the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice. As a corollary to this commandment, the Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization. Subject to these limitations, however, the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes. Indeed, “a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.” . . .

This is not to say that the application of the neutral-principles approach is wholly free of difficulty. The neutral-principles method, at least as it has evolved in Georgia, requires a civil court to examine certain religious documents, such as a church constitution, for language of trust in favor of the general church. In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust. . . .

On balance, however, the promise of nonentanglement and neutrality inherent in the neutral-principles approach more than compensates for what will be occasional problems in application. These problems, in addition, should be gradually eliminated as recognition is given to the obligation of “States, religious organizations, and individuals [to] structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions.” We therefore hold that a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute.

The dissent would require the States to abandon the neutral principles method, and instead would insist as a matter of constitutional law that whenever a dispute arises over the ownership of church property, civil courts must defer to the “authoritative resolution of the dispute within the church itself.” It would require, first, that civil courts review ecclesiastical doctrine and polity to determine where the church has “placed ultimate authority over the use of the church property.” After answering this question, the courts would be required to “determine whether the dispute has been resolved within that structure of government and, if so, what decision has been made.” They would then be required to enforce that decision. We cannot agree, however, that the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved.

The dissent also argues that a rule of compulsory deference is necessary in order to protect the free exercise rights “of those who have formed the association and submitted themselves to its authority.” This argument assumes that the neutral-principles method would somehow frustrate the free-exercise rights of the members of a religious association. Nothing could be further from the truth. The neutral-principles approach cannot be said to “inhibit” the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, hire employees, or purchase goods. Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form. . . .

Mr. Justice POWELL, with whom THE CHIEF JUSTICE, Mr. Justice STEWART, and Mr. Justice WHITE join, dissenting:

. . . [T]he ownership of the property of the Vineville church is not at issue. The deeds place title in the Vineville Presbyterian Church, or in trustees of that church, and none of the parties has questioned the validity of those deeds. The question actually presented is which of the factions within the local congregation has the right to control the actions of the titleholder, and thereby to control the use of the property, as the Court later acknowledges. . . .

The first stage in the “neutral principles of law” approach operates as a restrictive rule of evidence. A court is required to examine the deeds to the church property, the charter of the local church (if there is one), the book of order or discipline of the general church organization, and the state statutes governing the holding of church property. The object of the inquiry, where the title to the property is in the local church, is “to determine whether there [is] any basis for a trust in favor of the general church.” The court’s investigation is to be “completely secular,” “rel[ying] exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges.” Thus, where religious documents such as church constitutions or books of order must be examined “for language of trust in favor of the general church,” “a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust.” It follows that the civil courts using

this analysis may consider the form of religious government adopted by the church members for the resolution of intrachurch disputes *only* if that polity has been stated, in express relation to church property, in the language of trust and property law. . . .

This limiting of the evidence relative to religious government cannot be justified on the ground that it “free[s] civil courts completely from entanglement in questions of religious doctrine, polity, and practice.” For unless the body identified as authoritative under state law resolves the underlying dispute in accord with the decision of the church’s own authority, the state court effectively will have reversed the decisions of doctrine and practice made in accordance with church law. . . .

When civil courts step in to resolve intrachurch disputes over control of church property, they will either support or overturn the authoritative resolution of the dispute within the church itself. The new analysis, under the attractive banner of “neutral principles,” actually invites the civil courts to do the latter. The proper rule of decision, that I thought had been settled until today, requires a court to give effect in all cases to the decisions of the church government agreed upon by the members before the dispute arose. . . .

Disputes among church members over the control of church property arise almost invariably out of disagreements regarding doctrine and practice. Because of the religious nature of these disputes, civil courts should decide them according to principles that do not interfere with the free exercise of religion in accordance with church polity and doctrine. The only course that achieves this constitutional requirement is acceptance by civil courts of the decisions reached within the polity chosen by the church members themselves. . . .

Accordingly, in each case involving an intrachurch dispute—including disputes over church property—the civil court must focus directly on ascertaining, and then following, the decision made within the structure of church governance. By doing so, the court avoids two equally unacceptable departures from the genuine neutrality mandated by the First Amendment. First, it refrains from direct review and revision of decisions of the church on matters of religious doctrine and practice that underlie the church’s determination of intrachurch controversies, including those that relate to control of church property. Equally important, by recognizing the authoritative resolution reached within the religious association, the civil court avoids interfering indirectly with the religious governance of those who have formed the association and submitted themselves to its authority.

Religious Marriage Contracts in Secular Courts

Bruker v. Marcovitz Supreme Court of Canada 3 S.C.R. 607 (2007)

The judgment of McLachlin C.J. and Bastarache, Binnie, LeBel, Fish, Abella and Rothstein JJ. was delivered by Abella J.

Canada rightly prides itself on its evolutionary tolerance for diversity and pluralism. This journey has included a growing appreciation for multiculturalism, including the recognition that ethnic, religious or cultural differences will be acknowledged and respected. Endorsed in legal instruments ranging from the statutory protections found in human rights codes to their constitutional enshrinement in the *Canadian Charter of Rights and Freedoms*, the right to integrate into Canada's mainstream based on and notwithstanding these differences has become a defining part of our national character.

The right to have differences protected, however, does not mean that those differences are always hegemonic. Not all differences are compatible with Canada's fundamental values and, accordingly, not all barriers to their expression are arbitrary. Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright-line application. It is, at the same time, a delicate necessity for protecting the evolutionary integrity of both multiculturalism and public confidence in its importance.

A *get* is a Jewish divorce. Only a husband can give one. A wife cannot obtain a *get* unless her husband agrees to give it. Under Jewish law, he does so by "releasing" his wife from the marriage and authorizing her to remarry. The process takes place before three rabbis in what is known as a *beth din*, or rabbinical court.

The husband must voluntarily give the *get* and the wife consent to receive it. When he does not, she is without religious recourse, retaining the status of his wife and unable to remarry until he decides, in his absolute discretion, to divorce her. She is known as an *agunah* or "chained wife." Any children she would have on civil remarriage would be considered "illegitimate" under Jewish law.

For an observant Jewish woman in Canada, this presents a dichotomous scenario: under Canadian law, she is free to divorce her husband regardless of his

consent; under Jewish law, however, she remains married to him unless he gives his consent. This means that while she can remarry under Canadian law, she is prevented from remarrying in accordance with her religion. The inability to do so, for many Jewish women, results in the loss of their ability to remarry at all. . . .

In response to these concerns, after consultation with the leaders of 50 religious groups in Canada and with the specific agreement of the Roman Catholic, Presbyterian and Anglican churches, in 1990 the then Minister of Justice, Doug Lewis, introduced amendments to the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), Bill C-61, giving a court discretionary authority to prevent a spouse from obtaining relief under the Act if that spouse refused to remove a barrier to religious remarriage

The husband and wife, each represented by counsel, voluntarily negotiated and signed a “Consent to Corollary Relief” in order to settle their matrimonial disputes. One of the commitments made in the agreement was that they would attend before the rabbinical court to obtain a *get*.

The husband refused to do so for 15 years, challenging the very validity of the agreement he freely made, claiming that its religious aspect rendered it unenforceable under Quebec law, and arguing that he was entitled to be shielded by his right to freedom of religion from the consequences of refusing to comply with his commitment.

The wife, on the other hand, asserted that the agreement to attend and obtain a *get* was part of the trade-offs negotiated by the parties (they signed mutual releases) and was consistent with Quebec law and values. She sought a remedy in the form of damages to compensate her for the husband’s extended non-compliance. She did not seek an order of specific performance directing him to appear before the rabbis.

There are, therefore, two issues raised by this case. The first is whether the agreement in the Consent to give a *get* is a valid and binding contractual obligation under Quebec law. This first question involves examining the relevant provisions and principles of the Civil Code of Québec, S.Q. 1991, c. 64.

If the commitment is a legally binding one under Quebec law, we must determine whether the husband can rely on freedom of religion to avoid the legal consequences of failing to comply with a lawful agreement.

. . . The fact that a dispute has a religious aspect does not by itself make it non-justiciable.

In *Religious Institutions and the Law in Canada* (2nd ed. 2003), M. H. Ogilvie explained why issues with a religious aspect may be justiciable:

Subject to any protections accorded to individuals and religious groups pursuant to the *Canadian Charter of Rights and Freedoms*, which have yet to be worked out in detail by the courts, religious institutions and persons in Canada are subject to the sovereignty of Parliament and the sanctioning powers of the state invoked by the courts when disputes concerning religion are brought for resolution.

Nevertheless, the courts have expressed reluctance to consider issues relating to religious institutions, evidencing some embarrassment that internal church disputes should be determined by secular courts and doubting the appropriateness of judicial intervention. The courts have stated that they will not consider matters that are strictly spiritual or narrowly doctrinal in nature, but will intervene where civil rights or property rights have been invaded.

We are not dealing with judicial review of doctrinal religious principles, such as whether a particular *get* is valid. Nor are we required to speculate on what the rabbinical court would do. The promise by Mr. Marcovitz to remove the religious barriers to remarriage by providing a *get* was negotiated between two consenting adults, each represented by counsel, as part of a voluntary exchange of commitments intended to have legally enforceable consequences. This puts the obligation appropriately under a judicial microscope.

The next question is whether the obligation is valid and binding under Quebec law. . . . The civil law of Quebec recognizes three kinds of obligations: moral, civil (or legal) and natural. Only the first two are engaged in this case. . . .

Jean-Louis Baudouin and Pierre-Gabriel Jobin explain the difference in enforceability between a moral and civil obligation in the following way:

A civil obligation is sanctioned by law, which means that the creditor may enforce it in court. In contrast, a moral obligation is outside the legal realm and is not sanctioned by law, and its binding force is based solely on conscience, that is, on remorse. The “creditor” of a moral obligation may not seek to enforce it in court, since it can only be performed voluntarily. Moral obligations include the duty to give to charity and the duty to help one’s neighbour—which should be distinguished from the civil obligation to assist a person in danger.

I do not see the religious aspect of the obligation in Paragraph 12 of the Consent as a barrier to its civil validity. It is true that a party cannot be compelled to execute a moral duty, but there is nothing in the *Civil Code* preventing someone from transforming his or her moral obligations into legally valid and binding ones. Giving money to charity, for example, could be characterized as a moral and, therefore, legally unenforceable obligation. But if an individual enters into a contract with a particular charity agreeing to make a donation, the obligation may well become a valid and binding one if it complies with the requirements of a contract under the C.C.Q. If it does, it is transformed from a moral obligation to a civil one enforceable by the courts.

A contract is defined in art. 1378, para. 1 C.C.Q. as:

an agreement of wills by which one or several persons obligate themselves to one or several other persons to perform a prestation.

A contract's formation is governed by art. 1385 C.C.Q., which states:

A contract is formed by the sole exchange of consents between persons having capacity to contract, unless, in addition, the law requires a particular form to be respected as a necessary condition of its formation, or unless the parties require the contract to take the form of a solemn agreement.

It is also of the essence of a contract that it have a cause and an object

There is no dispute as to the capacity and consent of the parties in this case. Nor do I see anything objectionable in the "cause" of the contractual provision, namely, the mutual desire of the parties to be contemporaneously free to remarry in accordance with both their religious beliefs and secular rights. . . .

There remains Mr. Marcovitz's argument that . . . that an award of damages would be a violation of his freedom of religion because it would condemn him *ex post facto* "for abiding by his religion in the first place." . . .

I start by querying whether Mr. Marcovitz, in good faith, sincerely believed that granting a *get* was an act to which he objected as a matter of religious belief or conscience. It is not clear to me what aspect of his religious beliefs prevented him from providing a *get*. He never, in fact, offered a religious reason for refusing to provide a *get*. Rather, he said that his refusal was based on the fact that, in his words:

Mrs. Bruker harassed me, she alienated my kids from me, she stole some money from me, she stole some silverware from my mother, she prevented my proper visitation with the kids. Those are the reasons.

This concession confirms, in my view, that his refusal to provide the *get* was based less on religious conviction than on the fact that he was angry at Ms. Bruker. His religion does not require him to refuse to give Ms. Bruker a *get*. The contrary is true. There is no doubt that at Jewish law he *could* refuse to give one, but that is very different from Mr. Marcovitz being prevented by a tenet of his religious beliefs from complying with a legal obligation he voluntarily entered into and of which he took the negotiated benefits.

Even if requiring him to comply with his agreement to give a *get* can be said to conflict with a sincerely held religious belief and to have non-trivial consequences for him, . . . such a *prima facie* infringement does not survive the balancing mandated by this Court's jurisprudence and the Quebec Charter. . . .

There is also support internationally for courts protecting Jewish women from husbands who refuse to provide a religious divorce.

The use of damages to compensate someone whose spouse has refused to provide a *get* was upheld by the European Commission of Human Rights. In *D. v. France* (1983), the husband had been ordered by a French court to pay his ex-wife 25 000 francs to compensate her for his refusal to deliver a *get*. The husband applied to the Commission, arguing that his right to freedom of conscience and religion under the European Convention on Human Rights was violated by this award of damages. The Commission rejected his application, noting that "under Hebrew law it is customary to hand over the letter of repudiation after the civil divorce has been pronounced, and that no man with genuine religious convictions would contemplate delaying the remittance of this letter to his ex-wife."

French courts have held that the refusal to provide the *get* is a delictual fault. The remedy provided is the payment of damages to compensate the wife. . . .

And in *In the Marriage of Steinmetz* (1980), the Family Court of Australia awarded the wife a greater amount of spousal maintenance in order to "encourage" the husband to give her a religious divorce.

American courts, relying primarily on the rationale that obtaining a *get* is not solely a religious act but one that has the secular purpose of finalizing the dissolution of the marriage, have been willing to order parties to submit to the

jurisdiction of the *beth din*. In *Avitzur v. Avitzur* (1983), the New York Court of Appeals found that a clause in a Jewish marriage contract, requiring both parties to appear before the *beth din* upon the breakdown of the marriage for the purposes of obtaining a *get* was enforceable and did not violate the constitutional prohibition against excessive entanglement between church and state.

Of particular interest is the judicial treatment of a husband's refusal to provide a *get* in Israel, where judges have awarded damages as compensation to a wife because of her husband's refusal to give her a *get*. . . . Noting the husband's argument that disputes of this nature should best be left to rabbinical courts because religious law applies to marriage and divorce in Israel, Hacoheh J., who ordered the husband to pay 425,000 shekels in damages, including 100,000 shekels in aggravated damages, held:

. . . This international perspective reinforces the view that judicial enforcement of an agreement to provide a Jewish divorce is consistent with public policy values shared by other democracies. . . .

Deschamps J. dissenting, joined by Charron J.

The question before the Court is whether the civil courts can be used not only as a shield to protect freedom of religion, but also as a weapon to sanction a religious undertaking. Many would have thought it obvious that in the 21st century, the answer is no. However, the conclusion adopted by the majority amounts to saying yes. I cannot agree with this decision.

. . . [I]n Quebec, the state is neutral where religion is concerned. . . .

The requirements for issuing a *get* and the consequences of not having a religious divorce are governed by the rules of the Jewish religion. The state does not interfere in this area. For instance, the Quebec Superior Court has, in refusing to order a husband to grant his former wife a *get*, invoked not only the separation of religious institutions and the state, but also freedom of conscience. On the issue of freedom of conscience, Hurtubise J. wrote the following in *Ouaknine v. Elbilila* (1981):

From this standpoint, the question that arises is as follows: must the Court compel the respondent to appear before a rabbinical court and grant a religious divorce? Absent any evidence, must we assume that such an order would not be contrary to the precepts of the Jewish religion? And beyond the institution, the church, is it possible, in compelling an individual to do something like this, to

avoid interfering with and limiting the free exercise of his or her own freedom of religion and conscience without determining the individual's deeply held beliefs or making assumptions about what the individual intends? We do not think so.

. . . The principle of non-intervention makes it possible to avoid situations in which the courts have to decide between various religious rules or between rules of secular law and religious rules. In the instant case, the appellant has not argued that her civil rights were infringed by a civil standard derived from positive law. Only her religious rights are in issue, and only as a result of religious rules. Thus, she is not asking to be compensated because she could not remarry as a result of a civil rule. It was a rule of her religion that prevented her from doing so. She is not asking to be compensated because any children she might have given birth to would not have had the same civil rights as "legitimate" children. In Canadian law and in Quebec law, all children are equal whether they are born of a marriage or not. The ground for the appellant's claim for compensation conflicts with gains that are dear to civil society. Allowing the appellant's claim places the courts in conflict with the laws they are responsible for enforcing.



Minkin v. Minkin
New Jersey Superior Court
180 N.J. Super. 260 (1981)

MINUSKIN, J.S.C.

Plaintiff wife moved post judgment for an order requiring the defendant to obtain and pay for the costs of a Jewish ecclesiastical divorce known as a "get." . .

The issues are:

- (1) Whether the parties have entered into a contract enforceable by this court, and
- (2) Whether the relief sought by plaintiff would unconstitutionally infringe upon defendant's First Amendment right of exercise of religious freedom.

The parties were married in a Jewish ceremony where they entered into a contract, called a "*ketuba*," in which they agreed to conform to the provisions of

the laws of Moses and Israel. These laws require the husband to give his wife a get when he alleges an act of adultery on his wife's part. In the instant case the husband counterclaimed for divorce on the ground of adultery, giving rise to the wife's claim to require her husband to secure a get. The husband has refused and opposes any order to compel him to do so, claiming that such an order would violate the Establishment of Religion Clause of the First Amendment. The wife asserts that without the get she would be effectively restrained from remarrying in a manner consistent with her religious beliefs.

To compel the husband to secure a get would be to enforce the agreement of the marriage contract (*ketuba*). A court of equity will enforce a contract between husband and wife if it is not unconscionable to do so and if the performance to be compelled is not contrary to public policy. . . .

In the instant case the *ketuba* contract requires the participants to comply with certain reciprocal obligations pertaining to the marriage. For example, the wife is to perform the role of homemaker and to supply a dowry; the husband is to support and care for the wife. The *ketuba* is devoid of any requirement that could be construed to be against public policy. No interest of society is affected or impaired by its provisions, nor does it conflict with public morals. On the contrary, its purpose is obviously to promote a successful marital relationship and its enforcement, therefore, actually advances public policy. The contract simply calls for defendant, in securing a get, to do that which he agreed to do. Without compliance plaintiff cannot remarry in accordance with her religious beliefs. For these reasons the contract should be specifically enforced. . . .

. . . The *Nyquist* court set forth a three-prong test for determining whether an act violates the Establishment Clause of the First Amendment.

. . . [T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and, third, must avoid excessive entanglement with religion.

To determine whether enforcing the marriage contract would violate the three-prong test, and because "this issue is one of the most sensitive areas in the law," the court on its own motion requested the testimony of several distinguished rabbis well versed in Jewish law, and one of whom (Rabbi Richard Kurtz) is also a practicing attorney specializing in matrimonial law.

Rabbi Macy Gordon defined the get as a written document of severance, authorized by the husband and delivered to his wife, which states that all marital

bonds between them have been severed. He stated that a Jewish couple upon marriage enters into a *ketuba*, which is essentially a civil contract delineating the obligations of the parties during the marriage. . . . [H]e concluded that the acquisition of a *get* is not a religious act, but a severance of a contractual relationship between two parties.

Rabbi Judah Washer agreed that a *get* is a civil document for the same reasons, adding that the document contains no reference to God's name. In addition, in his opinion, a court order requiring the husband to secure the *get* would not be an interference with religion since the *get* does not affect the religious feelings of people, but is only concerned with the right of the wife to remarry.

Rabbi Menahem Meier testified that Jewish law cannot be equated with religious law, but instead is comprised of two components one regulating a man's relationship with God and the other regulating the relationship between man and man. The *get*, which has no reference to God but which does affect the relationship between two parties, falls into the latter category and is, therefore, civil and not religious in nature.

Rabbi Richard Kurtz concurred with Rabbi Meier's opinion that Jewish law is divided into two components and that the *get* is clearly civil. He described the *get* as a general release document where the husband releases the wife and frees her to remarry in compliance with the *ketuba* contract.

Rabbi Dresner, a reform rabbi, was called by defendant and although he concluded that the acquisition of a *get* was a religious act, he said he would marry the plaintiff. However, the weight to be given to his testimony was weakened when he admitted that the other rabbis called to testify were "far better Jewish scholar(s) than myself."

Relying upon credible expert testimony that the acquisition of a *get* is not a religious act, the court finds that the entry of an order compelling defendant to secure a *get* would have the clear secular purpose of completing a dissolution of the marriage. Its primary effect neither advances nor inhibits religion since it does not require the husband to participate in a religious ceremony or to do acts contrary to his religious beliefs. Nor would the order be an excessive entanglement with religion. In addition to testimony to that effect, the court takes judicial notice that the Legislature has seen fit to authorize clergy to perform marriages and, in doing so, permits the use of a religious ceremony. Such conduct, as sanctioned by the Legislature, has never been considered to be an excessive entanglement with religion. The *get* procedure is a release document devoid of religious connotation and cannot be construed as any more religious

than the marriage ceremony itself. Thus, the three-prong test protecting defendant pursuant to the First Amendment is satisfied. The court concludes that it may, without infringing on his constitutional rights, order defendant to specifically perform his contract. . . .

Aflalo v. Aflalo

New Jersey Superior Court
295 N.J. Super. 527 (1996)

FISHER, J.S.C.

. . . Here, the parties were married on October 13, 1983 in Ramle, Israel, and have one child, Samantha. Plaintiff Sondra Faye Aflalo (“Sondra”) has filed a complaint seeking a dissolution of the marriage. Defendant Henry Arik Aflalo (“Henry”) has answered the complaint. . . . Henry does not want a divorce and has taken action with The Union of Orthodox Rabbis of the United States and Canada in New York City (the “Beth Din”) to have a hearing on his attempts at reconciliation.

The issues at hand came to critical mass when the parties engaged in a settlement conference on February 14, 1996, while awaiting trial in this court. At that time the court was advised by counsel that the matter was “98% settled” but that Henry had placed what Sondra viewed as an insurmountable obstacle to a complete resolution: he refused to provide a “get.” . . .

. . . [Henry] stated under oath that he seeks a reconciliation and that Sondra had been summoned to appear before the Beth Din for this purpose. The court was also advised during oral argument that should reconciliation fail the Beth Din could recommend that Henry give Sondra a “get”; Henry stated under oath that while he desires a reconciliation he would follow the recommendations of the Beth Din and give the “get” if that was the end result of those proceedings. The court finds Henry both credible and sincere in this regard. . . .

The problem . . . festers since Sondra appears unwilling to settle this case without a “get.” Accordingly, this court must now lay to rest whether any order may be entered which would impact on Sondra’s securing of a Jewish divorce.

Sondra claims that this court, as part of the judgment of divorce which may eventually be entered in this matter, may and should order Henry to

cooperate with the obtaining of a Jewish divorce upon pain of Henry having limited or supervised visitation of Samantha or by any other coercive means. She claims that *Minkin v. Minkin* authorizes this court to order Henry to consent to the Jewish divorce. That trial court decision certainly supports her view. This court, however, believes that to enter such an order violates Henry's First Amendment rights and refuses to follow the course outlined in *Minkin*. . . .

The court is not unsympathetic to Sondra's desire to have Henry's cooperation in the obtaining of a "get." She, too, is sincere in her religious beliefs. Her religion, at least in terms of divorce, does not profess gender equality. But does that mean that she can obtain the aid of this court of equity to alter this doctrine of her faith? That the question must be answered negatively seems so patently clear that the only surprising aspect of Sondra's argument is that it finds some support in the few cases on the subject. . . .

. . . *Minkin* and its followers (including the New Jersey trial court in *Burns*) are not persuasive for a number of reasons.

. . . It is interesting that the court was required to choose between the conflicting testimony of the various rabbis to reach this conclusion. The one way in which a court may become entangled in religious affairs, which the court in *Minkin* did not recognize, was in becoming an arbiter of what is "religious." . . .

. . . Of course, religious parties and organizations are entitled to the adjudication in our civil courts of "secular legal questions." But in doing so the civil court cannot decide any disputed questions of religious doctrine. That is exactly what the *Minkin* court did when it sifted among the rabbinical testimony to find the most credible version.

Third, the conclusion that its order concerned purely civil issues is equally unconvincing. In determining to specifically enforce the "ketubah," the court recognized that "[w]ithout compliance [the wife] cannot marry in accordance with her religious beliefs." . . . By entering the order, the court empowered the wife to remarry in accordance with her religious beliefs and also similarly empowered any children later born to her. The mere fact that the "get" does not contain the word "God," which the *Minkin* court found significant, is hardly reason to conclude otherwise. . . .

Fourth, *Minkin* fails to recognize that coercing the husband to provide the "get" would not have the effect sought. The "get" must be phrased and formulated in strict compliance with tradition, according to the wording given in the Talmud. 6 *Encyclopedia Judaica* (1971). The precisely worded "get" states that the husband does "willingly consent, being under no restraint, to release, to set free,

and put aside thee, my wife” *Id.* Accordingly, in giving his wife a “get” a husband must “act without constraint.” Indeed, during the proceeding the husband is asked “whether he ordered [the “get”] of his own free will.” Singer, *The Jewish Encyclopedia*. What value then is a “get” when it is ordered by a civil court and when it places the husband at risk of being held in contempt should he follow his conscience and refuse to comply? Moreover, why should this court order such relief when that is something which the Beth Din will not do? If a “get” is something which can be coerced then it should be the Beth Din which does the coercing. In coercing the husband, the civil court is, in essence, overruling or superseding any judgment which the Beth Din can or will enter, contrary to accepted First Amendment principles.

Avitzur suggests a more indirect way of providing relief to the wife. A majority of the New York Court of Appeals found that the wording of the “ketubah” suggested an agreement of the marital partners to appear before the Beth Din and held that such an agreement could be enforced by the civil court without running afoul of First Amendment law. . . . An order requiring defendant to appear before the Beth Din was found to be available because the majority viewed the role of the civil court as enforcing “nothing more than an agreement to refer the matter of a religious divorce to a nonjudicial forum.” The three members of the court which dissented, however, . . . ascertained that even the limited relief which the majority of four approved required “inquiry into and resolution of questions of Jewish religious law and tradition” and thus inappropriately entangled the civil court in the wife’s attempts to obtain a religious divorce. . . .

Minkin ultimately conjures the unsettling vision of future enforcement proceedings. Should a civil court fine a husband for every day he does not comply or imprison him for contempt for following his conscience? Apparently so, according to New York law. Or, as suggested by Sondra, should visitation of Samantha be limited pending Henry’s cooperation? That argument finds no support anywhere. Unlike *Minkin* (where a judgment of divorce had already been entered), Henry seeks the intervention of the Beth Din in order to effect a reconciliation with his wife. Should this court enjoin Henry-no matter how imperfect he may be pursuing it-from moving for reconciliation in that forum and order other relief which the Beth Din apparently cannot give? This court should not, and will not, compel a course of conduct in the Beth Din no matter how unfair the consequences. The spectre of Henry being imprisoned or surrendering his religious freedoms because of action by a civil court is the very image which gave rise to the First Amendment.

It may seem “unfair” that Henry may ultimately refuse to provide a “get.” But the unfairness comes from Sondra’s own sincerely-held religious beliefs.

When she entered into the “ketubah” she agreed to be obligated to the laws of Moses and Israel. Those laws apparently include the tenet that if Henry does not provide her with a “get” she must remain an “agunah.” That was Sondra’s choice and one which can hardly be remedied by this court. This court has no authority—were it willing—to choose for these parties which aspects of their religion may be embraced and which must be rejected. Those who founded this Nation knew too well the tyranny of religious persecution and the need for religious freedom. To engage even in a “well-intentioned” resolution of a religious dispute requires the making of a choice which accommodates one view and suppresses another. If that is permitted, it readily follows that less “well-intentioned” choices may be made in the future by those who, as Justice Jackson once observed, believe “that all thought is divinely classified into two kinds—that which is their own and that which is false and dangerous.”

The tenets of Sondra’s religion would be debased by this court’s crafting of a short-cut or loophole through the religious doctrines she adheres to¹⁴; and the dignity and integrity of the court and its processes would be irreparably injured by such misuse. The First Amendment was designed to protect both institutions against such unwarranted, unwanted and unlawful steps over the “wall of separation between Church and State.” This court will not assist Sondra in her attempts to lower that wall. . . .



¹⁴ New York's legislature has provided such a short-cut. New York Domestic Relations Law § 253 requires that where a marriage has been solemnized by a clergyman, a party who commences a matrimonial action must verify that he or she has acted to remove all “barriers to remarriage.” It has been held that this requirement places an obligation on a husband of the Jewish faith to provide his wife with a “get.” In fact, that seems to have been the precise purpose of that statute. The then Governor of New York made the following statement upon passage of the statute: This bill was overwhelmingly adopted by the State Legislature because it deals with a tragically unfair condition that is almost universally acknowledged. The requirement of a get is used by unscrupulous spouses who avail themselves of our civil courts and simultaneously use their denial of a get vindictively or as a form of economic coercion. Concededly this use of our civil courts unfairly imposes upon one spouse, usually the wife, enormous anguish. This statute does not appear to have yet been challenged on First Amendment grounds.

RELIGIOUS AND SECULAR SOURCES OF LAW AND ACCOMMODATING RELIGION

Modern constitutional secular states prize the right of persons freely to exercise their religion. The question frequently arises whether this right can be reconciled with the enforcement of general laws, which may sometimes forbid particular religious practices. This is the issue of accommodation.

Constitution of India (1950)

PREAMBLE

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC.

...

Article 25. Freedom of conscience and free profession, practice and propagation of religion.—(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. . .

In adjudicating questions of accommodation, legal systems must first determine if a claimant is asserting a genuine religious claim. If a claimant is asserting a genuine religious claim to engage in a religious practice, the right to engage in that practice despite its legal prohibition must be balanced against

whatever state interests support the general prohibition. In doing this balancing, an essential dimension would seem to be the importance of the religious practice to the claimant's religious beliefs.

In the United States, it is an accepted premise of constitutional law that secular courts will not adjudicate the importance of a religious practice to a claimant's religious beliefs. This refusal makes the analytic treatment of accommodation claims extremely unstable, as can be seen in the following readings.

Accommodation in the United States

United States v. Lee
Supreme Court of the United States
455 U.S. 252 (1982)

Chief Justice BURGER delivered the opinion of the Court:

We noted probable jurisdiction to determine whether imposition of social security taxes is unconstitutional as applied to persons who object on religious grounds to receipt of public insurance benefits and to payment of taxes to support public insurance funds. The District Court concluded that the Free Exercise Clause prohibits forced payment of social security taxes when payment of taxes and receipt of benefits violate the taxpayer's religion. We reverse.

Appellee, a member of the Old Order Amish, is a farmer and carpenter. From 1970 to 1977, appellee employed several other Amish to work on his farm and in his carpentry shop. He failed to file the quarterly social security tax returns required of employers, withhold social security tax from his employees, or pay the employer's share of social security taxes. . . .

The preliminary inquiry in determining the existence of a constitutionally required exemption is whether the payment of social security taxes and the receipt of benefits interferes with the free exercise rights of the Amish. The Amish believe that there is a religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system. Although the Government does not challenge the sincerity of this belief, the Government does contend that payment of social security taxes will not threaten the integrity of the Amish religious belief or observance. It is not within "the judicial function and judicial competence," however, to determine whether appellee or the Government has the proper interpretation of the Amish faith;

“courts are not arbiters of scriptural interpretation.” We therefore accept appellee’s contention that both payment and receipt of social security benefits is forbidden by the Amish faith. Because the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights. . . .

Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system. . . .

Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. . . .

Accordingly, the judgment of the District Court is reversed. . . .

Justice STEVENS concurring in the judgment:

The clash between appellee’s religious obligation and his civic obligation is irreconcilable. . . . In my opinion, it is the objector who must shoulder the burden of demonstrating that there is a unique reason for allowing him a special exemption from a valid law of general applicability. . . .

The Court’s analysis supports a holding that there is virtually no room for a “constitutionally required exemption” on religious grounds from a valid tax law that is entirely neutral in its general application. Because I agree with that holding, I concur in the judgment.

In *Employment Division v. Smith* (1990), the United States Supreme Court defined free exercise rights in a very narrow way, virtually precluding constitutionally required accommodation of religious practices. This may be because the Court knew that it could never assess the importance of such practices to claimants.

Employment Division v. Smith
Supreme Court of the United States
494 U.S. 872 (1990)

Justice SCALIA delivered the opinion of the Court:

This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.

Oregon law prohibits the knowing or intentional possession of a “controlled substance” [including] . . . the drug peyote, a hallucinogen

Respondents Alfred Smith and Galen Black were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members. . . .

. . . [Respondents] contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. . . .

Respondents argue that, even though exemption from generally applicable criminal laws need not automatically be extended to religiously motivated actors, at least the claim for a religious exemption must be evaluated under the balancing test set forth in *Sherbert v. Verner* (1963). Under the Sherbert test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. . . .

. . . We conclude today that the sounder approach . . . is to hold the test inapplicable to such challenges. The government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, “cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.” . . .

The “compelling government interest” requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race, or before the government may regulate the content of speech, is not remotely comparable to

using it for the purpose asserted here. What it produces in those other fields—equality of treatment, and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly.

Nor is it possible to limit the impact of respondents' proposal by requiring a "compelling state interest" only when the conduct prohibited is "central" to the individual's religion. It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims." . . . "[I]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds." . . . Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.

If the "compelling interest" test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if "compelling interest" really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind. . . . The First Amendment's protection of religious liberty does not require this. . . .

Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug. . . .

Justice O'CONNOR, concurring in the judgment:

Although I agree with the result the Court reaches in this case, I cannot join its opinion. In my view, today's holding dramatically departs from well settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty. . . .

The Court today . . . interprets the Clause to permit the government to prohibit, without justification, conduct mandated by an individual's religious beliefs, so long as that prohibition is generally applicable. But a law that prohibits certain conduct—conduct that happens to be an act of worship for someone—manifestly does prohibit that person's free exercise of his religion. A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion. Moreover, that person is barred from freely exercising his religion regardless of whether the law prohibits the conduct only when engaged in for religious reasons, only by members of that religion, or by all persons. It is difficult to deny that a law that prohibits religiously motivated conduct, even if the law is generally applicable, does not at least implicate First Amendment concerns. . . .

To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. Under our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute. . . . Instead, we have respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the Government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest. . . . The compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests "of the highest order," "Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens." . . .

Justice BLACKMUN, with whom Justice BRENNAN and Justice MARSHALL join, dissenting:

This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the

free exercise of religion. Such a statute may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means.

Until today, I thought this was a settled and inviolate principle of this Court's First Amendment jurisprudence. The majority, however, perfunctorily dismisses it as a "constitutional anomaly." As carefully detailed in Justice O'Connor's concurring opinion, the majority is able to arrive at this view only by mischaracterizing this Court's precedents. . . .

For these reasons, I agree with Justice O'Connor's analysis of the applicable free exercise doctrine As she points out, "the critical question in this case is whether exempting respondents from the State's general criminal prohibition 'will unduly interfere with fulfillment of the governmental interest.' " Ante, quoting *United States v. Lee*. I do disagree, however, with her specific answer to that question.

. . . [A]lthough I agree with Justice O'Connor that courts should refrain from delving into questions whether, as a matter of religious doctrine, a particular practice is "central" to the religion, I do not think this means that the courts must turn a blind eye to the severe impact of a State's restrictions on the adherents of a minority religion. . . .

Respondents believe, and their sincerity has *never* been at issue, that the peyote plant embodies their deity, and eating it is an act of worship and communion. Without peyote, they could not enact the essential ritual of their religion. . . .

If Oregon can constitutionally prosecute them for this act of worship, they, like the Amish, may be "forced to migrate to some other and more tolerant region." . . . This potentially devastating impact must be viewed in light of the federal policy—reached in reaction to many years of religious persecution and intolerance—of protecting the religious freedom of Native Americans. . . . Congress recognized that certain substances, such as peyote, "have religious significance because they are sacred, they have power, they heal, they are necessary to the exercise of the rites of the religion, they are necessary to the cultural integrity of the tribe, and, therefore, religious survival." . . .

For these reasons, I conclude that Oregon's interest in enforcing its drug laws against religious use of peyote is not sufficiently compelling to outweigh respondents' right to the free exercise of their religion. . . .

Cheryl Rubenstein

*Legislating Religious Liberty Locally:
The Possibility of Compelling Conflicts**

. . . Scholars immediately labeled the *Smith* decision as a restrictive interpretation of the Free Exercise Clause. By altering the analytical standard, the Court had effectively removed protection for religious freedom. Individuals who knew that they would not be denied unemployment because they observe Saturday as the Sabbath and felt confident that they had the right to rear their children in a particular religious faith were no longer so certain. Justice Scalia's comment . . . also recognized the possible result of not judicially protecting religious claims: "[L]eaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself." Democratic government did not find this consequence to be preferable and viewed *Smith* as a call to arms.

. . .

Many in the United States regarded *Smith* as abandoning rights of free exercise of religion. Congress responded by enacting a federal statute, the Religious Freedom Restoration Act (RFRA), which held that government actions that substantially burdened the practice of religion were valid only if they were justified by a compelling interest and able to withstand strict judicial scrutiny. RFRA was struck down by the Supreme Court on the grounds that Congress was without power to enact it. But many states enacted their own versions of RFRA in order to create claims of religious freedom to counteract general laws forbidding discrimination on the basis of sexual orientation or requiring health insurance coverage of abortions or contraception. In the United States, claims of accommodation have in this way been drawn into contemporary conflicts about the regulation of sexuality.

* Excerpted from Cheryl Rubenstein, *Legislating Religious Liberty Locally: The Possibility of Compelling Conflicts*, 19 REV. LITIG. 289 (2000).

Douglas NeJaime & Reva B. Siegel
*Conscience Wars**

Claims to religious liberty play an increasing part in culture war conflicts. Owners of for-profit corporations argue that federal law regulating health care insurance forces the corporations, in violation of their conscience, to include contraceptives in employee health insurance benefits when the owners of the for-profit corporations believe that the contraceptives are abortifacients. Religiously affiliated non-profit organizations are statutorily exempt from this requirement, yet object that invoking the exemption makes them complicit in authorizing others to provide contraception to their employees. Raising similar complicity-based conscience objections, bakery owners refuse to provide cakes for same-sex weddings, and photographers refuse to shoot same-sex couples' ceremonies; they claim that furnishing goods or services forces them to participate in a relationship to which they have a religious objection.

These claimants assert they are like the religious practitioners upon which our religious liberties tradition is based. They are minority dissenters who should be given space to live according to their religious dictates, like Seventh-day Adventists observing a Saturday Sabbath and Amish parents resisting mandatory education laws. They are merely asking to step aside in a way that is consistent with the live-and-let-live philosophy that should guide a pluralistic society.

Yet upon closer inspection, complicity-based conscience claims arising in the domains of contraception, abortion, and same-sex marriage differ from the typical narrative upon which our adjudicated free exercise law was built. The paradigmatic free exercise claimant holds a religious belief that is anomalous in the larger society, and seeks an exemption from a law of general application in order to live in fidelity to that religious belief. The sought-after accommodation usually entails only generalized costs that are diffused across society. When the accommodation would inflict concentrated harms on third parties, the claimant is often turned away.

Conscience claims seeking exemptions to avoid complicity in contraception, abortion, and same-sex marriage differ from the paradigmatic free exercise claim in several important respects. No anomalous religious conviction is at issue. Instead, conscience claims of this kind involve religious convictions that are entangled with contested and partly disestablished social norms. The conscience claimant understands those who break with the claimant's religious

* Douglas NeJaime & Reva B. Siegel, *Conscience Wars*, (May 22, 2014) (unpublished manuscript).

precepts and the society's contested norms—for example, by ending a pregnancy or marrying a person of the same sex—as sinning. The conscience claimant objects to laws that, the claimant asserts, coerce her to be complicit in, participate in, or facilitate sinful conduct of others. Complicity-based conscience claims focus on third parties and frame their conduct as sinful. For this reason, accommodating complicity-based conscience claims imposes dignitary and other social-meaning harms on third parties, and may deter or obstruct their lawful conduct. These third-party harms are not merely incidental, but flow from the conscience claimant's treatment of a third-party rights holder as a sinner.

Unlike paradigmatic free exercise claims, complicity-based conscience claims play a prominent role in social mobilization. As the law repudiates traditional sexual norms, advocates seek to preserve majority social norms in new form, now speaking as a minority seeking religious exemptions from the law. . . .

A complicity-based conscience exemption has two audiences. In seeking legislative recognition of conscience claims, the movement continues to engage in norm contestation with the larger society, asserting that now-lawful conduct remains immoral and sinful. When an individual conscience claimant exercises the exemption, the conscience claimant singles out a member of the public engaged in lawful conduct and treats that person as a sinful or immoral person, whose conduct the claimant seeks to deter. The social meaning of the complicity-based conscience claim is legible because it is based on a traditional, incompletely displaced social norm, rather than an anomalous religious conviction. The conscience exemption's roots in a traditional norm amplify the exemption's power to stigmatize.

Analyzing culture wars conscience claims from a mobilization perspective helps us to appreciate that these claims produce special kinds of harm that contrast with many of the paradigmatic free exercise claims. Conscience exemptions premised on complicity treat citizens engaged in lawful conduct as sinners. Reiterated by a mass movement over time and across social domains, complicity-based conscience claims have distinctive power to inflict dignitary harm and to obstruct lawful conduct.

The dynamic we observe in the health care refusals context is not unique. Complicity-based conscience claims are central in the RFRA cases claiming that it is a violation of religious liberty for the government to require employers to carry health-care insurance which covers contraception. *Hobby Lobby* and *Conestoga Wood*, for instance, argue that the contraception mandate forces them to “provid[e] insurance coverage for items that risk killing an embryo [and thereby] makes them complicit in abortion.” Similarly, *Little Sisters* objects to

applying for an accommodation from the contraception mandate because “the Form acts as a ‘permission slip’ that authorizes . . . another organization to provide objectionable drugs to the Little Sisters’ employees.” Through the form it is “forced to initiate and facilitate the very thing which [it] religiously oppose[s] and become morally complicit in sin.” To put the point modestly, these are, but are not simply claims about money. These employers are treating employees who use contraception as sinners.

We also see this dynamic in the sexual orientation context. Social conservatives once used the criminal law to enforce traditional morality; they now have begun to speak as a minority seeking religious exemptions. For instance, Jack Phillips, the owner of Denver’s Masterpiece Cakes, “believes that the Bible commands him . . . not to encourage sin in any way.” He contends that baking and selling a cake to a same-sex couple forces him to “participate” in a sinful same-sex relationship. The refusal to sell itself creates meaning. The meaning of the conduct is intelligible because it reflects and reiterates a contested social norm. That is the source of its power to stigmatize.

The same-sex marriage claim is not merely analogous to claims in the abortion and contraception context. Rather, these claims are linked in a common movement. Indeed, the Manhattan Declaration, the 2009 pan-religious manifesto drafted by leading social conservatives, brings together in one statement of principle the movement’s abortion, same-sex-marriage, and religious conscience planks.

An example of the conflict identified by NeJaime and Siegel may be found in gay rights cases recently arising in New Mexico and Arizona. The New Mexico Supreme Court ruled on August 2013 that the state’s RFRA did not prevent the state from imposing non-discrimination requirements in public accommodations. Fearing that its courts might reach similar conclusions, on February 19th, 2014, the Arizona state legislature passed SB 1062, later vetoed by Governor Jan Brewer on February 26th, to amend its own RFRA law so that it would apply to disputes between private parties.

Bob Christie

*Religious Freedom Bill Riles Gay Rights Supporters**

PHOENIX (AP) - The Arizona Legislature gave final approval Thursday evening to legislation that allows business owners asserting their religious beliefs to refuse service to gays, drawing backlash from Democrats who called the proposal “state-sanctioned discrimination” and an embarrassment

Republicans stressed that the bill is about protecting religious freedom and not discrimination. They frequently cited the case of a New Mexico photographer who was sued after refusing to take wedding pictures of a gay couple and said Arizona needs a law to protect people in the state from heavy-handed actions by courts and law enforcement.

The bill allows any business, church or person to cite the law as a defense in any action brought by the government or individual claiming discrimination. It also allows the business or person to seek an injunction once they show their actions are based on a sincere religious belief and the claim places a burden on the exercise of their religion. . . .

Opponents raised scenarios in which gay people in Arizona could be denied service at a restaurant or refused medical treatment if a business owner thought homosexuality was not in accordance with his religion. One lawmaker held up a sign that read “NO GAYS ALLOWED” in arguing what could happen if the law took effect, drawing a rebuke for violating rules that bar signs on the House floor.

Democrats also said there were a host of other scenarios not involving sexual orientations where someone could raise their religious beliefs as a discrimination defense.

The bill is backed by the Center for Arizona Policy, a social conservative group that opposes abortion and gay marriage. The group says the proposal is needed to protect against increasingly activist federal courts and simply clarifies existing state law.

* Excerpted from Bob Christie, *Religious Freedom Bill Riles Gay Rights Supporters*, ASSOCIATED PRESS, Feb. 20, 2014, <http://bigstory.ap.org/article/gay-rights-groups-oppose-religious-protection-bill>.

Center for Arizona Policy

*Religious Freedom Restoration Act: SB 1062 Fact Sheet**

. . . SB 1062 will provide two much-needed updates to Arizona’s RFRA statute. First, the bill clarifies that the definition of “person” includes all types of businesses and legal entities. Although the question of whether private business owners should be afforded First Amendment protection should be a non-issue, opponents of religious freedom continue to argue that for-profit businesses do not have consciences. They argue that businesses cannot operate according to a sincerely held religious belief and make a conscientious objection to a government mandate. Further, the updated definition is similar to what already exists in Arizona law defining a person as including corporations and other business entities. . . .

[T]he bill also ensures that a government enactment is not permitted to infringe on religious belief merely because the enactment allows for enforcement by a private individual.

The critical need for this change came to light in a case recently ruled on by the New Mexico Supreme Court. On August 22, 2013, the New Mexico Supreme Court unanimously ruled in *Elane Photography v. Willock* that the state’s RFRA did not apply in a case where a private party sought to enforce a state law against another private party. . . .

As an example of just how serious the threats to religious liberty are and of the mindset of some opposed to religious liberty, a New Mexico justice in a concurring opinion to the *Elane Photography* case stated that the “price of citizenship” is being forced to compromise one’s religious beliefs. This is not what the founders of this nation had in mind when they drafted the First Amendment, yet America and Arizona continue to witness religious liberty shrink as organizations like the Freedom From Religion Foundation attempt to undermine our nation’s first freedom. In order to better protect religious freedom for all Arizonans, it is essential that Arizona strengthen the state RFRA.

* Excerpted from *Religious Freedom Restoration Act: SB 1062 Fact Sheet*, CTR. AZ. POL’Y (2014), <http://www.azpolicy.org/bill-tracker/religious-freedom-restoration-act-sb-1062>.

Arizona Senate Bill 1062 (2014)

*Amending Sections . . . Relating to the Free Exercise of Religion**

Be it enacted by the Legislature of the State of Arizona:

2. “Exercise of religion” means the practice or observance of religion, including the ability to act or refusal to act in a manner substantially motivated by a religious belief, whether or not the exercise is compulsory or central to a larger system of religious belief. . . .

5. “Person” includes any individual, association, partnership, corporation, . . . estate, trust, foundation or other legal entity. . . .

A. Free exercise of religion is a fundamental right that applies in this state even if laws, rules or other government actions are facially neutral.

B. Except as provided in subsection C of this section, state action shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.

C. State action may substantially burden a person’s exercise of religion only if the opposing party demonstrates that application of the burden to the person’s exercise of religion in this particular instance is both:

1. In furtherance of a compelling governmental interest.

2. The least restrictive means of furthering that compelling governmental interest. . . .

E. [T]he term substantially burden is intended solely to ensure that this article is not triggered by trivial, technical or de minimis infractions.

F. For purposes of this section, “state action” means any action by the government or the implementation or application of any law, including state and local laws . . . whether the implementation or application is made or attempted to be made by the government or by nongovernmental persons.

* Excerpted from 2014 ARIZ. LEGIS. SERV. (SB 1062) (West).

If courts cannot inquire into the importance and centrality of religious beliefs, how can they determine if state laws “substantially burden” the exercise of religion? Must they make this determination based entirely on the subjective assertions of claimants? If so, should the untested protestation of belief be sufficient to prevent the enforcement of all secular laws except those that can be shown to be the least restrictive means of furthering “a compelling government interest”?

In controversies now erupting throughout the United States, religious believers claim that their beliefs require them to exclude certain persons, like those who are gay, from public accommodations. They thus seek to use the right of religious freedom to justify discrimination that effectively converts public spaces into private spaces, where neutral laws of generally applicability no longer apply. Is this tolerable in a modern, secular, constitutional state?

American constitutional law thus faces a great dilemma. So long as it continues to adhere to the doctrine of *Lee*, it seems to be forced to choose between constitutional doctrine that narrowly defines the scope of free exercise rights, like that advanced in *Smith*, or that instead so generously protects free exercise rights as to threaten the viability of the secular state, as in the contemporary state RFRA statutes.

Accommodation and Proportionality

Many courts in the world do not suffer from the dilemmas in U.S. case law. They do not adopt the doctrine of *Lee*. In many secular jurisdictions, courts determine the scope of religious freedom by using the “proportionality” test. This test essentially weighs the strength of a state’s interest in regulation against the strength of an individual’s interest in pursuing particular religious practices.

Christian Education South Africa v. Minister of Education Constitutional Court of South Africa CCT4/00 (2000)

SACHS J:

The central question in this matter is: when Parliament enacted a law to prohibit corporal punishment in schools, did it violate the rights of parents of

children in independent schools who, in line with their religious convictions, had consented to its use?

The issue was triggered by the passage of the South African Schools Act (the Schools Act) in 1996, section 10 of which provides:

Prohibition of corporal punishment

- (1) No person may administer corporal punishment at a school to a learner.
- (2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault.

The appellant, a voluntary association, is an umbrella body of 196 independent Christian schools in South Africa with a total of approximately 14,500 pupils. Its parent body was originally established in the USA “to promote evangelical Christian education” and the appellant has been operating in South Africa since 1983. It says that its member schools maintain an active Christian ethos and seek to provide to their learners an environment that is in keeping with their Christian faith. They aver that corporal correction—the term they use for corporal punishment—is an integral part of this ethos and that the blanket prohibition of its use in its schools invades their individual, parental and community rights freely to practise their religion.

The appellant cited the following verses in the Bible as requiring its community members to use “corporal correction”:

Proverbs 22:6

Train up a child in the way it should go and when he is old he will not depart from it.

Proverbs 22:15

Foolishness is bound in the heart of a child, but the rod of correction shall drive it far from him.

Proverbs 19:18

Chasten thy son while there is hope and let not thy soul spare for his crying.

Proverbs 23:13 and 14

Do not withhold discipline from a child, if you punish with a rod he will not die. Punish him with a rod and save his soul from death.

In support of its contention that parents have a divinely imposed responsibility for the training and upbringing of their children, the appellant cites *Deuteronomy* 6:4 to 7:

“Hear, O-Israel! The Lord is our God, the Lord is one!

And you shall love the Lord your God with all your heart and with all your soul and with all your might.

And these words which I am commanding you today, shall be on your heart; and you shall teach them diligently to your sons and shall talk of them when you sit in your house and when you walk by the way and when you lie down and when you rise up.”

It contends that corporal punishment is a vital aspect of Christian religion and that it is applied in the light of its biblical context using biblical guidelines which impose a responsibility on parents for the training of their children

The appellant applied for and was granted leave to appeal to this Court on the grounds that the blanket prohibition in section 10 of the Schools Act infringes the following provisions of the Constitution:

14. Privacy
Everyone has the right to privacy
15. Freedom of religion, belief and opinion
(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
29. Education. . . .
(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions
30. Language and culture
Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.
31. Cultural, religious and linguistic communities
(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—
 - (a) to enjoy their culture, practise their religion and use their language; and

- (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

The respondent is the Minister of Education. He contends that it is the infliction of corporal punishment, not its prohibition, which infringes constitutional rights. More particularly, he contends that the claim of the appellant to be entitled to a special exemption to administer corporal punishment is inconsistent with the following provisions in the Bill of Rights:

- 9. Equality
 - (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- 10. Human dignity
 - Everyone has inherent dignity and the right to have their dignity respected and protected.
- 12. Freedom and security of the person
 - (1) Everyone has the right to freedom and security of the person, which includes the right— . . .
 - (c) to be free from all forms of violence from either public or private sources;
 - (d) not to be tortured in any way; and
 - (e) not to be treated or punished in a cruel, inhuman or degrading way.
- 28. Children
 - (1) Every child has the right— . . .
 - (d) to be protected from maltreatment, neglect, abuse or degradation

He furthermore places reliance on section 31(2) which states that section 31(1) rights “may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”

. . . It is clear from the above that a multiplicity of intersecting constitutional values and interests are involved in the present matter—some overlapping, some competing. The parents have a general interest in living their lives in a community setting according to their religious beliefs, and a more specific interest in directing the education of their children. The child, who is at the centre of the enquiry, is probably a believer, and a member of a family and a participant in a religious community that seeks to enjoy such freedom. Yet the

same child is also an individual person who may find himself “at the other end of the stick,” and as such be entitled to the protections of sections 10, 12 and 28. Then, the broad community has an interest in reducing violence wherever possible and protecting children from harm. . . .

I turn now to the question of whether the limitation on the rights of the appellants can be justified in terms of section 36, the limitations clause. The appellant argued that once it succeeded in establishing that the Schools Act substantially impacted upon its sincerely held religious beliefs, the state was required to show a compelling state interest in order to justify its failure to provide an appropriate exemption. This formulation correctly points to the need for a balancing exercise to be done, but establishes a standard that differs from that required by section 36. The proposed formulation imports into our law a rigid “strict scrutiny” test taken from American jurisprudence. . . . The test requires any legislative provision which impacts upon the freedom of religion to be serving a “compelling state interest”

Our Bill of Rights, through its limitations clause, expressly contemplates the use of a nuanced and context-sensitive form of balancing. Section 36 provides that:

- (1) The rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.

. . . Before setting out to apply the above approach to the facts of this case, I feel it necessary to comment generally on difficulties of proportionality analysis in the area of religious rights. The most complex problem is that the competing interests to be balanced belong to completely different conceptual and existential orders. Religious conviction and practice are generally based on faith. Countervailing public or private concerns are usually not and are evaluated mainly according to their reasonableness. To the extent that the two orders can be separated, with the religious being sovereign in its domain and the state sovereign in its domain, the need to balance one interest against the other is avoided.

However religion is not always merely a matter of private individual conscience or communal sectarian practice. Certain religious sects do turn their back on the world, but many major religions regard it as part of their spiritual vocation to be active in the broader society. Not only do they proselytise through the media and in the public square, religious bodies play a large part in public life, through schools, hospitals and poverty relief. They command ethical behaviour from their members and bear witness to the exercise of power by state and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of social activities for their members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is part of a way of life, of a people's temper and culture.

The result is that religious and secular activities are, for purposes of balancing, frequently as difficult to disentangle from a conceptual point of view as they are to separate in day to day practice. While certain aspects may clearly be said to belong to the citizen's Caesar and others to the believer's God, there is a vast area of overlap and interpenetration between the two. It is in this area that balancing becomes doubly difficult, first because of the problems of weighing considerations of faith against those of reason, and secondly because of the problems of separating out what aspects of an activity are religious and protected by the Bill of Rights and what are secular and open to regulation in the ordinary way.

The answer cannot be found by seeking to categorize all practices as religious, and hence governed by the factors relied upon by the appellant, or secular, and therefore controlled by the factors advanced by the respondent. They are often simultaneously both. Nor can it always be secured by defining it either as private or else as public, when here, too, it is frequently both. The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.

There can be no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries.

As far as the members of the appellant are concerned, what is at stake is not merely a question of convenience or comfort, but an intensely held sense about what constitutes the good and proper life and their place in creation. No one in this matter contested that the appellant's members sincerely believe that parents are obliged by scriptural injunction to use corporal correction as an integral part of the upbringing of their children. Furthermore, it has set up independent schools with the specific purpose of enabling parents to have their children educated in what they regard as a true Christian ethos. The impact of section 10 of the Schools Act on their religious and parental practices is, in their view, far from trivial.

Yet, while they may no longer authorise teachers to apply corporal punishment in their name pursuant to their beliefs, parents are not being deprived by the Schools Act of their general right and capacity to bring up their children according to their Christian beliefs. The effect of the Schools Act is limited merely to preventing them from empowering the schools to administer corporal punishment. . . .

The measure was part and parcel of a legislative scheme designed to establish uniform educational standards for the country. Educational systems of a racist and grossly unequal character and operating according to a multiplicity of norms in a variety of fragmented institutions, had to be integrated into one broad educational dispensation. Parliament wished to make a radical break with an authoritarian past. As part of its pedagogical mission, the Department sought to introduce new principles of learning in terms of which problems were solved through reason rather than force. In order to put the child at the center of the school and to protect the learner from physical and emotional abuse, the

legislature prescribed a blanket ban on corporal punishment. In its judgment, which was directly influenced by its constitutional obligations, general prohibition rather than supervised regulation of the practice was required. The ban was part of a comprehensive process of eliminating state-sanctioned use of physical force as a method of punishment. . . .

I do not wish to be understood as underestimating in any way the very special meaning that corporal correction in school has for the self-definition and ethos of the religious community in question. Yet their schools of necessity function in the public domain so as to prepare their learners for life in the broader society. Just as it is not unduly burdensome to oblige them to accommodate themselves as schools to secular norms regarding health and safety, payment of rates and taxes, planning permissions and fair labour practices, and just as they are obliged to respect national examination standards, so is it not unreasonable to expect them to make suitable adaptations to non-discriminatory laws that impact on their codes of discipline. The parents are not being obliged to make an absolute and strenuous choice between obeying a law of the land or following their conscience. They can do both simultaneously. What they are prevented from doing is to authorize teachers, acting in their name and on school premises, to fulfill what they regard as their conscientious and biblically-ordained responsibilities for the guidance of their children. Similarly, save for this one aspect, the appellant's schools are not prevented from maintaining their specific Christian ethos.

When all these factors are weighed together, the scales come down firmly in favour of upholding the generality of the law in the face of the appellant's claim for a constitutionally compelled exemption. The appeal is accordingly dismissed. . . .

Chaskalson P, Langa DP, Goldstone J, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Yacoob J and Cameron AJ concur in the judgment of Sachs J.

R v. N.S.
Supreme Court of Canada
2013 SCC 72 (2012)

Per McLachlin C.J. and Deschamps, Fish, and Cromwell JJ.

The issue is when, if ever, a witness who wears a niqab for religious reasons can be required to remove it while testifying. Two sets of Charter rights are potentially engaged—the witness’s freedom of religion and the accused’s fair trial rights, including the right to make full answer and defence. An extreme approach that would always require the witness to remove her niqab while testifying, or one that would never do so, is untenable. The answer lies in a just and proportionate balance between freedom of religion and trial fairness, based on the particular case before the court. A witness who for sincere religious reasons wishes to wear the niqab while testifying in a criminal proceeding will be required to remove it if (a) this is necessary to prevent a serious risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and (b) the salutary effects of requiring her to remove the niqab outweigh the deleterious effects of doing so.

Applying this framework involves answering four questions. First, would requiring the witness to remove the niqab while testifying interfere with her religious freedom? To rely on section 2(a) of the Charter, N.S. must show that her wish to wear the niqab while testifying is based on a sincere religious belief. The preliminary inquiry judge concluded that N.S.’s beliefs were not sufficiently strong. However, at this stage the focus is on sincerity rather than strength of belief. The second question is: would permitting the witness to wear the niqab while testifying create a serious risk to trial fairness? There is a deeply rooted presumption in our legal system that seeing a witness’s face is important to a fair trial, by enabling effective cross-examination and credibility assessment. The record before us has not shown this presumption to be unfounded or erroneous. However, whether being unable to see the witness’s face threatens trial fairness in any particular case will depend on the evidence that the witness is to provide. Where evidence is uncontested, credibility assessment and cross-examination are not in issue. Therefore, being unable to see the witness’s face will not impinge on trial fairness. If wearing the niqab poses no serious risk to trial fairness, a witness who wishes to wear it for sincere religious reasons may do so.

If both freedom of religion and trial fairness are engaged on the facts, a third question must be answered: is there a way to accommodate both rights and avoid the conflict between them?

. . . If no accommodation is possible, then a fourth question must be answered: do the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so? Deleterious effects include the harm done by limiting the witness's sincerely held religious practice. The judge should consider the importance of the religious practice to the witness, the degree of state interference with that practice, and the actual situation in the courtroom—such as the people present and any measures to limit facial exposure. The judge should also consider broader societal harms, such as discouraging niqab-wearing women from reporting offences and participating in the justice system. These deleterious effects must be weighed against the salutary effects of requiring the witness to remove the niqab. Salutary effects include preventing harm to the fair trial interest of the accused and safeguarding the repute of the administration of justice. . . .

Per LeBel and Rothstein JJ.

This appeal illustrates the tension and changes caused by the rapid evolution of contemporary Canadian society and by the growing presence in Canada of new cultures, religions, traditions and social practices. This case is not purely one of conflict and reconciliation between a religious right and the protection of the right of the accused to make full answer and defence, but engages basic values of the Canadian criminal justice system.

. . . The Constitution requires an openness to new differences that appear within Canada, but also an acceptance of the principle that it remains connected with the roots of our contemporary democratic society. A system of open and independent courts is a core component of a democratic state, ruled by law and a fundamental Canadian value. From this broader constitutional perspective, the trial becomes an act of communication with the public at large. The public must be able to see how the justice system works. Wearing a niqab in the courtroom does not facilitate acts of communication. Rather, it shields the witness from interacting fully with the parties, their counsel, the judge and the jurors. Wearing the niqab is also incompatible with the rights of the accused, the nature of the Canadian public adversarial trials, and with the constitutional values of openness and religious neutrality in contemporary democratic, but diverse, Canada. Nor should wearing a niqab be dependent on the nature or importance of the evidence, as this would only add a new layer of complexity to the trial process. A clear rule that niqabs may not be worn at any stage of the criminal trial would be consistent with the principle of public openness of the trial process and would safeguard the integrity of that process as one of communication.

Per Abella J. (dissenting)

The harmful effects of requiring a witness to remove her niqab, with the result that she will likely not testify, bring charges in the first place, or, if she is the accused, be unable to testify in her own defence, is a significantly more harmful consequence than the accused not being able to see a witness's whole face. Unless the witness's face is directly relevant to the case, such as where her identity is in issue, she should not be required to remove her niqab.

There is no doubt that the assessment of a witness's demeanour is easier if it is based on being able to scrutinize the whole demeanour package—face, body language, or voice. That, however, is different from concluding that unless the entire package is available for scrutiny, a witness's credibility cannot adequately be weighed. Courts regularly accept the testimony of witnesses whose demeanour can only be partially observed and there are many examples of courts accepting evidence from witnesses who are unable to testify under ideal circumstances because of visual, oral, or aural impediments. The use of an interpreter, for example, may well have an impact on how the witness's demeanour is understood, but it is beyond dispute that interpreters render the assessment of demeanour neither impossible nor impracticable. A witness may also have physical or medical limitations that affect a judge's or lawyer's ability to assess demeanour. A stroke may interfere with facial expressions; an illness may affect body movements; and a speech impairment may affect the manner of speaking. All of these are departures from the demeanour ideal, yet none has ever been held to disqualify the witness from giving his or her evidence on the grounds that the accused's fair trial rights are impaired. Witnesses who wear niqabs should not be treated any differently.

Since not being able to see a witness's whole face is only a partial interference with what is, in any event, only one part of an imprecise measuring tool of credibility, there is no reason to demand full "demeanour access" where religious belief prevents it. A witness wearing a niqab may still express herself through her eyes, body language, and gestures. Moreover, the niqab has no effect on the witness's verbal testimony, including the tone and inflection of her voice, the cadence of her speech, or, most significantly, the substance of the answers she gives. Defence counsel still has the opportunity to rigorously cross-examine the witness.

A witness who is not permitted to wear her niqab while testifying is prevented from being able to act in accordance with her religious beliefs. This has the effect of forcing her to choose between her religious beliefs and her ability to participate in the justice system. As a result, complainants who sincerely believe

that their religion requires them to wear the niqab in public, may choose not to bring charges for crimes they allege have been committed against them, or, more generally, may resist being a witness in someone else's trial. Where the witness is the accused, she will be unable to give evidence in her own defence. The majority's conclusion that being unable to see the witness's face is acceptable from a fair trial perspective if the evidence is "uncontested," essentially means that sexual assault complainants, whose evidence will inevitably be contested, will be forced to choose between laying a complaint and wearing a niqab, which may be no meaningful choice at all.

Does the "proportionality" approach necessarily involve secular courts in evaluating the centrality and importance of religious beliefs? If so, how are such evaluations compatible with the independence from religious doctrine required by the secular constitutional state? How can a court which attempts to engage in such an evaluation avoid the difficulties that engulfed the Indian Supreme Court in *Shah Bano*?

Yet if the "proportionality" approach does not require such an evaluation, must proportionality be determined solely by an assessment of the strength of relevant state interests?

JUDICIAL ENFORCEMENT OF
INTERNATIONAL HUMAN RIGHTS

DISCUSSION LEADERS

ALEC STONE SWEET AND HELEN KELLER

III. JUDICIAL ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS

DISCUSSION LEADERS:

ALEC STONE SWEET AND HELEN KELLER

European Convention on Human Rights

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| ECtHR Seminar Background Paper, <i>Implementation of the Judgments of the European Court of Human Rights: A Shared Judicial Responsibility?</i> (2014) | III-7 |
| Alec Stone Sweet, <i>A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe</i> (2012) | III-13 |
| <i>X. v. the Migration Authority of Thurgovia</i> (Federal Supreme Court of Switzerland, 2012) | III-18 |
| Haşım Kılıç, President of the Turkish Constitutional Court, <i>On the Occasion of the 52nd Anniversary of the Court</i> (April 25, 2014) | III-23 |

American Convention on Human Rights

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| Antônio Augusto Cançado Trindade, <i>Compliance with Judgments and Decisions—The Experience of the Inter-American Court of Human Rights: A Reassessment</i> (2014) | III-24 |
| Report Prepared by the Supreme Court of Mexico, <i>The Radilla Pacheco Case, Constitutional Reform on Human Rights in Mexico, and Consequences of the New Framework</i> (2011) | III-28 |
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| State Legislature of Colorado, <i>Tribute to Jessica Lenahan</i> (May 7, 2014) | III-39 |

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| Emmanuel K. Quansah, <i>An Examination of the Use of International Human Rights Law as an Interpretative Tool in Human Rights Litigation in Ghana and Botswana</i> (2010) | III-39 |
| Karen J. Alter, Laurence R. Helfer & Jacqueline R. McAllister, <i>A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice</i> (2013)..... | III-42 |
| SERAP v. Federal Republic of Nigeria (Community Court of Justice, ECOWAS, 2012) | III-47 |

India

Aparna Chandra, *Fostering Respect?: The Supreme Court of India's Approach to International Law: A Call for Caution* (2013) III-56

This chapter considers the increasingly structured interface between national law and international human rights instruments. In the last two decades, a rapidly expanding number of states have incorporated such treaties into national law. By “incorporation,” we mean the process through which international human rights become directly effective within national legal orders. Where such rights are directly effective, individuals may plead them before judges, who are under a duty to enforce them, when applicable. As a structural matter, incorporation will always raise two closely related issues. First, what rank in the domestic hierarchy of norms do human rights treaties occupy? Second, what is the relationship between (a) international human rights and the jurisprudence of international human rights courts, and (b) national constitutional rights and the jurisprudence of national high courts? The fact that national systems increasingly confer on human rights instruments a higher status than they do other international agreements also raises another question. What is so special about human rights treaties?

State practice varies widely. In the Council of Europe system, all 47 contracting states have incorporated the European Convention on Human Rights (ECHR). As a result, the ECHR is no longer merely a species of international law: it is *national* law that is directly enforceable by national judges. While states have incorporated the Convention through different mechanisms, we also find variation within national orders. In systems with multiple high courts, for example, judges do not always agree among themselves on a common approach to enforcing the Convention. Some courts are more receptive than are others to the European Court’s jurisprudence; and resistance to the latter’s influence is more pronounced in some areas of the law, compared to other domains.

The first part of the chapter explores the impact of incorporation of the ECHR. The first reading, produced by justices on the ECtHR for an audience of national judges, focuses on implementation issues through inter-judicial dialogue and cooperation. The second text, a paper by Alec Stone Sweet, describes the deep changes that incorporation has provoked within national legal systems. Most important, constitutional obstacles to the enforcement of the Convention have been overcome, including the prohibition of judicial review of statute, and the *lex posterior derogat legi priori* (as a rule to resolve conflicts between statute and the ECHR). It is in this context that we include a landmark judgment of the Swiss Federal Supreme Court, *X v. the Migration Authority of Thurgovia* (2012), which definitively established the primacy of the ECHR over statute in that country. Prior to this decision, that Court had resolved conflicts between federal statutes and treaty law on a case-by-case basis, sometimes applying the *lex posterior* rule. The ruling not only sets aside the *lex posterior* rule, it requires state officials, as a matter of constitutional obligation, to “implement the standards resulting from the

jurisprudence of the European Court of Human Rights.”

The chapter also includes materials from Turkey, which is currently in the throes of a major judicial-political confrontation after a series of rulings rendered by the Turkish Constitutional Court during the spring of 2014. Two relatively recent amendments of the Turkish Constitution are relevant to this conflict and the themes of this chapter. In 2004, an amendment upgraded the status of international human rights treaties in national law, compared with all other treaties. Article 90 of the Turkish Constitution now provides that “[i]n the case of a conflict between international agreements in the area of fundamental rights and freedoms . . . and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.” A second amendment in 2010 expanded the jurisdiction of the Constitutional Court to include direct petitions from individuals (beginning in 2012). The amendment was motivated, in part, to reduce Turkish applications to the European Court. The Prime Minister of Turkey and members of the ruling party have attacked the Constitutional Court’s 2014 decisions as politically motivated, and contrary to the national interest. In a response, excerpted below, the President of the Constitutional Court has strongly defended these rulings with reference to international human rights, the European Convention, and to precedents of the European Court.

The chapter then turns to the Organization of American States (OAS), and the American Convention on Human Rights (ACHR). In the ECHR, individuals can apply directly to the European Court once national remedies have been exhausted; in the ACHR, cases are referred to the IACtHR by the Commission or a state party. There exists no systematic research on incorporation, or comparative analysis of the rank and status of the ACHR in the national systems of contracting states. We know that some states are strongly resistant to incorporation. The courts of the Dominican Republic and Venezuela, for example, are empowered to review the legality of rulings rendered by the IACtHR with respect to the national constitution. On the other end of the spectrum is Argentina which, in a 1996 ruling, “unanimously held that the Constitution includes not only the treaties on human rights, but also the case-law of international tribunals.”¹

Here, we present three texts. The first excerpt, from a 2014 speech by a former President of the IACtHR Justice Cançado Trindade, compares the European and Inter-American systems, and details some of the challenges facing the IACtHR. The second is a 2011 Report of the Supreme Court of Mexico, which

¹ Ricardo Lorenzetti, President of the Supreme Court of Argentina, Presentation at the International Summit of High Courts, *Global Governance: Dialogue Between Courts* (Nov. 1-3, 2010), available at <http://www.summitofhighcourts.com/docs/papers/argentina.pdf>.

stakes out a firm commitment to incorporate the ACHR and the case law of its Court, in much the way Argentina has. The Supreme Court directs all Mexican judges to ensure that their decisions are compatible with the ACHR, as interpreted by the IACtHR. The third excerpt concerns a petition brought to the Inter-American Commission on Human Rights against the United States, a country that has resolutely refused to incorporate human rights instruments. Although the United States is not a party to the ACHR, it is nonetheless subject to the jurisdiction of the Commission, by virtue of having signed the Charter of the OAS. In its Report on the Merits of the petition, the Commission refers to a wide range of international human rights instruments, including the jurisprudence of the ECtHR, bringing them to bear on the United States and the case at hand.

In Africa, the emergence of an active, rights-protecting court for the fifteen-member Economic Community of West African States (ECOWAS) has dramatically altered the human rights landscape.² The chapter presents a paper by Alter, Helfer, and McAllister, who recount how, in 2004, the ECOWAS Court gained jurisdiction over individual petitions, and to what effect. We then present a 2012 ruling of the Court brought by the Socio-Economic Rights and Accountability Project against Nigeria. The case involves the state's failure to protect the rights of people living in the Niger Delta, who have long suffered from environmental degradation caused by the exploitation of oil fields by foreign companies. In its ruling, the ECOWAS Court declares that it may enforce a wide range of instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the African Charter on Human and Peoples' Rights. The individual petition, the source of the exploding docket of the ECOWAS Court, could well lead to incorporation of these instruments, but it might also lead to backlash against the Court. In any event, some African states have moved to incorporate human rights treaties on their own, of which (nominally dualist) Ghana provides an illustration here.

The chapter closes with a reading that traces how the Supreme Court of India has steadily incorporated human rights treaties, thereby reconfiguring the formal relationship between human rights and the constitutional order. Whereas the Constitution of India provides for a relatively orthodox dualism, beginning in the 1970s the Supreme Court successfully reconstructed the legal system in ways

² The pan-African analog to the European and Inter-American Courts is the African Court of Human and Peoples' Rights, which began operating under the auspices of the African Union in 2004. As of 2013, twenty-seven of fifty-four African Union states had ratified the protocol establishing the Court, and only six (Burkina Faso, Ghana, Malawi, Mali, Tanzania and Rwanda) had ratified the protocol permitting individual petitions. The regime's court issued its first ruling on the merits in 2009.

that the author, Aparna Chandra, characterizes as “functionally monist.” Today, the Supreme Court regularly uses the provisions of international human rights instruments in dynamic synergy with constitutional rights, to fill gaps in the Indian Constitution, as well as to provide guidance when interpreting national rights provisions.

EUROPEAN CONVENTION ON HUMAN RIGHTS

ECtHR Seminar Background Paper

*Implementation of the Judgments of the European Court of Human Rights: A Shared Judicial Responsibility?**

The enforcement of final judgments is a critical component of any rule of law system. As the European Court of Human Rights has held in relation to national legal systems, the right to bring proceedings would be illusory if a final, binding judicial decision was allowed to remain inoperative. This is equally true of . . . the judicial machinery set up by the European Convention on Human Rights. It has been confirmed by the Committee of Ministers of the Council of Europe which has recognized that the “speedy and efficient execution of judgments is essential for the credibility and efficacy of the [Convention] as a constitutional instrument of European public order on which the democratic stability of the continent depends.” However, the judgment of an international court implies a delicate balance between international jurisdiction and national sovereignty. Its enforcement therefore calls for a different type of procedure from that applicable to national proceedings, involving, among other things, dialogue and cooperation. This can also be expressed in terms of a shared responsibility between the different actors, including, for the Convention system, the Court, the Committee of Ministers, the Governments and the national courts.

The mechanism for the execution of the Court’s judgments is set out in Article 46 of the Convention, which provides first that the Court’s judgments are binding on the respondent States⁴ and secondly that their execution is subject to

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⁴ Article 46 § 1: “The High Contracting Parties undertake to abide by the final judgment in any case to which they are parties.”

the supervision of the Committee of Ministers.⁵ The original text of the Convention made no mention of any role for the Court in the execution phase, but Protocol No. 14 to the Convention added two elements to the process, namely the possibility for the Committee of Ministers to seek interpretative assistance from the Court to clarify obligations arising from a judgment and to institute proceedings before the Court to determine whether the respondent State has complied with a judgment. In both cases a majority of two-thirds of the Committee of Ministers is required.

The traditional approach to execution was therefore a strict division of labour between the Court, which rendered a judgment that was essentially declaratory, and the Committee of Ministers, which was considered to have exclusive responsibility for monitoring execution. The Committee of Ministers' role was one of supervision; the choice of the most appropriate means to implement a judgment fell to the respondent State. . . .

For the first forty years of the Court's existence, this mechanism functioned, broadly speaking, successfully. While execution was not always rapid, there were very few examples of the process failing completely. However, as the effects of the enlargement of the Council of Europe began to be felt and following the entry into force of Protocol No. 11,^{*} new problems emerged for which the traditional mechanism seemed not always sufficiently well-equipped. Deep-seated structural problems and very serious violations of core rights became more frequent. At the same time, in a new political climate, there appeared to be growing reluctance on the part of some States, including among the "old democracies," to accept rulings by the Court on certain politically sensitive issues. These phenomena led the Court to envisage new solutions and to take a more proactive role. . . .

As noted above, the Court has no formal role in the process of execution of judgments except as now provided for in Article 46 of the Convention. In many judgments it remains content to leave the determination of what is required by its finding of a violation to the Committee of Ministers and confines itself to awarding just satisfaction. Indeed in some cases the finding of a violation is considered to be sufficient just satisfaction in itself. . . .

⁵ Article 46 § 2: "The final judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution."

^{*} Protocol No. 11, which entered into force on November 11, 1994, expanded the jurisdiction of the European Court of Human Rights, conferring upon it, inter alia, competence to give advisory opinions.

Faced with a growing problem of “repetitive” cases deriving from structural violations the Court developed the pilot judgment procedure. The main features of this procedure are well known: the existence of a structural or systemic dysfunction at national level capable of generating a large number of applications to Strasbourg and the selection of a representative case making it possible to identify in a pilot judgment the source of the problem, indicate remedial measures and, where appropriate, decide the adjournment of pending cases raising the same issue. In specifying the general measure which the respondent State was required to take, the Court was assuming a responsibility hitherto exercised by the Committee of Ministers. However, although the idea first gestated within the Court this initiative was also a response to what was in a sense a plea for help from the Committee of Ministers.²⁴ Since then the pilot judgment procedure has been articulated in different forms, including so-called quasi-pilot judgments, but it is now a well-established feature of the Court’s jurisprudence and practice. This is reflected by its incorporation into the Rules of Court.²⁶ The new Rule expressly provides that the Court is to identify the type of remedial measure which the respondent State is required to take at the domestic level. It also states that the Court may direct in the operative provisions of the pilot judgment that the remedial measures so identified be adopted within a specified time. This codifies a growing practice on the part of the Court to indicate a time-frame for the adoption of remedial measures. Here the Court might be said to be straying further into the territory of the Committee of Ministers, since it not only indicates the type of remedial measure required but also engages in a form of supervision of the process. . . .

In some cases the Court considers the individual remedial measure to be self-evident to the point that any real choice is excluded. . . .

Relying on the international law principle of *restitutio in integrum*, the Court has repeatedly held that the most appropriate form of redress for a violation is to ensure that applicants are, as far as possible, put in the position in which they would have been if there had been no breach of the Convention. Thus, while the Court has found that the Convention does not give it jurisdiction to direct a State to open a new trial or to quash a conviction, it nevertheless insists that the most appropriate means of achieving *restitutio in integrum* in the context of Article 6 is

²⁴ Resolution (Res(2004)3) on judgments revealing an underlying systemic problem, adopted on 12 May 2004, inviting the Court “to identify in its judgments finding a violation of the Convention what it considers to be an underlying systemic problem and the source of that problem, in particular when it is likely to give rise to numerous applications, so as to assist States in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments.”

²⁶ Rule 61 adopted by the Court in February 2011.

the retrial of the applicant in a way which satisfies the requirements of the Convention, should the applicant so request. If initially this approach was limited to breaches of Article 6, the possibility of its being extended to other Convention provisions has been recognised. . . . This approach has been endorsed by the Committee of Ministers which in 2000 encouraged “the Contracting Parties . . . to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including re-opening of proceedings, in instances where the Court has found a violation of the Convention”

The Court has increasingly found itself compelled to play a more active part in the execution process in the interests of the effectiveness of the Convention system. At the same time it has continued to stress that it is primarily the function of the Committee of Ministers to oversee the process. However, some questions have arisen as to this approach and as to where the limits lie. Is it still necessary to insist on the declaratory nature of the Court’s judgments? It is accepted that, faced with a structural problem, spelling out the appropriate remedial measure may be a precious aid to the execution process. Does this mean that fixing the time-frame for its adoption is also legitimate? In situations of urgency, identifying a specific individual measure may indeed be necessary and desirable. Is this the case where a solution is less urgent? In relation to the re-opening of proceedings and situations of failed execution is there a clear definition of the Court’s proper role? To what extent can the Court consider the execution of its judgment in a later case? What new policies or practices could be developed to strengthen the Court’s role in the execution process?

As noted in the introduction, under the Convention the Court’s judgments are binding on the respondent States. How they affect national courts will initially depend on constitutional arrangements and in particular the way in which the Convention is incorporated into the national legal system.⁵⁰ It may also raise questions of the relationship between the executive and the judiciary and therefore of judicial independence. Whether or not national courts are constitutionally bound to follow Strasbourg judgments, it remains essential for those courts to retain full confidence in the international system. If they are not convinced by the Court’s reasoning, they will clearly be less enthusiastic about giving effect to Strasbourg judgments. This highlights the importance of having carefully reasoned and persuasive rulings and may also imply a duty for the Court to consider in detail what the practical consequences of its decisions will be at national level.

⁵⁰ See HELEN KELLER & ALEC STONE SWEET “A EUROPE OF RIGHTS—THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS” (2008).

There are many examples of national courts adapting their case-law following a judgment finding a violation. [Here follows a list of important examples from a diverse set of states.]

Under the Human Rights Act 1998 the United Kingdom courts are required to “take into account” Strasbourg jurisprudence. Following a Chamber judgment in the case of *Al-Khawaja* in which the European Court found a violation of Article 6 of the Convention* on the ground that statements of a witness who had not been called to give evidence during the trial were the sole or at least the decisive basis for the applicant’s conviction,⁷⁰ the United Kingdom Supreme Court revisited the question in a different case and in doing so examined the effect of the obligation “to take into account” Strasbourg case-law.⁷¹ As indicated in the lead judgment, this obligation would normally result in the Supreme Court applying principles that are clearly established by the Strasbourg Court. However, there would be occasions, albeit rare, where there were concerns as to whether the Strasbourg Court had sufficiently understood particular aspects of the domestic process. Where this happened, the Supreme Court could decline to follow the Strasbourg decision, giving reasons for adopting this course. It was expressly suggested that this could give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that was in issue, so as to create the possibility of a “valuable dialogue” between the two courts. The judgment set out a detailed analysis of the Strasbourg case-law to support the finding that the decision in *Al-Khawaja* need not be followed in the case in question. In the meantime the *Al-Khawaja* case had been accepted for referral to the Grand Chamber which gave judgment in December 2011 taking on board at least part of the Supreme Court’s reasoning. As the then President of the European Court noted in his concurring opinion, the case afforded “a good example of the judicial dialogue between the national courts and the European Court.”⁷³ In any event it shows the potential for a national court to argue on Convention grounds for a different solution from that initially adopted in Strasbourg. . . .

The French Court of Cassation was noticeably reluctant to follow Strasbourg jurisprudence concerning the admissibility of an appeal on points of law by a person who had absconded. It was not until a law was enacted

* Article 6 provides for the right to a fair trial.

⁷⁰ *Al-Khawaja and Tahery v. the United Kingdom*, nos. 26766/05 and 22228/06, 20.01.2009.

⁷¹ *R v. Horncastle* [2009] UKSC 14.

⁷³ Sir Nicolas Bratza reiterated this view in his speech at the official opening of the judicial year in January 2012, http://echr.coe.int/Documents/Speech_20120127_Bratza_JY_ENG.pdf.

strengthening the protection of the presumption of innocence seven years after the first judgment that the Court of Cassation changed its position.⁷⁸

In the *Markin* Chamber judgment concerning Russia⁷⁹ the Court found a violation of Article 14 read in conjunction with Article 8* arising out of the exclusion of male military personnel from entitlement to parental leave. In the context of Article 46 the Court recommended that the respondent State take measures, under the supervision of the Committee of Ministers, with a view to amending specific legislation and rules. This decision gave rise to overt criticism notably by the President of the Constitutional Court. It is true that the Chamber judgment had expressly indicated that it had found the Constitutional Court's reasoning unconvincing. The case was subsequently referred to the Grand Chamber which found the same violation, but without criticising the Constitutional Court and without indicating any specific general measure to be taken by way of execution.⁸¹ On the strength of that judgment new proceedings are pending before the Russian courts and a question of constitutionality has been submitted to the Constitutional Court.

Following the Court's judgment in *Maggio*⁸² finding a breach of Article 6 of the Convention relating to an intervention of the legislature in pending judicial procedures—concerning pension contributions abroad—which retroactively changed the applicable law, the Italian Constitutional Court decided that the Strasbourg judgment was contrary to the Constitution and thus not to be followed by Italian courts.⁸³

These examples, which are of course far from being exhaustive, show the real potential for national courts, particularly superior national courts, to play a key role in the execution process, while at the same time engaging in a constructive dialogue with Strasbourg. This calls for efforts on both sides to increase mutual understanding. One aspect of this relationship on which the Court has worked is the translation of its judgments into languages which the national

⁷⁸ Law of 15 June 2000, following, among others, the judgments in *Poitrimol v. France*, 23.11.1993, Series A no. 277 A, and *Guérin v. France*, 29.07.1998, Reports of Judgments and Decisions 1998-V.

⁷⁹ *Konstantin Markin v. Russia*, no. 30078/06, 7.10.2010.

* Article 8 provides for the right to respect for private and family life. Article 14 prohibits discrimination against individuals on any basis, including sex, race, language, religion, political opinions, national origin, etc.

⁸¹ *Konstantin Markin v. Russia* [GC], no. 30078/06, ECHR 2012 (extracts).

⁸² *Maggio and Others v. Italy*, nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, 31.05.2011.

⁸³ Decision no. 264/2012.

courts will understand. In this context it should be noted that in its opinion on draft Protocol No. 16 to the Convention the Court fully subscribes to the purpose of enabling a dialogue between it and the highest national courts and enhancing interaction between it and the national authorities. There remain however questions: what is the true effect of Strasbourg judgments in national systems? How are national courts to resolve potential conflicts between Strasbourg decisions and national constitutional law? What other means might be used to reinforce the relationship between the European Court and its national counterparts? What can the Court do to make it easier for national courts to contribute to the timely and effective execution of its judgments? . . .



Alec Stone Sweet

A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe^{*}

. . . The [system of rights protection] in Europe is comprised of three interlocking elements. First, individuals are able to plead fundamental rights, including the Convention, before national judges. Although the ECHR does not require incorporation into the domestic order, all 47 states have now done so, in ways that make it binding on all public authorities and enforceable by national judges. Second, national systems . . . are formally linked to a realm of rights adjudication beyond the state: every individual, regardless of citizenship, possesses an unfettered right to petition the European Court, once national remedies have been exhausted. Third, the ECHR comprises an autonomous source of rights doctrine. The Court treats the Convention as a “living” instrument, which is interpreted and applied in order to secure the effectiveness of rights, as society evolves. States have no means of blocking applications or the Court’s rulings, which are final . . .

In 1950, when the ECHR was signed, Ireland was the only member of the Council of Europe with any meaningful experience with rights review. The constitutions of Belgium, France, Luxembourg, The Netherlands, and the UK did not include a charter of rights and/or prohibited the judicial review of statutes. Norway’s constitution (1814) contained a handful of rights and permitted judicial review, but few if any important laws had ever been found to have violated these rights. The German and the Italian constitutional courts were still being designed.

^{*} Excerpted from Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1 GLOBAL CONSTITUTIONALISM 53 (2012).

Not surprisingly, a majority of states rejected proposals to grant individuals a right of petition, and to accept the compulsory jurisdiction of the European Court (which began operation only in 1959). With Protocol No. 11 (1998), states embraced a robust legal regime. . . .

[D]omestication of the Convention proceeded via different routes: express constitutional provision (Austria, many post-Communist states); judicial interpretation of constitutional provisions related to treaty law generally (most states in Western Europe); or special statutes (UK, Ireland, and Scandinavian states). With incorporation, all national courts in the system are capable of enforcing the Convention: individuals can plead the ECHR at national bar against any act of public authority; judges are under a duty to identify statutes that conflict with Convention rights, and to interpret statutes in lights of the ECHR to avoid conflicts whenever possible; and virtually all courts may refuse to apply statutes that conflict with Convention rights, with the notable exception of those in the UK and Ireland.

Incorporation is an inherently constitutional process The Convention quickly developed into a ‘shadow’ or ‘surrogate’ constitution in every state that did not possess its own judicially-enforceable charter of rights (including original signatories, Belgium, France, The Netherlands, Switzerland, and the UK). In the 1990s, Finland, Norway, and Sweden enacted new Bills of Rights, closely modeled on (and invoking) the ECHR, in order to fill gaps in their own constitutions.

In those states that possess, at least on paper, relatively complete systems of constitutional justice, incorporation provides supplementary protection [Germany, Greece, Ireland, Italy, Portugal, Spain, Turkey, and in the post-Communist states]. The Spanish Constitutional Tribunal, for example, enforces the ECHR as quasi-constitutional norms. The Tribunal will strike down statutes that violate the Convention as *per se* unconstitutional; it interprets Spanish constitutional rights in light of the ECHR, wherever possible; and it has ordered the ordinary courts to abide by the Strasbourg Court’s jurisprudence as a matter of *constitutional* obligation, including case law generated by litigation not involving Spain. If the judiciary ignores the Court’s jurisprudence, individuals can appeal directly to the Tribunal for redress. Nonetheless, the Tribunal insists that in the event of an irreconcilable conflict between the ECHR and the Spanish Constitution, the latter will prevail—a common position among constitutional courts. In many post-Communist states, as well, constitutional judges invoke the Strasbourg Court’s jurisprudence as authority, in order to enhance the status of fundamental rights—and hence their own positions—in the domestic context.

Strikingly, some states give the Convention constitutional rank (e.g., Albania, Austria, Slovenia); and, in The Netherlands, the ECHR enjoys supra-constitutional status. In Belgium, the Constitutional Court has determined that the ECHR possesses supra-legislative but infra-constitutional rank, while the Supreme Court holds that the ECHR possesses supra-constitutional status, thereby enhancing its autonomy vis-à-vis the Constitutional Court. . . .

[Incorporation] expand[ed] the discretionary authority of courts. Many judges will now refuse to apply law that conflicts with the Convention; at the same time, they are rapidly abandoning traditional methods of statutory interpretation. Instead of seeking to discern legislative intent, judges increasingly favor the purposive construction of statutes in light of fundamental rights jurisprudence. In systems in which multiple, functionally-differentiated, high courts co-exist (the majority of states), pluralism means that the supreme courts of ordinary jurisdiction may assume the mantle of *de facto* constitutional courts whenever they review the *Conventionality* of statutes. France, which for two centuries famously embraced and propagated the dogmas of the General Will (legislative sovereignty and the prohibition of judicial review), is now a robust example [of this trend]

Some of the most powerful states in Western Europe have had the greatest difficulty incorporating the ECHR to permit judges to enforce it against statute. In legal terms, the structural problem concerns the fact that in so-called ‘dualist’ systems—including original signatories, Germany, Ireland, Italy, Sweden, Norway, and the UK—constitutions confer upon treaty law the same rank as statute. In such systems, conflicts between statutes and treaty provisions are expected to be resolved according to the rule, *lex posterior derogat legi priori*. The rule is anathema to a [effective rights protection], since legislation adopted after the transposition of the ECHR into national law would normally be immune from review under the Convention. What is critical . . . is that, in these states, the rule has been relaxed or overridden altogether.

In Italy, at least until the late 1960s, “Italian courts refused to apply the Convention considering its provisions to be merely programmatic” (Candela Soriano 2008: 405). In the past decade, courts incorporated the Convention. . . . In 2004, the Supreme Court (*Cassazione*) began treating the Convention as directly applicable, while in 2007, the Italian Constitutional Court (ICC) struck down a statute (concerning expropriation) as unconstitutional on the grounds that it violated property rights under the Convention. In its decision, the ICC held that Italian judges are required to interpret national law in light of the ECHR and, where a conflict is unavoidable, to refer the matter to the ICC. Some judges have chosen to ignore this jurisprudence. In 2008, for example, a court of appeal decided on its own authority to refuse to apply a controlling statute on grounds

that it was incompatible with the Convention. The situation has given rise to a fierce debate: does the ECHR enjoy supra-legislative but infra-constitutional rank (the ICC's position) or constitutional status (the position of some civil courts and scholars)? . . .

In Germany, overcoming the *lex posterior* rule has been tortuous. Not until 1987 did the GFCC directly confront the problem, holding that German statutes, regardless of their date of adoption, must be "interpreted and applied in harmony" with the Convention. In its *Görgülü* decision (2005), the GFCC repudiated the "traditional theory" according to which the Strasbourg's Court's judgments did not bind the domestic organs of government, including the courts. The ruling establishes a strong presumption that judges are to apply the Court's jurisprudence when it is on point, except in "exceptional" circumstances, namely, when "it is the only way to avoid a violation of the fundamental principles contained in the Constitution." As important, the GFCC's ruling expanded the constitutional complaint procedure: individuals can now challenge (as a violation of their constitutional rights) judicial rulings that ignore or fail to properly take into account the European Court's case law. While *Görgülü* significantly bolstered the status of the ECHR within the domestic order, the GFCC also noted that it would settle any conflict between the Basic Law and the ECHR in terms of the former.

In 2011, the GFCC declared that the ECHR and the European Court's case law comprise interpretive "aids for the determination of the contents and scope of the fundamental rights and of rule-of-law principles enshrined in the Basic Law." Like *Görgülü*, the GFCC's *Preventive Detention* ruling ended a convoluted saga involving a direct conflict between the German courts and the European Court. In 2009, in *M v. Germany*, the Strasbourg Court had held that German law allowing the further detention of convicted criminals after they had served their prison sentences violated the ECHR. The GFCC had upheld the constitutionality of the relevant statute in 2004, in so far as such detention was deemed necessary to protect public security. When the GFCC appeared reluctant to change its position following the *M* judgment, the European Court issued a series of rulings finding the same violation. In *Prevention Detention*, the GFCC overturned its 2004 ruling, on the grounds that the Strasbourg's court's case law had constituted a significant "change in the legal situation." The Court then went on to ground the Basic Law's "openness" to the Convention in Article 1.2 of the Basic Law (which recognizes human rights as foundational principles).

As a result, all organs of the state are under a duty "not only to take into account" the ECHR in their decisions, but "to avoid conflict" between it and national law. "The openness of the Basic Law" the GFCC stated, "expresses an understanding of sovereignty that not only does not oppose international and

supranational integration, it presupposes and expects [integration].”

. . . In *Görgülü*, the GFCC had already declared that its own rights protecting role is exercised “indirectly in the service” of the Convention, an engagement that both protects Germany from findings of violations and “contributes to promoting a joint European development of fundamental rights.” In *Preventive Detention*, the GFCC acknowledged a dialogic relationship with the Strasbourg Court, without abandoning its position on the primacy of the Basic Law: “The fact that the German constitution has the final word is not incompatible with an international and European dialogue between courts, rather it [comprises the dialogue’s] normative foundation.” In June 2011, two months after *Preventive Detention*, the European Court responded favorably, finding no violation in a related case, *Mork v. Germany* (2011). The Court noted: “In its judgment, the GFCC stressed that the fact that the Constitution stood above the Convention in the domestic hierarchy of norms was not an obstacle to . . . dialogue between the courts” and that “in its reasoning, [the GFCC] relied on the interpretation . . . of the Convention made by this Court in its judgment in the case of *M. v. Germany*.” The outcome illustrates one basic mechanism—dialogue among autonomous courts—through which decentralized sovereignty can increase the effectiveness of the ECHR.

In two states—Ireland and the UK—the *lex posterior* rule has also been relaxed, although no judge is authorized to set aside legislation conflicting with the Convention. Pursuant to the ECHR Act (2003), Irish officials are under a duty to respect and enforce the Convention, and individuals can plead it against all acts of public authority, except those of Parliament and the courts. Under the UK Human Rights Act (2000), individuals may challenge all acts, including Parliamentary legislation; if a Parliamentary statute is found to be incompatible with the ECHR, the high courts are obligated to issue a ruling of incompatibility—but they may not set aside the offending legislative provisions. Declarations of incompatibility are addressed to the Parliament, which must indicate what remedial legislation, if any, will be proposed. In Ireland, the high courts may also issue rulings of incompatibility, although Parliament is not obliged to respond to them. In Norway and Sweden, which incorporated the ECHR through human rights statutes in the 1990s, the courts must give primacy to the Convention when in a conflict with legislation. In the past decade, Norwegian courts in particular have positioned themselves to become active participants in the development of Convention rights.

While the dynamics of incorporation are heavily mediated by constitutional provisions and doctrine, important strategic interests have been catalysts. In the 1990s, incorporation constituted a formal means for post-Communist states to signal their commitment to the massive institutional reforms

being demanded by Western states. [T]he ECHR has played a crucial role in democratic transitions after 1989. New bills of rights were modelled on the ECHR, with an eye towards future membership in the EU and the Council of Europe; and some states even signed the ECHR prior to ratifying new constitutions (including Albania, Armenia, Azerbaijan, Georgia, Poland, Slovakia, and Ukraine). For the core states of Western Europe, folding the post-Communist states into the ECHR also fulfilled important strategic interests. Protocol No. 11 reconstructed the regime, making it an extraordinarily efficient mechanism for monitoring the functioning of post-Communist states. For Western states, the cost of Protocol No. 11 is enhanced supervision of their own rights-regarding activities, a cost they have thus far been willing to pay. . . .

**X. v. the Migration Authority of Thurgovia
Federal Supreme Court of Switzerland
2C_828/2011 (2012)**

This case before the Swiss Federal Supreme Court (henceforth FSC) concerned a conflict of norms on the level of constitutional law: under certain conditions, Art. 121(3)-(6) of the Swiss Federal Constitution requires the expulsion of aliens without further examination of their case, whereas Article 8 of the European Convention on Human Rights (ECHR) requires an examination of the circumstances and a balancing of interests according to the principle of proportionality. The FSC relied on Articles 5(4)—“The Confederation and the Cantons shall respect international law,” and 190 of the Constitution—“The Federal Supreme Court and the other judicial authorities apply the federal acts and international law.” Applying these provisions, the FSC held that Art. 121(3)-(6) of the Constitution, new provisions introduced by the so-called Deportation Initiative (“Ausschaffungsinitiative”), did not take precedence over the ECHR.

The case concerned X., a Macedonian national, born in 1987, who entered Switzerland legally in 1994 and obtained a residency permit. In 2010 he was found guilty of violations of the Narcotics Act and was sentenced to a suspended sentence for participating in organized drug-related crime (the distribution of about 1 kilo of heroin). On the basis of the sentence, the migration authorities of the canton of Thurgovia revoked X.’s residency permit in 2011 and mandated his expulsion.

X. appealed to the FSC to quash the expulsion order. He argued that the measures were disproportionate, and that authorities had not given sufficient

weight to his successful integration and other private interests. Interim measures were granted.

The FSC referenced its relevant case-law in holding that the protection of public safety permits the expulsion of aliens in the case of severe crimes, including narcotics-related offences, even where there is only a small risk of further offences.

The FSC then referred to the jurisprudence of the European Court of Human Rights (ECtHR) concerning Article 8 ECHR (the protection of private and family life) and found that the ECtHR considers the same elements relevant for evaluating the permissibility of measures leading to the expulsion of second-generation aliens as the FSC. These elements are: the circumstances of the crime, the duration of residence, the amount of time since the commission of the crime and the behavior of the applicant in the interim, his or her social, cultural and family ties to the state of residency and the state of origin, his or her health and the duration of the ban on reentry. The FSC, after considering cases comparable to the one at hand, held that that X.'s expulsion was disproportionate. In doing so, it emphasized that X.'s offense was his first, that the applicant was well-integrated and engaged to be married in Switzerland, and that he spoke no Macedonian and only scant Albanian.

The FSC then turned to Art. 121(3)-(6) of the Constitution,^{*} which had been revised on Nov. 28, 2010 by the passage by popular vote and entry into force

* Art. 121(3)-(6) of the Constitution provides:

3. Irrespective of their status under the law on foreign nationals, foreign nationals shall lose their right of residence and all other legal rights to remain in Switzerland if they:
 - a. are convicted with legal binding effect of an offence of intentional homicide, rape or any other serious sexual offence, any other violent offence such as robbery, the offences of trafficking in human beings or in drugs, or a burglary offence; or
 - b. have improperly claimed social insurance or social assistance benefits.
4. The legislature shall define the offences covered by paragraph 3 in more detail. It may add additional offences.
5. Foreign nationals who lose their right of residence and all other legal rights to remain in Switzerland in accordance with paragraphs 3 and 4 must be deported from Switzerland by the competent authority and must be made subject to a ban on entry of from 5–15 years. In the event of reoffending, the ban on entry is for 20 years.
6. Any person who fails to comply with the ban on entry or otherwise enters Switzerland illegally commits an offence. The legislature shall issue the relevant provisions.

of the so-called Deportation Initiative. The FSC determined that the provision excludes a test of proportionality: if its conditions are fulfilled, the authorities, possessing no discretion in the matter, must revoke the residency permit of the person concerned.

. . . [T]he Deportation Initiative creates delicate problems of constitutional and public international law, for a mechanism for automatic deportation as may result from an isolated view of Article 121(3)-(6) or its implementation, respectively, excludes the proportionality test required under public international law for the measure ending residency in the individual case, wherefore it is contrary to the requirements of Article 8 ECHR and Article 13 of the Constitution (in combination with Article 36 of the Constitution) and Article 1 of the 7th Additional Protocol to the ECHR (SR 0.101.07) as well as Article 13 (procedural guarantees) and Article 17 (protection of family life from arbitrary interference) of the ICCPR (SR 0.103.2). The requirements under the Agreement on the Free Movement of Persons (SR 0.142; examination of the individual case and necessity of a contemporary risk to public safety or order at the point in time of the execution of the expulsion measure . . .) can no longer be fulfilled and the best interests of the child in the sense of Article 3 of the Convention on the Rights of the Child (SR 0.107) can no longer be taken into consideration. The text of the Convention is accordingly clearly at odds with the fundamental values acknowledged in Switzerland by means of constitutional and public international law; the constitutional provision makes no distinction between mild and severe crimes because it bases the obligatory expulsion on the type of crime concerned and not on the concrete severity of the penalty imposed and because it excludes the balancing of interests and evaluation based on the circumstances, as required by the ECHR in a democratic state under the rule of law and also by the Agreement on the Free Movement of Persons

Article 121(3) is [an open-textured] norm that leaves the legislator a certain scope for concretization. Its relationship to the other provisions and principles of the Constitution requires clarification. This cannot—in light of the separation of powers—be provided by the FSC at this time. The respective responsibility lies with the legislator (Article 121(4) of the Constitution). In the case of a collision of norms that cannot be resolved via interpretation, the FSC is bound by the domestic statutes and by public international law (Article 190 of the Constitution); it is for the political instances to regulate the necessary balance between the constitutional values at stake on the statutory level Article 121(4) of the Constitution refers—despite its conditional character . . .—not only to the various criminal offenses, but also to the legal consequences thereof, as these two aspects cannot be separated from each other in the overall scheme of the consequences of criminal behavior under the law relating to aliens. . . .

[E]ven if Art. 121(3)(a) of the Constitution could be directly applicable in the present case and its integration into the Constitution as a whole were to be ignored, this would not affect the result of the proceedings In case of a conflict of norms between international law and later laws, the jurisprudence generally assumes that public international law takes precedence, with the caveat that the legislator may explicitly [legislate] in conflict with public international law The jurisprudence has rejected the use of the “clear statement” doctrine in case of a conflict with human rights treaties . . . , but it also left the question open in one judgment In its recent judgment regarding this issue, the FSC has confirmed the primacy of public international law and the binding nature thereof . . . : if there is a real conflict between Swiss and public international law, Switzerland’s international obligations principally have primacy . . . ; this is even true for treaties that do not involve human or fundamental rights This primacy also exists in conflicts with “later” domestic laws, that is to say those which entered into force after an international norm; the *lex posterior* rule does not apply in the relationship between domestic and international law Switzerland cannot rely on its domestic law in order justify non-compliance with its treaty obligations Accordingly, domestic laws contrary to international law are generally not applicable

Article 8 ECHR, according to which every individual has the right to respect for his or her private and family life, is violated according to the jurisprudence of the ECtHR and accordingly in state practice when the person concerned has sufficiently strong personal or family ties in the state of residency which are sufficiently impacted by a measure rejecting or ending residency. The Convention, or the binding interpretation thereof by the ECtHR, respectively, requires, under Article 8(2), a balancing of the private interests of the affected person in remaining in the country, on the one hand, and the public interest in his or her removal and the ban on reentry for a permitted purpose, on the other, whereby the latter must, on the basis of the criteria employed by the ECtHR, outweigh the former on the basis of the consideration of all factors in the individual case in the sense that the measure seems necessary. . . . That is, as shown above, not the case here With the ECHR and the possibility of individual applications [to the ECtHR], Switzerland has not only accepted the substantive guarantees of the Convention, but also its enforcement mechanism and the obligation to, upon a judgment by the ECtHR, take the respective required individual and general measures in order to prevent similar violations of the Convention in future—if necessary also by amending the domestic law (see Art. 1 and Art. 46 ECHR . . .). The FSC is also bound by these obligations as concerns Art. 121(3) of the Constitution. It must further implement the standards resulting from the jurisprudence of the European Court of Human Rights (see Art. 190 of the Constitution). In the balancing of interests thereby required, the FSC can take into account the value judgments made by the drafters of the Constitution to the

extent that there is no conflict with higher-ranking law or with the margin of appreciation that the ECtHR leaves the individual member states of the Convention in the implementation of the migration and alien policy.

[The FSC therefore quashed the decision to expel.]

On March 24, 2014, an administrative court in Ankara, basing its decision on the guarantees provided by the Turkish Constitution and of the European Convention on Human Rights on freedom of expression and communication, annulled a March 20, 2014 decision taken by the Telecommunications Directorate (TİB) to ban Twitter, just before local elections. On April 2, 2014, the Constitutional Court agreed with the administrative court, invoking both Turkish Constitutional Law (Arts. 28-32) and the European Convention on Human Rights (Art. 10), and citing heavily to the European Court of Human Rights' case law on freedom of expression. The Constitutional Court stressed that the European Court had frequently held that individuals must be able to freely express ideas that the government, or parts of society, finds wrong or disturbing, and that this capacity is a foundation of democracy. Adopting the standard approach of the European Court, the Constitutional Court noted that Turkish public officials have initial discretion to restrain the freedom of expression when necessary in a democratic society, but that the exercise of this discretionary authority falls under the oversight of the Constitutional Court. The Court stated that its analysis is not of an abstract nature; the type, form, content, timing of the expression matter, and that any justification for restriction must be closely examined. Restrictions should be applied only as a last resort for important purposes, such as the protection of privacy or of democratic society. On May 3, 2014, the Constitutional Court opened a Twitter account.

On April 11, 2014, the Turkish Constitutional Court announced the annulment of a controversial law to restructure the Supreme Board of Judges and Prosecutors. The law, which was adopted as a direct response to the investigation of corruption among persons within and closely related to the ruling party, conferred on the Minister of Justice broad powers to replace members of the Board. After the law entered into force in February 2014, the Turkish press reported, "the head of the committee of inspectors and his aides and all inspectors and administrative staff working for the HSYK were removed from their jobs,"

and other key officials were replaced.¹ The Constitutional Court, which took the case on the basis of an individual complaint filed by members of the Republican People's Party (CHP), emphasized that the law posed a serious threat to the principles of separation of powers, judicial independence, and the rule of law. At the time of this writing, the ruling has not yet been made publicly available.

Somewhat controversially, the Twitter ruling was issued by the Court before the ordinary appeals process was completed, and the second, on the reorganization of the judiciary, preempted litigation in the ordinary courts altogether.

The rulings were condemned by members of the government and the ruling party. The Prime Minister, Recep Tayyip Erdoğan, attacked the decisions, characterizing them as political, biased, and unpatriotic. The President of the Constitutional Court (whose term ends this fall) responded in a major speech, excerpted below. The speech was broadcast live on many Turkish television channels.

Haşim Kılıç
President of the Turkish Constitutional Court
On the Occasion of the 52nd Anniversary of the Court
April 25, 2014

. . . To say that the Constitutional Court acts with a political agenda or to blame it for failing to observe national values is shallow criticism

Members of this Court dismiss the allegations of seeking political or social gain from their verdicts as an attack against their honor. . . .

Democracy, human dignity, and fundamental rights and freedoms are among the universal values that our Court has the obligation to protect. In the human rights treaties that the People of the modern world have agreed upon, and in particular, the European Convention of Human Rights and the Universal Declaration of Human Rights, fundamental rights and freedoms recognize only "being Human" as a common denominator and universal value [rather than] religion, race, doctrine, political opinion and ideology.

¹ Ali Aslan Kılıç-Ankara, *Justice Ministry Kicks Off Preparations for HSYK Elections*, TODAY'S ZAMAN, Apr. 30, 2014, <http://m.todayszaman.com/news-346569-justice-ministry-kicks-off-preparations-for-hsyk-elections.html>.

Turkey has shown the world its commitment to these universal values through various treaties and agreements. [T]he acceptance of the binding jurisdiction of the European Court of Human Rights in 1990, and the changes made in 2004 to Art. 90 of the Constitution on the subject of fundamental rights with reference to “universal standards” are changes that [can] be qualified as revolutionary. [Moreover,] the revision of Art. 148 of the Constitution in 2010 paved the way for individual applications to the Constitutional Court, and bringing rights violations caused by judicial bodies and administrations [directly] under the supervision of the constitutional judicial authority. . . . The Constitutional Court was recently heavily criticized for not having respected the exhaustion of judicial remedies in its ruling on the application for complaint relative to the blocking of a website by a court decision. Both the European Court of Human Rights and the Constitutional Court have expressed in many rulings the fact that the principle of “exhaustion of remedies” was not absolute. . . .

AMERICAN CONVENTION ON HUMAN RIGHTS

Antônio Augusto Cançado Trindade

*Compliance with Judgments and Decisions—The Experience of the Inter-American Court of Human Rights: A Reassessment**

To start with it should be observed that, unlike the ECtHR, the IACtHR does not have the benefit of a Committee of Ministers for the implementation of its judgments. . . .

Supervision of the execution of IACtHR judgments [continues] to be carried out only once a year, and in a very summary way, by the OAS General Assembly itself. . . .

The ACHR expressly provides that the part of the judgments of the IACtHR pertaining to compensatory damage may be executed in the State concerned in accordance with the domestic procedure in force for the execution of

* Antônio Augusto Cançado Trindade, Address at the 2014 Seminar of the European Court of Human Rights Strasbourg: Compliance with Judgments and Decisions—The Experience of the Inter-American Court of Human Rights: A Reassessment (January 31, 2014).

judgments against the State (Article 68 §2);** the Convention adds that States Parties are bound to comply with the decisions of the IACtHR in every case to which they are parties (Article 68 §1).*** By the end of the last decade, at domestic law level, only two States Parties to the ACHR had actually adopted permanent mechanisms for the execution of international judgments.⁴ Throughout the last decade, five other States Parties have adopted norms relating to execution of the judgments of the IACtHR. . . .

The supervision, undertaken *motu proprio* by the IACtHR, of the execution of its judgments has occurred in successive cases in recent years. . . . In its memorable judgment [in *Baena-Ricardo et al. (270 workers) v. Panama*] on its competence to supervise compliance with its previous judgment in that case (judgment of 2 February 2001 on Merits and reparations), the IACtHR determined that

[J]urisdiction includes the authority to administer justice; it is not restricted to stating the law, but also encompasses monitoring compliance with what has been decided. . . . Monitoring compliance with judgments is one of the elements that comprises jurisdiction. . . . Compliance with the reparations ordered by the Court in its decisions is the materialization of justice for the specific case and, ultimately, of jurisdiction. . . .

Compliance with judgment is strongly related to the right to access to justice, which is embodied in Articles 8 (Right to a Fair Trial) and 25 (Judicial Protection) of the American Convention” (paragraphs 72-74).

The IACtHR lucidly added, in the same vein, that to guarantee the right of access to justice it was not sufficient for a final ruling to be delivered declaring rights and obligations and extending protection to the persons concerned. It was also necessary to benefit from the existence of [:]

** Article 68, §2 provides: “That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state.”

*** Article 68, §1 provides: “The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.”

⁴ They are, respectively, Peru, which attributes to the highest judicial organ in domestic law (the Supreme Court of Justice) the power to determine the execution of, and compliance with, the decisions of organs of international protection whose jurisdiction Peru has undertaken to recognise (judicial model); and Colombia, which has opted for the attribution to a Committee of Ministers of the same function (executive model).

. . . effective mechanisms to execute the decisions or judgments, so that the declared rights are protected effectively. The execution of such decisions and judgments should be considered an integral part of the right to access to justice, understood in its broadest sense, as also encompassing full compliance with the respective decision. The contrary would imply the denial of this right.

. . . If the responsible State does not execute the measures of reparations ordered by the Court at the domestic level, it is denying the right to access to international justice”

In effect—the Court went on to state—the sanction provided for in Article 65 of the ACHR* assumes the free exercise by the IACtHR of its inherent powers of supervision of the execution of its judgments in the domestic law of the respondent States. Such exercise corresponds to its consistent practice from 1989 until the end of 2003. In the specific case of *Baena-Ricardo et al. (270 workers) v. Panama*, the IACtHR observed that the respondent State had not previously questioned the Court’s powers of supervision, and that in its judgment of 2 February 2001 the Court had already pointed out that it would supervise compliance with it.

The Court concluded in this respect that the State’s own conduct showed “beyond doubt” that the latter had recognised the competence of the IACtHR to supervise “compliance with its decisions” during “all the monitoring procedure.” . . . [T]he IACtHR firmly reasserted that it had competence to “continue monitoring full compliance” with the judgment of 2 February 2001 in the *cas d’espèce*. It thereby dismissed categorically the challenge of the State concerned, which was never again formulated before the IACtHR. The respondent State then proceeded to comply with the judgment in question.

Despite the earlier application (in 2000 and 2003) of Article 65 of the ACHR in cases of manifest non-compliance with judgments of the IACtHR (see above), since 2004 the IACtHR has ceased to apply Article 65 of the ACHR (as it should), thus rendering the exercise of the collective guarantee (underlying the ACHR) impossible in the last decade. This, in my perception, ultimately affects the inter-American system of protection as a whole. . . .

* Article 65 provides: “To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly’s consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations.”

If the (total or partial) non-compliance by States with the judgments of the IACtHR is not discussed and considered within the competent organs of the OAS—as is the case at present—this generates the mistaken impression or assumption that there is a satisfactory degree of compliance by respondent States with the judgments of the IACtHR. Regrettably, there is not—to the detriment of victims. I thus very much hope that the IACtHR will return to its earlier practice of principle consisting in applying Article 65 of the ACHR in cases of manifest non-compliance with its judgments.

The new majority viewpoint prevailing in the IACtHR in recent years (since the end of 2004), consisting in avoiding the application of the sanction provided for in Article 65, has been a “pragmatic” one, in the sense of avoiding “undesirable” clashes with the respondent States and of “encouraging” the latter to move gradually towards compliance with the judgments of the IACtHR. Hence the current practice on the part of the IACtHR of adopting successive resolutions on the supervision of compliance with IACtHR judgments, taking note of this or that measure taken by the States concerned and “closing” the cases concerned partially in respect of the measure(s) taken, in order to avoid discussions on the matter within the OAS.

In fact, this gives a false impression of the effectiveness of the “system” of protection, as the cases cannot be definitively “closed” because the degree of partial compliance is very high, just as is the degree of partial non-compliance. And all this is taking place to the detriment of the victims. Cases already decided by the IACtHR are thus kept on the Court’s list for an indeterminate period of time, awaiting final “closing” when full compliance has been secured, on the basis of a “pragmatic” approach which seeks to foster “good relations” with the States concerned, thereby avoiding the issue. The IACtHR is an international court, not a conciliation body which tries to “persuade” or “encourage” States to comply fully with its judgments.

. . . In conclusion, the IACtHR, which does not have an organ such as a Committee of Ministers to assist it in the supervision of the execution of its judgments and decisions, has taken that task upon itself. It has done so in the exercise of its inherent powers to exercise such supervision. Much has been achieved, but it has also experienced a setback (in the form of “partial compliance”), as we have seen. . . . [C]ompliance with the judgments and decisions of contemporary international human rights courts is directly related not only to the rule of law but also, ultimately, to the realisation of justice at national and international level.

Report Prepared by the Supreme Court of Mexico
The Radilla Pacheco Case, Constitutional Reform on Human Rights in Mexico, and Consequences of the New Framework *

[On November 3, 2009, the Inter-American Court of Human Rights issued its now-famous holding in the *Radilla Pacheco* case.¹ The case originated in a complaint filed with the IACtHR by a private Mexican human rights organization requesting a declaration of Mexico’s international responsibility for violations of the rights enshrined in Articles 3, 4, 5, 7, 8, and 25 of the American Convention on Human Rights, guaranteeing the rights to legal personality, life, personal integrity, personal freedom and legal protection, among others, against Mr. Rosendo Radilla Pacheco. The allegations named the forced disappearance of Radilla Pacheco on August 25, 1974, at the hands of the military of the State of Guerrero, Mexico, as well as violations stemming from the Mexican government’s failure to establish where the forced disappearance took place or locate the victim’s remains.

The IACtHR held the Mexican government liable for the human rights violations. It required Mexico to conduct an investigation and criminal proceedings and enforce the relevant sanctions in relation to the forced disappearance. The IACtHR also recommended:]

1. The State should adopt, within a reasonable period of time, the relevant legislative reforms to reconcile Article 57 of the Code of Military Justice* with relevant international standards and the American Convention on Human Rights; and

2. The State should implement, within a reasonable period of time and through the corresponding budgetary provisions, permanent programs or offices related to the analysis of the jurisprudence of the Inter-American System for the

* Excerpted from Supreme Court of Mexico, *Caso Radilla Pacheco, Reforma Constitucional en Materia de Derechos Humanos en México, Consecuencias de su Nuevo Contexto* (2011), available in Spanish at https://www.scjn.gob.mx/Transparencia/Lists/Becarios/Attachments/177/Becarios_175.pdf. Translated by Andrea Scoseria Katz.

¹ Judgment issued by the Inter-American Court of Human Rights, in the Case of *Radilla Pacheco v. Mexico*, November 23, 2009, available in Spanish at http://www.corteidh.or.cr/docs/casos/articulos/seriec_209_esp.pdf, consultada el 5 de octubre de 2012.

* Article 57 of the Mexican CMJ defines “crimes against military discipline” to include “those . . . committed by soldiers during times of duty,” including against civilians. Código de Justicia Militar, Art. 57(II)a), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/4.pdf>. On August 21, 2012, the Mexican Supreme Court declared Art. 57 unconstitutional in compliance with the IACtHR’s 2009 decision.

Protection of Human Rights in relation to the limits of military criminal jurisdiction, as well as a training program on the proper investigation and prosecution of acts of forced disappearance.

[Following that ruling, the Supreme Court of Justice of Mexico issued an opinion to determine the procedures required by the IACtHR judgment. The resulting opinion, Resolution 912/2010, figures among the most controversial holdings ever rendered by the Mexican Supreme Court.² Although it was welcomed by the legal academy and many human rights organizations as a breakthrough in human rights protection, questions over its implementation have provoked controversy over the practice of conventionality review, the review of domestic constitutional provisions in light of the requirements of the American Convention of Human Rights. Resolution 912/2010 held:]

Even in its capacity as a constitutional court, the Supreme Court of Justice is not competent to analyze, review, evaluate or pronounce on the correctness of a decision of the Inter-American Court of Human Rights

The Supreme Court shall not issue any statement questioning the validity of a judgment by the Inter-American Court of Human Rights, as such judgments constitute *res judicata* for the Mexican state

Such judgments are binding upon all organs of the Mexican State

Holdings of the Inter-American Court of Human Rights in cases in which Mexico did not figure as a party to the dispute shall guide the decisions of all Mexican judges, as long as they are more favorable to the applicant, in accordance with constitutional Article 1.*

[The courts shall] refer to the interpretive guidelines of the IACHR in order to determine whether there exists any more favorable

² Resolución en el expediente Varios 912/2010. Derivado de lo ordenado en el diverso expediente varios 489/2010, relativo a la sentencia emitida el veintitres de noviembre de dos mil nueve, por la corte interamericana de derechos humanos, Pleno de la Suprema Corte de Justicia (Supreme Court), Diario Oficial de la Federación, Septiembre de 2011. Available in Spanish at http://dof.gob.mx/nota_detalle.php?codigo=5212527&fecha=04/10/2011.

* Article 1 of the Mexican Constitution provides: "Every person in the United Mexican States shall enjoy the guarantees granted by this Constitution, which cannot be restricted or suspended except in such cases and under such conditions as are herein provided."

result [for the applicant] and in order to seek wider protection of the right to be protected.

The mandates contained in constitutional Article 1 must be read together with the provisions of Article 133* to determine the framework within which conventionality review shall be conducted by the judiciary ex officio. Such review must be in accordance with the existing model of constitutional review in our country.

While judges cannot make general pronouncements on the invalidity of statutes they consider contrary to human rights contained in the Constitution and treaties, nor expel such statutes from the legal order, they are required to stop applying these statutes, giving preference to the norms contained in the Constitution and relevant treaties.

In conducting ex officio conventionality review of human rights, the judiciary shall perform the following steps: a) Interpretation in a broad sense, meaning that judges shall apply the legal order in light of human rights; b) Interpretation in a strict sense when multiple legally valid interpretations are possible; c) Non-application of a law when the aforementioned alternatives are not possible; and, d) Ensure the primacy and effective implementation of human rights. . . .

The Judiciary of the Mexican Federation must review Article 57, Section II of the Code of Military Justice for compatibility with the Constitution and with the American Convention. As currently drafted, it is inconsistent with the provisions of Article 2 of the American Convention on Human Rights.**

* Article 133 provides:

This Constitution, the laws of the Congress of the Union that emanate therefrom, and all treaties that have been made and shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the supreme law of the whole Union. The judges of each State shall conform to the said Constitution, the laws, and treaties, in spite of any contradictory provisions that may appear in the constitutions or laws of the States.

** Article 2 of the American Convention on Human Rights provides:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such

Interpretation of Article 13 of the Constitution* must be consistent with principles of due process and access to justice established in the Constitution and the American Convention.

In strict compliance with the decision of the Inter-American Court, Article 13 of the Mexican Constitution must be applied so as to be in accordance with Article 2 of the American Convention and with the principles of due process and access to justice contained therein, in accordance with Article 8.1 of the American Convention on Human Rights.**

[This Resolution] sparked a wide and heated debate in the Plenary Tribunal of the Supreme Court [First was the question of whether the Supreme Court had the authority to issue such a resolution, given that it did not arise from an active case or controversy. Whether or not the resolution had binding force was also sharply debated.] Nevertheless, even if not established jurisprudence, the holdings of the Resolution have been observed by other judges, and . . . combined with the constitutional reform on human rights of June 10, 2011, these criteria have generated various practical consequences

Another controversial aspect of the Resolution was its assertion of the binding character of the guidelines laid down in judgments of the IACtHR. According to one set of judges in the Plenary Tribunal, such criteria were binding on national judges, even if they arose from a judgment to which Mexico was not a party. However, another [smaller] group of judges was of the opinion that these guidelines are merely advisory and could not affect the freedom of opinion of the judges of Mexico.

Another point of debate concerned the hierarchy of international treaties in the Mexican legal system. Some judges opined that, as a result of the constitutional reform discussed below, international treaties on human rights have the same legal status as the Constitution of Mexico. Another group of justices, however, argued that the principle of constitutional supremacy prevails in the

legislative or other measures as may be necessary to give effect to those rights or freedoms.

* Article 13 of the Mexican Constitution provides, in relevant part:

No one may be tried by private laws or special tribunals. . . . Military jurisdiction shall be recognized for the trial of crimes against and violation of military discipline, but the military tribunals shall in no case have jurisdiction over persons who do not belong to the army. Whenever a civilian is implicated in a military crime or violation, the respective civil authority shall deal with the case.

** Article 8.1 of the American Convention on Human Rights guarantees the right to a fair trial.

country's legal system, therefore implying that all international treaties, even those on human rights, lie below the federal constitution.

A final controversial issue concerned the establishment of ex officio conventionality review in a system of decentralized [federal] judicial review. [Under the new system,] it was determined that all judges can review a statute for compliance with the ACHR even if they cannot review it under the Constitution. . . .

On June 10, 2011, eleven provisions of the Mexican Constitution were reformed to expand human rights protections. Among the most significant reforms was that of Article 1 of the Constitution,* which was amended to introduce the right of all individuals to enjoy the human rights recognized in the Constitution and in international treaties to which Mexico is a party, as well as the principles of treaty-consistent and *pro personae* interpretation, encouraging the broadest possible protection of individuals.

Much of the subsequent debate on the implementation of the amendments focused on the question of whether “diffuse” conventional review would entail abandoning Mexico's extant system of “concentrated” judicial review, under which only federal judges had the authority to declare acts unconstitutional.

On July 21, 2011, the Supreme Court answered this question in the affirmative, interpreting the revised constitutional Article 1 and Article 133** to allow for a “diffuse” model of conventionality control, granting all judges—

*As revised on June 10, 2011, Article 1 provides, in relevant part:

In the United Mexican States, all individuals shall be entitled to the human rights granted by this Constitution and the international treaties signed by the Mexican State, as well as to the guarantees for the protection of these rights. . . .

The provisions relating to human rights shall be interpreted according to this Constitution and the international treaties on the subject, working in favor of the protection of people at all times.

All authorities, in their areas of competence, are obliged to promote, respect, protect and guarantee the human rights, in accordance with the principles of universality, interdependence, indivisibility and progressiveness. As a consequence, the State must prevent, investigate, penalize and redress violations to the human rights, according to the law. . . .

**Article 133 provides, in relevant part: “The judges of each State shall conform to the said Constitution, the laws, and treaties, in spite of any contradictory provisions that may appear in the constitutions or laws of the States.”

federal and state—the power to declare laws or acts incompatible with the American Convention on Human Rights. In essence, the Court created a system of review similar to that of the United States. Today, Mexican judges at all levels have the ability to declare an act or law unconstitutional and/or not in accordance with the American Convention.^{***}

Report on Merits, Jessica Lenahan (Gonzales) et al. v. U.S.
Inter-American Commission on Human Rights
Report No. 80/11, Case 12.626 (2011)

1. . . . The petition was presented on behalf of Ms. Jessica Lenahan, formerly Jessica Gonzales, and her deceased daughters Leslie (7), Katheryn (8) and Rebecca (10) Gonzales.

2. The claimants assert in their petition that the United States violated . . . the American Declaration by failing to exercise due diligence to protect Jessica Lenahan and her daughters from acts of domestic violence perpetrated by the ex-husband of the former and the father of the latter, even though Ms. Lenahan held a restraining order against him. They specifically allege that the police failed to adequately respond to Jessica Lenahan’s repeated and urgent calls over several hours reporting that her estranged husband had taken their three minor daughters (ages 7, 8 and 10) in violation of the restraining order, and asking for help. The three girls were found shot to death in the back of their father’s truck after the exchange of gunfire that resulted in the death of their father. The petitioners further contend that the State never duly investigated and clarified the circumstances of the death of Jessica Lenahan’s daughters, and never provided her with an adequate remedy for the failures of the police. According to the petition, eleven years have passed and Jessica Lenahan still does not know the cause, time and place of her daughters’ death.

3. The United States recognizes that the murders of Jessica Lenahan’s daughters are “unmistakable tragedies.” . . . The State claims that its authorities responded as required by law. . . . The State moreover claims that the petitioners cite no provision of the American Declaration that imposes on the United States an affirmative duty, such as the exercise of due diligence, to prevent the commission of individual crimes by private actors, such as the tragic and criminal murders of Jessica Lenahan’s daughters. . . .

^{***} This explanatory note relies heavily on the discussion of the 2011 Mexican constitutional reforms provided in Victor Manuel Collí Ek, *Improving Human Rights in Mexico: Constitutional Reforms, International Standards, and New Requirements for Judges*, 20 HUMAN RIGHTS BRIEF 7 (2012).

90. Jessica Lenahan’s claims at the national level reached the United States Supreme Court, the highest judicial and appellate court in the United States. On June 27, 2005, the Supreme Court rejected all of Jessica Lenahan’s claims by holding that under the Due Process Clause of the 14th Amendment of the U.S. Constitution,* Colorado’s law on the police enforcement of restraining orders did not give Jessica Lenahan a property interest in the enforcement of the restraining order against her former husband. In its analysis, the Supreme Court considered the Colorado Statute in question and the pre-printed notice to law enforcement officers on the restraining order, holding that a “well-established tradition of police discretion has long coexisted with apparently mandatory arrest statutes,” and that the “deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands,” had been previously recognized by the United States Supreme Court.

91. The Supreme Court specifically noted that:

It is hard to imagine that a Colorado police officer would not have some discretion to determine that—despite probable cause to believe a restraining order has been violated—the circumstances of the violation or the competing duties of that officer or his agency counsel decisively against enforcement in a particular instance. The practical necessity for discretion is particularly apparent in a case such as this one, where the suspected violator is not actually present and his whereabouts are unknown.¹⁴⁴ . . .

96. The Commission has also received information . . . that the problem of domestic violence in the United States was considered a “private matter,” and therefore, undeserving of protection measures by law enforcement agencies and the justice system.¹⁵⁴ Once domestic violence was finally recognized as a crime, women were still very unlikely to gain protection in the United States because of law enforcement’s widespread under-enforcement of domestic violence laws. . . .

* The Fourteenth Amendment to the U.S. Constitution provides, in relevant part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

¹⁴⁴ See Petitioners’ petition dated December 27, 2005, Exhibit F: U.S. Supreme Court Decision, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), 125 S. Ct. 2796, 2806.

¹⁵⁴ For example, the United States Attorney General documented in 1984 that the law enforcement’s perception of the problem as a “private matter” translated into inaction from the police and law enforcement agencies in general to domestic violence reports. See, U.S. Department of Justice, *Final Report: Attorney General’s Task Force on Family Violence 3* (1984).

97. Therefore, the creation of the restraining order is widely considered an achievement in the field of domestic violence in the United States, since it was an attempt at the state level to ensure domestic violence would be treated seriously. . . . However, one of the most serious historical limitations of civil restraining orders has been their widespread lack of enforcement by the police.¹⁶⁰ Police officers still tend to support “traditional patriarchal gender roles, making it difficult for them to identify with and help female victims.”

98. To effectively address the problem of domestic violence, at the federal level, Congress has adopted three major pieces of legislation that recognize the seriousness of domestic violence and the importance of a nationwide response: the Violence against Women Act of 1994, the Violence against Women Act of 2000, and the Violence against Women and Department of Justice Reauthorization Act of 2005. . . . However, most laws that protect persons in the United States from domestic violence and provide civil remedies against perpetrators and other responsible parties are state and local laws and ordinances. Over the past two decades, states have adopted a host of new laws to improve the ways that the criminal and civil justice systems respond to domestic violence. . . .

115. . . . [A]ccording to the well-established and long-standing jurisprudence and practice of the inter-American human rights system, the American Declaration is recognized as constituting a source of legal obligation for OAS member states, including those States that are not parties to the American Convention on Human Rights. These obligations are considered to flow from the human rights obligations of Member States under the OAS Charter. Member States have agreed that the content of the general principles of the OAS Charter is contained in and defined by the American Declaration, as well as the customary legal status of the rights protected under many of the Declaration’s core provisions. . . .

117. . . . The continuum of human rights obligations is not only negative in nature; it also requires positive action from States. . . .

119. [T]he Commission notes that both the universal system of human rights and the inter-American system of human rights—referring to the International Covenant on Civil and Political Rights, the American Convention, and other international instruments—have underscored that the duty of the State to implement human rights obligations in practice can extend to the prevention and response to the acts of private actors.

¹⁶⁰ U.S. Department of Justice, National Institute of Justice, *Research Preview: Civil Protection Orders: Victims’ Views on Effectiveness*, January 1998, <http://www.ncjrs.gov/pdffiles/fs000191.pdf>.

120. . . . The obligations established in Article II* extend to the prevention and eradication of violence against women, as a crucial component of the State's duty to eliminate both direct and indirect forms of discrimination. In accordance with this duty, State responsibility may be incurred for failures to protect women from domestic violence perpetrated by private actors in certain circumstances.

134. [The Court notes the compatible jurisprudence of the ECtHR.] . . . The Court has established that authorities should consider the prevalence of domestic violence, its hidden nature and the casualties of this phenomenon in the adoption of protection measures; an obligation which may be applicable even in cases where victims have withdrawn their complaints. [A]uthorities may have reason to know that the withdrawal of a complaint may signify a situation of threats on the part of the aggressor, or the State may at a minimum be required to investigate that possibility. Lastly, the Court has ruled that a State's failure to protect women from domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional. . . .

160. . . . [T]he Commission concludes that even though the State recognized the necessity to protect Jessica Lenahan and Leslie, Katheryn and Rebecca Gonzales from domestic violence, it failed to meet this duty with due diligence. The state apparatus was not duly organized, coordinated, and ready to protect these victims from domestic violence by adequately and effectively implementing the restraining order at issue; failures to protect which constituted a form of discrimination in violation of Article II of the American Declaration.

161. These systemic failures are particularly serious since they took place in a context where there has been a historical problem with the enforcement of protection orders; a problem that has disproportionately affected women—especially those pertaining to ethnic and racial minorities and to low-income groups—since they constitute the majority of the restraining order holders. . . . Even though the Commission recognizes the legislation and programmatic efforts of the United States to address the problem of domestic violence, these measures had not been sufficiently put into practice in the present case. . . .

163. The States' duties to protect and guarantee the rights of domestic violence victims must also be implemented in practice. As the Commission has established in the past, in the discharge of their duties, States must take into account that domestic violence is a problem that disproportionately affects

* Article 2 ACHR reads: "Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

women, since they constitute the majority of the victims. Children are also often common witnesses, victims, and casualties of this phenomenon. Restraining orders are critical in the guarantee of the due diligence obligation in cases of domestic violence. They are often the only remedy available to women victims and their children to protect them from imminent harm. They are only effective, however, if they are diligently enforced.

164. In the case of Leslie, Katheryn and Rebecca Gonzales, the Commission also establishes that the failure of the United States to adequately organize its state structure to protect them from domestic violence not only was discriminatory, but also constituted a violation of their right to life under Article I* and their right to special protection as girl-children under Article VII** of the American Declaration. As with other obligations under the American Declaration, States are not only required to guarantee that no person is arbitrarily deprived or his or her life. They are also under a positive obligation to protect and prevent violations to this right, through the creation of the conditions that may be required for its protection. In the case of Leslie, Katheryn and Rebecca Gonzales, the State had a reinforced duty of due diligence to protect them from harm and from deprivations of their life due to their age and sex, with special measures of care, prevention and guarantee. The State's recognition of the risk of harm and the need for protection—through the issuance of a protection order which included them as beneficiaries—made the adequate implementation of this protection measure even more critical. . . .

172. Article XVIII of the American Declaration establishes that all persons are entitled to access judicial remedies when they have suffered human rights violations. . . .

* Article I ACHR provides:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

** In relevant part, Article VII ACHR provides:

1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto. . . .
6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court

173. The inter-American system has affirmed for many years that it is not the formal existence of such remedies that demonstrates due diligence, but rather that they are available and effective. Therefore, when the State apparatus leaves human rights violations unpunished and the victim's full enjoyment of human rights is not promptly restored, the State fails to comply with its positive duties under international human rights law. The same principle applies when a State allows private persons to act freely and with impunity to the detriment of the rights recognized in the governing instruments of the inter-American system. . . .

193. The Commission has also identified the right to access information in respect to existing investigations as a crucial component of a victim's adequate access to judicial remedies.³⁰⁰ A critical component of the right to access information is the right of the victim, her family members and society as a whole to be informed of all happenings related to a serious human rights violation. The inter-American system has established that this right—the right to truth—is not only a private right for relatives of the victims, affording them a form of reparation, but also a collective right that ensures that society has access to information essential for the workings of democratic systems.

194. Eleven years have passed since the murders of Leslie, Katheryn and Rebecca Gonzales, and the State has not fully clarified the cause, time and place of their deaths. The State has not duly communicated this information to their family. . . . Leslie, Katheryn and Rebecca Gonzales' gravestones still do not contain information about the time and place of their death. . . .

196. . . . [T]he Commission finds that the United States violated the right to judicial protection of Jessica Lenahan and her next-of-kin under Article XVIII, for omissions at two levels. First, the State failed to undertake a proper inquiry into systemic failures and the individual responsibilities for the non-enforcement of the protection order. Second, the State did not perform a prompt, thorough, exhaustive and impartial investigation into the deaths of Leslie, Katheryn and Rebecca Gonzales, and failed to convey information to the family members related to the circumstances of their deaths.

197. The Commission considers that it does not have sufficient information to find the State internationally responsible for failures to grant Jessica Lenahan an adequate access to courts under Article XVIII. The Commission notes that Jessica Lenahan chose to raise her claims at the national level before federal courts. The undisputed facts show that her allegations reached

³⁰⁰ IACHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/V/II, Doc. 68 (January 20, 2007), paras. 54, 134, 139, 172 and 177.

the U.S. Supreme Court, the highest judicial instance and appellate court in the United States. The Supreme Court ruled on her claims on June 27, 2005. Even though this ruling was unfavorable to the victim, the record before the Commission does not display that this legal process was affected by any irregularities, omissions, delays, or any other due process violations that would contravene Article XVIII of the American Declaration. . . .

State Legislature of Colorado
Tribute to Jessica Lenahan
May 7, 2014

The Senate of the Colorado Legislature, convened in the Second Session of the Sixty-Ninth general Assembly, hereby honors and commends:

Jessica Lenahan

Motivated by the tragic loss of her three daughters in a domestic violence incident that remains unresolved, she has worked tirelessly to raise awareness of the legal system and law enforcement in many states to adequately protect victims of domestic violence. Her determined crusade, validated by a favourable ruling from the Inter-American Commission on Human Rights in her case, has reaffirmed the fact that freedom from domestic violence is a basic human right that government must ensure for all.

APPROACHES IN AFRICA

Emmanuel K. Quansah

*An Examination of the Use of International Human Rights Law as an Interpretative Tool in Human Rights Litigation in Ghana and Botswana**

. . . Ghana subscribes to the dualist approach to the relationship between international law and national law. As such for international law to become part of

* Excerpted from Emmanuel K. Quansah, *An Examination of the Use of International Law as an Interpretative Tool in Human Rights Litigation in Ghana and Botswana*, in *INTERNATIONAL LAW AND DOMESTIC HUMAN RIGHTS LITIGATION IN AFRICA* 37 (Magnus Killander ed., 2010).

national law the requisite legislative or executive action needs to be taken to incorporate ratified international treaties into national law before they can be applied by the courts. . . .

Since the attainment of independence in 1957, Ghana has become party to numerous international, African and regional human rights instruments. However, in practice, it incorporated very few of the instruments that it ratified into national laws. . . .

In some cases where there has not been a formal incorporation of a particular international instrument, existing laws have been amended to incorporate relevant portions of such [an] international instrument that the country has ratified. . . .

[E]ven where formal incorporation has not been made, international law principles may still operate in human rights litigation in terms of article 40 of the Constitution. This article obliges the government, *inter alia*, to “promote respect for international law, treaty obligations and settlement of international disputes by peaceful means” and to adhere to the principles enshrined in the treaties of all international organisations of which the country is a member. . . . Thus in the *CIBA* case the Supreme Court held that the principles of international instruments relating to fundamental human rights are enforceable to the extent that they fit into the provisions of article 33(5) of the Constitution which allows the courts to rely on other human rights principles in addition to those specifically set out in Chapter 5 of the Constitution dealing with “fundamental human rights.” Atuguba JSC said:

As to the enforceability of international instruments relating to fundamental human rights, I think that the matter can easily be resolved by recourse to article 33(5) . . . It cannot be contended that the principles of those instruments do not fit into this provision, and they are therefore to that extent enforceable.

[Thus] the door is open for the courts, in appropriate circumstances, to apply international instruments relating to human rights which have not been expressly incorporated into national law in order to determine human rights issues. . . .

[A]lthough there is no express stipulation in the Ghana Constitution for the application of international law in litigation before the courts, there have been occasions when international instruments have been relied upon in determination of cases. In *New Patriotic Party v. Inspector General of Police* (1993), . . . Archer

CJ said:

Ghana is a signatory to this African Charter and member states of the OAU and parties to the Charter are expected to recognise the rights, duties and freedoms enshrined in the Charter and to undertake to adopt legislative and other measures to give effect to the rights and duties. I do not think the fact that Ghana has not passed specific legislation to give effect to the Charter means that the Charter cannot be relied upon.

In *Adjei-Ampofo v. Attorney-General* it was noted, albeit *obiter*, that:

The reference to [“other human rights principles] referred to in article 33(5) could only be those rights and freedoms that have crystallized into widely or generally accepted rights, duties, declarations and guarantees through treaties, conventions, international or regional accords, norms and usages. One may venture as an example, the right of women to reproductive health, which forms part of the 1995 Beijing Declaration and Platform for Action, to which Ghana is a signatory.

[Although the Supreme Court would reject the claim,] the *obiter dictum* made by the Court in the course of its ruling indicates its preparedness to use international human rights standards as an interpretational tool.

. . . [Thus,] the courts appear to suggest that unincorporated treaties may create enforceable rights in national law. . . .

The Economic Community of West African States (ECOWAS) was established by treaty in 1975 to promote regional cooperation and economic development. The regime’s authority was limited however, and it failed to make much progress in building a common market. A judicial organ was originally envisaged but it was not until 1991 that states created the Community Court of Justice. In 1993, ECOWAS signed on to a new treaty, which fixed firm deadlines for removing barriers to intra-Community economic exchange, created a new Parliament, and authorized super-majoritarian voting (two-thirds) for certain ECOWAS measures.

Although the member states expected the Court to help them interpret and enforce the regime’s law, they limited its jurisdiction to inter-state complaints,

and rejected proposals to permit suits brought by individuals. Nonetheless, in its first ruling (2004), the ECOWAS Court entertained a suit brought by a Nigerian trader, Olajide Afolabi, who challenged a Nigerian decision to close its border with Benin. The Court dismissed the case, for lack of jurisdiction. As the authors of the excerpt below report, however, the *Afolabi v. Nigeria* decision immediately generated a “coordinated campaign” in favor of the individual petition. Urged on by the Court itself, the campaign was joined by human rights groups, other NGOs, and ECOWAS and state officials. The result was a protocol of January 19, 2005, which revised the treaty and transformed the Court into a rights jurisdiction.

Fifteen nations are currently members of ECOWAS: Benin, Burkina Faso, Cape Verde, the Côte d’Ivoire, the Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Nigeria, Senegal, Sierra Leone, and Togo.

Karen J. Alter, Laurence R. Helfer & Jacqueline R. McAllister
A New International Human Rights Court for West Africa:
*The ECOWAS Community Court of Justice**

. . . Barely nine months after the dismissal of the *Afolabi* case, the . . . reform campaign reached a successful conclusion. On January 19, 2005, the member states adopted the 2005 Protocol by consensus and with immediate provisional effect. The Protocol markedly expands the ECOWAS Court’s authority, most notably by giving the Court a capacious human rights mandate.

The 2005 Protocol’s most important clauses appear in two short sentences in articles redefining the ECOWAS Court’s jurisdiction and access rules. Article 3 revises Article 9 of the 1991 Protocol and lists each ground of jurisdiction. The fourth paragraph states: “The Court has jurisdiction to determine case[s] of violation of human rights that occur in any Member State.” Article 4, which adds a new Article 10 to the 1991 Protocol, identifies the litigants who have access to the ECOWAS Court. It [authorizes] the Court to receive complaints from “individuals on application for relief for violation of their human rights.” On first impression, these simple provisions appear straightforward. In reality, they mask three design features that collectively gave the ECOWAS Court much broader authority than other human rights tribunals.

* Karen J. Alter, Laurence R. Helfer & Jacqueline R. McAllister, *A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice*, 107 AM. J. INT’L L. 737 (2013).

Direct access for private litigants. First, the ECOWAS Court is unusual for a new human rights court in granting direct access to private litigants. For the vast majority of cases in the African and American human rights systems (and in the European system prior to 1998), complainants must first submit their allegations to a quasi-judicial commission that screens complaints and issues nonbinding recommendations for those petitions that it deems admissible. Review by a court with the power to issue a legally binding judgment occurs only if a state has voluntarily accepted the court's jurisdiction and if the commission or the state refers the case for a judicial resolution.

This tiered review structure—a commission to vet complaints, optional jurisdiction, and limiting the actors who can refer cases to a court—provides states with multiple layers of political protection. In the African Charter system, for example, private litigants have direct access to the African Court on Human and Peoples' Rights only if the respondent state has ratified the protocol establishing the Court and filed a separate optional declaration allowing private litigants to submit such complaints. To date, only seven of fifty-four African nations—four of them ECOWAS member states—have filed such declarations.

The ECOWAS Court lacks any of these political buffers. ECOWAS judges have repeatedly affirmed that private litigants “have direct access to . . . the Court when their human rights are violated.” The judges have extended access not only to individuals—who are expressly mentioned in the 2005 Protocol—but to NGOs. They have also rejected attempts by governments to circumvent the direct access provision, rebuffing arguments that human rights are matters essentially within a state's domestic jurisdiction, that ECOWAS treaties and protocols have no domestic effect, and that direct access for NGOs should be denied because litigants have no standing to challenge human rights violations before national courts.

An indeterminate human rights jurisdiction. A second distinctive feature of the Court's design is that no ECOWAS legal instrument prescribes which human rights its judges can adjudicate. The primary role of the European, Inter-American, and African courts is to interpret and apply their respective regional human rights charters. Their association with these instruments provides a sanctioned source of law and legal authority for their judges. By contrast, ECOWAS judges have no designated human rights charter to apply. By declining to designate a prescribed catalogue of rights, the 2005 Protocol avoided provoking political controversy over which rights the ECOWAS Court could review. The absence such of an enumerated list, however, also presented risks for the Court—namely, that its new human rights jurisdiction could be challenged as an overbroad delegation to interpret expansively this rapidly evolving area of international law. . . .

ECOWAS judges have viewed the lack of designated human rights norms as an “opportunity to define and delimit the scope and legal parameters of its human rights mandate in its own image.” The Court has underscored the primacy of the African human rights system, noting that all ECOWAS member states are parties to the African Charter, which is also referenced in the 1993 Treaty. But ECOWAS judges also regularly apply the Universal Declaration of Human Rights and UN human rights conventions that member states have ratified, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the UN Convention Against Torture.

The ECOWAS Court also considers a broad array of other sources when interpreting human rights norms. The Court draws inspiration from the 1991 Protocol’s directive to “apply, as necessary, the body of laws as contained in Article 38 of the Statute of the International Court of Justice,” which, in turn, specifies that treaties, custom, and general principles of law, as well as national judicial decisions and the teachings of highly qualified publicists, are all sources of international law. . . .

No requirement to first exhaust domestic remedies. The ECOWAS Court’s ability to hear human rights cases is aided by the absence of a requirement to exhaust local remedies. In all other regional and UN human rights petition systems, individuals must first seek relief in national courts, administrative agencies, or other domestic venues. If a petitioner does not exhaust such remedies—or explain why they are unavailable, ineffective, or insufficient—the international tribunal will dismiss her complaint.

In the human rights context, an exhaustion requirement acts as a buffer between domestic and international legal systems, [reinforcing subsidiarity and reducing forum shopping]. . . .

Since granting the ECOWAS Court the authority to hear human rights cases, West African governments have repeatedly asserted that individuals must exhaust domestic remedies before petitioning the Court in Abuja. The judges have unwaveringly rebuffed these arguments, reasoning that the lack of an exhaustion rule is neither an inadvertent omission nor a flaw in the Court’s human rights mandate, but a deliberately chosen element of its judicial architecture. . . . The ECOWAS Court has also decided cases that were pending before domestic courts, leading commentators to warn of potential conflicts between ECOWAS and national judges. . . .

In 2006, as part of a wider overhaul of the Community, the member states created a Judicial Council “to ensure that the Court is endowed with the best

qualified and competent persons to contribute . . . to the establishment of Community laws capable of consolidating and accelerating the regional integration process.” The council comprises the chief justices from member states not then represented on the seven-member Court.

The Judicial Council increases the influence of national judges in the selection process for the ECOWAS Court, and it creates misconduct review procedures that insulate judges from attempts by governments to remove them from office. ECOWAS judges are “statutory appointments”—high-level positions that rotate among the member states. West African governments collectively decide which country is next in line for a statutory appointment to the Court. The Legal Affairs Directorate then advertises for the position and collects submissions from eligible applicants. Applications that meet specified criteria are forwarded to the Judicial Council, which vets applications and interviews candidates. The council then selects three candidates and forwards their names, together with point-based rankings, to the ECOWAS Authority, which decides which candidate to appoint to the Court. For sitting judges, the Council is tasked with reviewing complaints alleging judicial bias and other forms of malfeasance, providing a layer of political insulation for ECOWAS judges against whom such charges are filed.

Also included in the Judicial Council reforms was a revision of the tenure of ECOWAS judges—from a five-year term with the possibility of one reappointment to a single, nonrenewable four-year term. . . . Although the shortening of terms may seem like a rebuke of the ECOWAS Court, no one we interviewed characterized the change in this way. Rather, they noted that shorter, nonrenewable terms would increase the opportunity of all ECOWAS member states to appoint judges to the Court. The Judicial Council and tenure reforms have been favorably received by stakeholders. . . .

Since the expansion of its jurisdiction in 2005, the ECOWAS Court has issued nearly seventy merits judgments, the large majority of which concern human rights. Many of these decisions are legally and politically consequential. In a well-publicized early case, ECOWAS judges found Niger liable for condoning a customary practice of female slavery. More recently, the Court issued a pathbreaking judgment against Nigeria for failing to regulate multinational oil companies that polluted the Niger Delta. Other high-profile decisions have barred the domestic prosecution of former Chadian president Hisssein Habré as contrary to the non-retroactivity of criminal law; ordered the restoration of funds embezzled from a program to provide free basic education to children; granted NGOs standing to challenge violations of economic and social rights; and awarded damages to individuals arbitrarily detained by police and security officials. . . .

Complainants have raised a wide array of legal issues before the ECOWAS Court. Some allegations relate to human rights only tangentially; others seek expansive interpretations of established rights; still others allege multiple violations but offer few supporting facts. The Court has responded to these diverse complaints by adopting fairly strict pleading and proof requirements. Applicants must “specify the particular human right which has been violated” and provide evidence that is “sufficiently convincing and unequivocal.” ECOWAS judges have also rejected litigants’ attempts to assert human rights claims against individuals, corporations, and subnational political bodies—issues that have also been litigated in the United States.

The judges’ circumspection with regard to remedies is also noteworthy. In the modern forms of slavery case, for example, the Court ordered Niger to pay the equivalent of U.S.\$20,000 to a woman who had been enslaved. The government paid the damages within three months, and, while not formally required to do so, prosecuted her former master. Yet the Court made compliance fairly easy for Niger by refusing the applicant’s entreaties to find fault with the laws, practices, and customs that gave rise to the modern slavery violations in the first instance.

Other high-profile decisions exhibit similar remedial caution. In the Nigerian education case, the ECOWAS Court declared that “every Nigerian child is entitled to free and compulsory basic education.” Yet it did not order the government to allocate whatever funds were required to educate all primary school age children. Instead, based on evidence that specific funds had been embezzled from the national education program, the Court ordered Nigeria to “take the necessary steps to provide the money to cover the shortfall” while the government pursued efforts “to recover the funds or prosecute the suspects.” . . .

In sum, although the ECOWAS Court is still a young international tribunal with an uncertain future, the Court has survived . . . major challenges to the exercise its human rights authority, arguably emerging stronger for having weathered those travails. The judges are also aware of ongoing concerns about noncompliance and are responding both in their jurisprudence and in actions outside the courtroom. Finally, . . . the ECOWAS Court’s status as a human rights court is far more settled than that of subregional community courts elsewhere in Africa.

SERAP v. Federal Republic of Nigeria
Community Court of Justice, ECOWAS
ECW/CCJ/JUD/18/12 (2012)

. . . 3. This case originated from a complaint brought on 23 July 2009 by the Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) pursuant to Article 10 of the Supplementary Protocol A/SP.1/01/05 against the President of the Federal Republic of Nigeria, the Attorney General of the Federation, Nigerian National Petroleum Company, Shell Petroleum Development Company, ELF Petroleum Nigeria Ltd, AGIP Nigeria PLC, Chevron Oil Nigeria PLC, Total Nigeria PLC and Exxon Mobil.

4. The Plaintiff alleged violation by the Defendants of the rights to health, adequate standard of living and rights to economic and social development of the people of Niger Delta and the failure of the Defendants to enforce laws and regulations to protect the environment and prevent pollution. . . .

12. The Plaintiff contended that Niger Delta has an enormously rich endowment in the form of land, water, forest and fauna which have been subjected to extreme degradation due to oil prospecting.

13. It averred that Niger Delta has suffered for decades from oil spills, which destroy crops and damage the quality and productivity of soil that communities use for farming, and contaminates water that people use for fishing, drinking and other domestic and economic purposes. That these spills which result from poor maintenance of infrastructure, human error and a consequence of deliberate vandalism or theft of oil have pushed many people deeper into poverty and deprivation, fuelled conflict and led to a pervasive sense of powerlessness and frustration.

14. It further contended that the devastating activities of the oil industries in the Niger Delta continue to damage the health and livelihoods of the people of the area who are denied basic necessities of life such as adequate access to clean water, education, healthcare, food and a clean and healthy environment.

15. The Plaintiff submitted that although Nigerian government regulations require the swift and effective clean-up of oil spills this is never done timorously and is always inadequate and that the lack of effective clean-up greatly exacerbates the human rights and environmental impacts of such spills.

16. It admitted that though some companies have engaged in development projects to help communities construct water and sanitation facilities and some individuals and families received payments these were inadequate.

17. It submitted that government's obligation to protect the right to health requires it to investigate and monitor the possible health impacts of gas flaring and the failure of the government to take the concerns of the communities seriously and take steps to ensure independent investigation into the health impacts of gas flaring and ensure that the community has reliable information, is a breach of international standards.

18. [The Court summarizes a long list of environmental damage and harms to health and livelihood taking place between 1995 and 2008.]

19. The Plaintiff prays the Court to make the following orders:

a) A Declaration that everyone in the Niger Delta is entitled to the internationally recognised human right to an adequate standard of living, including adequate access to food, to healthcare, to clean water, to clean and healthy environment; to social and economic development; and the right to life and human security and dignity.

b) A Declaration that the failure and/or complicity and negligence of the Defendants to effectively and adequately clean up and remediate contaminated land and water; and to address the impact of oil-related pollution and environmental damage on agriculture and fisheries is unlawful and a breach of international human rights obligations and commitments as it violates the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the African Charter on Human and Peoples' Rights.

c) A Declaration that the failure of the Defendants to establish any adequate monitoring of the human impacts of oil-related pollution despite the fact that the oil industry in the Niger Delta is operating in a relatively densely populated area characterised by high levels of poverty and vulnerability, is unlawful as it violates the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights.

d) A Declaration that the systematic denial of access to information to the people of the Niger Delta about how oil exploration and production will affect them, is unlawful as it violates the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the African Charter on Human and Peoples' Rights.

e) An Order directing the Defendants to ensure the full enjoyment of the people of Niger Delta to an adequate standard of living, including adequate access

to food, to healthcare, to clean water, to clean and healthy environment; to socio and economic development; and the right to life and human security and dignity.

f) An Order directing the Defendants to hold the oil companies operating in the Niger Delta responsible for their complicity in the continuing serious human rights violations in the Niger Delta. . . .

j) An Order directing the Defendants individually and/or collectively to pay adequate monetary compensation of 1 Billion Dollars (USD) to the victims of human rights violations in the Niger Delta, and other forms of reparation that the Honourable Court may deem fit to grant. . . .

24. The Federal Republic of Nigeria argues notably, that the Constitution of Nigeria only recognises the jurisdiction of the domestic courts of Nigeria, as far as competence to examine violation of the rights contained in the ICCPR is concerned, and that ICESCR did not provide that the rights contained in the said instrument were justiciable. The Federal Republic of Nigeria added that the Court has jurisdiction to adjudicate only in cases regarding the treaties, conventions and protocols of the Economic Community of West African States.

25. The new Article 9(4) of the Protocol on the Court as amended by Supplementary Protocol A/SP.1/01/05 of 19 January 2005 provides: “The Court has jurisdiction to determine cases of violation of human rights that occur in any Member State.” . . .

27. When the Member States were adopting the said Protocol, the human rights they had in view were those contained in the international instruments, with no exception whatsoever, and they were all signatory to those instruments. Thus attests the preamble of the said Protocol . . . which provides: “The rights set up in the African Charter on Human and Peoples’ Rights and other international instruments shall be guaranteed in each of the ECOWAS Member States; each individual or organisation shall be free to have recourse to the common or civil law courts, a court of special jurisdiction, or any other national institution established within the framework of an international instrument on Human Rights, to ensure the protection of his/her rights.”

28. Thus, even though ECOWAS may not have adopted a specific instrument recognising human rights, the Court’s human rights protection mandate is exercised with regard to all the international instruments, including the African Charter on Human and Peoples’ Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, etc. to which the Member States of ECOWAS are parties.

29. [B]y establishing the jurisdiction of the Court, they have created a mechanism for guaranteeing and protecting human rights within the framework of ECOWAS so as to implement the human rights contained in all the international instruments they are signatory to. . . .

31. As to the justiciability or enforceability of the economic, social and cultural rights, this Court is of the view that instead of a generalistic approach recognizing or denying their enforceability, the appropriate way to deal with that issue is to analyse each right in concrete terms, try to determine which specific obligation it imposes on the States and Public Authorities, and whether that obligation can be enforced by the Courts. . . .

33. In the instant case, what is in dispute is not a failure of the Defendants to allocate resources to improve the quality of life of the people of Niger Delta, but rather a failure to use the State authority, in compliance with international obligations, to prevent the oil extraction industry from doing harm to the environment, livelihood and quality of life to the people of that region.

34. The Court notes that behind the thesis developed by the Federal Republic of Nigeria is the principle contained in its own Constitution that the economic, social and cultural rights, being mere policy directives, are not justiciable or enforceable.

35. But it should also be noted that the sources of Law that the Court takes into consideration in performing its mandate of protecting Human Rights are not the Constitutions of Member States, but rather the international instruments to which these States voluntarily bound themselves at the international level, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights.

36. As held by the jurisprudence of this Court, in the Ruling of 27 October 2009, *SERAP v. Federal Republic of Nigeria and Universal Basic Education Commission*, once the concerned right for which the protection is sought before the Court is enshrined in an international instrument that is binding on a Member State, the domestic legislation of that State cannot prevail on the international treaty or covenant, even if it is its own Constitution.

37. This view is consistent with paragraph 2, Article 5 of the International Covenant on Economic, Social and Cultural Rights which Nigeria is party to by accession since 29 July 1993 which provides: "No restriction upon or derogation from any of the fundamental human rights recognised or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the

pretext that the present Covenant does not recognise such rights or that it recognises them to a lesser extent.”

38. In these circumstances, invoking lack of justiciability of the concerned right, to justify non accountability before this Court, is completely baseless.

39. It is thus evident that the Federal Republic of Nigeria cannot invoke the non justiciability or enforceability of ICESCR as a mean for shirking its responsibility in ensuring protection and guarantee for its citizens within the framework of commitments it has made vis-à-vis the Economic Community of West African States and the Charter. . . .

91. The Court notes that the Plaintiff alleges violation of several articles of the African Charter on Human and Peoples’ Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The Court finds that considering all the instruments invoked, including the Universal Declaration of Human Rights, 29 articles were alleged to have been violated.

92. The success of an application for human rights protection does not depend on the number of provisions or international instruments the applicant invokes as violated. It suffices . . . to cite the one which affords more effective protection to the right allegedly violated. . . .

95. From the submissions of both Parties, it has emerged that the Niger Delta is endowed with arable land and water which the communities use for their social and economic needs; several multinational and Nigerian companies have carried along oil prospection as well as oil exploitation which caused and continue to cause damage to the quality and productivity of the soil and water; the oil spillage, which is the result of various factors including pipeline corrosion, vandalisation, bunkering, etc. appears for both sides as the major source and cause of ecological pollution in the region. It is a key point that the Federal Republic of Nigeria has admitted that there has been in Niger Delta occurrences of oil spillage with devastating impact on the environment and the livelihood of the population throughout the time.

96. Though the Defendant’s contention is that the Plaintiff allegations are mere conjectures, this Court highlights and takes into account the fact that it is public knowledge that oil spills pollute water, destroy aquatic life and soil fertility with resultant adverse effect on the health and means of livelihood of people in its vicinity. Thus in so far as there is consensus by both parties on the occurrence of oil spills in the region, we have to presume that in the normal cause of events in such a situation, to wit, consequential environmental pollution exist there. [Cf.

Torrey Canyon (1967), *Amoco Cadiz* (1978), *Exxon Valdez* (1989), *Erika* (1999), *Prestige* (2002), *Deepwater Horizon* (April 2010).]

97. In the face of this finding, the question as to the causes or liability of the spills is not in issue in the instant case.

98. As such, the heart of the dispute is to determine whether in the circumstances referred to, the attitude of the Federal Republic of Nigeria, as a party to the African Charter on Human and Peoples' Rights, is in conformity with the obligations subscribed to in the terms of Article 24 of the said instrument, which provides: "All peoples shall have the right to a general satisfactory environment favourable to their development."

99. The scope of such a provision must be looked for in relation to Article 1 of the Charter, which provides: "The Member States of the Organization of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them."

100. Thus, the duty assigned by Article 24 to each State Party to the Charter is both an obligation of attitude and an obligation of result. The environment, as emphasised by the International Court of Justice, "is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn" (Legality of the threat or use of nuclear arms, ICJ Advisory Opinion of 8 July 2006, paragraph 28). It must be considered as an indivisible whole, comprising the "biotic and abiotic natural resources, notably air, water, land, fauna and flora and the interaction between these same factors" (International Law Institute, Resolution of 4 September 1997, Article 1). The environment is essential to every human being. The quality of human life depends on the quality of the environment.

101. Article 24 of the Charter thus requires every State to take every measure to maintain the quality of the environment understood as an integrated whole, such that the state of the environment may satisfy the human beings who live there, and enhance their sustainable development. It is by examining the state of the environment and entirely objective factors, that one judges, by the result, whether the State has fulfilled this obligation. If the State is taking all the appropriate legislative, administrative and other measures, it must ensure that vigilance and diligence are being applied and observed towards attaining concrete results.

102. In its defence, the Federal Republic of Nigeria exhaustively lists a series of measures it has taken to respond to the environmental situation in the

Niger Delta and to ensure a balanced development of this region.

103. Among these measures, the Court takes note of the numerous laws passed to regulate the extractive oil and gas industry and safeguard their effects on the environment, the creation of agencies to ensure the implementation of the legislation, and the allocation to the region, 13% of resources produced there, to be used for its development.

104. However, compelling circumstances of this case lead the Court to recognise that all of these measures did not prevent the continued environmental degradation of the region, as evidenced by the facts abundantly proven in this case and admitted by the very same Federal Republic of Nigeria.

105. This means that the adoption of the legislation, no matter how advanced it may be, or the creation of agencies inspired by the world's best models, as well as the allocation of financial resources in equitable amounts, may still fall short of compliance with international obligations in matters of environmental protection if these measures just remain on paper and are not accompanied by additional and concrete measures aimed at preventing the occurrence of damage or ensuring accountability, with the effective reparation of the environmental damage suffered. . . .

107. If, notwithstanding the measures the Defendant alleges having put in place, the environmental situation in the Niger Delta Region has still been of continuous degradation, this Court has to conclude that there has been a failure on the part of the Federal Republic of Nigeria to adopt any of the "other" measures required by the said Article 1 of African Charter to ensure the enjoyment of the right laid down in Article 24 of the same instrument.

108. From what emerges from the evidence produced before this Court, the core of the problem in tackling the environmental degradation in the Region of Niger Delta resides in lack of enforcement of the legislation and regulation in force, by the Regulatory Authorities of the Federal Republic of Nigeria in charge of supervision of the oil industry.

109. Contrary to the assumption of the Federal Republic of Nigeria in its attempt to shift the responsibility on the holders of a license of oil exploitation, the damage caused by the oil industry to a vital resource of such importance to all mankind, such as the environment, cannot be left to the mere discretion of oil companies and possible agreements on compensation they may establish with the people affected by the devastating effects of this polluting industry.

110. It is significant to note that despite all the laws it has adopted and all the agencies it has created, the Federal Republic of Nigeria was not able to point out in its pleadings a single action that has been taken in recent years to seriously and diligently hold accountable any of the perpetrators of the many acts of environmental degradation which occurred in the Niger Delta Region.

111. And it is precisely this omission to act, to prevent damage to the environment and to make accountable the offenders, who feel free to carry on their harmful activities, with clear expectation of impunity, that characterises the violation by the Federal Republic of Nigeria of its international obligations under Articles 1 and 24 of the African Charter on Human and Peoples' Rights.

112. Consequently, the Court concludes and adjudges that the Federal Republic of Nigeria, by comporting itself in the way it is doing, in respect of the continuous and unceasing damage caused to the environment in the Region of Niger Delta, has defaulted in its duties in terms of vigilance and diligence as party to the African Charter on Human and Peoples' Rights, and has violated Articles 1 and 24 of the said instrument.

113. In the statement of claims the Plaintiff asks for an order of the Court directing the Defendants to pay adequate monetary compensation of 1 Billion [US] Dollars . . . to the victims of human rights violations in the Niger Delta, and other forms of reparation the Court may deem fit to grant. . . .

116. . . . In case of human rights violations that affect indetermined number of victims or a very large population, as in the instant case, the compensation shall come not as an individual pecuniary advantage, but as a collective benefit adequate to repair, as completely as possible, the collective harm that a violation of a collective right causes.

117. Based on the above reasons, the prayer for monetary compensation of one Billion US Dollars to the victims is dismissed.

118. The Court is, however, mindful that its function in terms of protection does not stop at taking note of human rights violation. If it were to end in merely taking note of human rights violations, the exercise of such a function would be of no practical interest for the victims, who, in the final analysis, are to be protected and provided with relief. Now, the obligation of granting relief for the violation of human rights is a universally accepted principle. The Court acts indeed within the limits of its prerogatives when it indicates for every case brought before it, the reparation it deems appropriate.

119. In the instant case, in making orders for reparation, the Court is ensuring that measures are indicated to guide the Federal Republic of Nigeria to achieve the objectives sought by Article 24 of the Charter, namely to maintain a general satisfactory environment favourable to development. . . .

121. [The Court] Orders the Federal Republic of Nigeria to:

i. Take all effective measures, within the shortest possible time, to ensure restoration of the environment of the Niger Delta;

ii. Take all measures that are necessary to prevent the occurrence of damage to the environment;

iii. Take all measures to hold the perpetrators of the environmental damage accountable; . . .

124. AND THE FOLLOWING HEREBY APPEND THEIR SIGNATURES :

Hon. Justice Benfeito Mosso Ramos (Presiding)

Hon. Justice Hansine Donli (Member)

Hon. Justice Anthony Alfred Benin (Member)

Hon. Justice Clotilde Médégan Nougbodé (Member)

Hon. Justice Eliam Potey (Member)

INDIA

Since the 1970s, the Indian Supreme Court has, on the basis of Article 51 of the Constitution of India, gradually incorporated international human rights law into Indian constitutional law. The relevant part of Article 51 directs the “state” (but not the courts) to “foster respect for international law and treaty obligations in the dealing of organized people with one another.” As Aparna Chandra emphasizes, Article 51 was not considered to be judicially enforceable. Although, in practice, the executive dominates international treaty-making, under the Constitution (Articles 73 and 246[10]-[14]), international legal obligations have no domestic effect without Parliament’s approval, upon which they acquire the same status as statute in the hierarchy of legal norms. Despite these and other constraints, the Indian Supreme Court has constructed Article 51 as a portal

through which human rights treaties are domesticated and, in effect, given constitutional status alongside constitutional rights.

Aparna Chandra

Fostering Respect?: The Supreme Court of India's Approach to International Law: A Call for Caution^{*}

. . . . At least since the late 1970s, when the Supreme Court started articulating a sense of obligation towards applying international law in its decisions, no judge has taken a position of active resistance to international law. . . .

[In the post emergency period era] the Court . . . moved towards the incorporation of [treaty] law without the need for prior legislative intervention, [but] it was still dependent on the Executive first to enter into such obligations. . . . [I]n 1993 the Court referred to Article 9 (5), ICCPR as a basis for its decision to award compensation in a case of violation of fundamental rights, thus ignoring India's specific reservation to that clause. By this time, the Court had freed itself from both legislative and executive constraints in the direct application of treaty law in its adjudicative practices. While [earlier decisions] had still left open the scope for Parliament to reject international law through statute, by the mid-1990s, the Court . . . started viewing international law as having constitutional status. In 1993 Parliament . . . enacted the Protection of Human Rights Act in order to set up National and State Human Rights Commissions. The Act defined "human rights" as "the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India;" and "International Covenants" as ICCPR and ICESCR. . . . Parliament restricted enforceability by courts only to the ICCPR and the ICESCR.

However, in a series of judgments in the mid-1990s the Court held that, by virtue of this provision, Conventions such as CEDAW had also become "an integral part" of the Constitution Through this device, the Court domesticated certain international conventions at the level of the Constitution. . . .

The most significant decision on the constitutional domestication of international law was that of *Vishaka v. State of Rajasthan* [1997], a case dealing with the sexual harassment of women in the workplace. India does not have any statutory law specifically dealing with sexual harassment in the workplace. While

^{*} Excerpted from Aparna Chandra, *Fostering Respect?: The Supreme Court of India's Approach to International Law: A Call for Caution* (2013) (JSD Thesis, Yale Law School).

the Constitution guarantees women the right to equality, freedom from sex-based discrimination, and the freedom to work in any trade, profession, occupation or business, the links between sexual harassment and the denial of these rights had not been drawn before in any domestic judgment or other domestic legal text. The Court relied on Art. 11 of CEDAW and the CEDAW Committee's General Recommendation regarding this provision to draw the link between sexual harassment in the work place and the right against sex discrimination and freedom to work. As a result the Court was able to hold that the lack of a law governing the issue was a denial of women's fundamental rights, and as such the Court's jurisdiction under Art. 32 could be invoked to address the violation. The Court further held that in the absence of domestic law on an issue on which India has international obligations, the Court was obligated under Art. 32 read, *inter alia*, with Art. 51(c) of the Constitution to frame guidelines to meet such international obligations. The Court then used the CEDAW Committee's General Recommendations under Art. 11, CEDAW as a template for framing guidelines for addressing sexual harassment in the workplace. These guidelines were to have effect till such time as the Legislature chose to act on the matter. The Court stated that "[a]ny International Convention not inconsistent with the fundamental rights and in harmony with its spirit *must be* read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. . . . The international conventions and norms are to be read into [fundamental rights] in the absence of enacted domestic law occupying the field when there is no inconsistency between them." The wholesale importation of entire conventions, very loosely channeled through fundamental rights, made the Court's approach closer to direct application rather than interpretative incorporation. Since this case, the Court has time and again reiterated the notion of direct importation of international law into the Constitution.

The Court soon moved towards determining the constitutionality/validity of domestic legislation on the basis of the legislation's compatibility with India's international obligations. . . . The Court [then began] examining whether domestic rules are "intra vires" International Conventions. . . .

[E]ven though the Supreme Court has been directly incorporating international law into the domestic legal system and has been mandating obligatory compliance with to international legal norms in judicial decisions, the Court has not recognized international law as capable of giving rise to an independent cause of action. Rather, when a case is otherwise before the Court, in deciding the matter, the Court has been making use of international law as if it were directly applicable to the dispute at hand. . . . [Nonetheless] international law can help generate causes of action, by expanding the scope of domestic rights applicable to the dispute. . . . It is ironic that as late as in 2009, the Indian Supreme Court has been declaring that India is a dualist country. . . .



EQUALITY IN DEMOCRACY:
LEGISLATURES, COURTS, AND QUOTAS

DISCUSSION LEADERS

JUDITH RESNIK, REVA SIEGEL, AND SUSANNE BAER

IV. EQUALITY IN DEMOCRACY: LEGISLATURES, COURTS, AND QUOTAS

DISCUSSION LEADERS:

JUDITH RESNIK, REVA SIEGEL, AND SUSANNE BAER

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Constitutions around the world speak of the equality of citizens. Yet instantiating equality has proven challenging, and dramatic forms of inequality are commonplace. At times, this gap between law and social fact is great enough to threaten the legitimacy of democracies.

Inequality can undermine the claims democracies make and the ways democracies work. Deep social stratification calls into question claims of equal citizenship, and erodes the forms of social solidarity that democracies require to function. When social stratification is severe enough, it may be difficult for citizens to identify with one another and to recognize the government as one in which they have voice.

During the last several decades, representative governments have employed many strategies to alleviate inequalities. One class of commonly used approaches is sometimes termed “positive action”: practices seeking to promote the inclusion of groups that have been excluded, disfavored, or disadvantaged. Positive action structures decision making in a variety of domains—from politics and the judiciary to education and the market. Quotas are popular, with examples coming from dozens of countries; likewise, in many polities, quotas are deeply controversial. Individuals have challenged positive action measures as violating the very norm—equality—that positive action seeks to instantiate. Reasoning from formal and substantive understandings of equality, courts sometimes uphold and sometimes restrict positive action by imposing limits on the programs’ justifications and form.

Consider the propositions put forth for and against positive action. Arguing before legislatures and in courts, proponents have described the goals of positive action in a variety of ways. One important line of argument sounds in compensatory justice and emphasizes reasons for providing opportunities to members of groups that have suffered discrimination. Calls for positive action may also be forward-looking, seeking to alleviate caste or subordination. Utilitarian arguments for positive action seek to avoid these often-contentious justice-based claims. Utilitarian approaches emphasize that diversifying participation in an institution such as a legislature, workplace, or court will improve the way the institution functions. The argument is that altering an institution’s membership will change—for the better—the issues the institution addresses as well as the quality of its decisions. A related yet distinct line of argument emphasizes that these shifts in participation will increase the legitimacy of decisions made by institutions claiming to reflect and represent the body politic. Cutting across these and other kinds of justifications for positive action are concerns about symbolic and social meaning. Positive action that includes members of traditionally underrepresented groups on corporate boards, courts,

and legislatures can, at the same time, change understandings about the role and authority of citizens and institutions.

By contrast, opponents of positive action argue that preferences are unfair to those who are not their beneficiaries. From the opponents' vantage point, laws encouraging the inclusion of outsider groups distort the proper functioning of institutions. Critics contend that quotas are counterproductive in other ways, harming those they are designed to help. The meanings quotas make stereotype and stigmatize their beneficiaries. Critics also emphasize that because quotas violate the legitimate systems of organized work and politics, quotas are divisive. In so doing, quotas undermine, rather than strengthen, the institutions of democratic life.

These clashing arguments have put quotas at the center of long-running exchanges between courts and legislatures. Thus, we invite consideration of why constitutional democracies are drawn to positive action, despite the conflicts often associated with such programs. What is the appeal? What goods are provided to the institutions of a democratic polity, and what threats do such programs pose? Once democratic institutions decide on adopting positive action, should courts defer to their decisions? When courts intervene, what reasons do they give? What concerns explain why courts countenance certain justifications and require certain forms of positive action?

To explore these questions, the readings begin with some reflections on substantive equality in a Canadian decision upholding, against reverse discrimination challenge, positive action for Aboriginal peoples in commercial fishing licensing. We then turn to a line of cases in the European Court of Justice that uphold, with limits, preferences for women in government-based employment. Next considered are laws mandating gender quotas for the electoral lists of political parties. The story of such laws in France and in Spain illustrates the evolution of parity through border-crossing dialogues between social movements and courts. Courts also have become a focus of positive action. To illustrate, we consider legislative mandates that women must be placed on lists for appointments to the European Court of Human Rights and to the Belgium Constitutional Court. Shifting to another domain and away from the focus on gender, we turn to education, where various forms of positive action take into account race, ethnicity, caste, and class. Programs seeking to increase the admission of underrepresented groups in institutions of higher learning in India, the United States, and France have produced an expansive body of judgments and commentary.

There are of course many different ways of analyzing these bodies of law. One could explore differences in types of positive law (from jurisdiction to jurisdiction, or in constitutions as contrasted with legislation and directives or local and private body enactments). Or, one might ask how federalism fits in the story; do judges owe subnational decisions deference?

Alternatively, one might examine the concerns about legitimacy prompting arguments for and against positive action in particular domains—in the workplace, corporations, elections, the judiciary, and education. Views about these matters vary around the world. They also seem to depend on whether beneficiaries of positive action are identified by gender or race/ethnicity. For example, in cases where European law is supportive of gender-based quotas, would it likewise endorse race-based quotas?

Puzzles of this kind lead us back to the question of why legislatures repeatedly install quotas and why judges not infrequently rebel against them. Do judges have a distinctive set of concerns in the debates over positive action? Are there common themes that connect judicial interventions across borders? For example, European courts restricting gender-based positive action in the workplace and American courts restricting race-based affirmative action in education insist on the need for flexibility. What are the sources for the insistence that preferences take particular forms, and what concerns do such restrictions in fact reflect? In the back-and-forth between legislators and courts, how does positive action change in justification or in form?

The case law is rich with democratic iterations, and this session provides an opportunity to reflect on the legislative and judicial dialogues over whether and how democratic bodies adopt positive action measures.

FORMAL AND SUBSTANTIVE EQUALITY

R. v. Kapp
Supreme Court of Canada
2. S.C.R. 483 (2008)

[In order to increase aboriginal participation in commercial fishing, the Canadian federal government introduced an “Aboriginal Fisheries Strategy.” One element of the Strategy involved issuing communal fishing licenses to three

aboriginal bands, permitting designated fisherman to fish for salmon in the mouth of the Fraser River for a period of 24 hours and to sell their catch.

The appellants were commercial fishers, mainly non-aboriginal, who were excluded from the fishery during this period. Appellants engaged in protest fishing and were charged with “fishing at a prohibited time.” At the trial, they argued that the fishing license scheme discriminated against them on the basis of race in violation of section 15(1) of the *Canadian Charter of Rights and Freedom*.^{*} The trial court held that the license granted to the Aboriginals violated the protesters’ equality rights under the Charter.]

The judgment of McLachlin, C.J., and Binnie, LeBel, Deschamps, Fish, Abella, Charron, and Rothstein, J.J., was delivered by McLachlin, C.J., and Abella, J.:

Substantive equality, as contrasted with formal equality, is grounded in the idea that: “The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.” . . . Sections 15(1) and 15(2)^{**} work together to promote the vision of substantive equality that underlies s. 15 as a whole. . . . Under s. 15(1), the focus is on *preventing* governments from making distinctions based on the enumerated or analogous grounds that: have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping. Under s. 15(2), the focus is on *enabling* governments to pro-actively combat existing discrimination through affirmative measures.

. . . We would therefore formulate the test under s. 15(2) as follows. A program does not violate the s. 15 equality guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds.

^{*} Section 15(1) of the Charter reads: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

^{**} Section 15(2) of the Charter reads: “Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

. . . The government's aims correlate to the actual economic and social disadvantage suffered by members of the three aboriginal bands. The disadvantage of aboriginal people is indisputable. In *Corbiere v. Canada (Minister of Indian and Northern Affairs)* (1999), the Court noted “the legacy of stereotyping and prejudice against Aboriginal peoples.” The Court has also acknowledged that “Aboriginal peoples experience high rates of unemployment and poverty, and face serious disadvantages in the areas of education, health and housing.” More particularly, the evidence shows in this case that the bands granted the benefit were in fact disadvantaged in terms of income, education and a host of other measures. This disadvantage, rooted in history, continues to this day. The communal fishing license, by addressing long-term goals of self-sufficiency and, more immediately, by providing additional sources of income and employment, relates to the social and economic disadvantage suffered by the bands. The fact that some individual members of the bands may not experience personal disadvantage does not negate the group disadvantage suffered by band members. . . .

Owen Fiss

*Groups and the Equal Protection Clause**

[T]he antidiscrimination principle embodies a very limited conception of equality, one that is highly individualistic and confined to assessing the rationality of means. I . . . want to outline another mediating principle—the group-disadvantaging principle—one that has as good, if not better, claim to represent the ideal of equality, one that takes a fuller account of social reality, and one that more clearly focuses the issues that must be decided in equal protection cases. . . .

* * *

[B]lacks are very badly off, probably our worst-off class (in terms of material well-being second only to the American Indians), and in addition they have occupied the lowest rung for several centuries. In a sense, they are America's perpetual underclass. It is both of these characteristics—the relative position of the group and the duration of the position—that make efforts to improve the status of the group defensible. This redistribution may be rooted in a theory of compensation—blacks as a group were put in that position by others and the redistributive measures are owed to the group as a form of compensation. The

* Excerpted from Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

debt would be viewed as owed by society, once again viewed as a collectivity. But a redistributive strategy need not rest on this idea of compensation, it need not be backward looking (though past discrimination might be relevant for explaining the identity and status of blacks as a social group). The redistributive strategy could give expression to an ethical view against caste, one that would make it undesirable for any social group to occupy a position of subordination for any extended period of time. What, it might be asked, is the justification for that vision? I am not certain whether it is appropriate to ask this question, to push the inquiry a step further and search for the justification of that ethic; visions about how society should be structured may be as irreducible as visions about how individuals should be treated—for example, with dignity. But if this second order inquiry is appropriate, a variety of justifications can be offered and they need not incorporate the notion of compensation. Changes in the hierarchical structure of society—the elimination of caste—might be justified as a means of (a) preserving social peace; (b) maintaining the community as a community, that is, as one cohesive whole; or (c) permitting the fullest development of the individual members of the subordinated group who otherwise might look upon the low status of the group as placing a ceiling on their aspirations and achievements. . . .

I would therefore argue that blacks should be viewed as having three characteristics that are relevant in the formulation of equal protection theory: (a) they are a social group; (b) the group has been in a position of perpetual subordination; and (c) the political power of the group is severely circumscribed. Blacks are what might be called a specially disadvantaged group, and I would view the Equal Protection Clause as a protection for such groups. Blacks are the prototype of the protected group, but they are not the only group entitled to protection. . . .

EMPLOYMENT: POSITIVE ACTION FOR WOMEN

The tension between equality in law and equality in fact—between formal and substantive equality—is expressed across many layers of European legislation and case law. Article 23, “Equality Between Men and Women,” of the EU Charter of Fundamental Rights, which acquired the force of law under the Lisbon Treaty in December of 2009, provides:

Equality between men and women must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the underrepresented sex.

Decades prior to the adoption of Article 23, the European Economic Community had promulgated Council Directive 1976/207, in 1976, to implement the “principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.”*

Georg Badeck & Others
European Court of Justice (Grand Chamber)
C-158/97 (2000)

[In 1997, the Constitutional Court for Hessen referred a preliminary question to the European Court of Justice on whether the Hessen Equal Rights Law—HGIG, adopted in 1993 to “eliminate discrimination on grounds of sex and family status”—was consistent with EU law. The Hessen law required that, in areas where “fewer women than men are employed in a pay, remuneration or salary bracket in a career group” in either the judicial service and public attorney's office, an advancement plan for women “shall contain binding targets, for two years at a time” for appointments and promotions. For such “women's advancement plans,” the law required that “more than half of the posts . . . be filled [by women] in a sector in which women [were] under-represented,” unless “a particular sex is an indispensable condition for an activity or if it is convincingly demonstrated that not enough women with the necessary qualifications are available.”

Georg Badeck and others challenged these provisions as inconsistent with “the constitutional principle of choosing the best persons, in that it entails giving priority to candidates on grounds of sex rather than merit, and also with the

* The Amsterdam Treaty, which came into force in 1999, authorized positive action by the Member States. Those provisions are now enshrined in Article 157.4 of the Treaty on the Functioning of the European Community (TFEU), which reads: “With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantage in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.”

principle of equal treatment, which not only prohibits giving priority to a specific group but confers a fundamental right on all individuals, a right which guarantees citizens equal opportunities with respect to starting-points, not advantages for a specific category of persons with respect to points of arrival.”

As the Advocate General Antonio Saggio explained in his opinion, at issue was the “the scope of positive action to promote equality between men and women,” which he defined to be “action, legislative or administrative, that provides instruments to secure equal social opportunities for a specific, naturally or historically disadvantaged group,” such as “programmes to encourage the appointment and promotion of women.” He commented that such “provisions are certainly positive but they are inherently discriminatory, being designed to favour a particular category of persons, and as such are clearly contrary to the general principle of equality.” The “central” challenge was thus “to establish how far and on what conditions positive action at national level such as the action at issue in this case may be regarded as compatible with the Community legal order.”]

[The Court was composed of G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, R. Schintgen (Presidents of Chambers), P.J.G. Kapteyn (Rapporteur), C. Gulmann, J.-P. Puissechet, G. Hirsch, P. Jann and M. Wathelet, Judges.]

. . . 17. The Court held in *Kalanke v Freie Hansestadt Bremen* (1995) . . . that a national rule to the effect that where equally qualified men and women are candidates for the same promotion, in sectors where there are fewer women than men at the level of the relevant post, women are automatically to be given priority involves discrimination on grounds of sex.

18. In . . . *Marschall v Land Nordrhein-Westfalen* (1997) the Court had to rule on whether a national rule containing a clause to the effect that women are not to be given priority in promotion if reasons specific to an individual male candidate tilt the balance in his favour . . . is designed to promote equal opportunity for men and women within the meaning of Article 2(4) of the Directive.

19. The Court noted . . . that since Article 2(4) is specifically and exclusively designed to authorise measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life, it authorises national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men

21. The Court observed . . . that even where candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life, so that the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances

22 . . . [In] *Marschall*, . . . unlike the rules at issue in *Kalanke*, a national rule which contains a saving clause does not exceed the limits of the exception in Article 2(4) of the Directive if, in each individual case, it provides for male candidates who are as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilt the balance in favour of a male candidate. . . .

THE COURT, hereby rules:

Article 2(1) and (4) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions does not preclude a national rule which

- in sectors of the public service where women are under-represented, gives priority, where male and female candidates have equal qualifications, to female candidates where that proves necessary for ensuring compliance with the objectives of the women's advancement plan, if no reasons of greater legal weight are opposed, provided that that rule guarantees that candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates,

- prescribes that the binding targets of the women's advancement plan for temporary posts in the academic service and for academic assistants must provide for a minimum percentage of women which is at least equal to the percentage of women among graduates, holders of higher degrees and students in each discipline,

- in so far as its objective is to eliminate under-representation of women, in trained occupations in which women are under-represented and for which the State does not have a monopoly of training, allocates at least half the training places to women, unless despite appropriate measures for drawing the attention of

women to the training places available there are not enough applications from women,

- where male and female candidates have equal qualifications, guarantees that qualified women who satisfy all the conditions required or laid down are called to interview, in sectors in which they are under-represented,

- relating to the composition of employees' representative bodies and administrative and supervisory bodies, recommends that the legislative provisions adopted for its implementation take into account the objective that at least half the members of those bodies must be women.

[In contrast, while the Advocate General had recommended that most of the provisions be upheld, he viewed the provisions requiring that “half of the members of the internal bodies of the public administration must be women” as incompatible with EU law.]

Governments in Europe have, in the last decade, fashioned quotas for membership on non-executive corporate boards. Since 2003, Norway has required that public limited liability companies shall have boards with at least 40% of each gender represented; noncompliant companies can be dissolved. France has enacted a requirement that the boards of all listed companies and large public non-listed companies have at least 20% membership from each sex by 2014 and 40% by 2017. Companies that fail to comply will have their board elections nullified and director benefits suspended. The Netherlands requires large corporations to have 30% board membership from each sex; a “comply or explain” mechanism is in place for implementation.

In 2012, the European Commission proposed a Directive requiring that, subject to the conditions imposed by cases such as *Kalanke*, *Marschall*, and *Badeck*, non-executive boards should include at least 40% women by 2020. The Proposal engendered debate about whether such a rule should be left to member-states; after modification by the European Parliament on first reading, the Directive was, as of the summer of 2014, awaiting the vote of the Council.

THE BODY POLITIC: ELECTORAL LISTS

Decision No. 82-146 of 18 November 1982 Constitutional Council of France

[At the recommendation of nearly eighty French MPs the Constitutional Council took up the constitutionality of a law amending the Electoral Code for local elections to require that the lists of candidates drawn up by the parties contain a maximum of 75% of persons of the same sex. In other words, women would be guaranteed a minimum of 25% of the places on the list of candidates.]

. . . 5. Considering that, according to article 3 of the Constitution:

National sovereignty belongs to the people, which shall exercise it by its representatives and by means of referendum.

No section of the people, nor any individual, may arrogate its exercise to itself.

Suffrage may be direct or indirect, under the conditions provided by the Constitution. It shall always be universal, equal, and secret. .

. .

Within the terms settled by *loi*, all adult French nationals of both sexes, enjoying their civil and political rights, are voters.

and according to article 6 of the Declaration of the Rights of Man and of the Citizen:

All citizens, being equal [in the eyes of the law], are equally eligible for all public dignities, positions, and employment according to their abilities, and without distinction other than that of their virtues and talents;

6. . . . [T]hese principles of constitutional value oppose any division of voters or eligible candidates into categories . . . ;

7. [T]he *loi* . . . must be declared contrary to the Constitution.

Blanca Rodríguez-Ruiz & Ruth Rubio-Marín

*The Gender of Representation: On Democracy, Equality, and Parity**

. . . [T]he Conseil's rejection of the constitutionality of the quota law in 1982 was based precisely on the notion that such a system departed from equality and universality of voting and from traditional French principles of national sovereignty and the indivisibility of the electoral body according to French tradition.

In the French case, the idea of parity came about and gained strength specifically relative to the quota system as a formula for making the tradition of French universalism compatible with the political inclusion of women, as one half of humanity. Equality was sought in preference over the quota and, with it, the equal participation of all in the representation of all. Parity, argue its advocates, is not a means for representing women collectively as a group with specific interests to be exclusively propounded; nor, as held by its detractors, does it turn its back on French universalism by opting for a communitarian approach to representation. It is more about finishing the work begun by the French Revolution and preventing an abstract universalism (which, until now, has always de facto been a masculine universalism) from denying—as it did for a century and a half—women's right to vote and to stand for elections. It is about preventing the continued relegation of women—as is currently the case—to the statistical status of (always merely) being politically represented rather than being regarded as representatives.

In addition, parity's advocates argue that, unlike the quota system, gender parity does not necessarily open Pandora's box for the French nation to break into a multiplicity of groups defined by race, religion, age, or sexual orientation, each one claiming separate representation. Gender, the argument maintains, is not merely another factor of differentiation; it is, by nature, cross-cutting in that it is immutable, noncontingent, or, as claimed, the *prima divisio* (the universal difference) because it is the only difference that cannot be disassociated from the notion of personhood. Women are not a group or a minority—they are half of the population. The citizen is not an abstract, universal entity but, by nature, a gendered being. Parity is thus nothing more than the political expression of the fact that humanity is composed of two gendered halves and, therefore, its representative bodies must be analogously composed to be democratically legitimate.

* Excerpted from Blanca Rodríguez-Ruiz & Ruth Rubio-Marín, *The Gender of Representation: On Democracy, Equality, and Parity*, 6 INT'L J. CONST. L. 287 (2008).

Thus, the distinction between parity and quotas and the discussion as to which is compatible with the French universalist tradition is at the forefront of the French debate. . . .

By including an equal number of men and women in the public realm of representation, parity democracy provides the basis for the state to cease being the exclusive venue of individuals perceived as independent, and it allows for dependence—symbolized and managed mainly by women—to enter the public realm. The sexual contract had relegated human dependence to the private sphere, considered the natural terrain of women; moreover, the democratic state continues to see it as an obstacle to the ideal independence of autonomous people. With parity democracy, such dependence may move into the public realm as an equally important facet of ordinary life. Once human dependence ceases to be perceived as an obstacle to participation in public affairs, political representation can be achieved not only with regard to the masculine ideal of individuals but also in terms of those aspects that the sexual contract traditionally ascribed to women. The state could then go on to represent all individuals in all their complexity; human autonomy, as aspired to under the liberal ideal, would be thus redefined. The paradigm would no longer be the dependence-free adult but, rather, the adult who takes responsibility for his or her own dependence as well as for those who depend upon him or her as natural limitations on any life project.

Parity democracy is, then, in line with the dismantling of the sexual contract and the implementation of a truly democratic state. A parliament composed of a similar number of men and women encompasses independence and the management of dependence in equal measure, thus achieving the advancement of an ideal of human autonomy that assumes the interdependence of individuals instead of denying it. That said, assuming that the goal is to break the sexual contract, and to do so by incorporating interdependence into the political realm as a defining element thereof, we can ask ourselves: Why is it necessary to impose parity democracy to reach that goal? Why is it not enough to have a parliament composed, essentially, of men inclined to pass laws providing both for people unable to function autonomously and for their caretakers?

We believe the answer is twofold. First, there is the symbolic and cultural aspect. The very existence of a parliament composed of an equal number of men and women radiates the message to all citizens that politics is no longer reserved for independent men nor even for a select group of women who have managed to adapt to the male parameters of independence. It is, instead, a setting where both genders must come together to debate the common good. In this sense, parity democracy has the specific potential to expand the horizons of what women and girls imagine to be possible for themselves. And given that women's exclusion

from politics is structurally linked to the very definition of masculinity and femininity (respectively, in terms of independence and the management of dependence), parity democracy works as an instrument of cultural transformation that dismantles the pillars of the social contract standing on those definitions.

The other aspect is functional. We believe it unlikely that a parliament composed mainly of men can give the management of dependence its due place in the public realm—as a fundamental, defining element of that realm and not as a social pathology that must be treated. Since politics has forever been dominated by men who operate on rules conjured up from the myth of independence (think, for instance, about the requirement of total availability in terms of work schedule and geographic mobility), and since this myth has only been sustainable due to the existence of women who handle men’s dependency from the shadows, we are now faced with a political world custom-made to fit its own false paradigm. It is not surprising, therefore, that the political class is an avid consumer of care provided by others, while it undervalues the “female” work of managing dependence. This being so, there is no good reason to think that the political class (consisting primarily of men) would have any interest in questioning a system that privileges them and, at this point, is simply accepted by most people as the natural way of things.

Here it could be argued that matters are already changing, and that parity is not necessary to bring about change. There are already women in politics, and there is no reason to believe that their presence will not grow over time. Along with those growing numbers, it may be expected that the management of dependence will take on an increasingly central role in public affairs. We contend, however, that the dismantling of the sexual contract requires parity and, therefore, that it can be imposed by law if it does not occur spontaneously. What the uneven presence of women in politics shows is not that the public sphere, as currently conceived, has internalized human interdependence as a defining element in the same way it has internalized the cult of independence. What the presence of some women in politics proves is that there are women who are capable of playing by the rules created by men in the same way men do. And they are capable of doing it by virtue of bearing a much greater cost than men do (the so-called double shift); or by approximating the ideal of the “unburdened” male required by the rules of politics (which implies, for women, not marrying, or divorcing quickly, and not having children, or having fewer than desired); or because the privileges of class allow them to significantly shift those dependencies onto the shoulders of other women. . . .

Instead, parity impacts both genders equally, putting them and the respective notions of independence and the management of dependency each

represents on an equal footing in public affairs, with the result that neither dependency nor caretaking nor the female gender is stigmatized. Furthermore, the quota system does not create a base for the types of women who go into politics to become increasingly representative of the female gender in functional terms. Rather, aspiring to a minimum number probably will cause a kind of natural selection among women, favoring those who function most like men and are thus less representative of the underrepresented gender. Therefore, while quotas may change the players on the political field, they will not likely make any change in the rules of the game. Parity, on the other hand, can redefine those rules by granting equal relevance to both independence and the management of dependency.

In light of all the above, if we are right and if democracy properly conceived must transcend the premises of the sexual contract, then parity—the equal presence of both genders in politics—is a democratic must. . . .

Julie C. Suk

*Quotas and Consequences: A Transnational Re-evaluation**

. . . [In 1982, the Constitutional Council struck the quota on the ground that constitutional principles] “preclude any division of persons entitled to vote or stand for election into separate categories.”

Following the 1982 decision, a new line of argumentation around gender quotas emerged. Feminists appropriated the language of universalism and indivisibility to be compatible with—if not require—gender parity achieved through quotas. “No real democracy is possible . . . if the question of equality between men and women is not posed as a political prerequisite, emanating from the constitutive principles of the regime, exactly like universal suffrage and separation of powers,” declared a report to the Council of Europe in 1989. . . .

. . . Parity was not a division of the electorate, but a way of repairing longstanding divisions.

* Excerpted from Julie C. Suk, *Quotas and Consequences: A Transnational Re-evaluation*, in *PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW* 228 (Deborah Hellman & Sophia Moreau eds., 2013).

In France, this reconceptualization of gender quotas catalyzed important legal changes. In 1999, . . . Article 3, the very same article that declared the universality and secrecy of suffrage, was amended to add the following sentence: “The law shall promote equal access by men and women to electoral power and elected positions.” This amendment removed the constitutional barrier to legislation adopting an electoral gender quota. In 2000, a new parity statute required party candidate lists to alternate male and female candidates for positions on various regional and municipal councils. This alternation rule guaranteed the outcome that women would constitute half (or almost half, in the case of odd numbers) of all these positions. However, for the national parliamentary elections, which do not follow a proportional representation/party list system, the 2000 law simply required political parties to run an equal number of male and female candidates under threat of losing public funding proportionate to the party’s gender gap.

An additional constitutional transformation was achieved in 2008. In 2006, the French legislature had attempted to adopt a statute requiring gender parity on corporate boards of directors. The Constitutional Council struck it down, holding that the 1999 amendment had only applied to elected office. In response, the Constitution was amended once again, strengthening the link between gender quotas and the indivisibility of the republic. In 2008, the language authorizing gender quotas was moved to Article 1, of the French Constitution, which articulates the fundamental principles of the republic. It now reads:

France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organized on a decentralized basis.

Statutes shall promote equal access by women and men to elective offices and posts as well as to positions of professional and social responsibility.

This amendment enabled the 2011 statute imposing gender parity quotas on corporate boards of directors, as well as other recent legislation adopting gender balance rules in other leadership contexts. The constitutional amendments of 1999 and 2008 reflect a shift in the collective understanding of gender balance. While achieving gender representation through quotas was regarded as divisive thirty years ago, it is now understood as constitutionally authorized and encouraged in order to create a more universal and legitimate democratic republic.

Electoral Gender Quotas Case
Constitutional Court of Spain
STC Decision No. 12/2008 (2008)*

The Plenum of the *Tribunal Constitucional* (“Constitutional Court”), made up of Ms María Emilia Casas Baamonde, Presiding Judge, Mr Guillermo Jiménez Sánchez, Mr Vicente Conde Martín de Hijas, Mr Javier Delgado Barrio, Mr Roberto García-Calvo y Montiel, Ms Elisa Pérez Vera [Judge Rapporteur giving the opinion], Mr Eugeni Gay Montalvo, Mr Jorge Rodríguez-Zapata Pérez, Mr Ramón Rodríguez Arribas, Mr Pascual Sala Sánchez, Mr Manuel Aragón Reyes and Mr Pablo Pérez Tremps, Judges, has pronounced

ON BEHALF OF THE KING, the following DECISION:

[Article 44 bis of the Organic Law 5/1985 of the General Election Law (hereafter the Organic Law on Equality, or, in Spanish: LOREG), as amended by a second additional provision of Organic Law 3/2007 (in Spanish: LOIMH), of March 22nd, on achieving effective equality between men and women requires that election lists must have “a balanced composition between women and men . . . so that in the list of candidates as a whole each sex represents a minimum of forty percent.” Enforcing this provision, an Elections Board rejected the all-female list for a local election of the center-right party, the People’s Party (PP’s). The rejected PP’s candidates filed a case before the First Administrative Court of Santa Cruz of Tenerife; before the Spanish Constitutional Court, more than fifty Members of Parliament from the PP’s Parliamentary Group also contested the law.]

. . . [N]ew article 44 bis LOREG [provides]:

The lists of candidates presented for elections for the lower house of parliament (Congreso), for municipal elections and elections for members of island councils (*consejos insulares*) and for inter-island councils (*cabildos insulares*) of the Canary Islands under the terms set out in this Act, members of the European Parliament and members of the legislative assemblies of the devolved regions (*comunidades autónomas*) must have a balanced composition between women and men, so that in the list of candidates as a

* Excerpted from an official translation provided by the Constitutional Court of Spain, available at <http://www.tribunalconstitucional.es/en/jurisprudencia/restrad/Pages/JCC122008en.aspx>. The dissenting opinion was translated by Bilyana Petkova and Andrea Scoseria Katz.

whole each sex represents a minimum of forty percent. When the number of positions to cover is less than five, the proportion between women and men shall be as numerically balanced as possible. . . .

2. The challenged additional provision is inserted in a statute the title of which—“Organic Law for the effective equality between women and men”—states its purpose, which is none other than achieving effective, substantial equality between the sexes. . . .

3. . . . That legislative reform, incorporated by the second additional provision of LOIMH, [Organic Law 3/2007 of March 22nd] seeking the effective equal participation of men and women in the membership of the representative institutions of a democratic society, does not establish an inverse or compensatory discrimination measure (favouring one sex over another), but rather a formula for balance between sexes, which is not even strictly equal as it does not impose total equality between men and women, but rather stipulates that neither can make up the election lists of candidates in a proportion below 40 percent (or above 60 percent). It operates in two directions, insofar as that proportion is ensured equally for both sexes.

. . . The starting point for our analysis lies in the fact that the requirement for electoral balance between sexes is exclusively aimed at those who can present lists of candidates, in other words, in accordance with article 44.1 of the LOREG, exclusively the parties, federations and coalitions of parties and to groups of electors. It is not therefore strictly speaking a condition for eligibility/cause for ineligibility, as it does not immediately affect individual rights to stand for election. It is a condition relating to political parties and groups of electors, in other words, legal entities which are not holders of rights to vote and stand for election, the infringement of which is claimed.

5. . . . These provisions do not imply a pejorative treatment for either sex, since, strictly speaking, they do not even express a differentiated treatment due to the sex of the candidates, in view of the fact that the proportions are established equally for the candidates of each sex. It is not therefore a measure based on majority/minority criteria (as would happen if race or age for example were taken into account as elements of differentiation), but rather paying attention to a criterion (gender) which universally divides each society in two groups which are balanced in percentage terms. As indicated in the preamble of the Organic Law into which this additional provision is inserted: “The call in the Act for balanced presence or composition, which aims at ensuring sufficiently significant representation of both sexes in bodies and positions of responsibility, also

therefore covers the rules regulating the general electoral regime, opting for a suitably flexible formula in order to reconcile the requirements deriving from articles 9.2* and 14** of the Constitution with the legal requirements of standing for election for public office (passive suffrage) included in article 23*** of the same constitutional text. The recent international texts on the matter are thereby accepted and advance is made towards guaranteeing a balanced presence between women and men in the ambit of political representation, with the fundamental objective of improving the quality of that representation and thereby of our own democracy.”

Hence article 44 bis LOREG seeks the effectiveness of article 14 of the Spanish Constitution in the ambit of political representation, where, although men and women are formally equal, it is clear that the latter have always been substantively passed over. Demanding that the political parties comply with their constitutional condition as instruments for political participation (article 6 of the Spanish Constitution),* by drawing up their lists of candidates so that both sexes have a balanced participation, is to use the parties to make effective the enjoyment of the rights demanded by article 9.2 of the Spanish Constitution. And also to do so in a constitutionally lawful manner, as with the composition of the legislative houses or of local government councils the incorporation of women (who are half of the population) in legislative procedures and in the exercise of public power in a significant number is ensured. This is in short consistent with the democratic principle which demands the best identity possible between those who govern and those who are governed.

* Article 9.2 of the Spanish Constitution (SC) reads: “It is incumbent upon the public authorities to promote conditions which ensure that the freedom and equality of individuals and of the groups to which they belong may be real and effective, to remove the obstacles which prevent or hinder their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life.” Official translation from the website of the Constitutional Court of Spain at: <http://www.tribunalconstitucional.es/en/constitucion/Pages/ConstitucionIngles.aspx>.

** Article 14 SC reads: “Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance.”

*** Article 23 SC reads: “(1) Citizens have the right to participate in public affairs, directly or through representatives freely elected in periodic elections by universal suffrage. (2) They likewise have the right to access on equal terms to public office, in accordance with the requirements determined by law.”

* Article 6 SC reads: “Political parties are the expression of political pluralism; they contribute to the formation and expression of the will of the people and are an essential instrument for political participation. Their creation and the exercise of their activities are free in so far as they respect the Constitution and the law. Their internal structure and their functioning must be democratic.”

. . . [As the law] does not deal with any aspect of the ordinary internal life of the political parties, neither is there any infringement of the dimension relating to the freedom of internal organisation and functioning.

6. . . . [N]or does the challenged provision infringe the political parties' ideological freedom or their freedom of expression First, it does not do so with regard to feminist ideology. A rule such as article 44 bis LOREG does not make feminist parties or ideologies unnecessary, but, from this precept, it is article 9.2 of the Spanish Constitution which, once specifying its effective mandate in terms of positive law, makes constitutionally lawful the impossibility of presenting lists of candidates which wish to make feminist statements by presenting lists made up entirely of women. In the new regulatory context it is not now necessary to compensate the greater masculine presence with exclusively female lists of candidates, for the simple reason that that historical imbalance becomes impossible. It is true that a radical feminist ideology which seeks female predominance cannot be constitutionally prohibited, but nor can it hope to elude the constitutional mandate of formal equality (article 14 of the Spanish Constitution) or the rules pronounced by the legislator in order to make effective substantive equality as established in 9.2 of the Spanish Constitution.

Hence the second additional provision of the LOIMH does not prevent the existence of parties with ideology which goes against effective citizen equality. If this were so, we would have to agree with the appellants on the unconstitutionality of the measures contained in the challenged legal precept, because this Constitutional Court has already indicated that there is no room in our system for a model of "militant democracy" which imposes positive adherence to the system and, primarily, to the Constitution On the contrary, . . . our constitutional system is based, for historical circumstances linked to its origin, on the broadest guarantee for fundamental rights, which cannot be limited on the grounds that they are used for an anti-constitutional purpose. Therefore the requirement that the political formations which seek to participate in the elections must necessarily include candidates from both sexes in the proportion contained in the second additional provision of the LOIMH does not involve requiring that these same political formations share in the values upon which the democracy of equality is based.

In particular, the existence is not prevented of political formations which actively defend the primacy of people of a certain sex, or which advocate postulates which we could call "male chauvinist" or "feminist." What the second provision in question requires is that when these tenets are sought to be advocated by accessing elected public positions that they are done so starting with lists of candidates which are made up of both sexes.

On the other hand, neither does the ideological freedom suffer of the parties in general, in other words, those which do not make feminism the core of their ideological definition. More precisely, the instrumental component of this freedom does not disappear which consists of their capacity to include in their lists of candidates those who are most capable or suitable for the public offer of their election programme and, afterwards, if applicable, in order to defend the party's programme in the institutions which they join as representatives of the popular will. That freedom of the parties is not, as already stated, absolute or unlimited, and it can also be constrained by all of the legal requirements constituting the capacity for election, including amongst others and for the case of general elections, that of nationality, or by those which, like that being examined here, do not affect individual capacity but rather that of the parties and groups authorised to present lists of candidates, and including the requirement of a certain number of candidates or involving the system of blocked lists. . . .

The aim is in short that the equality that effectively exists insofar as the division of the society in accordance to gender is not distorted in the bodies of political representation with the overwhelming majority of one of them. Political representation which is organised from the supposition of the necessary division of society into two sexes is perfectly constitutional, as it is considered that that balance is a determining factor in order to define the content of the regulations and acts which must emanate from those bodies. Not their ideological or political content, but rather the pre-content or substratum upon which any political decision must be based: the absolute equality between men and women. Requiring those who wish to perform a representative function and to rule over their fellow citizens who stands for election in a group which is balanced in terms of gender is to guarantee that whatever their political programme they will share with all of the representatives a representation which includes both sexes cannot be waived when governing a society which is, necessarily, thus composed. . . .

10. Finally, as regards the complaint which must be considered as referring to section 1 of article 23 of the Spanish Constitution about the fragmentation of the electoral body, it is not held that the debated measures violate the unity of the category of citizen or involve a certain risk of dissolving the general interest into a set of partial interests or by categories. As we have already indicated, the principle of balanced composition of the electoral lists of candidates is based on a natural and universal criterion, namely sex. Now then, here we must add that the provisions of the second additional provision of the LOIMH do not involve creating special links between electors and those eligible, nor the compartmentalisation of the electoral body according to gender. The candidates defend diverse political opinions before the electorate as a whole and,

if they receive its support, will also represent it as a whole and not only the voters of their same sex.

The appellants' argument that the requirement of equality prejudices the unity of the sovereign people insofar as it introduces in the category of citizen—"one and indivisible" for the appellant members of parliament—the dividing line of sex, cannot be upheld. It is sufficient to say that the electoral body is not confused with the holder of the sovereignty, in other words the Spanish people,* although its will is expressed through it. This electoral body is subject to the Constitution and the rest of the legal order (article 9.1 of the Spanish Constitution),** insofar as the sovereign people is the ideal unit to attribute the constituent power and, as such, foundation of the Constitution and of the law. The grounds determining the condition of elector do not therefore affect this ideal unit, but rather to the group of those who, as citizens, are subject to Spanish law and they only have the rights guaranteed to them in the Constitution, with the content which, ensuring an indispensable constitutional minimum, is determined by the constituted legislator. . . .

MAGISTRATE DON JORGE RODRÍGUEZ-ZAPATA PÉREZ,
DISSENTING

1. For the first time since the inception of our democracy twenty-six women—sixteen from the constituency of Garachico and ten from Brunete—could not take part as candidates in elections due to their status as women. This result stems from Article 44 bis of Organic Law 5/1985 (LOREG) . . . on achieving effective equality between women and men. This paradox reveals the complexity of the matter

A superficial approach to the problem of parity in political representation might lead one to believe that what is at stake is as simple as the desirability of having an equivalent or approximately equivalent proportion of women running for public office as men. . . .

* Article 1.2 SC reads: "National sovereignty is vested in the Spanish people, from whom emanate the powers of the State."

** Article 9.1 SC reads: "It is incumbent upon the public authorities to promote conditions which ensure that the freedom and equality of individuals and of the groups to which they belong may be real and effective, to remove the obstacles which prevent or hinder their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life."

. . . However, in our constitutional model the imposition of parity or electoral quotas by law infringes the principle of unity in political representation and the ideological freedom and self-organization of political parties, damaging the right of nominated candidates to be elected as they are excluded from participating in the electoral process by the norm in question.

2. The demand for parity is based on the idea that the division of humanity into two sexes is stronger than, and prevails over, any other criteria of unity or distinction between human beings. However, since the beginnings of the liberal State one of the fundamental principles emerging from the French Revolution is that political representation is indivisible because it is an expression of the general will. In reaction to the “Ancien Règime” and the stratification of [parliamentary] assemblies, the new political order established, in the words of Sieyès, that: “the citizen is man free of any class, group or personal interest; the individual is a member of the community stripped of everything that could imprint upon his personality a particular character.” Representative government is built on this concept of the citizen and Art. 6 of the Declaration of Rights of Man and of the Citizen of 1789 affirmed that: “Law is the expression of the general will. All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.” . . .

In Western democracies, the primary function of political representation is to transform [an] initial plurality into “a” political will because it is worthwhile that the heterogeneity of races, religions, cultures, languages, places of birth, etc., does not pose an obstacle to the legal status of the citizen. One is a citizen and only a citizen. This is why in our constitutional model, sovereignty resides with the Spanish people in its entirety. From the Spanish people emanate all State powers (Art. 1.2 SC), the Parliament represents the Spanish people (Art. 66.1 SC)* and all Spanish people are voters and candidates (Art. 68.5 SC).**

The new model of political representation established by Organic Law 3/2007 (LOIMH) of March 22nd places the condition of sex between sovereignty and the status of the citizen, so that men and women, until now undifferentiated in the exercise of their right to vote, have to take into account a circumstance that

* Article 66.1 SC reads: “The Cortes Generales represent the Spanish people and consist of the Congress of Deputies and the Senate.”

** Article 66.5 SC reads: “All Spaniards who are entitled to the full exercise of their political rights are electors and eligible for election.”

they cannot dispose of. Certainly, it is of little wonder that the regulation has been met with mistrust by a large part of the feminist field.

The question we must ask ourselves is whether it is conceivable to divide political representatives into categories in order to facilitate or ensure that each category is represented without severely affecting the principle of unity and homogeneity of the citizenry. If the answer is “yes,” this will enable the legislature in the future to impose on the electoral body electoral nominations integrated into groups defined by race, language, sexual orientation, religion, certain genetic handicaps, by young people, seniors, etc. . . . For instance, through constitutional reform, Belgium has introduced language quotas in its political life.

3. For the majority, Article 9.2 SC is the *deus ex machina* that enables modifications of the model of democracy in force since the adoption of the Constitution of 1978. However, it cannot be ignored that it was not until the early eighties that proposals to introduce gender quotas on electoral lists began to be introduced, such as the “Barre” project in France or when in 1986 the Greens adopted in Germany the “Frauenstatut” and two years later the SPD [the German Social Democrats’ Party] came up with the so-called “Quotenbeschluss,” and in the nineties there emerged proposals for electoral parity. Therefore, the Spanish constituent could have hardly enabled the Spanish legislature in 1978, through Article 9.2 SC, to change the popular model of political representation. . . .

In my view, Article 9.2 SC is conducive of measures that foster material equality. In fact, it is in the Scandinavian countries where women have achieved greater and effective presence on the ballot, only through positive measures voluntarily incorporated into the political parties’ statutes. It is the duty of the Welfare State to remove obstacles that hinder the freedom and equality of individuals and to adopt incentives so that groups that were historically . . . hampered from access to public office can accede to representative positions in conditions of real equality. Therefore, in the case of women, the legislature has the responsibility to establish measures for reconciling work with family life; targeting gender violence in all its forms, sexual harassment and the sexual objectification of women in the media; combatting sexism in education and discrimination in employment and wages; and facilitating options for motherhood and any other forms of positive action tending to decisively improve the position of women in society and, most relevant here, to encourage their integration in political life. Therefore, I consider it constitutionally valid for political parties to adopt clauses in their bylaws to ensure the participation of women in electoral lists.

Even the Convention on the Elimination of All Forms of Discrimination against Women, of 18th of December 1979, which entered into force in Spain on February 4th, 1984, and which is still the most advanced standard of international law in this area, the New York Convention of 1953 on the Political Rights of Women, and Resolution No. 169 of the European Parliament of 1988, impose a mandate, not upon national governments or parliaments, but rather on political parties.

Moreover, the Convention on the Elimination of All Forms of Discrimination Against Women includes temporary special measures aimed at accelerating the *de facto* equality between men and women, which are to be discontinued once the objectives of equality of opportunity and treatment are achieved (Article 4). Indeed, it is essential that positive discrimination measures be temporary as a logical consequence of the fact that men and women are inherently equal in rights and in human dignity. However, Article 44a of the Organic Law on Equality, rather than improving the starting position of women in order to enable them to achieve a given result—access positions of political representation on equal terms with the men—, seeks to directly impose a result, since in a system of closed, alternating electoral lists, equality of opportunities becomes equality of results. . . .

5. I believe that legislative imposition of parity or electoral quotas violates the freedom of thought and self-organization of political parties (Art. 6 and 22 SC).^{*} A mature democracy must have confidence that its political parties “express political pluralism, contribute to the formation and manifestation of the popular will and are an essential tool for political participation” and that “their creation and exercise of activity is free when in compliance with the Constitution and the law.” (Art. 6 SC).

It seems obvious that the women or men who make up electoral lists do not aspire to represent, respectively, women or men. It is indefensible that women vote for women only and men for men, or that each sex only represents itself. The decision of the voter is the result of a complex sets of motives that only a concrete sociological analysis could, more or less precisely, determine in each case, but it seems clear that citizens’ votes depend on the program defended by political

^{*} Article 22 SC reads: “(1) The right of association is recognised. (2) Associations which pursue ends or use means classified as criminal offences are illegal. (3) Associations set up on the basis of this article must be recorded in a register for the sole purpose of public knowledge. (4) Associations may only be dissolved or have their activities suspended by virtue of a justified court order. (5) Secret and paramilitary associations are prohibited.”

parties, coalitions and groups of voters, regardless of whether their lists are composed of men or women.

Finally, I think we should reflect on the reasons why in France, Germany, Italy, Portugal or Belgium, the introduction of quotas or parity requirements in political activity was preceded by reforms to their constitutions. I do not think that these revisions merely express these countries' respect for their own constitutional norms, but something deeper, namely the need for structural elements of democracy to be the result of consensus and not imposition by a temporary parliamentary majority upon the rest of the political forces.

THE JUDICIARY

In recent decades, courts have become a site of concern, and representative bodies have imposed obligations that women gain seats on judiciaries. Does positive action for courts raise questions different than those explored in the workplace and in legislatures? Once democratic bodies impose positive action for judiciaries, what are the bases for courts to intervene? How do those concerns play out when, as here, judges are ruling on positive action about the selection of judges to their own court? What explains the insistence on flexibility—exceptions—to quotas? Below, we excerpt a decision focused on the composition of a supra-national court, which raises additional questions about what deference, if any, is owed to subunits.

**Advisory Opinion on Certain Legal Questions
Concerning the Lists of Candidates Submitted with a View to the
Election of Judges to the European Court of Human Rights**
European Court of Human Rights
12 February 2008

[Each state that is a party to the Convention is entitled to have one judge serve on the ECtHR. Article 22 authorizes each state party to nominate a slate of three individuals from whom the Council of Europe's parliamentary assembly (PACE) makes the selection. Judges serve nine-year terms.

In 2004, PACE sought to increase the number of women judges by promulgating Resolution 1366 (“Candidates for the European Court of Human Rights”), reporting that the Assembly had decided “not to consider lists of candidates” when “the list does not include at least one candidate of each sex.” In 2005, the Assembly enacted Resolution 1426, “not[ing] that women are clearly still under-represented in the Court today, as only 11 of the 44 judges currently in office are women,” and reminding state parties that the Assembly had decided “not to consider lists of candidates” if the list did not “include at least one candidate of each sex, except when the candidates belong to the sex which is under-represented in the Court, that is the sex to which under 40% of the total number of judges belong.”

In 2004, the Maltese government submitted an all-male list; PACE declined to review the list, and Malta resubmitted that list unaltered in 2006, and PACE again rejected the list.

OPINION FOR THE COURT DELIVERED in Grand Chamber by JEAN-PAUL COSTA, *President*, Christos Rozakis, Nicolas Bratza, Boštjan M. Zupančič, Peer Lorenzen, Françoise Tulkens, Loukis Loucaides, Ireneu Cabral Barreto, Corneliu Bîrsan, Nina Vajić, Mindia Ugrekhelidze, Anatoly Kovler, Vladimiro Zagrebelsky, Antonella Mularoni, Elisabet Fura-Sandström, Egbert Myjer, Dragoljub Popovic, *judges.*]

. . . 34. The Court has analysed the provisions governing the composition of [other]. . . international courts The analysis reveals that, while all the systems employ geographical and legal criteria [for the appointment of judges], representation on the basis of gender is less commonly advocated. Only the International Criminal Court and the African Court on Human and Peoples’ Rights have—non binding—rules aimed at promoting balanced representation of the sexes in their composition.

35. . . . [T]he information provided by the governments of the Contracting States . . . shows that only three of them (Austria, Belgium and Latvia) have specific provisions in their legislation ensuring egalitarian representation in their Supreme and/or Constitutional Courts. However, some have legislation or action plans in place aimed at increasing the numbers of women in the public service in general and the Supreme and/or Constitutional Courts in particular. . . .

39. . . . [T]he Court considers it appropriate to give a ruling on this question [within the infrequently used advisory opinion procedure] in the interests of the proper functioning of the Convention system, . . . to ensure that the

situation which gave rise to the request for an opinion does not cause a blockage in the system.

42. . . . [T]he conditions laid down in Article 21 § 1 [for judicial selection] are mandatory and binding [T]here is nothing to prevent Contracting Parties from taking account of additional criteria or considerations. These might include . . . an attempt to achieve a certain balance between the sexes or between different branches of the legal profession

45. . . . [N]either Article 22 nor the Convention system sets any explicit limits on the criteria, which can be employed by the Parliamentary Assembly in choosing between the candidates put forward. Hence, it is the Assembly's custom to consider candidates also "with an eye to a harmonious composition of the Court, taking into account, for example, their professional backgrounds and a gender balance." . . .

47. . . . [T]he inclusion of a member of the under-represented sex is not the only criterion applied by the Assembly which is not explicitly laid down in Article 21 § 1. The same is true of the criterion that candidates should have "sufficient knowledge of at least one of the two official languages." In the Court's view, however, the latter criteria can be legitimately considered to flow implicitly from Article 21 § 1 and, in a sense, to explain it in greater detail. Hence, for example, a sufficient knowledge of at least one of the official languages is necessary in order to make a useful contribution to the Court's work, given that the Court uses only those two languages. . . .

48. However, in the Court's view, what distinguishes the criterion relating to a candidate's sex from the criteria referred to in the preceding paragraph is the lack of an implicit link with the general criteria concerning judges' qualifications laid down in Article 21 § 1. . . .

49. . . . [T]he criterion in question derives from a gender-equality policy which reflects the importance of equality between the sexes in contemporary society and the role played by the prohibition of discrimination and by positive discrimination measures in attaining that objective. . . . [T]here is [a] far-reaching consensus as to the need to promote gender balance within the State and in the national and international public service, including the judiciary. [Citing, *inter alia*, United Nations Convention on the Elimination of All Forms of Discrimination against Women and the Council of Europe and the European Union.] . . .

51. . . . [T]he Contracting Parties, which alone have the power to amend the Convention, have thus set the boundaries which the Assembly may not overstep in its pursuit of a policy aimed at ensuring that the lists include a candidate of the under-represented sex: such a policy must not have the effect of making it more difficult for Contracting Parties to put forward candidates who also satisfy all the requirements of Article 21 § 1, which are . . . to be given primary consideration. . . . [T]he Contracting Parties have, admittedly, accepted the principle of nominating candidates of the sex under-represented at the Court, but not without provision being made for derogations from the rule. The obligation is therefore one of means, not of outcome.

52. Such a situation may arise in particular for States where the number of persons engaged in the legal profession is small. These States must not be placed in a position where, in order to fulfill the criterion concerning the sex of candidates, they can only nominate candidates who satisfy the criteria of Article 21 § 1 if they choose non-nationals. Although useful in certain cases the latter option, were it to be imposed, would need to be approached with caution from the point of view of respecting States' sovereignty in the matter. It would be unacceptable for a State to be forced to nominate non-national candidates solely in order to satisfy the criterion relating to a candidate's sex, which is not enshrined in the Convention. Furthermore, this would be liable to produce a situation where the elected candidate did not have the same knowledge of the legal system, language or indeed cultural and other traditions of the country concerned as a candidate from that country. Indeed, the main reason why one of the judges hearing a case must be the "national judge," a rule that dates back to the beginnings of the Convention and is today enshrined in Article 27 § 2, is precisely to ensure that the judges hearing the case are fully acquainted with the relevant domestic law of the respondent State and the context in which it is set. Accordingly, it would be incompatible with the Convention to require a State to nominate a candidate of a different nationality solely in order to achieve a gender balance.

53. . . . [A]lthough the aim of ensuring a certain mix in the composition of the lists of candidates is legitimate and generally accepted, it may not be pursued without provision being made for some exceptions designed to enable each Contracting Party to choose national candidates who satisfy all the requirements of Article 21 § 1. Of course, the precise nature and scope of such exceptions have yet to be defined.

54. . . . [I]n not allowing any exceptions to the rule that the under-represented sex must be represented, the current practice of the Parliamentary Assembly is not compatible with the Convention: where a

Contracting Party has taken all the necessary and appropriate steps with a view to ensuring that the list contains a candidate of the under-represented sex, but without success, and especially where it has followed the Assembly's recommendations advocating an open and transparent procedure involving a call for candidatures . . . , the Assembly may not reject the list in question on the sole ground that no such candidate features on it. Accordingly, exceptions to the principle that lists must contain a candidate of the under-represented sex should be defined as soon as possible.

Law of April 4, 2014
Special Law Modifying the Law of
6 January 1989 on the Constitutional Court (Belgium)*

. . . Article 12 para 5. The Court shall be composed of judges from different genders, . . . of at least one third of judges from each sex.

. . . 38. [The requirement becomes effective when at least one third of the judges are of each sex, and until] the Court is composed of at least one third of judges from each sex . . . , the King shall nominate a judge from the under-represented sex when the preceding two nominations have not increased the number of judges from that sex.

One commentator explained that if “women remain unrepresented on the Court (as they currently are, representing only around 16% of the Court), and the next two appointees are men, the third appointment will have to be a woman. . . . Introducing quotas . . . is not in itself revolutionary [for Belgium]. . . . The composition of the Belgian Constitutional Court has, from its creation, required linguistic and “professional” quotas: six judges should be Dutch-speaking, three of whom should be former MPs, and six judges should be French-speaking, again,

* Loi spéciale portant modification de la loi du 6 janvier 1989 sur la Cour constitutionnelle [Special Law Modifying the Law of January on the Constitutional Court] of Apr. 4, 2014, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], 202293. Extract translated by Bilyana Petkova.

three of whom should be former MPs. . . . [Further], the Act on the Constitutional Court has stated since 2003 that “the Court shall be composed of judges of both sexes.” [But] . . . only four women—all former MPs—have been appointed to the Constitutional bench since its creation in 1984. Moreover, up until January 2014, the Court has never counted more than one woman at a time among the twelve judges sitting on the bench. . . . [Proponents] have argued for diversity for three main reasons. First, it would reinforce the democratic character of the courts. Second, it would allow for a better protection of sex-specific interests. And finally, it would improve the quality of justice by bringing more flexibility and more creativity on the bench. . . .” Adelaide Remiche, *Belgian Parliament Introduces Sex Quota in Constitutional Court*, OXFORD HUM. RTS. HUB (April 21, 2013), ohrh.law.ox.ac.uk/belgian-parliament-introduces-sex-quota-in-constitution-al-court.

Judith Resnik

*Representing What? Women, Judges, and Equality**

. . . Over the course of the century, women judges went from being solitary “firsts” and token members of courts to proudly heralded aggregate data points as judiciaries recorded the growth in percentages of women judges. Within the last three decades, the presence of women judges (intersecting with other demographic categories) has come to be seen as a necessary attribute of judiciaries, just as their absence has become a problem in need of explanation.

That the legitimacy of courts depends in any part on women serving as judges is an outgrowth of political and social movements reinterpreting the role of courts in democratic market economies. Adjudication is an ancient form, but only during the course of the twentieth century did courts come to be obliged to welcome all persons as equals—as litigants, witnesses, jurors, staff, lawyers, and judges. These new egalitarian requirements now embrace both a range of demographics (race, ethnicity, sexual orientation, age, disability) and of claimants (consumers, employees, family members, tenants, welfare beneficiaries, veterans, criminal defendants, and prisoners).

* Excerpted from Judith Resnik, Arthur Liman Professor, Yale Law School, *Representing What? Women, Judging, and Justice in the United States*, Address at the Center for Public Law International Symposium: The Judge is a Woman (Nov. 7, 2013).

Embedding the narrative of women judges in the new demands that courts be egalitarian venues exposes the complexity and fragility of what women-as-judges might be understood to represent. The easy proposition is that women and men of all colors can now take up all roles in courts and, hence, that formal barriers have fallen. The more difficult questions are about whether and how inclusion alters the topics that judiciaries address, the rights recognized, and the processes used. What is the meaning of women's new presence as judges in the domain of courts? Do aspirations (and sometime mandates) to include women as judges represent commitments to affirmative obligations for all persons to participate in all roles in courts?

In short, women judges make one difference by their very being: they embody the twentieth-century idea that women and men are equally entitled to play all of society's roles. But whether women-as-judges will mark any other differences depends on the forms of collective action that women and others, in the name of judging and beyond, undertake to continue to expand the range of legal protections and obligations in constitutional democracies.

Thus, the core conflicts over calls for adding women to benches and the injunctions to do so are linked to the larger debates about what affirmative tasks reside in government—about whether the government will be understood to have positive obligations to provide services and protections through, for example, subsidizing courts and their users, combatting violence against women, and creating or permitting targeted programs to make workplaces welcoming to women and men of all colors. At issue is not only the identity of women judges but also the identity of courts, hanging not on a balance but dependent on political conceptions of the obligations of government. . . .



EDUCATION: RACE, ETHNICITY, CASTE, CLASS, AND THE CREAMY LAYER

Ashoka Kumar Thakur v. Union of India Supreme Court of India 6 SCC 1 (2008)

[In 2006, India enacted the 93rd Amendment to its Constitution to modify Article 15* by introducing a clause permitting the use of reservations in admission to public and private educational institutions. Ashoka Kumar Thakur, the petitioner, argued that the constitutional amendment was itself unconstitutional because it violated the principle of equality—a part of the basic structure of the Constitution.]

The Judgments of the Court were delivered by K.G. BALAKRISHNAN, C.J.

[Separate opinions were written by Dr. Arijit Pasayat, joined by C.K. Thakker, by R.V. Raveendran, and by Dalveer Bhandari, JJ.]

1. . . . [F]ew in independent India have voiced disagreement with the proposition that the disadvantaged sections of the population deserve and need “special help.” But there has been considerable disagreement as to which category of disadvantaged sections deserve such help, about the form this help ought to take and about the efficacy and propriety of what the government has done in this regard. . . .

6. Reservation is one of the many tools that are used to preserve and promote the essence of equality, so that disadvantaged groups can be brought to the forefront of civil life. It is also the duty of the State to promote positive

* Article 15 had provided:

- (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them . . .
- (3) Nothing in this article shall prevent the State from making any special provision for women and children
- (4) Nothing . . . shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes

measures to remove barriers of inequality and enable diverse communities to enjoy the freedoms and share the benefits guaranteed by the Constitution. In the context of education, any measure that promotes the sharing of knowledge, information and ideas, and encourages and improves learning, among India's vastly diverse classes deserves encouragement. To cope with the modern world and its complexities and turbulent problems, education is a must and it cannot remain cloistered for the benefit of a privileged few. Reservations provide that extra advantage to those persons who, without such support, can forever only dream of university, education, without ever being able to realize it. This advantage is necessary. In the words of President Lyndon Johnson, "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line and then say, 'You are free to compete with all the others.'"^{*} . . .

10. By The Constitution (Ninety-Third Amendment) Act, 2005, Clause (5) was inserted in Article 15 of the Constitution which reads as under:

Nothing in this article or in sub-clause (g) of clause (1) of article 19^{**} shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to the educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30^{***}

11. . . . [The] Parliament introduced Article 15(5) by The Constitution (Ninety-Third Amendment) Act, 2005 to enable the State to make such provision for the advancement of SC [Scheduled Castes], ST [Schedule Tribes] and Socially and Educationally Backward Classes (SEBC) of citizens in relation to a specific subject, namely, admission to educational institutions including private educational institutions whether aided or unaided by the State notwithstanding the provisions of Article 19(1)(g). In the Statement of Objects and Reasons of the Constitution (Ninety-Third Amendment) Act, 2005 it has been stated that:

^{*} President Lyndon B. Johnson, To Fulfill These Rights, Howard University Commencement Address (June 4, 1965).

^{**} Article 19(1)(g) provides: "All citizens shall have the right- . . . (g) to practise any profession, or to carry on any occupation, trade or business."

^{***} Article 30(1) provides: "(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice."

At present, the number of seats available in aided or State maintained institutions, particularly in respect of professional education, is limited in comparison to those in private unaided institutions.

To promote the educational advancement of the socially and educationally backward classes of citizens, i.e., the OBCs [Other Backward Classes] or the Scheduled Castes and Scheduled Tribes in matters of admission of students belonging to these categories in unaided educational institutions other than the minority educational institutions referred to Clause (1) of Article 30 of the Constitution, it is proposed to amplify Article 15. The new Clause (5) shall enable the Parliament as well as the State Legislatures to make appropriate laws for the purposes mentioned above.

13. After the above Constitution (Ninety-Third Amendment) Act, 2005, the Parliament passed The Central Educational Institutions (Reservation in Admission) Act, 2006 (No. 5 of 2007) (hereinafter referred to as “the Act 5 of 2007”).

14. Section 3 of Act 5 of 2007 provides for reservation of 15% seats for Scheduled Castes, 7% seats for Scheduled Tribes and 27% for Other Backward Classes in Central Educational Institutions. . . .

120. If any Constitutional amendment is made which moderately abridges or alters the equality principle or the principles under Article 19(1)(g), it cannot be said that it violates the basic structure of the Constitution. If such a principle is [not] accepted, our Constitution would not be able to adapt itself to the changing conditions of a dynamic human society. Therefore, the plea raised by the Petitioners' that the present Constitutional Ninety-Third Amendment Act, 2005 alters the basic structure of the constitution is of no force. Moreover, the interpretation of the Constitution shall not be in a narrow pedantic way. . . . “The “Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crisis of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A Constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges.” . . .

122. . . . [W]e hold that the Ninety-Third Amendment to the Constitution does not violate the “basic structure” of the Constitution so far as it relates to aided educational institutions. . . .

170. It is to be understood that [the] “creamy layer” principle is introduced . . . to exclude a section of a particular caste on the ground that they are economically advanced or educationally forward. They are excluded because unless this segment of caste is excluded from that caste group, there cannot be proper identification of the backward class. If the “creamy layer” principle is not applied, it could easily be said that all the castes that have been included among the socially and educationally backward classes have been included exclusively on the basis of caste. Identification of SEBC . . . solely on the basis of caste is expressly prohibited by various decisions of this Court and it is also against Article 15(1) and Article 16(1)** of the Constitution. To fulfill the conditions and to find out truly what is socially and educationally backward class, the exclusion of “creamy layer” is essential.

171. It may be noted that the “creamy layer” principle is applied not as a general principle of reservation. It is applied for the purpose of identifying the socially and educationally backward class. One of the main criteria for determining the SEBC is poverty. If that be so, the principle of exclusion of “creamy layer” is necessary. Moreover, the majority in Indra Sawhney's case upheld the exclusion of “creamy layer” for the purpose of reservation in Article 16(4).* Therefore, we are bound by the larger Bench decision of this Court in [the]

** Article 16(1) provides that: There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

* Article 16(4) provides that:

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4A) Nothing in this article shall prevent the State from making any provision for reservation 3[in matters of promotion, with consequential seniority, to any class] or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the

Indra Sawhney case. . . . Moreover, Articles 15(4) and 15(5) are designed to provide opportunities in education thereby raising educational, social and economical levels of those who are lagging behind. . . . By excluding those who have already attained economic well-being or educational advancement, the special benefits provided under these clauses cannot be further extended to them and, if done so, it would be unreasonable, discriminatory or arbitrary, resulting in reverse discrimination. . . .

213. . . . [P]etitioners contended that the reservation of 27% provided for the backward classes in the educational institutions contemplated under the Act does not prescribe any time limit and this is opposed to the principle of equality. According to . . . petitioners, this affirmative action that is to bring about equality is calculated to produce equality on a broader basis by eliminating de facto inequalities and placing the weaker sections of the community on a footing of equality with the stronger and more powerful section so that each member of the community, whatever is his birth, occupation or social position may enjoy equal opportunity of using to the full, his natural endowments of physique, of character and of intelligence. This compensatory state action can be continued only for a period till that inequality is wiped off. Therefore, the petitioners have contended that unless the period is prescribed, this affirmative action will continue for an indefinite period and would ultimately result in reverse discrimination. It is true that there is some force in the contention advanced by the learned Counsel for the petitioners but that may happen in future if the reservation policy as contemplated under the Act is successfully implemented. But at the outset, it may not be possible to fix a time limit or a period of time.

214. Depending upon the result of the measures and improvements that have taken place in the status and educational advancement of the socially and educationally backward classes of citizens, the matter could be examined by the Parliament at a future time but that cannot be a ground for striking down a legislation. After some period, if it so happens that any section of the community gets an undue advantage of the affirmative action, then such community can very well be excluded from such affirmative action programme. The Parliament can certainly review the situation and even though a specific class of citizens is in the legislation, it is the constitutional duty of the Parliament to review such affirmative action as and when the social conditions are required. There is also the safeguard of judicial review and the court can exercise its powers of judicial review and say that the affirmative action has carried out its mission and is thus

vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent. reservation on total number of vacancies of that year.

no longer required. In the case of reservation of 27% for backward classes, there could be a periodic review after a period of 10 years and the Parliament could examine whether the reservation has worked for the good of the country. Therefore, the legislation cannot be held to be invalid on that ground but a review can be made after a period of 10 years.

DALVEER BHANDARI, J.

. . . 557. Did the original Framers intend to provide caste-based reservation in education to the lower classes? No, the *original* Framers did not. Soon after the Constitution was adopted, the very same Framers acted quickly to permit reservation for SC/ST/SEBCs in education by adding Art 15(4), vide the First Amendment, to the Constitution. In doing so, they deviated from their own goal; the casteless society would have to wait. In *Sawhney (I)*, the Court upheld this decision and bound us to a certain degree on this point. I have no choice but to uphold the impugned legislation by which the Government may still identify SEBCs, in part, by using caste.

558. Caste-based reservation was initially a temporary measure that was to only last for ten years. The original Framers considered caste-based reservation a necessary evil. Thus, they limited it in time. Extending this time limit has only exacerbated casteism.

559. The Parliamentary Debates clearly reflect that the ultimate aim of reservation was a casteless and classless society for India. To this end, reservation should only be given for a specific period of time. If these reservations or benefits have to continue perpetually, then the basic goal of achieving casteless and classless society would never be accomplished.

560. The need for caste-based reservation has “worn out” over time. Evidence for the proposition that caste is no longer a valid determinant of one's ability to move up in society is strong. More than the way society judges you based on caste, the relevant question is whether caste precludes you from rising. If caste doesn't, then what does? The answer is simple: money.

561. Income is a much better determinant of educational achievement than caste. . . .

576. . . . The original Framers took steps to abolish caste-based distinction. . . . The legislative reservations for SC/ST were an exception to [the] overarching goal of creating a casteless society; that is why they were set to expire in 1960. . . . Reservation based on caste strengthens communalism. Non-SEBCs naturally

seek SEBC status so that they may capture SEBC benefits. Upper castes, denied a seat, harbor ill will against lower castes who gain admission (whether it was by merit or not). . . .

603. To be clear, there is no claim arising out of the goal to promote a casteless society. No right of action exists. The right of action is found in secularism. Though not explicitly found in the un-amended Constitution, the original Framers made it clear that India was to be a secular democracy. Discrimination based on religion is prohibited by [several articles of the Constitution.] . . . The original Framers went out of their way to ensure that minorities would be able to maintain their identity. Article 27 precludes the state from adopting a state religion, whereas Article 25 grants citizens the right to profess, practice and propagate religion. With rights come responsibilities. One of them is found at Article 51A(3)*, which instructs citizens “to promote harmony and spirit of brotherhood amongst all people . . . transcending religious . . . diversities.”

604. . . . Secularism was very much embedded in their constitutional philosophy. . . . “By secular State, as I understand it, . . . no citizen . . . will have any preferential treatment . . . simply on the ground that he professed a particular form of religion.” This is relevant today because quotas are state-sponsored discrimination against those who are not deemed SEBCs—caste being a by-product of religion. Though affirmative action is allowed, there is a point at which it violates secularism. . . .

605. In conclusion, the First Parliament, by enacting Article 15(5), deviated from the original Framers' intent. They passed an amendment that strengthens, rather than weakens casteism. If caste-based quotas in education are to stay, they should adhere to a basic tenet of secularism: they should not take caste into account. Instead, exclusively economic criteria should be used. For a period of ten years, other factors such as income, occupation and property holdings etc. including caste, may be taken into consideration and thereafter only economic criteria should prevail. *Sawhney* (I) has tied our hands. I nevertheless believe that caste matters and will continue to matter as long as we divide society along caste lines. Caste-based discrimination remains. Violence between castes occurs. Caste politics rages on. Where casteism is present, the goal of achieving a

* Now codified at Article 51A(e), that provision reads: “It shall be the duty of every citizen of India . . . (e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women.”

casteless society must never be forgotten. Any legislation to the contrary should be discarded.

A summary of the holdings, by Sudhir Krishnaswamy and Madhav Khosla, is provided below.

Table 1: Opinions of Judges in *A K Thakur**

| Judge | Art 15(5): State Maintained and Aided Institutions | Art 15(5): Unaided Institutions | Identification of OBCs | Creamy Layer Exclusion | Application of Creamy Layer Exclusion to SC/ST | Periodic Review of the Act |
|---|--|---------------------------------|---|------------------------|--|----------------------------|
| Chief justice Balakrishnan | Valid | Question expressly left open | Caste can be used, but not solely on the basis of caste | To be excluded | Not applicable | Every 10 Years |
| Justice Pasayat (for himself and justice Thakker) | Valid | Question expressly left open | Caste can be used, but not solely on the basis of caste | To be excluded | Silent on the issue, thus question left open | Every five years |
| Justice Bhandari | Valid | Unconstitutional | Caste can be used, but not solely on the basis of caste | To be excluded | Question expressly left open | Silent on the issue |
| Justice Raveendran | Valid | Question expressly left open | Caste can be used, but not solely on the basis of caste | To be excluded | Silent on the issue, thus question left open | Every 10 years |

* “Unaided Institutions” are private schools. Table 1 is reproduced from Sudhir Krishnaswamy & Madhav Khosla, *Reading A K Thakur v. Union of India: Legal Effect and Significance*, ECON. POL. WEEKLY (July 19, 2008).

Reva B. Siegel

*From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases**

For decades, the Supreme Court has sharply divided in equal protection race discrimination cases. As commonly described, the Justices disagree about whether the Equal Protection Clause is properly interpreted through a colorblind anticlassification principle concerned with individualism or through an antisubordination principle concerned with inequalities in group status. This Article uncovers a third perspective on equal protection in the opinions of swing Justices who have voted to uphold and to restrict race conscious remedies because of concern about social divisiveness which, they believe, both extreme racial stratification and unconstrained racial remedies can engender. The Article terms this third perspective on equal protection concerned with threats to social cohesion the antibalkanization perspective. . . .

[A section examining concerns about social cohesion and division in the equal protection opinions of Justices Lewis Powell, Sandra Day O'Connor, and Anthony Kennedy concludes:] Because Justices reasoning from an antibalkanization perspective understand that pervasive racial stratification can leave some groups feeling like outsiders or nonparticipants, the Justices permit and sometimes encourage government to act in ways that promote racial integration (a form of equality realized through social cohesion). Because Justices reasoning from an antibalkanization perspective understand that interventions promoting racial integration can become a locus of racial conflict, they insist that race-conscious interventions undertaken for compelling public-regarding purposes must nonetheless anticipate and endeavor to ameliorate race-conscious resentments. . . .

. . . Antibalkanization recognizes that the nation has a history of racial wrongs that it seeks to transcend. . . . Reasoning from history, Justices employing the antibalkanization perspective are capable of differentiating between government policies that entrench and repair race inequality. . . . The opinions preserving and limiting race-conscious remedies have emphasized the importance of cultivating social bonds that enable groups to relate and identify across difference. . . .

* Excerpted from Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011).

[Yet p]roponents of antibalkanization are concerned that the pursuit of racial justice itself poses threats to community and are prepared to subordinate the pursuit of racial justice to the preservation of social cohesion. Antibalkanization takes from the anticlassification principle attention to the claims of those aggrieved by benign race-conscious interventions. It attends to the concerns of the dispreferred, channeling their concerns into limits on race-conscious remedies, which it often justifies in the name of individualism. In the interests of avoiding conflict and estrangement, the antibalkanization perspective privileges race-conscious interventions that interact with the public in forms that affirm commonality rather than difference. . . . Proponents of antibalkanization recognize that, to get beyond race, it may be necessary to take race into account; but, for them, taking race into account means crafting interventions that ameliorate racial wrongs without unduly aggravating racial resentments. . . .

The antibalkanization perspective understands the repair of racial injustice as fundamentally political, a responsibility of representative institutions of government as well as courts. Unlike the anticlassification and antisubordination principles, which were articulated as courts were striking down openly segregative laws, the antibalkanization principle emerged later, as courts grappled with challenges to the constitutionality of civil rights laws. Where the anticlassification and antisubordination principles have been articulated in ways that presuppose that the judiciary is the branch of government primarily responsible for vindicating equality values, the antibalkanization perspective emerged in answer to the question of whether courts would allow representative government to rectify race inequality. In the cases that we have examined, questions of constitutional permission predominate (that is, government is permitted but not required to promote integration; government may engage in affirmative action for certain purposes but not others). Antibalkanization vindicates constitutional values by authorizing representative institutions to promote equality, while imposing on courts responsibility for constraining the form of political interventions so as to ameliorate resentments they may engender. Antibalkanization thus understands the judicial role not as mandating or managing, but as channeling constitutional politics that vindicate equality values.

. . .

* * *

. . . Moderates have employed strict scrutiny, not to bar all race-conscious efforts to integrate, but rather to impose a particular social form on government's race-conscious efforts to integrate: to insist that when government engages in a race-conscious act in support of integration, government interacts with the public

in ways that emphasize commonality among citizens and minimize the appearance of racial partiality.

. . . In *Bakke*, Justice Powell emphasized commonality when he rejected remedial justifications for educational affirmative action in favor of racial “diversity” and when he imposed conditions on affirmative action, such as the requirements that schools consider all applicants together and consider every applicant as an individual. Justice O’Connor followed this example, leading the Court to impose constraints on affirmative action in *Gratz* and *Grutter* designed to diminish the salience of race in the administration of the programs

In all these examples, moderates allow government to engage in race-conscious efforts to integrate, providing that government proceeds in ways that lower the salience of race in its interactions with the public. Antibalkanization, as we have seen, is distinctively concerned about the appearance of race-conscious interventions—the risk that race-conscious civil rights interventions will heighten conflict or resentment.

The concerns that antibalkanization raises about the social form and meaning of race-conscious interventions find echoes in conversations about remedial interventions that unfold in progressive circles. Many progressives advocate structuring government interventions so that they do not emphasize, entrench, or construct group-differentiated identities. Kenji Yoshino argues that universalizing appeals to liberty might serve as the “new equal protection” in a society of increasing pluralism. Nancy Fraser advocates redressing group inequalities through “transformative remedies” that destabilize conventional understandings of group identity, rather than “affirmative remedies” that further entrench conventional understandings of group identity. Understood as a concern about the form of government interventions under conditions of social conflict, antibalkanization’s impulse to channel race-conscious interventions into universalizing forms might be, or might grow to be, a “transformative remedy” designed to cultivate the new understandings of race that a constitutional democracy needs in order to sustain social commitments to equal opportunity in an epoch of racial transition.

Antibalkanization’s concern about preserving social cohesion in an epoch of racial transition raises hard and fraught issues for antistatist theory. . . . Work of this kind might supply reasons, internal to antistatist theory, to structure remedial interventions in terms that affirm commonality rather than emphasize difference. Yet many critical race theorists remain deeply skeptical of any doctrine suggesting equal protection solicitude for the racially privileged or expressing a “post-racial” equivalence in position between majority and minority

group members, especially where the practical consequence of the restriction is to impose constitutional limitations on the scope of remedial interventions. . . .

Grutter v. Bollinger

Supreme Court of the United States

539 U.S. 306 (2003)

[In 1997, Barbara Grutter, a white resident of Michigan, sued the University of Michigan Law School, which had rejected her application for admission. Grutter alleged that the University violated the Equal Protection clause of the Fourteenth Amendment as well as federal statutes because the University considered an applicant's race as a factor.]

JUSTICE O'CONNOR delivered the opinion of the Court.

. . . We last addressed the use of race in public higher education over 25 years ago. In the landmark *Bakke* case, we reviewed a racial set-aside program that reserved 16 out of 100 seats in a medical school class for members of certain minority groups. The decision produced six separate opinions, none of which commanded a majority of the Court. Four Justices would have upheld the program against all attack on the ground that the government can use race to "remedy disadvantages cast on minorities by past racial prejudice." Four other Justices avoided the constitutional question altogether and struck down the program on statutory grounds. Justice Powell provided a fifth vote not only for invalidating the set-aside program, but also for reversing the state court's injunction against any use of race whatsoever. The only holding for the Court in *Bakke* was that a "State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." Thus, we reversed that part of the lower court's judgment that enjoined the university "from any consideration of the race of any applicant."

Since this Court's splintered decision in *Bakke*, Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies. . . .

Justice Powell began by stating that “[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.” In Justice Powell’s view, when governmental decisions “touch upon an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.” Under this exacting standard, only one of the interests asserted by the university survived Justice Powell’s scrutiny.

First, Justice Powell rejected an interest in “reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession” as an unlawful interest in racial balancing. Second, Justice Powell rejected an interest in remedying societal discrimination because such measures would risk placing unnecessary burdens on innocent third parties “who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.” Third, Justice Powell rejected an interest in “increasing the number of physicians who will practice in communities currently underserved,” concluding that even if such an interest could be compelling in some circumstances the program under review was not “geared to promote that goal.”

Justice Powell approved the university’s use of race to further only one interest: “the attainment of a diverse student body.” . . . Justice Powell grounded his analysis in the academic freedom that “long has been viewed as a special concern of the First Amendment.” Justice Powell emphasized that nothing less than the “‘nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.” . . .

Justice Powell was, however, careful to emphasize that in his view race “is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.” . . . Rather, “[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.” . . .

. . . [F]or the reasons set out below, today we endorse Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions.

The Equal Protection Clause provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const., Amdt. 14, § 2. Because the Fourteenth Amendment “protect[s] persons, not groups,” all

“governmental action based on race – a group classification long recognized as in most circumstances irrelevant and therefore prohibited – should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed.” . . .

We have held that all racial classifications imposed by government “must be analyzed by a reviewing court under strict scrutiny.” This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. “Absent searching judicial inquiry into the justification for such race-based measures,” we have no way to determine what “classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.” We apply strict scrutiny to all racial classifications to “‘smoke out’ illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.”

. . . Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it. . . .

. . . Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context. . . .

. . . [W]e have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination. . . . Today, we hold that the Law School has a compelling interest in attaining a diverse student body.

The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer. . . . Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. . . .

As part of its goal of “assembling a class that is both exceptionally academically qualified and broadly diverse,” the Law School seeks to “enroll a ‘critical mass’ of minority students.” The Law School’s interest is not simply “to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.” That would amount to outright racial balancing, which is patently unconstitutional. Rather, the Law School’s concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.

These benefits are substantial. As the District Court emphasized, the Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds."

. . . In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, "[b]ased on [their] decades of experience," a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security." . . .

We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to "sustaining our political and cultural heritage" with a fundamental role in maintaining the fabric of society. This Court has long recognized that "education . . . is the very foundation of good citizenship." *Brown v. Board of Education* (1954). For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity. The United States, as amicus curiae, affirms that "[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective." And, "[n]owhere is the importance of such openness more acute than in the context of higher education." Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.

Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. . . .

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our

heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools “cannot be effective in isolation from the individuals and institutions with which the law interacts.” Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America. . . .

To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot “insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.” Instead, a university may consider race or ethnicity only as a “‘plus’ in a particular applicant’s file,” without “insulat[ing] the individual from comparison with all other candidates for the available seats.” In other words, an admissions program must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.”

We find that the Law School’s admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in *Bakke*, truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. . . .

We are satisfied that the Law School’s admissions program, like the Harvard plan described by Justice Powell, does not operate as a quota. Properly understood, a “quota” is a program in which a certain fixed number or proportion of opportunities are “reserved exclusively for certain minority groups” . . . and “insulate the individual from comparison with all other candidates for the available seats.” In contrast, “a permissible goal . . . require[s] only a good-faith effort . . . to come within a range demarcated by the goal itself,” and permits consideration of race as a “plus” factor in any given case while still ensuring that each candidate “compete[s] with all other qualified applicants.” . . .

The Law School’s goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota. . . . “[S]ome attention to numbers,” without more, does not transform a flexible admissions system into a rigid quota. Nor, as Justice KENNEDY posits, does the Law School’s consultation of the “daily reports,” which keep track of the racial and

ethnic composition of the class (as well as of residency and gender), “sugges[t] there was no further attempt at individual review save for race itself” during the final stages of the admissions process. . . .

. . . When using race as a “plus” factor in university admissions, a university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application. . . .

Here, the Law School engages in a highly individualized, holistic review of each applicant’s file. . . .

. . . With respect to the use of race itself, all underrepresented minority students admitted by the Law School have been deemed qualified. By virtue of our Nation’s struggle with racial inequality, such students are both likely to have experiences of particular importance to the Law School’s mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences. . . .

We agree that, in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School’s race-conscious admissions program does not unduly harm nonminority applicants.

We are mindful, however, that “[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.” Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. . . .

In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity. . . .

The requirement that all race-conscious admissions programs have a termination point “assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.” . . .

. . . It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today. . . .

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, concurring.

The Court's observation that race-conscious programs "must have a logical end point," accords with the international understanding of the office of affirmative action. The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994, endorses "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms." But such measures, the Convention instructs, "shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved." . . .

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in part and dissenting in part.

. . . The "educational benefit" that the University of Michigan seeks to achieve by racial discrimination consists, according to the Court, of "cross-racial understanding," and "better prepar[ation of] students for an increasingly diverse workforce and society," all of which is necessary not only for work, but also for good "citizenship." This is not, of course, an "educational benefit" on which students will be graded on their law school transcript (Works and Plays Well with Others: B+) or tested by the bar examiners (Q: Describe in 500 words or less your cross-racial understanding). For it is a lesson of life rather than law—essentially the same lesson taught to (or rather learned by, for it cannot be "taught" in the usual sense) people three feet shorter and 20 years younger than the full-grown adults at the University of Michigan Law School, in institutions ranging from Boy Scout troops to public-school kindergartens. If properly considered an "educational benefit" at all, it is surely not one that is either uniquely relevant to law school or uniquely "teachable" in a formal educational setting. And therefore: If it is appropriate for the University of Michigan Law School to use racial discrimination for the purpose of putting together a "critical mass" that will convey generic lessons in socialization and good citizenship, surely it is no less appropriate—indeed, particularly appropriate—for the civil service system of the State of Michigan to do so. There, also, those exposed to "critical masses" of

certain races will presumably become better Americans, better Michiganders, better civil servants. And surely private employers cannot be criticized—indeed, should be praised—if they also “teach” good citizenship to their adult employees through a patriotic, all-American system of racial discrimination in hiring. The nonminority individuals who are deprived of a legal education, a civil service job, or any job at all by reason of their skin color will surely understand. . . .

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in part and dissenting in part.

Frederick Douglass, speaking to a group of abolitionists almost 140 years ago, delivered a message lost on today’s majority:

[I]n regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply *justice*. The American people have always been anxious to know what they shall do with us I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! . . . And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! . . . [Y]our interference is doing him positive injury.” *What the Black Man Wants: An Address Delivered in Boston, Massachusetts, on 26 January 1865* . . . (emphasis in original).

Like Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators. Because I wish to see all students succeed whatever their color, I share, in some respect, the sympathies of those who sponsor the type of discrimination advanced by the University of Michigan Law School (Law School). The Constitution does not, however, tolerate institutional devotion to the status quo in admissions policies when such devotion ripens into racial discrimination. Nor does the Constitution countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of “strict scrutiny.” . . .

The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives,

but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all. . . .

JUSTICE KENNEDY, dissenting.

The separate opinion by Justice Powell in . . . *Bakke*, is based on the principle that a university admissions program may take account of race as one, nonpredominant factor in a system designed to consider each applicant as an individual, provided the program can meet the test of strict scrutiny by the judiciary. This is a unitary formulation. . . .

It is unfortunate, however, that the Court takes the first part of Justice Powell's rule but abandons the second. Having approved the use of race as a factor in the admissions process, the majority proceeds to nullify the essential safeguard Justice Powell insisted upon as the precondition of the approval. The safeguard was rigorous judicial review, with strict scrutiny as the controlling standard. . . . In the context of university admissions the objective of racial diversity can be accepted based on empirical data known to us, but deference is not to be given with respect to the methods by which it is pursued. Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality. The majority today refuses to be faithful to the settled principle of strict review designed to reflect these concerns. . . .

Recall the earlier example of the *Badeck* case, in which the European Court of Justice addressed the Hessen employment goals. The Court distinguished *Badeck* from the provisions at issue in the 1995 judgment in *Kalanke*, which had held incompatible with EU law a German mandate imposing the selection of women whenever equally qualified male and female candidates were eligible for jobs in sectors where women were under-represented. The Court reasoned that in *Kalanke* the law was impermissible because it allowed women to be “*automatically . . . given priority.*” That response parallels the discussion in *Grutter*, which also stressed the importance of flexibility when approving affirmative action for racial minorities in higher education.

Fisher v. University of Texas
Supreme Court of the United States
133 S. Ct. 2411 (2013)

[The admissions policy at the University of Texas has been shaped by years of conflict over affirmative action. In 1996, before *Grutter* was decided, a federal appellate court invalidated the affirmative action policy that the University employed to admit undergraduates. The Texas Legislature then “enacted a measure known as the Top Ten Percent Law,” which “grant[ed] automatic admission to any public state college, including the University, to all students in the top 10% of their class at high schools in Texas that comply with certain standards.” Because the racial and socio-economic composition of Texas high schools varied by neighborhood, the Ten Percent Law foreseeably increased the number of students from minority and lower-income households admitted into the state university system. Educators remained interested in bringing to the state’s higher education system a more diverse group of minority students than were admitted through the Ten Percent Plan. After the Court’s ruling in *Grutter* (2003), the University of Texas began to consider race as a factor in an individualized admissions system that the state believed accorded with the Court’s ruling. This new system sought to augment the Ten Percent Plan with race-sensitive individualized consideration of applicants.

Abigail Fisher sued the University in 2008 after she unsuccessfully sought admission to the University’s entering class. She was one of 29,501 applicants. “From this group 12,843 were admitted, and 6,715 accepted and enrolled.” Fisher argued that the “use of race in the admissions process violated the Equal Protection Clause of the Fourteenth Amendment.” At issue was whether it was “necessary” for the University, given the flow of students into the system from the Ten Percent Plan, to consider the applicants’ race in individual admissions decisions. The University won summary judgment in the appellate court that its consideration of race in admissions was *Grutter*-compliant.]

Justice KENNEDY delivered the opinion of the Court.

. . . The Court concludes that the Court of Appeals did not hold the University to the demanding burden of strict scrutiny articulated in *Grutter* and . . . *Bakke* [and] . . . [we] remand[] for further proceedings. . . .

Once the University has established that its goal of diversity is consistent with strict scrutiny . . . there must still be a further judicial determination that the admissions process meets strict scrutiny in its implementation. The University must prove that the means chosen by the University to attain diversity are

narrowly tailored to that goal. On this point, the University receives no deference. *Grutter* made clear that it is for the courts, not for university administrators, to ensure that “[t]he means chosen to accomplish the [government’s] asserted purpose must be specifically and narrowly framed to accomplish that purpose.” True, a court can take account of a university’s experience and expertise in adopting or rejecting certain admissions processes. But, as the Court said in *Grutter*, it remains at all times the University’s obligation to demonstrate, and the Judiciary’s obligation to determine, that admissions processes “ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.” . . .

Narrow tailoring also requires that the reviewing court verify that it is “necessary” for a university to use race to achieve the educational benefits of diversity. . . . A plaintiff, of course, bears the burden of placing the validity of a university’s adoption of an affirmative action plan in issue. But strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.

Rather than perform this searching examination, however, the Court of Appeals held petitioner could challenge only “whether [the University’s] decision to reintroduce race as a factor in admissions was made in good faith.” And in considering such a challenge, the court would “presume the University acted in good faith” and place on petitioner the burden of rebutting that presumption. . . . The Court of Appeals held that to “second-guess the merits” of this aspect of the University’s decision was a task it was “ill-equipped to perform” and that it would attempt only to “ensure that [the University’s] decision to adopt a race-conscious admissions policy followed from [a process of] good faith consideration.” . . .

. . . Strict scrutiny does not permit a court to accept a school’s assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice. . . .

. . . The Court vacates [the] judgment [of the Court of Appeals], but fairness to the litigants and the courts that heard the case requires that it be remanded so that the admissions process can be considered and judged under a correct analysis. . . . [T]he Court of Appeals must assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity. Whether this record—and not “simple . . . assurances of good intention”—is sufficient is a question for the Court of Appeals in the first instance.

[Justice Kagan did not participate. Justice Scalia concurred to reiterate his view that “[t]he Constitution proscribes government discrimination on the basis of race.” Justice Thomas also concurred that “[t]he Constitution abhors classifications based on race” because “every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.”

Justice Ginsburg was the sole dissenter. She argued that “Texas’ percentage plan was adopted with racially segregated neighborhoods and schools front and center stage. It is race consciousness, not blindness to race, that drives such plans. . . . I have several times explained why government actors, including state universities, need not be blind to the lingering effects of ‘an overtly discriminatory past,’ the legacy of ‘centuries of law-sanctioned inequality.’ . . . Among constitutionally permissible options, I remain convinced, ‘those that candidly disclose their consideration of race [are] preferable to those that conceal it.’ . . . Accordingly, I would not return this case for a second look.”]

The French Ten Percent Plan

The Texas Ten Percent Plan offered a model that proved of interest in France. The Plan’s indirection was of appeal because, while the French had amended their Constitution to permit positive action on grounds of gender, the French remain uneasy about positive action on other grounds. Article I of the French Constitution provides that “France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion.”

In 2013, France enacted a new statute, reproduced below, on admissions in higher education.

**Act No. 2013-660 of 22 July 2013 on
Higher Education and Research
(France)***

[O]n the basis of their results in each section of the baccalaureate, the best students of every high school have a right to be admitted to all higher education programs where admission might operate through selection. The percentage of the student beneficiaries of this right is decided every year by decree. As to ensure the beneficiaries of this right a spot in these programs, the representative of the minister of national education in each region reserves a percentage of positions in each of them.

Daniel Sabbagh

*The Rise of Indirect Affirmative Action: Converging Strategies for Promoting “Diversity” in Selective Institutions of Higher Education in the United States and France**

. . . Affirmative action policies vary substantially across the many countries where they are found, regarding their *intended beneficiaries* (ethnic, racial, religious, or caste-based groups held to be economically and/or socially disadvantaged, but also aboriginal peoples, women, the disabled, or even war veterans), the more or less flexible *instruments* they use, the *legal norms* (constitutional, legislative, administrative) from which they derive, the *extent of their domain of implementation*, and their *ultimate goal* as potentially inferred from observing how they work and the justifications provided to support them. They also vary in the *explicitness* with which and the *extent* to which group membership operates in the decision-making process. In this respect, there are at least three different types of affirmative action:

* This material was translated by and provided to us by Patrick Weil. See also Patrick Weil, LA RÉPUBLIQUE ET SA DIVERSITÉ: IMMIGRATION, INTÉGRATION, DISCRIMINATIONS (2005); Son Thierry Ly & Patrick Weil, *Plus de Justice dans le Système Scolaire: Pour un Droit des Meilleurs Élèves de Chaque Lycée à Entrer Dans une Filière Selective*, in 80 PROPOSITIONS QUI NE COÛTENT PAS 80 MILLIARDS (Patrick Weil ed., 2012).

** Excerpted from Daniel Sabbagh, *The Rise of Indirect Affirmative Action: Converging Strategies for Promoting “Diversity” in Selective Institutions of Higher Education in the United States and France*, 63 WORLD POL. 470 (2011).

—*Outreach*, that is, proactive policies designed only to bring a more diverse range of candidates into a recruitment or promotion pool, with group membership being taken into account in a limited way, within the preliminary process of enlarging the set from which applicants will eventually be selected, as opposed to the selection itself.

—*Direct affirmative action* is sometimes labeled “preferential treatment” in the United States and is also known as “positive discrimination” in France (and Britain). It refers to measures that grant an advantage to the members of designated groups *in the final decision over the allocation of scarce goods*, through more or less flexible policy instruments (compulsory “quotas,” tie-breaking rules, aspirational “goals” or “targets”) that become more contentious as they become less flexible. . . .

—*Indirect affirmative action* refers to policies that appear impartial but are designed to benefit (implicitly) designated groups more than others and might be construed as “disparate impact” discrimination if the outcomes for the affected groups were reversed. They may be understood as (more or less conspicuous) instances of a “substitution strategy” under which what looks like the secondary effect of a formally neutral principle of allocation is at least in part the reason why that principle has been adopted in the first place, given the perceived illegitimacy and/or unlawfulness of pursuing the decision maker’s true objective in a more straightforward manner. The goal then is to maximize the overlap between the effects of the two allocation criteria—the official one and the officious one—yet without reaching the point where the *de facto* equivalence between these two instruments would become so complete that the intent accounting for the choice of the official criterion could not be credibly denied. While the property on the basis of which the designated groups are distinguished does not come into play at the level of “*policy implementation*”—in that the instrument used to allocate social benefits does not take cognizance of it—it does come into play at the level of “*policy evaluation*,” as it figures in the assessment of the costs and benefits of the consequences to be expected from the course of action undertaken. . . .

[Comparing France and the United States, Sabbagh observes:] In France, however, the legal issue of whether one ought to infer *a rule of color-blindness* from the constitutionally grounded *principle of equality* was not left for the courts to decide. It was settled beforehand, and the answer was incorporated into the text of the Constitution itself. . . .

. . . Article 1 of the 1958 Constitution thus provides that “France . . . ensures the equality of all citizens before the law, *without any distinction of origin, race, or religion*.” Therefore, corrective or “remedial” uses of race by state

authorities are the legal equivalent of “invidious” ones and are simply ruled out. Further, not only may no public policy explicitly target segments of the population defined by this forbidden criterion but also, as a result of a 1978 law, the mere collection of statistical data using racial or ethnic categories is prohibited. Therefore, researchers interested in assessing the extent of discrimination have had no option but to proceed indirectly by using a set of proxies (such as the individuals’ first and/or last names, insofar as they are or are not typically “French sounding,” and the birthplace and citizenship at birth of their parents) that may or may not be acknowledged as such. . . .

Sudhir Krishnaswamy & Madhav Khosla
Reading A K Thakur vs Union of India:
Legal Effect and Significance *

. . . 2.4 Creamy Layer Exclusion

The exclusion of the “creamy layer” among the groups identified as [Other Backward Classes (OBC)] has been an important issue in Indian reservation policy since [*Indra Sawhney v. Union of India* (1992)]. Both Article 15(5) and the CEI Act are silent on the issue of the exclusion of the creamy layer and it was argued that this was not an essential constitutional requirement. However, the Court concluded that it is bound by the decision in *Indra Sawhney* and as chief justice Balakrishnan noted, “the majority in *Indra Sawhney*’s case upheld the exclusion of ‘creamy layer’ for the purpose of reservation in Article 16(4). Therefore, we are bound (by) the larger bench decision of this Court in *Indra Sawhney*’s case, and it cannot be said that the ‘creamy layer’ principle cannot be applied for identifying SEBCs [Socially and Economically Backward Classes].”

Despite unanimity on this issue, the Court was divided on the parameters to be used in excluding the creamy layer. The chief justice and justice Raveendran concurred that the office memorandum issued by the government of India, ministry of personnel, public grievances and pensions (department of personnel and training) on September 8, 1993 could be applied (it *may* be used). The chief justice further noted that the union and the state governments should issue

* Excerpted from Sudhir Krishnaswamy & Madhav Khosla, *Reading A K Thakur vs Union of India: Legal Effect and Significance*, 43 *ECON. & POL. WEEKLY* 53 (2008).

appropriate guidelines to identify the “creamy layer.” Justice Bhandari, on the other hand, held that although the identification of the creamy layer should be left to the government, the aforementioned office memorandum was not comprehensive and ought to be periodically revised. Justice Pasayat remained silent on the issue. Thus, while the chief justice and justice Raveendran seem to be satisfied with a set of criteria which results in a thin creamy layer, justice Bhandari clearly favours a set of criteria that would result in a much thicker creamy layer. However, regardless of individual views on how the creamy layer must be identified, all four opinions thought it best to defer to the government on this issue and provide no strict guidelines. . . .

CONTINUING CONFLICTS OVER POSITIVE ACTION

Around the world, positive action is popular. In a database called the “Quota Project: Global Database of Quotas for Women,” http://www.quotaproject.org/country_by_region.cfm, 125 countries were listed as having constitutional or legislative quotas aiming to affect elections in various ways. Yet in many countries, positive continues to provoke conflict, as the debates surrounding the courts’ decisions in *Thakur* and *Grutter* attest.

After the Supreme Court’s decision in *Grutter*, the citizens of Michigan, in 2006, amended the state’s constitution to ban affirmative action:

- (1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
- (2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
- (3) For the purposes of this section “state” includes, but is not necessarily limited to, the state itself, any city, county, any public

college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.*

In 2014, the United States Supreme Court upheld this ban on affirmative action against an equal protection challenge in *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality By Any Means Necessary (BAMN)*. *Schuette* shattered the seeming consensus of *Fisher*. The many opinions in *Schuette* reveal that the Justices are deeply divided about the role of courts in a nation deeply divided about affirmative action. Is it the use of racial classifications or the threat of harm to racial minorities that warrants close judicial scrutiny? And does the enactment of this law threaten harm to minorities? In concluding, we provide brief excerpts of the debates that prompted multiple opinions totalling close to a hundred pages.

Justice Kennedy, who advocated exacting judicial scrutiny of affirmative action in *Grutter* and *Fisher*, wrote an opinion, joined by Chief Justice Roberts and Justice Alito, which emphasized the importance of the Court deferring to democratic deliberation:

. . . It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds. The process of public discourse and political debate should not be foreclosed even if there is a risk that during a public campaign there will be those, on both sides, who seek to use racial division and discord to their own political advantage. . . . These First Amendment dynamics would be disserved if this Court were to say that the question here at issue is beyond the capacity of the voters to debate and then to determine. . . .

Justice Scalia, joined by Justice Thomas, concurred in the judgment:

. . . Does the Equal Protection Clause of the Fourteenth Amendment *forbid* what its text plainly *requires*? Needless to say (except that this case obliges us to say it), the question answers itself. “The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.” . . .

* MICH. CONST., art. I, § 26.

The dissent trots out the old saw, derived from dictum in a footnote, that legislation motivated by “prejudice against discrete and insular minorities” merits “more exacting judicial scrutiny.” . . . (quoting *United States v. Carolene Products* [n.4] (1938)) [W]e should not design our jurisprudence to conform to dictum in a footnote in a four-Justice opinion. . . .

Justice Breyer concurred in the judgment and wrote separately to emphasize that judicial deference was owed to decisions to *adopt* as well as to those that *prohibit* affirmative action:

. . . I continue to believe that the Constitution permits, though it does not require, the use of the kind of race-conscious programs that are now barred by the Michigan Constitution. The serious educational problems that faced Americans at the time this Court decided *Grutter* endure.

The Constitution allows local, state, and national communities to adopt narrowly tailored race-conscious programs designed to bring about greater inclusion and diversity. But the Constitution foresees the ballot box, not the courts, as the normal instrument for resolving differences and debates about the merits of these programs. In short, the “Constitution creates a democratic political system through which the people themselves must together find answers” to disagreements of this kind. . . .

. . . Just as . . . principle strongly supports the right of the people, or their elected representatives, to adopt race-conscious policies for reasons of inclusion, so must it give them the right to vote not to do so.

. . . [M]y discussion here is limited to circumstances in which decisionmaking is moved from an unelected administrative body to a politically responsive one, and in which the targeted race-conscious admissions programs consider race solely in order to obtain the educational benefits of a diverse student body. We need now decide no more than whether the Federal Constitution permits Michigan to apply its constitutional amendment in those circumstances. I would hold that it does. Therefore, I concur in the judgment of the Court. . . .

Justice Sotomayor, joined by Justice Ginsburg, dissented:

. . . We are fortunate to live in a democratic society. But without checks, democratically approved legislation can oppress minority groups. For that reason, our Constitution places limits on what a majority of the people may do. . . .

. . . I firmly believe that our role as judges includes policing the process of self-government and stepping in when necessary to secure the constitutional guarantee of equal protection. . . .

My colleagues are of the view that we should leave race out of the picture entirely and let the voters sort it out. . . .

Race matters. Race matters in part because of the long history of racial minorities' being denied access to the political process. . . .

Race also matters because of persistent racial inequality in society—inequality that cannot be ignored and that has produced stark socioeconomic disparities.

And race matters for reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away. Race matters to a young man's view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman's sense of self when she states her hometown, and then is pressed, "No, where are you *really* from?", regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: "I do not belong here."

In my colleagues' view, examining the racial impact of legislation only perpetuates racial discrimination. This refusal to accept the stark reality that race matters is regrettable. The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the

guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society. It is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race *does* matter. . . .



CONSTITUTIONAL CONSTRAINTS ON THE
POWER TO PUNISH

DISCUSSION LEADERS

KATE STITH, DENNIS CURTIS, NANCY GERTNER, AND
SABINO CASSESE

V. CONSTITUTIONAL CONSTRAINTS ON THE POWER TO PUNISH

DISCUSSION LEADERS:

KATE STITH, DENNIS CURTIS, NANCY GERTNER, AND SABINO CASSESE

Limiting the Authority To Punish

The Right To Hope

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| Life Imprisonment Case (Federal Constitutional Court of Germany, 1977)..... | V-4 |
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Structuring Sentencing Decision-Making and Allocating the Authority To Sentence

Constraints on the Kind, Quality, and Range of Information To Be Considered

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Is Sentencing a “Judicial” or a “Legislative” Function?

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Every country must address the question of how to punish individuals for violations of criminal law. Punishment involves the direct application of state power to individuals, affecting their liberty and deliberately imposing stigma. Hence, the questions for this chapter are about what constraints, if any, constitutions impose on sentencing decisions crafted by legislative and executive branches.

A first set of issues involves the factors that must, constitutionally, be taken into account and the metrics judges—at national and supra-national levels—use when evaluating these factors. Judges have explored to what extent the requirement of human dignity, bans on cruel and degrading treatment, prescriptions against unusual or disproportionate punishments and against arbitrariness—as well as equality precepts—limit the authority of the state to punish. At issue in many cases are what deference is due to legislatures and when, in federations and in supra-national courts, deference is due to state and national judgments. Our examples come from cases involving life sentences without any hope for release and those in which the age (young or old) of an offender and other characteristics (such as the status of being a parent) are seen as constitutionally relevant to sentencing. Yet other decisions address whether the status of being a first offender or having cooperated with authorities supports mitigation of punishment.

A second set of issues revolves around the range of information that may be considered at sentencing and the degree of certainty about its accuracy. One model of sentencing invites consideration of the whole person's life; issues have emerged about the sources of knowledge and the burdens of showing that certain allegations are incorrect.

The third set of questions asks about institutional authority and judicial identity. Is sentencing a decision that belongs uniquely to judges? How much can legislatures direct decisions, and when do principles of separation of powers or judicial independence come into play? For example, if a legislature created a numerical sentencing grid and directed executive branch officials to apply the grid rules to offenders, thereby ending the judiciary's role after a person was convicted but before sentencing, could constitutional challenges be brought to such a procedure?

LIMITING THE AUTHORITY TO PUNISH

The Right To Hope

Life Imprisonment Case Federal Constitutional Court of Germany BVerfGE 45, 187 (1977)*

[A criminal defendant, Detlev R., shot a drug addict, Guentler L., who had threatened to expose the defendant if he had not brought the ordered drugs. Detlev killed his victim by shooting him in the back of the head three times at close range. Under the 1969 Penal Code, the prescribed mandatory penalty was life imprisonment for persons who killed another out of wanton cruelty or to cover up some other criminal activity. The Verden Regional Court, where the defendant was tried, considered that sanction incompatible with the dignity clause of Article 1,** and referred the question to the Constitutional Court.]

A sentence of life imprisonment represents an extraordinarily severe infringement of a person's basic rights. Of all valid punishments in the catalogue of [criminal] penalties, this one is the most invasive of the inviolable right to personal freedom guaranteed by Article 2 (2)*** [T]he state not only limits the basic right secured by Article 2(2), but it also—depending of course on the individual case—implicates numerous other rights guaranteed by the Basic Law. . . .

. . . Neither original history nor the ideas and intentions of the framers are of decisive importance in interpreting particular provisions of the Basic Law.

* Excerpted and translated in *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* (Donald Kommers & Russell Miller eds., 3d ed. 2012).

** Article 1 provides: “(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. (3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law.”

*** Article 2 provides: “(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law. (2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.”

Since adoption of the Basic Law, our understanding of the content, function, and effect of basic rights has deepened. Additionally, the medical, psychological, and sociological effects of life imprisonment have become better known. Current attitudes [and] [n]ew insights can influence and even change the evaluation of this punishment in terms of human dignity and the principles of a constitutional state.

II. . . . The free human person and his or her dignity are the highest values of the constitutional order. . . . This is based on the conception of human persons as spiritual-moral beings endowed [with] the freedom to determine and develop themselves. . . . [T]he state must regard every individual within society with equal worth. It is contrary to human dignity to make persons the mere tools of the state. The principle that “each person must shape his own life” applies unreservedly to all areas of law; the intrinsic dignity of each person depends on his or her status as an independent personality. . . . Respect for human dignity especially requires the prohibition of cruel, inhuman, and degrading punishments. The state cannot turn the offender into an object of crime prevention to the detriment of his or her constitutionally protected right to social worth and respect. . . . Thus, Article 1 (1) considered in tandem with the principle of the state based on social justice requires the state to guarantee that minimal existence—especially in the execution of criminal penalties—necessary for a life worth of a human being. If human dignity is understood in this way, then it would be intolerable for the state forcefully to deprive [persons of their] freedom without at least providing them with the chance to someday regain their freedom. . . .

A sentence of life imprisonment must be supplemented, as is constitutionally required, by meaningful treatment of the prisoner. Regarding those prisoners under life sentences, prisons also have the duty to strive toward their resocialization, to preserve their ability to cope with life and to counteract the negative effects of incarceration and the destructive changes in personality that accompany imprisonment. This task finds its justification in the constitution itself; it can be inferred from the guarantee of the inviolability of human dignity within the meaning of Article 1 (1) of the Basic Law.

In enforcing this punishment in the Federal Republic, state officials are under a duty not merely to incarcerate but also to rehabilitate the prisoner through appropriate treatment The Court on several occasions has maintained that rehabilitation is constitutionally required in any community that establishes human dignity as its centerpiece and commits itself to the principle of social justice. The [prisoner’s] interest in rehabilitation flows from Article 2(1) in tandem with Article 1. The condemned criminal must be given the chance, after atoning for his or her crime, to reenter society. The state is obligated, within the

realm of the possible, to take all measures necessary for the achievement of this goal. . . .

An assessment of the constitutionality of life imprisonment from the vantage point of Article 1(1) and the constitutional state principle shows that a humane enforcement of life imprisonment is possible only when the prisoner is given a concrete and realistically attainable chance to regain his or her freedom at some later point in time; the state strikes at the very heart of human dignity when treating prisoners without regard to the development of their personalities, stripping them of all hope of ever earning their freedom. The legal provisions relating to the granting of pardons do not sufficiently guarantee this hope, which makes a life sentence acceptable as a matter of human dignity. . . .

Vinter and Others v. the United Kingdom
European Court of Human Rights (Grand Chamber)
App. Nos. 66069/09, 130/10 and 3896/10 (2013)

[The Grand Chamber, composed of: Dean Spielmann, President, Josep Casadevall, Guido Raimondi, Ineta Ziemele, Mark Villiger, Isabelle Berro-Lefèvre, Dragoljub Popović, Luis López Guerra, Mirjana Lazarova Trajkovska, Nona Tsotsoria, Ann Power-Forde, Işıl Karakaş, Nebojša Vučinić, Linos-Alexandre Sicilianos, Paul Lemmens, Paul Mahoney, Johannes Silvis, judges, and Michael O’Boyle, Deputy Registrar, delivered the following judgment.

After England and Wales abolished the death penalty in 1965, the maximum sentence for murder became life imprisonment. When sentencing, a trial judge was required to set a minimum term of imprisonment, which reflected the seriousness of the offense. Once the minimum term has been served, the prisoner could apply to the Parole Board for release on licence. Trial judges also have the option of imposing a “whole life order,” under which the prisoner cannot be released except at the discretion of the Secretary of State. The decision-making options are further detailed in the *McLoughlin* decision, excerpted after *Vinter*.]

1. This case originated in three applications against the United Kingdom of Great Britain and Northern Ireland lodged . . . by three British nationals, Mr. Douglas Gary Vinter, Mr. Jeremy Neville Bamber and Mr. Peter Howard Moore. .

. . Applicants alleged that the whole life orders which had been imposed on them amounted to ill-treatment contrary to Article 3 of the Convention.* . . .

15. On 20 May 1996, [Mr. Vinter] was sentenced to life imprisonment for the murder of a work colleague, with a minimum term of ten years. He was released on licence on 4 August 2005. . . .

17. On 5 February 2008 [Vinter] . . . gave himself up to the police, telling them that he had killed his wife. . . . A post-mortem examination revealed that the deceased had a broken nose, deep and extensive bruising to her neck (which was consistent with attempted strangulation), and four stab wounds to the chest. Two knives were found at the scene, one of which had a broken blade.

18. [In April 2008, Vinter pled guilty to murder.] The trial judge considered that Vinter fell into that small category of people who should be deprived permanently of their liberty . . . [and entered] a whole life order.

19. . . . [The Court of Appeal] found that, given the circumstances of the offence, there was no reason whatever to depart from the normal principle enshrined in schedule 21 to the 2003 Act that, where murder was committed by someone who was already a convicted murderer, a whole life order was appropriate for punishment and deterrence.

20. [The second applicant, Bamber, was found guilty of having shot and killed his “parents, his adoptive sister and her two young children.” The trial judge recommended a minimum sentence of twenty-five years.]

21. [The Secretary of State imposed a whole life tariff, concluding that the requirements of retribution and deterrence could only be satisfied by the second applicant remaining in prison for the whole of his life.]

26. [The third applicant, Moore, was convicted in November 1996 of multiple stabbing murders.] . . . The victims were homosexual men and the applicant, himself a homosexual, was alleged to have committed the murders for his own sexual gratification. Each victim was stabbed many times with a large combat knife which [Moore] had bought for that purpose. . . .

28. After the third applicant was convicted, the trial judge passed the mandatory sentence of life imprisonment and recommended to the Secretary of

* Article 3 provides: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

State for the Home Department that, in his view, [Moore] should never be released. . . .

30. The High Court found that, since the case involved the murder of two or more persons, sexual or sadistic conduct and a substantial degree of premeditation, under schedule 21 the starting point was a whole life order. There were no mitigating features and even the Lord Chief Justice, although recommending a minimum term of thirty years, had shared the trial judge's view that it might never be safe to release [Moore]. . . .

83. It was common ground between the parties in their submissions before the Chamber that any grossly disproportionate sentence would amount to ill-treatment contrary to Article 3. . . .

108. First, . . . the Court would emphasise that no Article 3 issue could arise if, for instance, a life prisoner had the right under domestic law to be considered for release but was refused on the ground that he or she continued to pose a danger to society. . . . Indeed, preventing a criminal from re-offending is one of the "essential functions" of a prison sentence. This is particularly so for those convicted of murder or other serious offences against the person. . . . States may fulfil [their] obligation [to protect the public] by continuing to detain such life sentenced prisoners for as long as they remain dangerous.

109. Second, in determining whether a life sentence in a given case can be regarded as irreducible, the Court has sought to ascertain whether a life prisoner can be said to have any prospect of release. Where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy Article 3. . . .

111. It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention. . . . [T]hese grounds will include punishment, deterrence, public protection and rehabilitation. Many of these grounds will be present at the time when a life sentence is imposed. However, the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence. What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated.

112. Moreover, if such a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable. If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence. Thus, even when a whole life sentence is condign punishment at the time of its imposition, with the passage of time it becomes . . . a poor guarantee of just and proportionate punishment. . . .

[These] considerations must apply under the Convention system, the very essence of which, as the Court has often stated, is respect for human dignity.

114. Indeed, there is also now clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.

115. The Court has already had occasion to note that, while punishment remains one of the aims of imprisonment, the emphasis in European penal policy is now on the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence. . . .

117. [A] large majority of Contracting States either do not impose life sentences at all or, if they do impose life sentences, provide some dedicated mechanism, integrated within the sentencing legislation, guaranteeing a review of those life sentences after a set period, usually after twenty-five years' imprisonment. . . .

119. . . . Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds.

120. However, . . . having regard to the margin of appreciation which must be accorded to Contracting States in the matters of criminal justice and sentencing, it is not its task to prescribe the form (executive or judicial) which that review should take. For the same reason, it is not for the Court to determine when that review should take place. This being said, the Court would also observe that the comparative and international law materials before it show clear support for

the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter.

121. . . . [W]here domestic law does not provide for the possibility of such a review, a whole life sentence will not measure up to the standards of Article 3 of the Convention. . . .

126. However, the Court must be concerned with the law as it presently stands on the published policies as well as in judicial dicta and as it is applied in practice to whole life prisoners. The fact remains that . . . the Secretary of State has not altered the terms of his explicitly stated and restrictive policy on when he will exercise his [review] power. [T]he Prison Service Order remains in force and provides that release will only be ordered in certain exhaustively listed, and not merely illustrative, circumstances, namely if a prisoner is terminally ill or physically incapacitated and other additional criteria can be met (namely that the risk of re-offending is minimal, further imprisonment would reduce the prisoner's life expectancy, there are adequate arrangements for the prisoner's care and treatment outside prison, and early release will bring some significant benefit to the prisoner or his or her family). . . .

130. [Accordingly,] the Court . . . finds that the requirements of Article 3 . . . have not been met in relation to any of the three applicants.

131. In reaching this conclusion the Court would note that, in the course of the present proceedings, the applicants have not sought to argue that, in their individual cases, there are no longer any legitimate penological grounds for their continued detention. The applicants have also accepted that, even if the requirements of punishment and deterrence were to be fulfilled, it would still be possible that they could continue to be detained on grounds of dangerousness. The finding of a violation in their cases cannot therefore be understood as giving them the prospect of imminent release. . . .

FOR THESE REASONS, THE COURT

. . . *Holds*, by sixteen votes to one, that there has been a violation of Article 3 in respect of each applicant

[The concurring opinion of Judge Ziemele raising the question of the award of damages under Article 41 is omitted.]

CONCURRING OPINION OF JUDGE POWER-FORDE

. . . [W]hat tipped the balance for me in voting with the majority was the Court's confirmation, in this judgment, that Article 3 encompasses what might be described as "the right to hope." It goes no further than that. The judgment recognises, implicitly, that hope is an important and constitutive aspect of the human person. Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading.

CONCURRING OPINION OF JUDGE MAHONEY

. . . 9. As I read the Chamber's test . . . it brings together two distinct requirements under Article 3 that arise at different points in time, one being a procedural requirement . . . or a preventive requirement concerning the nature of the sentence . . . , the other being a substantive requirement concerning the actual conditions of the serving of the sentence. . . .

20. . . . In principle, . . . a mechanism [affording a not wholly unreal prospect of eventual release] could be said to exist under English law in the form of: (a) the possibility for the life prisoner to apply to the Secretary of State for exercise of the statutory power of release on Article 3 grounds (disappearance of penological justification); and (b) the Secretary of State's duty to release if such grounds are shown.

There was, however, a lack of sufficient clarity existing at the relevant time as to the wider nature of the criteria on which the statutory discretion to release whole life prisoners must, as a matter of English law, be exercised. For this reason, the present applicants, at the moment of their sentencing, could not be expected to harbour the requisite prospect—"faint hope"—of release.

As consequence of this lack of sufficient clarity in the manner of operation of the applicable domestic law, the whole life sentences in issue, when imposed on the applicants, cannot be regarded as having been "reducible" for the purposes of Article 3; and there has been what the dissenting minority in the Chamber called a procedural breach of Article 3. . . .

PARTLY DISSENTING OPINION OF JUDGE VILLIGER

. . . My disagreement stems from the method which this judgment chooses to examine the alleged breach of Article 3 of the Convention, namely that the irreducible sentence imposed on the applicants runs counter to this provision as such. . . .

. . . [R]eference is made to the “standards” and “requirements” of Article 3. However, nowhere in the judgment are these standards and requirements explained, analysed and applied. . . .

. . . [T]he judgment provides for an abstract assessment and fails to undertake a concrete examination of each applicant’s situation at the time when it is examining the case. How can the Court know what will happen in ten, twenty or thirty years?

. . . [T]his general and abstract application of Article 3 to the present case does not, in my view, square easily with the principle of subsidiarity underlying the Convention, not least when, as the judgment itself recognises, issues relating to just and proportionate punishment are the subject of rational debate and civilised disagreement

Finally, and not least, this manner of proceeding overlooks the different thresholds in Article 3. The judgment makes no reference as to whether the minimum severity of treatment has been attained in respect of the applicants in order to bring about the application of Article 3. . . .

Clearly, the considerations in the judgment as to the problematic issues of irreducible sentences are relevant and valuable, but they have to be examined individually. Furthermore, in the context of such an individual examination, it is not the circumstances which existed at the outset of the sentence which are relevant, but rather the concrete circumstances which exist at point in time when the Court comes to examine the case. . . .

In my opinion, . . . Article 3 does not come into play as regards the first applicant ([Vintner who has served] just over five years [of his sentence]) and the third applicant ([Moore who has served] nearly seventeen years).

The second applicant ([Bamber,] twenty-seven years) is approaching a borderline situation. However, bearing in mind the reasons for his conviction and sentence, i.e., multiple murders, I would consider that the justifications for detention have not (yet) shifted and that the primary justification for his detention, namely punishment, remains decisive. In this respect I am satisfied that, in 2008

and 2009 respectively, the High Court and the Court of Appeal examined this particular point and concluded that the grounds of punishment and deterrence continued to prevail in respect of the second applicant

Dirk van Zyl Smit, Pete Weatherby & Simon Creighton
Whole Life Sentences and the Tide of European Human Rights
*Jurisprudence: What Is To Be Done?**

In this 2014 essay, published before the next case, *R. v. Ian McLoughlin*, Dirk van Zyl Smit, Pete Weatherby, and Simon Creighton explain the impact of *Vinter* and its import. In their view “(1) Implicit in the right to a prospect of release is a right to an opportunity to rehabilitate oneself. (2) Implicit in the right to review of the continued enforcement of a life sentence is a right to a review that meets standards of due process.” As a consequence, the “type of review . . . required to satisfy these principles” differed from what “the Parole Board currently required in England and Wales after an offender has served a minimum period set by the sentencing court, a post-tariff review. The key difference is that in a *Vinter* review all the penological justifications for the original sentence—including the seriousness of the offence—must be reviewed to determine whether the balance between them has changed and continued detention is justified. In contrast, the *post-tariff* review is limited to a review of the risk to society posed by the offender, as detention for the minimum period is deemed sufficient for retribution and deterrence.” As the authors read the decision, both kinds of review would be required.

They also note that “whole life sentences make up only a small proportion of the very large number of prisoners serving indeterminate sentences in England and Wales. Only 51 of the 12,963 prisoners serving life sentences and other fully indeterminate sentences on 30 September 2013 were subject to whole life orders. However, 1092 of those serving life sentences had minimum terms of more than 20 years. There are strong indications that the overall length of minimum terms has increased since 2003” Further, in “most European jurisdictions that have life imprisonment, the procedure for the release of persons serving a life sentence

* Excerpted from Dirk van Zyl Smit, Pete Weatherby & Simon Creighton, *Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What Is to Be Done?* 14 HUM. RTS. L. REV. 1 (2014).

is different to that in England and Wales, because the trial judge does not set an individualised minimum period. Legislation sets the general minimum term, usually of between 12 and 25 years, at which point all persons subject to life sentences are to be considered for release by a court, which may or may not have other functions relating to the enforcement of sentences. Unlike in England and Wales, the consideration at this stage is open ended. The court or tribunal responsible for release considers the seriousness of the original offence as a factor in its decision on whether to release the prisoner but also includes in its consideration the progress towards rehabilitation that a prisoner may have made in detention and the risk that he may still pose to society.”

The authors conclude that in *Vintner*:

[T]here was uncontradicted evidence of the stress that Vinter and one of the other applicants suffered and of the deterioration of their personalities in a situation where they had no prospect of release. It may safely be surmised that the impact of the complete loss of hope of even a prospect of rehabilitation is much greater than the impact of anger at procedural shortcomings in the release process. The achievement of the Grand Chamber in *Vinter* was to recognise this problem, to note that most European states had developed a way of dealing with it, and to develop its Article 3 jurisprudence in order to compel a state like the United Kingdom, which was not addressing the problem, to respond to it. In so doing, the Grand Chamber treated the ECHR as a “living instrument.” It was following directly in the tradition of the pioneering judgment in *Tyrer v. United Kingdom*, which held that state-imposed corporal punishment of a juvenile, which by the 1970s had been rejected in almost all European countries, was degrading and thus in contravention of Article 3 of the ECHR.

Much remains to be done on the procedural side in particular, for, as the Grand Chamber explained in 1999 in *Selmouni v. France*, “the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.” *Vinter* has demonstrated that the need for a comprehensive and manifestly fair procedure to evaluate progress towards release is most urgent for the persons who are likely to remain in prison for the longest on grounds of punishment and deterrence. . . .

R. v. Ian McLoughlin

United Kingdom Court of Appeal (Criminal Division)
[2014] EWCA Crim 188 (Feb. 18, 2014)

Before Lord Chief Justice Thomas, Lord Justice Treacy, and Mr Justice Burnett.

Lord Thomas, Chief Justice:

1. The statutory scheme enacted by Parliament for sentencing an adult guilty of murder is set out in the Murder (Abolition of Death Penalty) Act 1965, the Criminal Justice Act 2003 [(CJA 2003)], and Crime (Sentences) Act 1997 (the 1997 Act):

i) A trial judge must . . . impose a life sentence for murder [and] . . . the judge must decide whether to make a minimum term of a fixed number of years or a whole life order.

ii) If a fixed minimum term order is made, the Parole Board has the power . . . , commonly called the early release provisions, to direct release of the offender after the expiry of any minimum term for a fixed number of years set by the trial judge; it considers in essence the risk to the public if release is ordered. However, the Parole Board has no such power where a whole life order is made.

iii) A power of release is given . . . to the Secretary of State, if there are exceptional circumstances which justify release on compassionate grounds.

2. In the cases before the court a challenge is made to this scheme. It is advanced under Article 3 of the Convention and founded on decisions of the Strasbourg Court: . . .

. . . On 9 July 2013, the Grand Chamber of the Strasbourg Court gave its decision in *Vinter v United Kingdom*. It held, for reasons we shall analyse, that there had been a violation of Article 3 in relation to the whole life orders imposed on the basis that they were not reducible. . . .

9. . . . Under [the CJA 2003] the trial judge approaches the task of setting the penal element of the sentence of mandatory life imprisonment by determining the seriousness of the offence in accordance with the principles set out in Schedule 21 and any applicable guidelines of the Sentencing Council. The judge is not concerned with risk to the public on release. Paragraph 4 of that schedule provides that the appropriate starting point where the seriousness of the offence or offences is exceptionally high should be a whole life order. The types of case that would normally fall within this category are:

- (a) the murder of two or more persons, where each murder involves any of the following—
 - (i) a substantial degree of premeditation or planning,
 - (ii) the abduction of the victim, or
 - (iii) sexual or sadistic conduct,
- (b) the murder of a child if involving the abduction of the child or sexual or sadistic motivation,
- (c) a murder done for the purpose of advancing a political, religious, racial or ideological cause, or
- (d) a murder by an offender previously convicted of murder. . . .

14. In *Vinter* the Grand Chamber set out its view that it was axiomatic that a person could not be detained unless there were “legitimate penological grounds” for detention; those grounds were stated by the court to include punishment, deterrence, public protection and rehabilitation. . . .

17. We do not read the judgment of the Grand Chamber in *Vinter* as in any way casting doubt on the fact that there are crimes that are so heinous that just punishment may require imprisonment for life. There may be legitimate dispute as to what such crimes are—at one end genocide or mass murder of the kind committed in Europe in living memory or, at the other, murder by a person who has committed other murders, but that there are such crimes cannot be doubted. In *Vinter* the Grand Chamber accepted that, because what constitutes a just and proportionate punishment is the subject of debate and disagreement, States have a margin of appreciation. Under our constitution it is for Parliament to decide whether there are such crimes and to set the framework under which the judge decides in an individual case whether a whole life order is the just punishment.

18. We therefore conclude that no specific passage in the judgment nor the judgment read as a whole in any way seek to impugn the provisions of the CJA

2003 (as enacted by Parliament) which entitle a judge to make at the time of sentence a whole life order as a sentence reflecting just punishment.

19. The Grand Chamber made clear, as is self evident, that there is no violation of Article 3 if a prisoner in fact spends the whole of his life in prison. . .

20. However, the Grand Chamber considered that the justification for detention might shift during the course of a sentence; although just punishment at the outset, it might cease to be just after the passage of many years. It said . . . that for a life sentence to be compatible with Article 3, there must therefore be both a prospect of release and a possibility of review. . . .

22. Thus whilst it is clear that the Grand Chamber accepted that a judge can impose a whole life order as just punishment, it concluded that a legal regime for a review during the sentence must be in place at the time the sentence is passed. . . .

35. In our judgment the law of England and Wales . . . does provide to an offender “hope” or the “possibility” of release in exceptional circumstances which render the just punishment originally imposed no longer justifiable.

36. It is entirely consistent with the rule of law that such requests are considered on an individual basis against the criteria that circumstances have exceptionally changed so as to render the original punishment which was justifiable no longer justifiable. We find it difficult to specify in advance what such circumstances might be, given that the heinous nature of the original crime justly required punishment by imprisonment for life. But circumstances can and do change in exceptional cases. The interpretation of [the laws Parliament has enacted governing sentencing an adult guilty of murder] we have set out provides for that possibility and hence gives to each such prisoner the possibility of exceptional release.

37. Judges should therefore continue to apply the statutory scheme in the CJA 2003 and in exceptional cases, likely to be rare, impose whole life orders . . .

40. McLoughlin . . . had a previous history of serious offending, including previous convictions for manslaughter and murder. . . .

42. On 13 July 2013 McLoughlin . . . went to the home of Mr Cory-Wright, then in his 80s, intending to get money and property from him by theft or robbery if necessary. When he arrived Mr Cory-Wright invited him into his home

and gave him a drink. . . . McLoughlin . . . forced Mr Cory-Wright upstairs and tied him up. He then robbed him of valuables Mr Cory-Wright freed himself and shouted for help. A neighbour, Mr Buck, came to help, even though Mr Cory-Wright warned him not to do so. McLoughlin came out of the house, grabbed Mr Buck and slashed his throat with a knife. Mr Buck managed to escape to his own front garden but died before the emergency services could attend. Three days later McLoughlin was arrested . . . [and] admitted killing Mr Buck and robbing Mr Cory-Wright.

43. There was only one mitigating feature, namely his plea of guilty. There were four aggravating features. First, the murder was committed in the course of a robbery. Second, he had the numerous previous convictions we have set out, including both the previous murder and the manslaughter to which we have referred. Third, the robbery was premeditated, involved the use of a knife and was committed against a vulnerable victim in his own home. Fourth, at the time, he was a prisoner serving the custodial part of the life sentence imposed on him for murder. The judge also found it difficult to accept that he had not formed the intention of killing Mr Buck. . . .

45. In the course of his sentencing remarks the judge said he had to decide whether there should be a whole life order or whether there should be a determinate minimum term. In deciding whether to impose a whole life order the judge referred to the decision in *Vinter* and said:

Given that there is a duty upon the court imposed by the Human Rights Act to act in compliance with the Convention and to take into account at the least of it the decisions of the Court. And given that the 2003 Act does not require me to pass a whole life order, even though that is necessarily my starting point, I have reached the conclusion against the background that is incumbent upon me to pass a sentence which is compliant with the Convention if I can. But it is not appropriate to impose a whole life term. However, even for a man of 55 years of age the minimum term of years must be a very long one indeed. . . .

47. It is clear that the judge did not think he had the power to make a whole life order. He was, for the reasons we have given, in error. His reasoning as to whether he should impose a whole life order or a minimum term of a fixed number of years, had therefore proceeded on the assumption he had no such power.

48. We must consider the matter afresh. The judge proceeded on the basis of a misunderstanding of the law. It is our duty to exercise our judgment free from that

misunderstanding. This was McLaughlin's second conviction for murder. The serious aggravating features were correctly identified by the judge. The only mitigation was his admission and plea.

49. . . . A court must only impose a whole life order if the seriousness is exceptionally high and the requirements of just punishment and retribution make such an order the just penalty. As a second murder, it was a case for which the starting point is normally a whole life order. In addition it had the aggravating features to which we have referred. The only mitigation was his plea.

50. In our judgment this was a case where the seriousness was exceptionally high and just punishment required a whole life order. A fixed minimum term of 40 years was for that reason unduly lenient. We therefore quash the minimum term of 40 years and make a whole life order. . . .

59. . . . The making of a whole life order requires detailed consideration of the individual circumstances of each case. It is likely to be rare that the circumstances will be such that a whole life order is required. Our decision on each case turns on its specific facts and cannot be seen as a guide to any similar case.

The Relevance of Age, Parenting, and Culpability

Miller v. Alabama Supreme Court of the United States 132 S. Ct. 2455 (2012)

Justice KAGAN delivered the opinion of the Court.

The two 14-year-old offenders in these cases were convicted of murder and sentenced to life imprisonment without the possibility of parole. In neither case did the sentencing authority have any discretion to impose a different punishment. State law mandated that each juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life *with* the possibility of parole) more appropriate. Such a scheme prevents those meting out punishment from considering a juvenile's "lessened culpability" and "greater capacity for change," and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties. We therefore hold

that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on “cruel and unusual punishments.”* . . .

The cases before us implicate two strands of precedent reflecting our concern with proportionate punishment. The first has adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty. So, for example, we have held that imposing the death penalty for nonhomicide crimes against individuals, or imposing it on mentally retarded defendants, violates the Eighth Amendment. Several of the cases in this group have specially focused on juvenile offenders, because of their lesser culpability. Thus, [*Roper v. Simmons* (2005)] held that the Eighth Amendment bars capital punishment for children, and [*Graham v. Florida* (2010)] concluded that the Amendment also prohibits a sentence of life without the possibility of parole for a child who committed a nonhomicide offense. *Graham* further likened life without parole for juveniles to the death penalty itself, thereby evoking a second line of our precedents. In those cases, we have prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death. Here, the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment. . . .

We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment. Because that holding is sufficient to decide these cases, we do not consider [the] alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger. But given all we have said in *Roper*, *Graham*, and this decision about children’s diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between “the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” Although we do not foreclose a sentencer’s ability to make that judgment in homicide cases,

* The Eighth Amendment to the United States Constitution provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison. . . .

Alabama and Arkansas . . . contend that because many States impose mandatory life-without-parole sentences on juveniles, we may not hold the practice unconstitutional. In considering categorical bars to the death penalty and life without parole, we ask as part of the analysis whether objective indicia of society’s standards, as expressed in legislative enactments and state practice show a “national consensus” against a sentence for a particular class of offenders. By our count, 29 jurisdictions (28 States and the Federal Government) make a life-without-parole term mandatory for some juveniles convicted of murder in adult court. The States argue that this number precludes our holding.

We do not agree For starters, the cases here are different from the typical one in which we have tallied legislative enactments. Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty. And in so requiring, our decision flows straightforwardly from our precedents: specifically, the principle of *Roper*, *Graham*, and our individualized sentencing cases that youth matters for purposes of meting out the law’s most serious punishments. When both of those circumstances have obtained in the past, we have not scrutinized or relied in the same way on legislative enactments. We see no difference here.

In any event, the “objective indicia” that the States offer do not distinguish these cases from others holding that a sentencing practice violates the Eighth Amendment. In *Graham*, we prohibited life-without-parole terms for juveniles committing nonhomicide offenses even though 39 jurisdictions permitted that sentence. That is 10 *more* than impose life without parole on juveniles on a mandatory basis. And in [*Atkins v. Virginia* (2002)], *Roper*, and *Thompson v. Oklahoma* (1988), we similarly banned the death penalty in circumstances in which less than half of the States that permitted capital punishment (for whom the issue existed) had previously chosen to do so. . . .

. . . . Almost all jurisdictions allow some juveniles to be tried in adult court for some kinds of homicide. But most States do not have separate penalty provisions for those juvenile offenders. Of the 29 jurisdictions mandating life without parole for children, more than half do so by virtue of generally applicable penalty provisions, imposing the sentence without regard to age. And indeed, some of those States set no minimum age for who may be transferred to adult

court in the first instance, thus applying life-without-parole mandates to children of any age—be it 17 or 14 or 10 or 6. As in *Graham*, we think that “underscores that the statutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration.” That Alabama and Arkansas can count to 29 by including these possibly (or probably) inadvertent legislative outcomes does not preclude our determination that mandatory life without parole for juveniles violates the Eighth Amendment. . . .

Justice BREYER with whom Justice SOTOMAYOR joins, concurring.

I join the Court's opinion in full. . . .

In [*Graham v. Florida*] we said that “when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability.” . . . For one thing, “compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility. . . .” For another thing, *Graham* recognized that lack of intent normally diminishes the “moral culpability” that attaches to the crime in question, making those that do not intend to kill “categorically less deserving of the most serious forms of punishment than are murderers.” . . . [B]ecause of this “twice diminished moral culpability,” the Eighth Amendment forbids the imposition upon juveniles of a sentence of life without parole for nonhomicide cases. . . .

I recognize that in the context of felony-murder cases, the question of intent is a complicated one. The felony-murder doctrine traditionally attributes death caused in the course of a felony to all participants who intended to commit the felony, regardless of whether they killed or intended to kill . . . based on the idea of “transferred intent”; the defendant's intent to commit the felony satisfies the intent to kill required for murder. . . .

But in my opinion, this type of “transferred intent” is not sufficient to satisfy the intent to murder that could subject a juvenile to a sentence of life without parole. . . .

. . . At base, the theory of transferring a defendant's intent is premised on the idea that one engaged in a dangerous felony should understand the risk that the victim of the felony could be killed, even by a confederate Yet the ability to consider the full consequences of a course of action and to adjust one's conduct accordingly is precisely what we know juveniles lack capacity to do effectively. . . .

This is, as far as I can tell, precisely the situation present in Kuntrell Jackson's case. Jackson simply went along with older boys to rob a video store. On the way, he became aware that a confederate had a gun. He initially stayed outside the store, and went in briefly, saying something like "We ain't playin'" or "I thought you all was playin,'" before an older confederate shot and killed the store clerk. . . . Crucially, the jury found him guilty of first-degree murder under a statute that permitted them to convict if, Jackson "attempted to commit or committed an aggravated robbery, and, in the course of that offense, he, or an accomplice, caused [the clerk's] death under circumstance manifesting extreme indifference to the value of human life." . . . Thus, to be found guilty, Jackson did not need to kill the clerk (it is conceded he did not), nor did he need to have intent to kill or even "extreme indifference." As long as one of the teenage accomplices in the robbery acted with extreme indifference to the value of human life, Jackson could be convicted of capital murder.

The upshot is that Jackson, who did not kill the clerk, might not have intended to do so either. . . . If, on remand, however, there is a finding that Jackson did intend to cause the clerk's death, the question remains open whether the Eighth Amendment prohibits the imposition of life without parole upon a juvenile in those circumstances as well. . . .

Chief Justice ROBERTS, with whom Justice SCALIA, Justice THOMAS, and Justice ALITO join, dissenting.

Determining the appropriate sentence for a teenager convicted of murder presents grave and challenging questions of morality and social policy. Our role, however, is to apply the law, not to answer such questions. The pertinent law here is the Eighth Amendment to the Constitution, which prohibits "cruel and unusual punishments." Today, the Court invokes that Amendment to ban a punishment that the Court does not itself characterize as unusual, and that could not plausibly be described as such. . . .

The parties agree that nearly 2,500 prisoners are presently serving life sentences without the possibility of parole for murders they committed before the age of 18. The Court accepts that over 2,000 of those prisoners received that sentence because it was mandated by a legislature. And it recognizes that the Federal Government and most States impose such mandatory sentences. Put simply, if a 17-year-old is convicted of deliberately murdering an innocent victim, it is not "unusual" for the murderer to receive a mandatory sentence of life without parole. That reality should preclude finding that mandatory life imprisonment for juvenile killers violates the Eighth Amendment.

Our precedent supports this conclusion. When determining whether a punishment is cruel and unusual, this Court typically begins with objective indicia of society's standards, as expressed in legislative enactments and state practice. We look to these "objective indicia" to ensure that we are not simply following our own subjective values or beliefs. Such tangible evidence of societal standards enables us to determine whether there is a "consensus against" a given sentencing practice. If there is, the punishment may be regarded as "unusual." But when, as here, most States formally require and frequently impose the punishment in question, there is no objective basis for that conclusion.

Our Eighth Amendment cases have also said that we should take guidance from "evolving standards of decency that mark the progress of a maturing society." . . . In this case, there is little doubt about the direction of society's evolution: For most of the 20th century, American sentencing practices emphasized rehabilitation of the offender and the availability of parole. But by the 1980's, outcry against repeat offenders, broad disaffection with the rehabilitative model, and other factors led many legislatures to reduce or eliminate the possibility of parole, imposing longer sentences in order to punish criminals and prevent them from committing more crimes. Statutes establishing life without parole sentences in particular became more common in the past quarter century. And the parties agree that most States have changed their laws relatively recently to expose teenage murderers to mandatory life without parole. . . .

Here the number of mandatory life without parole sentences for juvenile murderers, relative to the number of juveniles arrested for murder, is over 5,000 times higher than the corresponding number in *Graham*. There is thus nothing in this case like the evidence of national consensus in *Graham*.

The Court disregards these numbers, claiming that the prevalence of the sentence in question results from the number of statutes requiring its imposition. True enough. The sentence at issue is statutorily mandated life without parole. Such a sentence can only result from statutes requiring its imposition. In *Graham* the Court relied on the low number of actual sentences to explain why the high number of statutes allowing such sentences was not dispositive. Here, the Court excuses the high number of actual sentences by citing the high number of statutes imposing it. To say that a sentence may be considered unusual *because* so many legislatures approve it stands precedent on its head.

The Court also advances another reason for discounting the laws enacted by Congress and most state legislatures. Some of the jurisdictions that impose mandatory life without parole on juvenile murderers do so as a result of two statutes: one providing that juveniles charged with serious crimes may be tried as

adults, and another generally mandating that those convicted of murder be imprisoned for life. According to the Court, our cases suggest that where the sentence results from the interaction of two such statutes, the legislature can be considered to have imposed the resulting sentences “inadvertently.” . . .

It is a fair question whether this Court should ever assume a legislature is so ignorant of its own laws that it does not understand that two of them interact with each other, especially on an issue of such importance as the one before us. . . . [H]ere the widespread and recent imposition of the sentence makes it implausible to characterize this sentencing practice as a collateral consequence of legislative ignorance. . . .

In the end, the Court does not actually conclude that mandatory life sentences for juvenile murderers are unusual. It instead claims that precedent “leads to” today’s decision, primarily relying on *Graham* and *Roper*. Petitioners argue that the reasoning of those cases “compels” finding in their favor. The Court is apparently unwilling to go so far, asserting only that precedent points in that direction. But today’s decision invalidates the laws of dozens of legislatures and Congress. This Court is not easily led to such a result. . . . If the Court is unwilling to say that precedent compels today’s decision, perhaps it should reconsider that decision. . . .

Justice THOMAS, with whom Justice SCALIA joins, dissenting.

Today, the Court holds that “mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments.’” To reach that result, the Court relies on two lines of precedent. The first involves the categorical prohibition of certain punishments for specified classes of offenders. The second requires individualized sentencing in the capital punishment context. Neither line is consistent with the original understanding of the Cruel and Unusual Punishments Clause. The Court compounds its errors by combining these lines of precedent and extending them to reach a result that is even less legitimate than the foundation on which it is built. Because the Court upsets the legislatively enacted sentencing regimes of 29 jurisdictions without constitutional warrant, I respectfully dissent. . . .

Today’s decision invalidates a constitutionally permissible sentencing system based on nothing more than the Court’s belief that “its own sense of morality . . . pre-empts that of the people and their representatives.” . . . Because nothing in the Constitution grants the Court the authority it exercises today, I respectfully dissent. . . .

Justice ALITO, with whom Justice SCALIA joins, dissenting.

. . . The Court now holds that Congress and the legislatures of the 50 States are prohibited by the Constitution from identifying any category of murderers under the age of 18 who must be sentenced to life imprisonment without parole. Even a 17½-year-old who sets off a bomb in a crowded mall or guns down a dozen students and teachers is a “child” and must be given a chance to persuade a judge to permit his release into society. Nothing in the Constitution supports this arrogation of legislative authority. . . .

What today’s decision shows is that our Eighth Amendment cases are no longer tied to any objective indicia of society’s standards. . . .

R. v. D.B.

Supreme Court of Canada

[2008] 2 S.C.R. 3

The judgment of McLachlin C.J. and Binnie, LeBel, Fish and Abella JJ. was delivered by Abella J:

7. . . . D.B. went to the local mall with friends. A fight ensued with 18-year-old Jonathan Romero, in the course of which D.B. knocked Romero to the ground and punched him. Romero lost consciousness. D.B. fled. . . .

9. Romero . . . died from his injuries. . . .

11. The offence to which D.B. pleaded guilty, manslaughter, is a presumptive offence. D.B. applied for a youth sentence rather than the adult sentence presumptively imposed by the [Youth Criminal Justice Act (YCJA)]. The Crown opposed his application, seeking to have him sentenced as an adult and recommending a sentence of five years’ imprisonment. The maximum youth sentence allowable for this offence under the YCJA is three years.

12. D.B. then challenged the constitutionality of the provisions of the YCJA which place the onus on a young person to prove that a youth sentence, not an adult one, should be imposed. . . .

13. The trial judge . . . allowed the [*Canadian Charter of Rights and Freedoms*] challenge. . . .

14. . . . [T]he trial judge concluded that a youth sentence involving intensive rehabilitation custody would be appropriate The Crown appealed. . . .

20. The constitutionality of two sets of provisions of the YCJA are at issue, both of which D.B. asserts violate s. 7 of the Charter, which states:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

21. Both sets of provisions affect a young person who has been found guilty of a presumptive offence. A “presumptive offence” is defined as follows in s. 2(1):

(a) an offence committed, or alleged to have been committed, by a young person who has attained the age of fourteen years, or, in a province where the lieutenant governor in council has fixed an age greater than fourteen years under section 61, the age so fixed

(b) a serious violent offence for which an adult is liable to imprisonment for a term of more than two years committed, or alleged to have been committed, by a young person after the coming into force of section 62 (adult sentence) and after the young person has attained the age of fourteen years, or, in a province where the lieutenant governor in council has fixed an age greater than fourteen years under section 61, the age so fixed, if at the time of the commission or alleged commission of the offence at least two judicial determinations have been made . . . at different proceedings, that the young person has committed a serious violent offence.

22. The first group of impugned provisions requires a young person convicted of a presumptive offence to justify the imposition of a youth sentence rather than an adult one.

23. The second set of provisions being challenged, the “privacy provisions,” deals with the loss of the privacy protection of a publication ban when a young person is convicted of a presumptive offence. . . .

24. The “onus provisions” affect the length and type of sentence that young persons receive. The “privacy provisions” determine whether or not their identity will be disclosed. The basis of the constitutional challenge before this

Court is that both sets of provisions impose a “reverse onus” since the burden is on the young person to persuade the court that he or she should not lose the benefit of the youth sentencing provisions, rather than on the Crown to attempt to prove that an adult sentence is justified. . . .

37. The analysis under s. 7 proceeds in two stages: Is there a deprivation of life, liberty and/or security of the person? If so, does the deprivation accord with principles of fundamental justice? If there has been a deprivation that does not accord with principles of fundamental justice, a violation of s. 7 has occurred. . . .

39. This . . . means . . . the inquiry in this case is into whether that deprivation is in accordance with the principles of fundamental justice. And that in turn requires a determination first of what principle of fundamental justice is at issue here. . . .

41. What the onus provisions *do* engage, in my view, is what flows from *why* we have a separate legal and sentencing regime for young people, namely that because of their age, young people have heightened vulnerability, less maturity and a reduced capacity for moral judgment. This entitles them to a *presumption* of diminished moral blameworthiness or culpability. This presumption is the principle at issue here and it is a presumption that has resulted in the entire youth sentencing scheme, with its unique approach to punishment. . .

48. Canada . . . has consistently acknowledged the diminished responsibility and distinctive vulnerability of young persons in all of the YCJA’s statutory predecessors. . . .

66. The courts, too, have acknowledged the reality of reduced moral culpability on the part of young people. . . .

67. This consensus also exists internationally. . . . Anthony N. Doob and Michael Tonry . . . observe that “[t]he most notable aspect of the treatment of youths who offend in Western countries is that every country appears to have laws or policies reflecting the belief that youths should be treated differently from adult offenders”

68. The preceding confirms, in my view, that a broad consensus reflecting society’s values and interests exists, namely that the principle of a presumption of diminished moral culpability in young persons is fundamental to our notions of how a fair legal system ought to operate. . . .

70. The remaining issue, therefore, is whether the presumption of an adult sentence in the onus provisions is consistent with the principle of fundamental justice that young people are entitled to a presumption of diminished moral culpability. In my view, they are not. . . .

Rothstein J. (dissenting in part)—

. . . 106. I agree with Abella J. that young persons are entitled, based on their reduced maturity and judgement, to a presumption of diminished moral blameworthiness and that this presumption is a principle of fundamental justice. It is on the issue of whether this principle of fundamental justice creates further presumptions of youth sentences lower than adult sentences and of a publication ban that we disagree.

107. . . . Parliament considered the competing interests, on the one hand, of young persons to have their reduced moral blameworthiness taken into account and, on the other, of society to be protected from violent young offenders and to have confidence that the youth justice system ensures the accountability of violent young offenders as it was entitled to do. That the YCJA presumes adult sentences and publication for serious violent offences is in accordance with principles of fundamental justice because it in no way precludes a youth sentence or a publication ban where considered appropriate by the youth criminal justice court. . . .

108. The presumptive offence scheme *significantly* recognizes the age, reduced maturity and increased vulnerability of young persons and, as a result, it complies with the principles of fundamental justice. . . .

Prosecutor v. Plavšić

International Criminal Tribunal for the Former Yugoslavia
No. IT-00-39&40/1-S (2003)

[Biljana Plavšić, the former President of Republika Srpska, was indicted in May of 2002 on counts alleging genocide, complicity in genocide, and the following crimes against humanity: persecutions, extermination and killing, deportation and inhumane acts. In October of that year, she pled guilty to persecutions, a crime against humanity, and the other counts were dismissed. The December 2002 sentencing decision, below, analysed the legal import, under international and constitutional precepts, of her cooperation and her age of 72.]

Before Judge Richard May, Presiding Judge Patrick Robinson, and Judge O-Gon Kwon.

. . . 8. Count 3, to which the accused has pled guilty, alleges that . . . the accused, acting individually and in concert with others in a joint criminal enterprise, planned, instigated, ordered and aided and abetted persecutions of the Bosnian Muslim, Bosnian Croat and other non-Serb populations of 37 municipalities in Bosnia and Herzegovina (“BH”)

19. . . . [The accused] learned a great deal about the gravity and nature of the crimes committed by the forces which she led and inspired during the war; and she recognizes her obligation to accept responsibility for acts committed by others. . . .

21. . . . [I]n determining sentence the Trial Chamber must take account of the following factors: the gravity of the crime; any aggravating circumstances; any mitigating circumstances; [and] the general practice regarding prison sentences in the courts of the former Yugoslavia.

22. The Appeals Chamber of the International Tribunal has held that retribution and deterrence are the main principles in sentencing for international crimes. . . .

23. . . . [T]he principle of retribution must be understood as reflecting a fair and balanced approach to the exaction for wrongdoing. This means that the penalty must be proportional to the wrongdoing.

24. . . . [T]he penalties imposed by the International Tribunal must, in general, have sufficient deterrent value to ensure that those who would consider committing similar crimes will be dissuaded from doing so.

25. The cardinal feature in sentencing is the gravity of the crime. . . .

52. The Trial Chamber accepts that this is a crime of utmost gravity, involving as it does a campaign of ethnic separation which resulted in the death of thousands and the expulsion of thousands more in circumstances of great brutality. The gravity is illustrated by: the massive scope and extent of the persecutions; the numbers killed, deported and forcibly expelled; the grossly inhumane treatment of detainees; and the scope of the wanton destruction of property and religious buildings.

53. The Prosecution identifies three aggravating factors: (i) the leadership position of the accused; (ii) the vulnerability of the victims; and (iii) the depravity of the crimes to which the victims were subjected. . . .

60. The Trial Chamber therefore has to determine an appropriate sentence for an accused who was in the high leadership position described and was involved in crimes of the utmost gravity. The Trial Chamber is unable to accept the submission of the Prosecution that the severest sentence, *i.e.*, imprisonment for the rest of her life, which this International Tribunal is capable of passing would be appropriate in the absence of a plea of guilty. On the other hand, the Trial Chamber does accept that misplaced leniency would not be fitting and that a substantial sentence of imprisonment is called for.

61. . . . The Prosecution submits that the relevant mitigating circumstances include: entry of a guilty plea and acceptance of responsibility; remorse; voluntary surrender; post-conflict conduct; previous good character; and age. . . .

63. An accused's "substantial" co-operation with the Prosecutor is the only mitigating circumstance that is expressly mentioned in the Rule. . . .

73. The Trial Chamber accepts [her statements of remorse at sentencing] as part of the mitigating circumstances connected with a guilty plea. Indeed, it may be argued that by her guilty plea, Mrs. Plavšić had already demonstrated remorse. This, together with the substantial saving of international time and resources as a result of a plea of guilty before trial, entitle the accused to a discount in the sentence which would otherwise have been appropriate. However, there is a further and significant circumstance to be considered, namely the role of the guilty plea of the accused in establishing the truth in relation to the crimes and furthering reconciliation in the former Yugoslavia. . . .

84. The Trial Chamber accepts that the voluntary surrender of the accused is a mitigating circumstance for the purpose of sentence. . . .

94. . . . [T]he Trial Chamber is satisfied that Mrs. Plavšić was instrumental in ensuring that the Dayton Agreement [for Peace in Bosnia and Herzegovina] was accepted and implemented in Republika Srpska [in December 1995]. As such, she made a considerable contribution to peace in the region and is entitled to pray it in aid in mitigation of sentence. The Trial Chamber gives it significant weight.

95. The Defence submits that age is a mitigating factor in sentencing [recognized] in both international and domestic jurisprudence [In] the *Papon*

v. France case from the European Court on Human Rights, . . . the then 90-year-old appellant (who had been found guilty of aiding and abetting crimes against humanity by a French court) submitted that the combination of his age and state of health made his imprisonment incompatible with Article 3 of the European Convention on Human Rights, which provides that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” The Court observed that:

advanced age is not a bar to pre-trial detention or a prison sentence in any of the Council of Europe’s member States. However, age in conjunction with other factors, such as state of health, may be taken into account either when sentence is passed or while the sentence is being served (for instance when a sentence is suspended or imprisonment is replaced by house arrest). While none of the provisions of the Convention expressly prohibits imprisonment beyond a certain age, the Court has already had occasion to note that, under certain circumstances, the detention of an elderly person over a lengthy period might raise an issue under Article 3. Nonetheless, regard is to be had to the particular circumstances of each specific case. . . .

96. The Defence also refers to the national criminal law systems of the United Kingdom, Australia and Canada, in which a sentencing court may consider advanced age a mitigating factor for sentencing. Further, the Defence has submitted a report concerning the health of Mrs. Plavšić, which concludes that it may be expected that the condition of the accused “will worsen with time, especially in conditions of stress caused by the criminal-legal situation and living conditions in prison. The current condition of the patient requires further regular doctor’s control and treatment.” . . .

100. . . . [T]he Prosecution submits that while the age of an accused may be considered as a factor in determining a sentence, there is no jurisprudence that either requires a court to consider age or that precludes the imposition of any sentence, even a life sentence for an older offender. The Prosecution concludes that there are two additional factors that emerge from the jurisprudence regarding sentencing. First, there are no cases which require a court to consider the age of the accused in determining sentencing. Second, those courts which have considered this circumstance have balanced that factor against the gravity of the offence. . . .

106. . . . [The Trial Chamber concluded that it did consider] as a mitigating factor the advanced age of the accused and in doing so, it takes into account the medical report filed on her behalf. . . .

109. In this connection the Defence states that the comportment of the accused while in detention and the general co-operation with the Trial Chamber and the Prosecutor during the proceedings is a mitigating factor. It submits that from the moment that the accused voluntarily surrendered to the International Tribunal, the accused has always shown respect for the Trial Chamber and the Prosecution, and that she has always fully complied with the terms and conditions imposed on her at the UNDU and during her provisional release. The Trial Chamber accepts that these are mitigating factors but attaches less significance to them than the other factors already raised.

110. In the light of the above, the Trial Chamber finds that the following are the relevant, substantial, mitigating circumstances in this case: guilty plea (together with remorse and reconciliation); voluntary surrender; post-conflict conduct; and age. To each of these circumstances the Trial Chamber attaches weight. In particular, the Trial Chamber attaches great weight to Mrs. Plavšić's guilty plea and post-conflict conduct. Together, these circumstances make a formidable body of mitigation. . . .

118. . . . [T]he Trial Chamber notes that the laws in effect in the former Yugoslavia at the time Mrs. Plavšić committed the crime, allow for a maximum of 20 years' imprisonment, in lieu of the death penalty. . . .

134. For the foregoing reasons, having considered the arguments of the parties, the evidence presented at the Sentencing Hearing, and the Statute and the Rules, the Trial Chamber Biljana Plavšić to eleven years' imprisonment and states that she is entitled to credit for 245 days in relation to the sentence imposed by the Trial Chamber, as of the date of this Sentencing Judgement, together with such additional time as she may serve pending the determination of any appeal.

In 2009, the ICTY ordered the early release of Plavšić, after she had served two-thirds of her sentence.*

United States v. Angelos

United States District Court for the District of Utah
345 F. Supp. 2d 1227 (D. Utah 2004)

[Weldon Angelos was found guilty on three counts of illegal firearm possession. Under the Federal Sentencing Guidelines, Mr. Angelos' offenses warranted a baseline sentence of 78 to 97 months. However, a federal statute, 18 U.S. Code § 924, penalized possession of a firearm in the context of violent or drug trafficking offenses by imposing a mandatory minimum sentence of five years imprisonment for a first-time violation, and a minimum of 25 years imprisonment for a second or subsequent violation. Since Mr. Angelos possessed three firearms, he was subject to the 25-year mandatory minimum sentence.]

CASSELL, District Judge.

Defendant Weldon Angelos stands now before the court for sentencing. . . . [H]e was convicted of dealing marijuana and related offenses, [and] both the government and the defense agree that Mr. Angelos should serve about six to eight years in prison. But there are three additional firearms offenses for which the court must also impose sentence. Two of those offenses occurred when Mr. Angelos carried a handgun to two \$350 marijuana deals; the third when police found several additional handguns at his home when they executed a search warrant. For these three acts of possessing (not using or even displaying) these guns, the government . . . urges the court to sentence Mr. Angelos to a prison term of no less than 61½ years—six years and a half (or more) for drug dealing followed by 55 years for three counts of possessing a firearm in connection with a drug offense. In support of its position, the government relies on a statute—18 U.S.C. § 924(c)—which requires the court to impose a sentence of five years in

* Prosecutor v. Plavšić, Case No. IT-00-39&4011-ES p.21, Decision of the President on the Application For Pardon or Commutation of Sentence of Mrs. Biljana Plavšić. (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 Sept. 14, 2009).

prison the first time a drug dealer carries a gun and twenty-five years for each subsequent time. . . .

Mr. Angelos' sentence is presumptively governed by the Federal Sentencing Guidelines. . . .

Mr. Angelos challenges this presumptive sentence on two grounds. His main argument is that § 924(c) is unconstitutional as applied to him, either because the additional 55-year sentence is irrational punishment that violates equal protection principles or is cruel and unusual punishment that violates the Cruel and Unusual Punishment Clause. . . .

. . . Title 18 U.S.C. § 924(c) was proposed and enacted in a single day as an amendment to the Gun Control Act of 1968 enacted following the assassinations of Martin Luther King, Jr. and Robert F. Kennedy. Congress intended the Act to address the "increasing rate of crime and lawlessness and the growing use of firearms in violent crime." . . .

. . . In the 36 years since its passage, the penalties attached to § 924(c) have been made continually harsher either by judicial interpretation or congressional action. . . .

. . . [U]nless a law infringes upon a fundamental right or classifies along suspect lines such as race, the court's review is limited to determining whether there is a rational basis for the law. . . .

Mr. Angelos contends that § 924(c) effectively sentences him to life in prison and that this statutory scheme is irrational as applied to him. . . . [because it] leads to unjust punishment and creates irrational distinctions between different offenders and different offenses. . . .

[The court first finds that the defendant is effectively receiving a life sentence under § 924(c).] . . .

Mr. Angelos argues that his sentence is irrational because the enhancement provided for under § 924(c) increases his sentence by 55 years, whereas were the [Federal Sentencing] Guidelines alone to be applied, his sentence would be enhanced by only two years. . . .

The Guidelines, Mr. Angelos argues, reflect the judgment of experts appointed by Congress to determine "just punishment" for federal criminal offenses. Because his sentence, the result of 924(c), is at such discrepancy with

the Guidelines determination of “just punishment,” Mr. Angelos argues that his sentence is irrational. . . .

In this case, neither side has offered any strong reason for believing that the sentence the Guidelines alone provide for would not achieve just punishment. . . . Bearing firmly in mind the conclusion of Congress’ expert agency that 121 months is the longest appropriate prison term for all the criminal conduct in this case, it comes as a something of a shock to then consider the § 924(c) counts. . . .

Mr. Angelos [also] contends that his § 924(c) sentence is not only unjust but also irrational when compared to the punishment imposed for other more serious federal crimes. . . .

. . . The § 924(c) counts pile on an additional 55 years *solely* for three offenses of possessing firearms in connection with that trafficking. . . . Section 924(c) punishes Angelos more harshly for crimes that threaten potential violence than for crimes that conclude in actual violence to victims (e.g., aircraft hijacking, second-degree murder, racist assaults, kidnapping, and rape). This factor, therefore, also suggests the irrationality of § 924(c).

Mr. Angelos also argues that § 924(c) is irrational in failing to distinguish between the recidivist and the first-time offender. . . .

. . . In 1993 in *Deal v. United States*, the Supreme Court . . . [read] the “second or subsequent” language in § 924(c) to apply equally to the recidivist who is convicted of violating § 924(c) on separate occasions after serving prison time and to the defendant who is convicted of multiple § 924(c) counts in the same proceeding stemming from a single indictment. . . . This is what is known as “count stacking.” When multiple § 924(c) counts are stacked on top of each other, they produce lengthy sentences that fail to distinguish between first offenders (like Mr. Angelos) and recidivist offenders. . . .

Other true recidivist statutes do not operate this way. Instead, they graduate punishment (albeit only roughly) between first offenders and subsequent offenders. . . .

. . . [C]rime victims expect that the penalties the court imposes will fairly reflect the harms that they have suffered. When the sentence for actual violence inflicted on a victim is dwarfed by a sentence for carrying guns to several drug deals, the implicit message to victims is that their pain and suffering counts for less than some abstract “war on drugs.” . . .

. . . [W]hat can be said on behalf of the statute? The Sentencing Commission has catalogued the six rationales that are said to undergird mandatory sentencing schemes such as § 924(c):

- (1) Assuring “just” (i.e. appropriately severe) punishment,
- (2) elimination of sentence disparities,
- (3) judicial economies resulting from increased pressure on defendants to plead guilty,
- (4) stronger inducements for knowledgeable offenders to cooperate in the investigation of others,
- (5) more effective deterrence, and
- (6) more effective incapacitation of the serious offender. . . .

If the court were to evaluate these competing tradeoffs, it would conclude that stacking § 924(c) counts on top of each other for first-time drug offenders who have merely possessed firearms is not a cost-effective way of obtaining deterrence. It is not enough to simply be “tough” on crime. Given limited resources in our society, we also have to be “smart” in the way we allocate our resources. But these tradeoffs are the subject of reasonable debate. It is not the proper business of the court to second-guess the congressional judgment that § 924(c) is a wise investment of resources. Instead, in conducting rational basis review of the statute, the court is only to determine whether “any ground can be conceived to justify [the statutory scheme] as rationally related to a legitimate government interest.” “Where there are ‘plausible reasons’ for Congress’ action, [the court’s] inquiry is at an end.” . . . Accordingly, the court reluctantly concludes that § 924(c) survives rational basis scrutiny. While it imposes unjust punishment and creates irrational classifications, there is a “plausible reason” for Congress’ action. As a result, this court’s obligation is to follow the law and to reject Mr. Angelos’ equal protection challenge to the statute.

In [Mr. Angelos’] argument, he is joined in an *amicus* brief filed by a distinguished group of 29 former United States District Judges, United States Circuit Court Judges, and United States Attorneys [arguing] . . . that controlling Eighth Amendment case law places an outer limit on punishments that can be imposed for criminal offenses, forbidding penalties that are grossly disproportionate to any offense. . . .

. . . [T]he court must engage in a proportionality analysis [and] examine (1) the nature of the crime and its relation to the punishment imposed, (2) the punishment for other offenses in this jurisdiction, and (3) the punishment for similar offenses in other jurisdictions.

. . . Thus, the proportionality question in this case boils down to whether the 55-year sentence is . . . disproportionate to the offense of carrying or possessing firearms three times in connection with dealing marijuana.

. . . In weighing the gravity of the offenses, the court should consider the offenses of conviction and the defendant's criminal history, as well as "the harm caused or threatened to the victim or society, and the culpability of the offender." Simply put, "[d]isproportionality analysis measures the relationship between the nature and number of offenses committed and the severity of the punishment inflicted upon the offender."

The criminal history in this case is easy to describe. Mr. Angelos has no prior adult criminal convictions and is treated as a first-time offender under the Sentencing Guidelines.

The sentence-triggering criminal conduct in this case is also modest. Here, on two occasions while selling small amounts of marijuana, Mr. Angelos possessed a handgun under his clothing, but he never brandished or used the handgun. The third relevant crime occurred when the police searched his home and found handguns in his residence. These handguns had multiple purposes—including recreational activities—but because Mr. Angelos also used the gun to protect himself while dealing drugs, the possession of these handguns is also covered by § 924(c). Mr. Angelos did not engage in force or violence, or threats of force or violence, in furtherance of or in connection with the offenses for which he has been convicted. No offense involved injury to any person or the threat of injury to any person. It is well-established that crimes marked by violence or threat of violence are more serious and that the absence of direct violence affects the strength of society's interest in punishing a particular criminal.

It is relevant on this point that the Sentencing Commission has reviewed crimes like Mr. Angelos' and concluded that an appropriate penalty for all of Mr. Angelos' crimes is no more than about ten years (121 months). . . .

The next . . . factor requires comparing Mr. Angelos' sentence with the sentences imposed on other criminals in the federal system. Generally, "[i]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive." This factor points strongly in favor of finding that the sentence in this case is excessive. . . . Mr. Angelos will receive a far longer sentence than those imposed in the federal system for such major crimes as aircraft hijacking, second-degree murder, racial beating inflicting life-threatening injuries, kidnapping, and rape. Indeed, Mr. Angelos will receive a far longer sentence than those imposed for three aircraft

hijackings, three second-degree murders, three racial beatings inflicting life-threatening injuries, three kidnappings, and three rapes. Because Mr. Angelos is “treated in the same manner as, or more severely than, criminals who have committed far more serious crimes,” it appears that the second factor is satisfied.

The final . . . factor requires the court to examine “sentences imposed for the same crime in other jurisdictions.” Evaluating this factor is also straightforward. Mr. Angelos sentence is longer than he would receive in any of the fifty states. . . .

. . . But before the court declares the sentence unconstitutional, there is one last obstacle to overcome. The court is keenly aware of its obligation to follow precedent The Supreme Court has considered one case that might be regarded as quite similar to this one. In *Hutto v. Davis* (1982), the Supreme Court held that two consecutive twenty-year sentences—totaling forty years—for possession of nine ounces of marijuana said to be worth \$200 did not violate the Eighth Amendment. If *Davis* remains good law, it is hard see how the sentence in this case violates the Eighth Amendment.

[The court then specifies a number of more recent cases that continue to cite *Davis* as precedent in Eighth Amendment challenges to sentences.]

In light of these continued references to *Davis*, the court believes it is it obligated to follow its holding here. . . . Under *Davis*, Mr. Angelos’ sentence is not cruel and unusual punishment. Therefore, his Eighth Amendment challenge must be rejected. . . .

Having disposed of the legal arguments in this case, it seems appropriate to make some concluding, personal observations. I have been on the bench for nearly two-and-half years now. During that time, I have sentenced several hundred offenders under the Sentencing Guidelines and federal mandatory minimum statutes. By and large, the sentences I have been required to impose have been tough but fair. In a few cases, to be sure, I have felt that either the Guidelines or the mandatory minimums produced excessive punishment. But even in those cases, the sentences seemed to be within the realm of reason.

This case is different. It involves a first offender who will receive a life sentence for crimes far less serious than those committed by many other offenders—including violent offenders and even a murderer—who have been before me. . . . I am legally obligated to impose this sentence. But I feel ethically obligated to bring this injustice to the attention of those who are in a position to do something about it. . . .

The 55-year sentence mandated by § 924(c) in this case appears to be unjust, cruel, and irrational. But our constitutional system of government requires the court to follow the law, not its own personal views about what the law ought to be. Perhaps the court has overlooked some legal point, and that the appellate courts will find Mr. Angelos' sentence invalid. But applying the law as the court understands it, the court sentences Mr. Angelos to serve a term of imprisonment of 55 years and one day. The court recommends that the President commute this unjust sentence and that the Congress modify the laws that produced it. The Clerk's Office is directed to forward a copy of this opinion with its commutation recommendation to the Office of Pardon Attorney and to the Chair and Ranking Member of the House and Senate Judiciary Committees.

In 2013, the United States Sentencing Commission recommended eliminating mandatory minimums for certain crimes and restricting charge "stacking" (such as the three gun counts in the *Angelos* case). Further, a group of former judges, prosecutors, and other individuals wrote to President Obama in support of commutation of Mr. Angelos sentence. As of this writing (June 2014), Mr. Angelos remains incarcerated.

S v. M
Constitutional Court of South Africa
(2007) (2) SACR 539

SACHS J:

1. When considering whether to impose imprisonment on the primary caregiver of young children, did the courts below pay sufficient attention to the constitutional provision that in all matters concerning children, the children's interests shall be paramount?

2. M is a 35 year old single mother of three boys aged 16, 12, and 8. In 1996 she was convicted of fraud and sentenced to a fine coupled with a term of imprisonment that was suspended for five years. In 1999 she was charged again with fraud, and while out on bail after having been in prison for a short period, committed further fraud. In 2002 she was convicted in the Wynberg Regional

Court on 38 counts of fraud and four counts of theft. The Court took all the counts together for purposes of sentence. . . . The Court asked for a correctional supervision report. The report indicated that M would be an appropriate candidate for a correctional supervision order. Despite strong pleas from her attorney that she not be sent to prison the Court sentenced her to four years' direct imprisonment.

3. . . . The High Court later held that she had been wrongly convicted on a count of fraud . . . [and] converted her sentence to one of imprisonment under section 276(1)(i)2 of the Criminal Procedure Act (the CPA). The effect of this change was that after she had served eight months imprisonment, the Commissioner for Correctional Services (the Commissioner) could authorise her release under correctional supervision. The Court denied her leave to appeal against this sentence to the Supreme Court of Appeal.

4. M then petitioned the Supreme Court of Appeal for leave to appeal against the order of imprisonment. The Supreme Court of Appeal turned down her request. It did not give reasons. She next applied to this Court for leave to appeal against the refusal of the Supreme Court of Appeal to hear her oral argument, as well as against the sentence imposed by the High Court. . . .

10. Sentencing is innately controversial. However, all the parties to this matter agreed that . . . the nature of the crime, the personal circumstances of the criminal and the interests of the community are the relevant factors determinative of an appropriate sentence. . . .

12. Section 28(2) of the Constitution provides that “[a] child’s best interests are of paramount importance in every matter concerning the child.” . . .

20. No constitutional injunction can in and of itself isolate children from the shocks and perils of harsh family and neighbourhood environments. What the law can do is create conditions to protect children from abuse and maximise opportunities for them to lead productive and happy lives. Thus, even if the State cannot itself repair disrupted family life, it can create positive conditions for repair to take place, and diligently seek wherever possible to avoid conduct of its agencies which may have the effect of placing children in peril. It follows that section 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk. Similarly, in situations where rupture of the family becomes inevitable, the State is obliged to minimise the consequent negative effect on children as far as it can. . . .

32. . . . [S]ection 28(2) of the Constitution should be read with section 28(1)(b) which provides that every child has a right to family or parental care, or appropriate alternative care when removed from the family environment. . . . [T]hese provisions impose four responsibilities on a sentencing court when a custodial sentence for a primary caregiver is in issue. They are:

- To establish whether there will be an impact on a child.
- To consider independently the child's best interests.
- To attach appropriate weight to the child's best interests.
- To ensure that the child will be taken care of if the primary caregiver is sent to prison.

33. . . . Focused and informed attention needs to be given to the interests of children at appropriate moments in the sentencing process. The objective is to ensure that the sentencing court is in a position adequately to balance all the varied interests involved, including those of the children placed at risk. This should become a standard preoccupation of all sentencing courts. To the extent that the current practice of sentencing courts may fall short in this respect, proper regard for constitutional requirements necessitates a degree of change in judicial mindset. Specific and well-informed attention will always have to be given to ensuring that the form of punishment imposed is the one that is least damaging to the interests of the children, given the legitimate range of choices in the circumstances available to the sentencing court. . . .

37. These guidelines are consistent with the State's constitutional duty to protect life, limb and property by diligently prosecuting crime. A balancing exercise has to be undertaken on a case-by-case basis. It becomes a matter of context and proportionality. Two competing considerations have to be weighed by the sentencing court.

38. The first is the importance of maintaining the integrity of family care. .

..

39. The second consideration is the duty on the State to punish criminal misconduct. . . .

46. A rather perfunctory question put to M by the Regional Magistrate and by the prosecutor at her trial centred around whether, if she went to prison, the children would not be on the street. That enquiry was inadequate. . . .

48. I conclude therefore that the Regional Magistrate passed sentence without giving sufficient independent and informed attention as required by

section 28(2) read with section 28(1)(b), to the impact on the children of sending M to prison. This failure carried through into the approach adopted by the High Court. . . . In these circumstances the sentencing Courts misdirected themselves by not paying sufficient attention to constitutional requirements. This Court is therefore entitled to reconsider the appropriateness of the sentence imposed by the High Court. . . .

50. . . . I [now] consider the question of what the sentence should be. . . .

53. M's counsel . . . [points out] that she had already spent three months in prison, one month while awaiting trial before having been granted bail, and three months serving her sentence before being released on bail. Furthermore, the delay in finalising the matter had in fact provided M with the opportunity to demonstrate her capacity to develop business activities and increase her income, apparently through honest endeavour. For seven years she had manifested an ability and a will to function actively in society, apparently without breaking the law.

54. He added that all the reports indicate that she is a good parent in her dealings with her children and that they are devoted to her; even though some alternative family care could be arranged if she were to go to prison, this could involve splitting up the children and placing them in homes far away from the schools they presently attend and the community in which they live. As the curator pointed out, they live in a socially fragile environment and are at an age where major disruptions to their lives could have seriously deleterious consequences. Further imprisonment would in all probability impose more strain than the family could bear, with potentially devastating effects on the children. . . .

65. [It is true that] M is a repeat offender and committed the offences over a period of time and during the suspension period of her previous sentence. The offences were deliberate and calculated, involving deception of people who trusted her. She was driven by greed rather than need. Given the seriousness of her misconduct, the sentence of four years' imprisonment must stand. M has already spent three months in prison, one awaiting trial, and two after the sentence was imposed. . . .

66. Sentencing is always difficult. Nevertheless, I have come to the conclusion that, with the extra evidence made available to us, what is called for is backdating the sentence already served, suspending the rest of the sentence so that she need not go back to prison after this order is issued, and adding a correctional supervision order made by this Court

Moseneke DCJ, Mokgoro J, Ngcobo J, O'Regan J, Skweyiya J, Van der Westhuizen J concur in the judgment of Sachs J.

MADALA J:

. . . 124. Although a custodial sentence may seem harsh, the fact is that the applicant was shown mercy by the High Courts on a prior occasion but misused the opportunity of proving how repentant she was instead; she would not walk on a straight and narrow path for the benefit of the children during the period of suspension. She continued as if nothing had ever happened.

125. . . . I find no compelling justifications why the applicant should not serve her custodial sentence.

126. . . . I am not persuaded that the sentence imposed by the High Court should be interfered with in this matter. In the circumstances I would grant leave to appeal and dismiss the appeal.

Navsa AJ and Nkabinde J concur in the judgment of Madala J.

President of the Republic of South Africa and Another v. Hugo
Constitutional Court of South Africa
(1997) (4) SA 1

[In 1994, South Africa's President, citing his constitutional powers to pardon and reprieve offenders, granted early release, as authorized by a 1994 Act, to prisoners in certain categories, including mothers with children under the age of twelve. The respondent, John Phillip Peter Hugo, a single father of a child under twelve, challenged the constitutionality of the pardon as violating South Africa's constitutional prohibition on gender discrimination. The lower court held the Act unconstitutional, and the President and the Minister of Correctional Services appealed to the Supreme Constitutional Court.]

GOLDSTONE J:

3. . . . The respondent alleged that the Presidential Act was in violation of the provisions of section 8(1) and (2)* of the interim Constitution in as much as it unfairly discriminated against him on the ground of sex or gender and indirectly against his son in terms of section 8(2) because his incarcerated parent was not a female. . . .

37. The reason given by the President for the special remission of sentence of mothers with small children is that it will serve the interests of children. To support this, he relies upon . . . evidence . . . that mothers are, generally speaking, primarily responsible for the care of small children in our society. . . . This statement, of course, is a generalisation. There will, doubtless, be particular instances where fathers bear more responsibilities than mothers for the care of children. . . . However, although it may generally be true that mothers bear an unequal share of the burden of child rearing in our society as compared to the burden borne by fathers, it cannot be said that it will ordinarily be *fair* to discriminate between women and men on that basis.

38. For all that it is a privilege and the source of enormous human satisfaction and pleasure, there can be no doubt that the task of rearing children is a burdensome one. It requires time, money and emotional energy. For women without skills or financial resources, its challenges are particularly acute. For many South African women, the difficulties of being responsible for the social and economic burdens of child rearing, in circumstances where they have few skills and scant financial resources are immense. The failure by fathers to shoulder their share of the financial and social burden of child rearing is a primary cause of this hardship. The result of being responsible for children makes it more difficult for women to compete in the labour market and is one of the causes of the deep inequalities experienced by women in employment. The generalisation upon which the President relied is therefore a fact which is one of the root causes of women's inequality in our society. . . . It is unlikely that we will achieve a more egalitarian society until responsibilities for child rearing are more equally shared.

* Section 8(1) of the Interim Constitution of South Africa of 1994 provides: "Every person shall have the right to equality before the law and to equal protection of the law."

Section 8(2) provides: "No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language."

39. The fact, therefore, that the generalisation upon which the appellants rely is true, does not answer the question of whether the discrimination concerned is fair. Indeed, it will often be unfair for discrimination to be based on that particular generalisation. Women's responsibilities in the home for housekeeping and child rearing have historically been given as reasons for excluding them from other spheres of life. . . .

40. That, however, has not happened in this case. The President has afforded an opportunity to mothers, on the basis of the generalisation, that he has not afforded to fathers. In my view, the fact that the individuals who were discriminated against by a particular action, such as the one under consideration, were not individuals who belonged to a class who had historically been disadvantaged does not necessarily mean that the discrimination is fair.

41. The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. . . .

It is not enough for the appellants to say that the impact of the discrimination in the case under consideration affected members of a group that were not historically disadvantaged. They must still show in the context of this particular case that the impact of the discrimination on the people who were discriminated against was not unfair. In section 8(3), the interim Constitution contains an express recognition that there is a need for measures to seek to alleviate the disadvantage which is the product of past discrimination. We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context. . . .

43. To determine whether that impact was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in

terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination.

44. The power to pardon duly convicted prisoners in terms of which the President acted is conferred upon him by the interim Constitution. . . . It is not a private act of grace in the sense that the pardoning power in a monarchy may be. It is a recognition in the interim Constitution that a power should be granted to the President to determine when, in his view, the public welfare will be better served by granting a remission of sentence or some other form of pardon. . . .

46. [The presidential pardon may] will also provide an opportunity to the President to release groups of convicted prisoners where he or she considers it desirable in the public interest. This is such a case. Here the pardon was not to an individual to correct a miscarriage of justice, but to a group to confer an advantage upon them as an act of mercy at a time of great historical significance. . . .

47. In this case, two groups of people have been affected by the Presidential Act: mothers of young children have been afforded an advantage: an early release from prison; and fathers have been denied that advantage. The President released three groups of prisoners as an act of mercy. The three groups—disabled prisoners, young people and mothers of young children—are all groups who are particularly vulnerable in our society, and in the case particularly of the disabled and mothers of young children, groups who have been the victims of discrimination in the past. The release of mothers will in many cases have been of real benefit to children which was the primary purpose of their release. The impact of the remission on those prisoners was to give them an advantage. . . . It is true that fathers of young children in prison were not afforded early release from prison. But although that does, without doubt, constitute a disadvantage, it did not restrict or limit their rights or obligations as fathers in any permanent manner. It cannot be said, for example, that the effect of the discrimination was to deny or limit their freedom, for their freedom was curtailed as a result of their conviction, not as a result of the Presidential Act. That Act merely deprived them of an early release to which they had no legal entitlement. Furthermore, the Presidential Act does not preclude fathers from applying directly to the President for remission of sentence on an individual basis in the light of their own special circumstances. In his affidavit, the President made clear that fathers of young children could still apply in the ordinary way for remission of their sentences in the light of their particular circumstances. The Presidential Act may have denied them an opportunity it afforded women, but it cannot be said that it fundamentally impaired their rights of dignity or sense of equal worth. The impact upon the relevant fathers, was, therefore, in all the circumstances of the exercise of the

Presidential power, not unfair. The respondent, therefore, has no justified complaint under section 8(2) of the interim Constitution.

48. . . . [I]f the President decides to approach the issue of pardon or reprieve not in individual cases, but by reference to a category of offender, then it may be well nigh impossible to do so other than by the “blunt axe” method. In the legislative or administrative context other methods would usually be available and over or under inclusive classifications would be less likely to be held fair. I do not agree with Magid J, therefore, that on this account the President failed to discharge the burden placed upon him by the provisions of section 8(4) of the interim Constitution to establish that the discrimination was not unfair. . . .

51. . . . Here the Court is being asked to hold on the constitutionality of presidential powers exercised These constitutional powers, in their exercise by the President, could have benefited the applicant. The President, conceivably could have decided to include fathers with children under the age of twelve years. Had it been unconstitutional to exclude such fathers, the applicant would at the least have been entitled to a declaratory order in the terms suggested in the judgment of Kriegler J. . . .

52. In the result, however, it has been established that the President has exercised his discretion fairly and in a manner that was consistent with the interim Constitution. . . .

53. . . . The provisions of the Presidential Act No. 17 of 27 June, 1994 relating to the remission of sentences of mothers in prison on 10 May, 1994, with children under the age of twelve years, are declared to be not inconsistent with the Constitution of the Republic of South Africa Act 200 of 1993.

Chaskalson P, Mahomed DP, Ackermann, Langa, Madala, and Sachs JJ concur in the judgment of Goldstone J.

[Not reproduced here are the following separate opinions: Justice Didcott wrote an opinion concurring in setting aside the appeal, and dissenting on the validity of the presidential pardon. Justice Kriegler wrote a dissenting opinion holding that the presidential pardon was inconsistent with the prohibition on gender discrimination and therefore invalid. Justice Mokgoro wrote an opinion in which she concurred in the dismissal of the appeal on the grounds that, although she believed that the pardon constituted unfair gender discrimination, such discrimination was justifiable under section 33(1) of the Constitution. Justice O’Regan wrote a concurring opinion finding that the harm inflicted upon fathers was not severe, and therefore the pardon was not unfair.]

STRUCTURING SENTENCING DECISION-MAKING AND ALLOCATING THE AUTHORITY TO SENTENCE

Constraints on the Kind, Quality, and Range of Information To Be Considered

United States v. Watts
Supreme Court of the United States
519 U.S. 148 (1997)

PER CURIAM. . . .

. . . [The] police discovered cocaine base in a kitchen cabinet and two loaded guns and ammunition hidden in a bedroom closet of Watts' house. A jury convicted Watts of possessing cocaine base with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), but acquitted him of using a firearm in relation to a drug offense, in violation of 18 U.S.C. § 924(c). Despite Watts' acquittal on the firearms count, the District Court found by a preponderance of the evidence that Watts had possessed the guns in connection with the drug offense. In calculating Watts' sentence, the court therefore added two points to his base offense level under United States Sentencing Commission, Guidelines Manual § 2D1.1(b)(1) ["If a dangerous weapon (including a firearm) was possessed, increase [the base offense level] by 2 levels"]. The court of appeals vacated the sentencing, holding that "a sentencing judge may not, 'under *any* standard of proof,' rely on facts of which the defendant was acquitted." . . .

We begin our analysis with 18 U.S.C. § 3661, which codifies the longstanding principle that sentencing courts have broad discretion to consider various kinds of information. . . . We reiterated this principle in *Williams v. New York* (1949), in which a defendant convicted of murder and sentenced to death challenged the sentencing court's reliance on information that the defendant had been involved in 30 burglaries of which he had not been convicted. . . . Indeed, under the pre-Guidelines sentencing regime, it was "well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted."

The Guidelines did not alter this aspect of the sentencing court's discretion. . . . USSG § 1B1.3(a)(2) requires the sentencing court to consider "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction." Application Note 3 . . . gives the following example:

[W]here the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine . . . subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales

In short, we are convinced that a sentencing court may consider conduct of which a defendant has been acquitted. . . .

[S]entencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction. In [a case decided in the previous term], we held that a sentencing court could, consistent with the Double Jeopardy Clause, consider uncharged cocaine importation in imposing a sentence on marijuana charges that was within the statutory range, without precluding the defendant's subsequent prosecution for the cocaine offense. . . .

[Here], the jury acquitted the defendant of using or carrying a firearm during or in relation to the drug offense. That verdict does not preclude a finding by a preponderance of the evidence that the defendant did, in fact, use or carry such a weapon, much less that he simply *possessed* the weapon in connection with a drug offense. . . .

[Not reproduced here are the concurring opinion of Justice BREYER, the concurring opinion of Justice SCALIA, and the dissenting opinion Justice KENNEDY.]

STEVENS, J., dissenting.

"The Sentencing Reform Act of 1984 revolutionized the manner in which district courts sentence persons convicted of federal crimes." . . . Strict mandatory rules have dramatically confined the exercise of judgment based on a totality of the circumstances. . . .

In 1970, during the era of individualized sentencing, Congress enacted the statute now codified as 18 U.S.C. § 3661 to make clear that otherwise inadmissible evidence could be considered by judges in the exercise of their

sentencing discretion. The statute, however, did not tell the judge how to weigh the significance of any of that evidence. The judge was free to rely on any information that might shed light on a decision to grant probation, to impose the statutory maximum, or to determine the precise sentence within those extremes. . .

Although the Sentencing Reform Act of 1984 has cabined the discretion of sentencing judges, the 1970 statute remains on the books. . . . [Under this new regime], the role played by §3661 is of a narrower scope [being limited to the narrow area in which the sentencing judge now has discretion: in choosing the precise point within the calculated sentencing range]. . . .

In my opinion [the Sentencing Reform Act of 1984] should be construed in the light of the traditional requirement that criminal charges must be sustained by proof beyond a reasonable doubt. That requirement has always applied to charges involving multiple offenses as well as a single offense. . . . The notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to [our constitutional] jurisprudence. I respectfully dissent.

R. v. Angelillo

Supreme Court of Canada

[2006] 2 SCR 728

[J]udgment of McLachlin C.J. and Bastarache, LeBel, Deschamps and Charron JJ. delivered by

CHARRON, J. —

1. During sentencing, is it appropriate for the court to consider evidence of facts tending to establish the commission of another offence in respect of which the offender has been charged but not convicted? If such evidence is admissible in principle, is it in the interests of justice in the instant case to allow the Crown to introduce this fresh evidence on appeal?

2. After pleading guilty to a charge of theft, Gennaro Angelillo was sentenced to a term of imprisonment of two years less a day to be served in the community, subject to his complying with certain conditions At the time of sentencing, Crown counsel was unaware that Mr. Angelillo was under police

investigation once again for incidents that had occurred after his guilty plea and that later led to new charges. . . . [T]he Crown . . . sought leave to introduce fresh evidence, leave to appeal the sentence and a stay of sentence. The [Quebec] Court of Appeal dismissed the motion to introduce fresh evidence, because in its view “[t]his evidence is not relevant” and because “[t]o accept what the prosecution is proposing would mean accepting that the respondent can be punished more severely for committing an offence of which he might be found not guilty.” . . .

3. . . . According to the rules laid down in *Palmer v. The Queen* [1980], and applied in *R. v. Lévesque* [2000], an appellate court should not generally admit evidence if, by due diligence, it could have been adduced at trial—although this general principle is not to be applied as strictly in a criminal case as in civil cases—and should only admit evidence that is relevant and credible and that could reasonably be expected to have affected the result had it been adduced at trial together with the other evidence.

4. The Crown submits that the Court of Appeal erred in holding that evidence of facts tending to establish the commission of another offence is irrelevant to the determination of the appropriate sentence, regardless of the purpose being pursued, unless the offence in question resulted in a conviction. The Crown wishes to produce this fresh evidence not to prove that the other offence was committed, but for the sole purpose of establishing Mr. Angelillo’s character

5. Although . . . the fresh evidence is relevant and . . . in principle, evidence of facts tending to establish the commission of another offence of which the offender has not been convicted can in certain cases be admitted to enable the court to determine a just and appropriate sentence, I would, for the reasons that follow, dismiss the appeal. Since the fresh evidence constitutes the basis for outstanding charges against Mr. Angelillo for which he has not yet stood trial, it can be admitted only in the context of the procedure provided for in s. 725(1)(b) or (b.1) [of the Criminal Code.] The conditions for that procedure include a requirement that the offender’s consent be obtained. Furthermore, I feel that the Crown has not shown due diligence. Accordingly, the Court of Appeal’s decision not to admit the fresh evidence is affirmed and the appeal is dismissed. . . .

13. In *Lévesque*, this Court adapted to an appeal against sentence the four criteria set out in *Palmer* for determining whether it is in the interests of justice to admit fresh evidence on an appeal from a verdict:

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this

general principle will not be applied as strictly in a criminal case as in civil cases.

(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue relating to the sentence.

(3) The evidence must be credible in the sense that it is reasonably capable of belief.

(4) The evidence must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

14. In *Lévesque*, the Court recognized that the strict rules of a trial do not apply to a sentencing hearing, because in order to determine the appropriate sentence the judge must have as much information as possible about the accused. . . .

16. . . . I am of the view that the Crown did not act with due diligence and that, in the interests of the administration of justice, the failure to do so is determinative. . . . The record shows unequivocally that the Crown could have submitted the evidence in question to the trial judge were it not for [a] breakdown in communication [between the Crown counsel and the detective sergeant]. It cannot be in the interests of the administration of justice to condone such a lack of co-ordination and co-operation between the Crown and the police. . . .

18. Every accused person has the right to be presumed innocent. This fundamental right is not only set out in s. 6 [of the Criminal Code], but is also guaranteed by s. 11(d) of the *Canadian Charter of Rights and Freedoms*.^{*} However, the presumption of innocence is not irrebuttable. At the sentencing stage, it has obviously been rebutted with respect to the offence of which the accused has been convicted. There is therefore no question that, in determining the just and appropriate sentence, the judge can consider the underlying facts of the offence that has been proved. Moreover, sentencing is an individualized process in which the court must take into account not only the circumstances of the offence, but also the specific circumstances of the offender. . . .

^{*} Section 11(d) of the Canadian Charter of Rights and Freedoms provides: “Any person charged with an offence has the right . . . to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”

22. . . . Thus, the objectives of sentencing cannot be fully achieved unless the information needed to assess the circumstances, character and reputation of the accused is before the court. The court must therefore consider facts extrinsic to the offence, and the proof of those facts often requires the admission of additional evidence.

23. Since the offender must be punished only for the offence in issue, the court will generally not admit evidence of other offences that have not been proved. . . .

31. I cannot agree with Fish J., who would admit no evidence of acts tending to establish the commission of another offence in respect of which the offender has not been charged, except in the context of s. 725(1)(c). Under that provision, . . . the court may consider any facts *forming part of the circumstances of the offence* that could constitute the basis for a separate charge. I concede that there may be cases in which such facts are also relevant to the offender's character or reputation. But it is not always easy to tie evidence of reputation or character to a separate offence. Nor does such evidence always form part of the circumstances of the offence—sometimes it only forms part of the circumstances of the offender. With respect, if Fish J. were right, a pre-sentence report setting out facts demonstrating that the offender has a violent character, is a drug addict, has no respect for the court's authority or has not learned his or her lesson could violate the presumption of innocence, since such facts could very well tend to establish the commission of various offences, including assault, possession of narcotics and breach of recognizance. I do not believe this to be the effect of the presumption of innocence. . . .

36. The fact that Mr. Angelillo had been charged with two new counts of fraud, both of which were allegedly committed while he was waiting to be sentenced, was obviously relevant to the assessment of the danger his release would represent for the community. Had [the Court of Appeal] considered it necessary to do so, [it] could have postponed the sentencing hearing to a date after the interim release hearing regarding the new charges in order to be better informed of the risk resulting from the subsequent acts.

37. Furthermore, . . . Mr. Angelillo chose to present evidence relating to his character. . . . [Counsel for Mr. Angelillo] raised mitigating factors such as “the existence of remorse and regrets,” relying more specifically on the pre-sentence report, which states that Mr. Angelillo “has done some soul-searching, which seems to be sincere, about his inappropriate behaviour” and that his “time in court [has] had a major deterrent effect,” and concludes that Mr. “Angelillo is not dangerous and that his risk of re-offending is low.” Had Crown counsel been

aware of the new facts, she could have asked the court to order that the pre-sentence report be updated, as it was already almost a year old. It is reasonable to believe that the author of the updated report might have given a less optimistic opinion as to Mr. Angelillo's risk of re-offending. Without this update, there was a risk that the court might be deceived—which did in fact happen, according to the Crown. I agree that it is in the interests of justice to avoid such a result. . . .

FISH J.

40. . . . With respect, . . . I do not share my colleague's view that sentencing courts may consider uncharged *and unrelated* offences. Parliament has addressed the issue in s. 725(1)(c) In virtue of that provision, sentencing courts may consider uncharged offences only if they are related to the offence charged—that is to say, only if they consist in “facts forming part of the circumstances [of the crime for which the accused is to be sentenced].” And Parliament has taken care to protect offenders from being twice punished in this regard: Offences considered by the sentencing court pursuant to s. 725(1)(c) cannot form the basis of further proceedings against the offender.

41. Justice Charron would permit sentencing courts to consider uncharged offences even if they are unrelated, and she would remove for these unrelated offences the protection that Parliament has expressly provided for related offences. Moreover, as we shall see, this proposal rests on the doubtful proposition that evidence of an aggravating factor—other offences—is not introduced for purposes of punishment although it will almost invariably have that effect. . . .

Is Sentencing a “Judicial” or a “Legislative” Function?

An essential question in sentencing is which institution or institutions have the authority to (a) generate sentencing standards in general, (b) make the charging decision in the specific case, and (c) determine the punishment for an individual. Different sovereigns allocate that decisionmaking authority in different ways amongst legislatures, the executive (prosecutors), the judiciary, and administrative agencies (once parole authorities and now sentencing commissions). In *Kable v. Director of Public Prosecutions (NSW)* (1996), the Australian Federal Court grappled with the constitutionality of a statute that established preventive detention of defendants by characterizing the proceedings as civil proceedings, without the usual protections of criminal procedure. While ostensibly dealing with the power of Australian state courts to exercise federal judicial jurisdiction under Chapter III of the Commonwealth Constitution, the

decision had broader implications. It established an “incompatibility test”—to identify when courts were asked to exercise powers that were repugnant to or incompatible with the exercise of judicial power. As applied to sentencing, it raises the question of whether there is an irreducible judicial role in sentencing, which cannot be abrogated by legislative enactments.

In *United States v. Mistretta* (1989), the United States Supreme Court addressed a separation-of-powers challenge to the constitutionality of the Sentencing Reform Act, which created the United States Sentencing Commission and authorized the promulgation of Sentencing Guidelines by that entity. The majority dealt principally with the questions whether it was appropriate for the Sentencing Reform Act to designate that the Commission was an “independent” agency “in the judicial branch,” and whether Congress had given too much power to the Commission. Eight members of the Court found no constitutional infirmity, rejecting the claim that this agency “in the judicial branch” was in effect making new criminal law. Justice Scalia, in dissent, denied that the Commission was actually in the judicial branch (indeed, only three of its seven members had to be judges); he thought it was in *no* branch, a “sort of junior-varsity Congress . . . making . . . rules that have the effect of law.” Neither the majority nor the dissent addressed, or perhaps even saw, other fundamental constitutional issues, including (1) whether the Sentencing Guidelines unconstitutionally encroached on judicial power by aggrandizing prosecutorial control over sentencing, and (2) whether the Guidelines violated due process rights of defendants by providing penalties based on the defendant’s “real offense” conduct, not simply the crime of which he was convicted. (The latter was the basis for the Court’s 2005 decision in *United States v. Booker* holding that mandatory “real offense” sentencing is unconstitutional.)

Kable v. Director of Public Prosecutions (NSW)
Federal Court of Australia
189 CLR 51 (1996)

Brennan CJ, Dawson, Toohey, McHugh, Gaudron and Gummow JJ.

[Kable, charged with the murder of his wife, pled guilty to manslaughter and was sentenced to imprisonment for a minimum term of four years and an additional term of one year and four months. Once in prison, Kable’s actions—such as sending threatening letters to members of his deceased wife’s family—prompted concerns that her family remained at risk. With Kable’s release from custody imminent, the New South Wales Parliament passed the Community Protection Act 1994 (NSW) (the Act), which conferred jurisdiction upon the Supreme Court of New South Wales to make an order for the preventive detention

of Kable. Although the text of the Act suggested it applied to any person, through subsequent amendment, the Act was confined to Kable alone.

Kable argued both that the Act constituted an improper exercise of judicial power by the Parliament of New South Wales and that the Act invested in the Supreme Court of New South Wales a non-judicial power which is incompatible with Ch III of the *Commonwealth Constitution*.*

Toohey, Gaudron, McHugh and Gummow JJ held that the Act was invalid, by Toohey J on the ground that the Supreme Court of New South Wales was exercising federal jurisdiction, in the exercise of which a court could not act in a manner incompatible with Chapter III of the Commonwealth Constitution. Gaudron, McHugh and Gummow JJ concurred on the grounds that the exercise of jurisdiction under the Act was incompatible with the integrity, independence, and impartiality of the Supreme Court as a court in which federal jurisdiction also had been invested under Chapter III. Brennan and Dawson JJ dissented.]

Toohey, J.:

. . . Clearly enough, the original intention of the legislature was to enact a statute of more general application; what emerged was legislation directed at one person only. . . .

[A]lthough nothing in Ch III [of the Commonwealth Constitution] prevents a State from conferring executive government functions on a State court judge as *persona designata*, if the appointment of a judge as *persona designata* gave the appearance that the court as an institution was not independent of the executive government of the State, it would be invalid. . . .

[A]lthough New South Wales has no entrenched doctrine of the separation of powers and although the Commonwealth doctrine of separation of powers cannot apply to the State, in some situations the effect of Ch III of the *Constitution* may lead to the same result as if the State had an enforceable doctrine of separation of powers. This is because it is a necessary implication of the Constitution's plan of an Australian judicial system with State courts invested

* Chapter III, Section 71 provides: "The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes."

with federal jurisdiction that no government can act in a way that might undermine public confidence in the impartial administration of the judicial functions of State courts. . . .

. . . [The Act's] object is to detain the appellant not for what he has done but for what the executive government of the State and its Parliament fear that he might do. . . .

In my opinion, those who initiated and passed the Act plainly expected and intended that the imprisonment of the appellant would continue after the expiration of his sentence for the manslaughter of his wife. . . .

[W]hatever else the Parliament of New South Wales may be able to do in respect of the preventive detention of individuals who are perceived to be dangerous, it cannot, consistently with Ch III of the *Constitution*, invoke the authority of the Supreme Court to make the orders against the appellant by the methods which the Act authorises. This is because the Act and its procedures compromise the institutional impartiality of the Supreme Court. . . .

. . . [N]o Parliament in the Commonwealth of Australia has ever given a court a jurisdiction that is remotely similar to that which the Act gives to the Supreme Court of New South Wales. It is not merely that the Act involves the Supreme Court in the exercise of non-judicial functions or that it provides for punishment by way of imprisonment for what the appellant is likely to do as opposed to what he has done. The Act seeks to ensure, so far as legislation can do it, that the appellant will be imprisoned by the Supreme Court when his sentence for manslaughter expires. . . .

The Act expressly removes the ordinary protections inherent in the judicial process. It does so by stating that its object is the preventive detention of the appellant, by removing the need to prove guilt beyond reasonable doubt, by providing for proof by materials that may not satisfy the rules of evidence and by declaring the proceedings to be civil proceedings although the Court is not asked to determine the existing rights and liabilities of any party or parties. It is not going too far to say that proceedings under the Act bear very little resemblance to the ordinary processes and proceedings of the Supreme Court. . . .

The Act is thus far removed from the ordinary incidents of the judicial process. It invests the Supreme Court with a jurisdiction that is purely executive in nature. . . .

Gaudron J. [concurring separately:]

. . . The question whether the Constitution requires that State courts not have particular powers conferred upon them depends, in my view, on a proper understanding of the integrated judicial system for which Ch III provides—the “autochthonous expedient,” as it has been called. . . .

The integrity of the courts depends on their acting in accordance with the judicial process and, in no small measure, on the maintenance of public confidence in that process. . . .

The Act, in several of its provisions, suggests that an application under s 5(1) is to be determined in accordance with rules generally applicable in legal proceedings. In this respect, I have already referred to the description of the appellant as “the defendant,” the description of the proceedings as “civil proceedings” and the suggestion that the rules of evidence apply when, in significant respects, they do not. Mention has also been made of s 16 which provides for proceedings under s 5(1) to be “commenced by summons in accordance with rules of court.” In truth, the proceedings contemplated by s 5(1) are unique with unique procedures and with rules which apply only to the appellant. They are proceedings which the Act attempts to dress up as proceedings involving the judicial process. In so doing, the Act makes a mockery of that process and, inevitably, weakens public confidence in it. And because the judicial process is a defining feature of the judicial power of the Commonwealth, the Act weakens confidence in the institutions which comprise the judicial system brought into existence by Ch III of the *Constitution*.

Section 5(1) of the Act is invalid. So too are the remaining provisions of the Act which serve no purpose other than to carry s 5(1) into effect.

McHugh J. [concurring separately:]

. . . No one who has read the lengthy and anxious judgment of Levine J making the order imprisoning the appellant or the judgments of the judges of the Court of Appeal upholding that order or the judgment of Grove J refusing to make a further order against the appellant could doubt their independence and impartiality in administering the law. The judgments of Levine J and the Court of Appeal demonstrate that the order against the appellant was made and upheld only because the object of the Act, the evidence and the methods and burden of proof left them no alternative to making and upholding the s 5 order. But the constitutional validity of the Act cannot depend on how the judges of the Supreme Court discharge the duty that the Act imposes upon them. The Act was either

valid or invalid when it was given the Royal Assent. Nothing that the judges of the Supreme Court did after its enactment could change its status as a valid or invalid piece of legislation.

At the time of its enactment, ordinary reasonable members of the public might reasonably have seen the Act as making the Supreme Court a party to and responsible for implementing the political decision of the executive government that the appellant should be imprisoned without the benefit of the ordinary processes of law. Any person who reached that conclusion could justifiably draw the inference that the Supreme Court was an instrument of executive government policy. That being so, public confidence in the impartial administration of the judicial functions of the Supreme Court must inevitably be impaired. The Act therefore infringed Ch III of the *Constitution* and was and is invalid. . . .

Dawson J., dissenting:

. . . The detention which the Act authorises the court to impose upon the appellant is, the respondent contends, preventive rather than punitive, although the appellant understandably points to the fact that the detention is in a prison, a place of punishment, rather than some other institution. . . . The issues raised are not predetermined by the legislation, as the refusal by Grove J to grant a second preventive detention order demonstrates. Clearly the Act does not amount to a bill of attainder or of pains and penalties. It does not involve a legislative judgment of criminal guilt and, in any event, does not have an ex post facto operation.

. . . [T]hese considerations raise matters which go to the desirability of the Act rather than to its validity. Notwithstanding that the wisdom of the policy adopted by the legislature is open to question, the policy is a matter for the legislature rather than for this Court. . . .

[Omitted here is a concurring opinion by Gummow J., and a dissenting opinion by Brennan CJ.]

United States v. Mistretta
Supreme Court of the United States
488 U.S. 361 (1989)

Justice BLACKMUN delivered the opinion of the Court.

. . . [W]e granted certiorari . . . in order to consider the constitutionality of the Sentencing Guidelines promulgated by the United States Sentencing Commission. The Commission is a body created under the Sentencing Reform Act of 1984

Historically, federal sentencing—the function of determining the scope and extent of punishment—never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of Government. . . . Congress early abandoned fixed-sentence rigidity, however, and put in place a system of ranges within which the sentencer could choose the precise punishment. Congress delegated almost unfettered discretion to the sentencing judge to determine what the sentence should be within the customarily wide range so selected. . . .

Serious disparities in sentences, however, were common. . . . Congress had wrestled with the problem for more than a decade when, in 1984, it enacted the sweeping reforms that are at issue here. . . .

Before settling on a mandatory-guideline system, Congress considered other competing proposals for sentencing reform. It rejected strict determinate sentencing because it concluded that a guideline system would be successful in reducing sentence disparities while retaining the flexibility needed to adjust for unanticipated factors arising in a particular case. The Judiciary Committee rejected a proposal that would have made the sentencing guidelines only advisory.

The Act, as adopted . . . rejects imprisonment as a means of promoting rehabilitation It consolidates the power that had been exercised by the sentencing judge and the Parole Commission to decide what punishment an offender should suffer. This is done by creating the United States Sentencing Commission, directing that Commission to devise guidelines to be used for sentencing, and prospectively abolishing the Parole Commission. . . . It makes all sentences basically determinate. It makes the Sentencing Commission's guidelines binding on the courts It authorizes limited appellate review of the sentence. . . . Thus, guidelines were meant to establish a range of determinate sentences for categories of offenses and defendants according to various specified factors, “among others.”

The Commission is established “as an independent commission in the judicial branch of the United States.” It has seven voting members (one of whom is the Chairman) appointed by the President “by and with the advice and consent of the Senate.” “At least three of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States.” No more than four members of the Commission shall be members of the same political party. The Attorney General, or his designee, is an ex officio non-voting member. The Chairman and other members of the Commission are subject to removal by the President “only for neglect of duty or malfeasance in office or for other good cause shown.” Except for initial staggering of terms, a voting member serves for six years and may not serve more than two full terms. . . .

[W]e turn to Mistretta’s claim that the Act violates the constitutional principle of separation of powers. . . . He argues that Congress, in constituting the Commission as it did, effected an unconstitutional accumulation of power within the Judicial Branch while at the same time undermining the Judiciary’s independence and integrity. . . . At the same time, petitioner asserts, Congress unconstitutionally eroded the integrity and independence of the Judiciary by requiring Article III judges to sit on the Commission, by requiring that those judges share their rulemaking authority with nonjudges, and by subjecting the Commission’s members to appointment and removal by the President. According to petitioner, Congress, consistent with the separation of powers, may not upset the balance among the Branches by co-opting federal judges into the quintessentially political work of establishing sentencing guidelines, by subjecting those judges to the political whims of the Chief Executive, and by forcing judges to share their power with nonjudges.

. . . Although the unique composition and responsibilities of the Sentencing Commission give rise to serious concerns about a disruption of the appropriate balance of governmental power among the coordinate Branches, we conclude, upon close inspection, that petitioner’s fears for the fundamental structural protections of the Constitution prove, at least in this case, to be “more smoke than fire,” and do not compel us to invalidate Congress’ considered scheme for resolving the seemingly intractable dilemma of excessive disparity in criminal sentencing. . . .

. . . As we described at the outset, the sentencing function long has been a peculiarly shared responsibility among the Branches of Government and has never been thought of as the exclusive constitutional province of any one Branch. For more than a century, federal judges have enjoyed wide discretion to determine the appropriate sentence in individual cases and have exercised special authority

to determine the sentencing factors to be applied in any given case. Indeed, the legislative history of the Act makes clear that Congress' decision to place the Commission within the Judicial Branch reflected Congress' "strong feeling" that sentencing has been and should remain "primarily a judicial function." That Congress should vest such rulemaking in the Judicial Branch, far from being "incongruous" or vesting within the Judiciary responsibilities that more appropriately belong to another Branch, simply acknowledges the role that the Judiciary always has played, and continues to play, in sentencing. . . .

In sum, since substantive judgment in the field of sentencing has been and remains appropriate to the Judicial Branch, and the methodology of rulemaking has been and remains appropriate to that Branch, Congress' considered decision to combine these functions in an independent Sentencing Commission and to locate that Commission within the Judicial Branch does not violate the principle of separation of powers. . . .

Justice SCALIA, dissenting.

While the products of the Sentencing Commission's labors have been given the modest name "Guidelines," they have the force and effect of laws, prescribing the sentences criminal defendants are to receive. A judge who disregards them will be reversed. I dissent from today's decision because I can find no place within our constitutional system for an agency created by Congress to exercise no governmental power other than the making of laws. . . .

Today's decision follows the regrettable tendency of our recent separation-of-powers jurisprudence . . . to treat the Constitution as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much—how much is too much to be determined, case-by-case, by this Court. The Constitution is not that. Rather, as its name suggests, it is a prescribed structure, a framework, for the conduct of government. In designing that structure, the Framers *themselves* considered how much commingling was, in the generality of things, acceptable, and set forth their conclusions in the document. . . .

I think the Court errs, in other words, not so much because it mistakes the degree of commingling, but because it fails to recognize that this case is not about commingling, but about the creation of a new Branch altogether, a sort of junior-varsity Congress. It may well be that in some circumstances such a Branch would be desirable; perhaps the agency before us here will prove to be so. But there are many desirable dispositions that do not accord with the constitutional structure we

live under. And in the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous. . . .



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