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Introduction

This book presents an overview of the extent to which the UK Supreme Court is prepared to uphold human rights. Basing itself not just on the judgments of the Supreme Court itself, which was established as recently as October 2009, but also on the decisions of the court it replaced, the Appellate Committee of the House of Lords, the book focuses on the attitudes struck by the United Kingdom's most senior judges in relation to the rights set out in the Human Rights Act 1998. Those rights, called 'Convention rights' in the Act, are taken directly from the European Convention on Human Rights. Litigants in the United Kingdom who are unhappy with the way in which the top domestic court has protected their Convention rights can apply to have their complaint dealt with again by the European Court of Human Rights in Strasbourg. It is frequently possible, therefore, to measure the thinking of top UK judges against that of judges in the European Court. This book tries to conduct that measurement but also analyses the numerous human rights judgments of the House of Lords and Supreme Court which have not been reviewed in Strasbourg.

The study pays close attention to the views of individual judges in the domestic court and flags up the sharp differences of opinion which have often been expressed. It does so not just in relation to the substantive content of Convention rights but also in relation to how those rights have been vindicated through the Human Rights Act, looking at issues such as who is bound by the Act and the extent to which it permits judges to change the commonly accepted meaning of legislation. With a view to predicting how new issues might be dealt with, the book identifies trends to date and characterizes the attitudes of Supreme Court Justices as indicated in their judicial and extra-judicial pronouncements. It does not purport to be a detailed account of the current state of the whole of human rights law in the United Kingdom.

This opening chapter deals with relevant preliminary matters. It begins by explaining the origins of the Supreme Court and considering what difference its creation may have made to the way our top judges operate in the human rights field. It then looks at the jurisdiction of the Supreme Court, giving special attention to the controversies surrounding its role in relation to Scotland. There follow sections on the composition of the Court, the system for appointing new Justices, and the characteristics of those appointed. A further section looks at factors that can influence the processing of appeals to the Court, especially appeals concerning human rights. Finally the chapter sets out what will be covered in the book's subsequent chapters.

The new Supreme Court

The Supreme Court came into existence on 1 October 2009, replacing the Appellate Committee of the House of Lords as the top court within the United Kingdom.[1] The Appellate Committee had existed since 1876, but for centuries before then the House functioned on a non-statutory basis as the final court of appeal on most matters arising within the court systems of England and Wales, Scotland, and Ireland.[2] The decision to create the Supreme Court was an unexpected and controversial one when it was announced by Prime Minister Tony Blair in 2003, and was not unanimously welcomed by the judges who were then serving in the Appellate Committee as Lords of Appeal in Ordinary, or Law Lords as they were more usually called.[3] But the controversy was really over peripheral matters such as where the top court should be located, who its members should be, and what it would cost to run, not over the more substantive issues such as what the new Court's jurisdiction should be and whether its role within the unwritten constitution of the United Kingdom should be different from that played by the Appellate Committee. What seems to have mainly motivated the politicians who advocated the new Court was the doctrine of separation of powers: in the twenty-first century it looked very odd, especially in a country committed to the rule of law[4] and to the appearance, as well as the reality, of fairness and impartiality, that the top domestic court was physically located in the same building as the national Parliament and whose judges were *ex officio* members of one of the two chambers of that Parliament.[5] In any event, the man who more than anyone else ensured that the Supreme Court would become a reality is Lord Bingham of Cornhill, the Senior Law Lord from 2000 to 2008.[6]

There was some speculation that, despite protestations to the contrary, the new Court might seek to claim a greater importance than its predecessor, that the views of individual Justices might attract much greater publicity, and that the Court might

[1] It had been argued for by Lord Steyn, a serving Law Lord, as early as 2002: Steyn (2002). He reminds us that as far back as 1867 Walter Bagehot had written: 'The Supreme Court of the English people ought to be a great conspicuous tribunal … [and] … ought not to be hidden beneath the robes of a legislative assembly': Bagehot (1993), 149.

[2] Jones (2009); Keane (2009); Phillips (2008).

[3] Le Sueur (2009); Darbyshire (2011), Ch 15. Lords Nicholls, Hoffmann, Hope, Hutton, Millett, and Rodger all believed that 'on pragmatic grounds, the proposed change is unnecessary and will be harmful', while Lords Bingham, Steyn, Saville, and Walker saw 'the functional separation of the judiciary at all levels from the legislature and the executive as a cardinal feature of a modern, liberal, democratic state governed by the rule of law'; Lord Hobhouse was in favour of a Supreme Court in principle, but did not think the government's particular proposal was a good one. See 'The Law Lords' response to the Government's consultation paper on Constitutional reform: a Supreme Court for the United Kingdom' (CP 11/03 July 2003), available at <http://www.parliament.uk/documents/judicial-office/judicialscr071103.pdf> (last accessed 4 December 2012).

[4] The Constitutional Reform Act 2005, s 1(a), states that there is an 'existing constitutional principle of the rule of law'. For more on this Act, see Mance (2006).

[5] In *McGonnell v UK* (2000) 30 EHRR 289 the European Court of Human Rights held that Art 6 of the ECHR was breached by the fact that the Bailiff of Guernsey was both President of the island's Parliament and a judge in its Royal Court. The Lord Chancellor in the UK government was entitled to sit as a judge in the House of Lords, but that practice was abandoned in 2001 and there is no provision in the Constitutional Reform Act 2005 which allows the Lord Chancellor to sit in the Supreme Court.

[6] See the tribute by Hale (2009b), who says (at 209) that the Supreme Court may be Lord Bingham's 'most important and long-lasting legacy'. For his views on human rights, see Bingham (1993) and (2010).

change the working methods of the House of Lords so as to operate in a more modern and accessible way. In fact, apart from in that last respect, most of this speculation has proved wide of the mark, at any rate so far. The Supreme Court has adopted a forthright, but hardly surprising, Mission Statement:

> [T]o ensure that the President, Deputy President and Justices of the Court can deliver just and effective determination of appeals heard by the Court, in ways which also best develop the Rule of Law and the administration of justice.[7]

Bearing that statement in mind, any sober comparison of the 'product' of the Supreme Court with that of the House of Lords—in terms of judgments issued—is bound to conclude that it is very much a case of *plus ça change plus c'est la même chose*.[8] It is not easy to demonstrate that the Justices have in any way been more activist or outspoken than the Law Lords, even in the field of human rights, especially as the Law Lords themselves had a full nine years to acclimatize to the challenges thrown up by the Human Rights Act. The Justices do now compile and deliver their judgments slightly differently from the way their predecessors did,[9] with the first judgment no longer always being that of the most senior judge but rather that of the judge who has written the most detailed judgment explaining why the decision has gone a certain way; any dissenting judgments are usually placed after the judgments of all the judges in the majority. Moreover, Justices are increasingly issuing joint judgments, and the provision of summaries of Supreme Court decisions for the benefit of the media ensures that they are more accurately reported by the national press. In reality, the only *significant* change has been that the Supreme Court has much more frequently than the House of Lords convened a bench of more than five judges to hear appeals. In its first three 'legal' years, 2009–12, out of 164 separate sets of judgments issued by the Justices, no fewer than 35 involved seven Justices and a further 12 involved nine Justices.[10] Of the 35 cases, 14 concerned human rights issues, and of the 12 cases seven involved human rights issues. Altogether, 29 per cent of all the cases dealt with involved more than five Justices, and 45 per cent of the cases involving more than five Justices concerned human rights issues. In the last three years of the Appellate Committee of the House of Lords, by way of contrast, only two of the 180 cases involved more than five Law Lords (just over 1 per cent), each of which raised human rights issues.[11]

[7] This is at the front of each of the Court's Annual Reports. It is backed by eight strategic objectives, one of which is to 'promote knowledge of the importance of the Rule of Law'.

[8] Blom-Cooper et al (2011), xxvii. In the legal year 2009–10 there were 10 cases involving seven judges and three cases involving nine judges; in 2010–11 the figures were 12 and eight respectively; and in 2011–12 they were 13 and one. The Court's Annual Reports highlight all of these cases, with the 2011–12 Report stating that larger benches are 'a notable feature of the United Kingdom Supreme Court's brief history' (at 25). For an analysis of the new Court's output during its first year, see Blom-Cooper et al (2010); for the first two years see UCL (2011) and Phillips (2012). See too Malleson (2011); Lennan (2010).

[9] A fact noted by Lord Phillips in his Foreword to the Supreme Court Annual Report and Accounts 2011–12, HC 26, 6.

[10] These include two in which, because of Lord Rodger's illness, only eight Justices ultimately decided the appeal.

[11] These were *R (Gentle) v Prime Minister* [2008] UKHL 20, [2008] AC 1356 and *Secretary of State for the Home Dept v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269.

The Court has published the criteria which it takes into account before deciding whether more than five judges should be selected to hear an appeal.[12] To some extent these could have been deduced from the previous practice of the House of Lords, but the fact that they have been made explicit is an indication that the Court wishes to be more transparent about the way it operates and that it envisages a larger bench being convened reasonably frequently. Decisions by larger benches have the potential to allow the Court to present a more powerful and united front to the outside world.[13]

The jurisdiction of the Supreme Court

The jurisdiction of the new court is almost the same as that of the Appellate Committee of the House of Lords. It can hear appeals in civil and criminal cases from all three jurisdictions in the United Kingdom (England and Wales, Scotland, and Northern Ireland), except that no criminal appeals can be heard from Scotland. The only change from previous practice is that responsibility for deciding 'devolution' cases, which were previously referred to the Judicial Committee of the Privy Council, has been transferred to the Supreme Court.[14] These can arise under the Scotland Act 1998,[15] the Northern Ireland Act 1998,[16] and the Government of Wales Act 2006.[17]

The routes by which appeals can be brought to the new court are virtually identical to those which applied when the Appellate Committee was in place,[18] with most appeals requiring permission from a panel of three Supreme Court Justices before they can be fully heard.[19] The main exception continues to be appeals from Scotland, where in civil cases no judicial leave is required, only the signature of two senior counsel.[20] In civil cases in England and Wales or Northern Ireland, permission to appeal can be granted either by the lower court or by a Supreme Court panel.[21] The prospective appellant in those jurisdictions therefore has two bites of the cherry, but does not have to take the first bite before taking the second (ie he or she can apply for permission from the

[12] They are whether it is a case (1) where the Court is being asked to depart, or may decide to depart, from a previous decision, (2) of high constitutional importance, (3) of great public importance, (4) where a conflict between decisions in the House of Lords, the Privy Council or the Supreme Court has to be reconciled, and (5) which raises an important point in relation to the European Convention on Human Rights. The criteria are available on the Court's website, under 'Court procedures' and then 'Panel numbers criteria'.

[13] See Cornes (2011) for comments about personal leadership within the Supreme Court. Malleson (2011), 754, suggests that 'because the judicial role which the new Supreme Court Justices have inherited has been a far more dynamic one than is generally acknowledged it is likely that the Supreme Court will evolve into a top court which more closely resembles the supreme courts or constitutional courts found in other parts of the world'.

[14] Constitutional Reform Act 2005, s 40(4)(b) and Sch 9.

[15] Scotland Act 1998, ss 33 and 98, and Sch 6.

[16] Northern Ireland Act ss 11 and 79, and Sch 10.

[17] Government of Wales Act 2006, ss 96, 99, 112 and 149, and Sch 9.

[18] Dickson (2007a).

[19] The Supreme Court's website <http://www.supremecourt.gov.uk> publishes monthly lists of the outcome of applications for permission to appeal but gives 'full case details' (including whether the appeal raises human rights) only at a later stage.

[20] The top court has often complained that an appeal brought to them under this system did not deserve their attention. See eg *G Hamilton (Tullochgribban Mains) Ltd v The Highland Council* [2012] UKSC 31.

[21] Administration of Justice (Appeals) Act 1934, s 1(1).

Supreme Court even though no such application has first been submitted to the lower court). It seems that, in practice, relatively few requests are made to lower courts for permission to appeal to the Supreme Court.

The Supreme Court, like the House of Lords before it, has no power to 'call in' issues for decision. At times, such as when the Court of Appeal in England and Wales grants permission to appeal in a civil matter, or when devolution issues are referred, the Supreme Court Justices have no choice but to deal with the questions presented to them, however undeserving of their attention they may deem them to be. The Justices can pick and choose which other appeals to hear, but the pool from which they can select consists only of those cases in which one or more of the litigating parties has lodged an application for permission to appeal, apart from the rare occasions on which the Court of Appeal, having considered a case referred to it by the Attorney General, refers it further to the Supreme Court.[22] Needless to say, the costs involved in pursuing an appeal or reference to the Supreme Court are often prohibitive and for that reason parties who believe that they still have a deserving case will often refuse to take the matter further. In criminal cases, moreover, the Courts of Appeal in England and Wales and in Northern Ireland have a veto over appeals being taken to the Supreme Court: appeals can proceed only if the lower court first certifies that there is a point of law of general public importance involved.

The Supreme Court and Scotland

In theory, no criminal appeals can go from Scotland to the Supreme Court, but the transfer to the Court of the Privy Council's jurisdiction to hear devolution issues arising in Scotland has meant that, in practice, the Supreme Court *can* hear criminal appeals from Scotland where the ground of appeal is that the defendant's human rights have been violated.[23] This has caused considerable consternation north of the border, particularly after the Supreme Court's decision in *Fraser v Her Majesty's Advocate*,[24] where the Court of Criminal Appeal in Edinburgh was ordered to quash a man's conviction for murdering his wife and to consider whether to authorize a new prosecution, the basis for the decision being that the Crown's failure to disclose certain evidence to the defence had made the original trial unfair, in violation of Article 6 of the

[22] Under the Criminal Justice Act 1972, s 36 (on a point of law following a person's acquittal in a criminal case) and the Criminal Justice Act 1988, s 36 (on whether a court's sentence has been unduly lenient).

[23] Cases on devolution issues in Scotland can currently reach the Supreme Court in three different ways: (1) by being referred to that Court by three or more judges of the Court of Session or two or more judges of the High Court of Justiciary, in which event no further permission is required; (2) by an appeal being lodged against the determination of a devolution issue by the Inner House of the Court of Session after a reference has been made to that court by a lower court, in which event, again, no further permission is required; or (3) by an appeal being lodged against the determination of a devolution issue by two or more judges of the High Court of Justiciary, or by three or more judges of the Court of Session in a case where there is otherwise no appeal to the Supreme Court, in which event the permission of the Scottish court concerned or, if that permission is not obtained, of the Supreme Court itself, is required. See Scotland Act 1998, s 98 and Sch 6, paras 7–13.

[24] [2011] UKSC 24. There had been an earlier Supreme Court decision of the same ilk: *Cadder v HM Advocate* [2010] UKSC 43, [2010] 1 WLR 2601. That led to corrective legislation in the Scottish Parliament—the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.

European Convention on Human Rights. Within two weeks of the Supreme Court's edict, the First Minister of Scotland set up a group to review the future scope of Scottish appeals to the Supreme Court in criminal cases.

As Aileen McHarg has ably explained,[25] the final report produced by this review group was actually the third to be issued on the topic within two years. The first, the Walker Review published in January 2010, proposed that all Scottish appeals raising UK-wide legal issues (whether civil or criminal) should be capable of being heard by the Supreme Court but that all appeals raising only Scottish issues should not be appealable to London.[26] No further action was taken on this report but later that year the Advocate General[27] appointed a further group of experts to explore the more specific question whether devolution issues in criminal cases should continue to be heard by the Supreme Court. That group proposed, in November 2010, that rather than these issues being heard in London just because they concern the exercise of a function of the Lord Advocate (who is a member of the Scottish Government),[28] the Scotland Act 1998 should be amended so as to create a new free-standing right of appeal to the Supreme Court in criminal cases where an issue of compatibility with the European Convention on Human Rights or EU law arises.[29] The third report, published in its final version in September 2011,[30] agreed with the second report but suggested that appeals should be possible only if (a) the appeal court in Scotland were to verify that a point of law of general public importance is involved and (b) the Supreme Court were deprived of its power to make an ultimate ruling on the facts of the case and confined to deciding the specific question of law posed for it.

The matter has been resolved, for the time being at least,[31] by provisions in the Scotland Act 2012,[32] which insert additional sections into the Criminal Procedure (Scotland) Act 1995 and the Scotland Act 1998. The Advocate General for Scotland has been given the right to become a party to any criminal proceedings in Scotland, so far as they relate to a compatibility issue, that is, to whether a public authority has acted or is proposing to act in a way which is unlawful under section 6(1) of the Human Rights Act 1998 or inconsistent with EU law, or whether any provision of an Act of the Scottish Parliament is incompatible with a Convention right or with EU law.[33] Moreover, where

[25] McHarg (2011). See also Himsworth (2011); Reed and Murdoch (2011).

[26] See <http://scotland.gov.uk/Publications/2010/01/19154813/0> (last accessed 4 December 2012).

[27] The Advocate General is the head of the UK government's Scottish legal office. His or her job is to ensure that Scots law and the devolution settlement are taken into account in the development of UK government policy and legislation and that the UK government's interests are effectively represented in Scottish litigation. The Lord Advocate, also known as Her Majesty's Advocate, who is a minister in the Scottish government, is head of the prosecution service in Scotland: see the Scotland Act 1998, ss 44 and 48.

[28] Scotland Act 1998, s 98 and Sch 6, para 1(c).

[29] See <http://www.oag.gov.uk/oag/files/Expert%20Group%20report(1).doc> (last accessed 4 December 2012).

[30] See <http://www.scotland.gov.uk/Resource/Doc/254431/0120938.pdf> (last accessed 4 December 2012).

[31] The position has to be reviewed after three years, with further consideration being given at that time to, amongst other matters, whether an appeal to the Supreme Court on a compatibility issue should lie only if the High Court of Justiciary certifies that the issue raises a point of law of general public importance: Scotland Act 2012, s 38(3)(c).

[32] Sections 34–38. At the time of writing these were not yet in force.

[33] Criminal Procedure (Scotland) Act 1995, s 288ZA, inserted by the Scotland Act 2012, s 34.

a compatibility issue has arisen in criminal proceedings before a court, other than a court consisting of two or more judges of the High Court, the court may, instead of determining it, refer the issue to the High Court, and the Lord Advocate or Advocate General for Scotland, if a party to the criminal proceedings, may *require* the court to make such a reference.[34] The High Court, in turn, may either determine the issue referred to it or refer it further to the Supreme Court.[35] The Lord Advocate or Advocate General for Scotland, if a party to criminal proceedings before a court consisting of two or more judges of the High Court, may again *require* the court to refer to the Supreme Court any compatibility issue which has arisen in the proceedings otherwise than on a reference.[36] When an issue is referred to the Supreme Court, that court may exercise its powers only for the purpose of determining the compatibility issue and must then remit the proceedings to the High Court for determination.[37] These procedures apply to compatibility issues which would otherwise have been 'devolution issues'. In summary, the power of the Advocate General to require a reference to be made to the Supreme Court has been slightly expanded, but the jurisdiction of the Supreme Court to issue the final determination in a particular category of devolution case has been restricted. The suggestion that the Supreme Court should be permitted to deal with criminal cases raising Convention compatibility issues only if the appeal court in Scotland has certified that a point of law of general public importance is involved has not been implemented.[38] The number of such cases coming to the Supreme Court is therefore unlikely to decrease, but that Court will only be able to lay down the applicable legal rules, not to apply them to the facts of the cases before it.

The composition of the Supreme Court

When the Supreme Court was formed on 1 October 2009, 10 of the 12 Lords of Appeal in Ordinary who were members of the Appellate Committee of the House of Lords the previous day automatically became Justices of the Supreme Court.[39] They were, in order of seniority,[40] Lord Phillips of Worth Matravers, Lord Hope of Craighead, Lord Saville of Newdigate, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe, Lady Hale of Richmond, Lord Brown of Eaton-under-Heywood, Lord Mance, Lord Collins of Mapesbury, and Lord Kerr of Tonaghmore. With the establishment of the new Court, Lord Phillips and Lord Hope switched roles from Senior Lord of Appeal and Second Senior Lord of Appeal to President and Deputy President of the Supreme Court respectively.

Lord Scott of Foscote retired from the Appellate Committee of the House of Lords on 30 September 2009 and Lord Neuberger of Abbotsbury resigned on the same day

[34] Ibid, s 288ZB(1) and (2), inserted by the Scotland Act 2012, s 35.
[35] Ibid, s 288ZB(3) and (4).
[36] Ibid, s 288ZB(5).
[37] Ibid, s 288ZB(6)–(8).
[38] Scotland Act 1998, Sch 6, para 1, as amended by the Scotland Act 2012, s 36(4).
[39] Constitutional Reform Act 2005, s 24.
[40] The President and Deputy President rank as the most senior Justices; thereafter seniority depends on when the Justice was first appointed to the top court (whether the Appellate Committee of the House of Lords or the Supreme Court).

to take up the post of Master of the Rolls (head of the Civil Division of the Court of Appeal). On 1 October 2009 the outgoing Master of the Rolls, Sir Anthony Clarke, took up the seat which Lord Scott of Foscote would have occupied in the Supreme Court, and was given a peerage as Lord Clarke of Stone-cum-Ebony. The seat vacated by Lord Neuberger was not filled until April 2010, when Sir John Dyson was appointed as a Supreme Court Justice. He was given the courtesy title of Lord Dyson, but not a full peerage.[41] The same practice will be applied to all future appointees, unless they already happen to hold a peerage.

In September 2010 Lord Saville retired, being replaced in May 2011 by Lord Wilson of Culworth. Lord Collins retired in May 2011 and Lord Rodger died in June 2011; they were respectively replaced by Lord Sumption in January 2012 and Lord Reed in February 2012. Then Lord Brown retired in April 2012 and was replaced a month later by Lord Carnwath. Lord Phillips stood down as President of the Supreme Court on 30 September 2012 and was replaced by Lord Neuberger, just three years after he had chosen to serve as Master of the Rolls rather than move from the Appellate Committee of the House of Lords to the Supreme Court. There is some irony in this appointment as Lord Neuberger had been wary of the proposal to replace the Appellate Committee with the Supreme Court.[42] Lord Dyson followed Lord Neuberger's example by stepping down from the top court on 30 September 2012 to take over as Master of the Rolls; his replacement has not yet been announced. Lord Walker will retire in March 2013 and Lord Hope in June 2013, at which point a new Deputy President will need to be appointed.

As of 1 July 2013, therefore, barring unforeseen circumstances, we know that the Justices of the Supreme Court, in order of seniority, will include: Lord Neuberger (President), Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Reed, and Lord Carnwath. Three people who are not currently on the Court will by then have been appointed. There may then be a lengthy period of stability before more changes are required, since the next scheduled retirement dates for Justices in post are not likely to fall due until April and May 2018, when Lords Mance and Clarke, respectively, will reach the age of 75. But of course one or more Justices may choose to retire before that time. The details of all these changes to the membership of the Supreme Court, as well as short biographies of the individuals currently in post, are set out in Appendices 1 and 2 at the end of this book. Appendix 1 also includes details of the Law Lords who served in the Appellate Committee of the House of Lords from the time of the enactment of the Human Rights Act 1998. In all there have been 32 individuals (not counting ad hoc judges) who have had the opportunity since that Act was passed to issue judgments in the United Kingdom's top court on Convention rights.

[41] Press release of the Supreme Court 13/2010, 13 December 2010.

[42] In an interview with Joshua Rozenberg broadcast by Radio 4 on 8 September 2009, Lord Neuberger said: 'The danger is that you muck around with a constitution like the British Constitution at your peril because you do not know what the consequences of any change will be' and he added that there was a real risk of 'judges arrogating to themselves greater power than they have at the moment'. He had not yet been appointed as a Law Lord when, in 2003, that group was asked for its opinion on the creation of a Supreme Court: see n 3 above. See Neuberger (2009a).

The appointment process

The Constitutional Reform Act 2005 provides for a maximum of 12 Supreme Court Justices to be in office at any one time,[43] the same number as that allowed for Lords of Appeal in Ordinary since 1994. To be eligible for appointment a person must have (a) held high judicial office for a period of at least two years, (b) satisfied the judicial-appointment eligibility condition on a 15-year basis, or (c) been a qualifying practitioner for at least 15 years.[44] The second of these criteria was inserted in 2008 to reflect more general changes that were made at that time to the judicial appointments system in England and Wales.[45] It means, for example, that a person who has been qualified as a barrister or solicitor in England and Wales for at least 15 years—and during that period has 'gained experience in law'—is eligible for appointment to the Supreme Court even though the experience has been gained other than through private legal practice.[46] It could be gained through engagement in other 'law-related activities' such as acting as an arbitrator or teaching law,[47] and such activities do not have to have been carried out on a full-time basis, for pay, or even within the United Kingdom.[48]

The Constitutional Reform Act 2005 requires that when a commission is making selections for the appointment of Justices it 'must ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom'.[49] By constitutional convention two of the judges in the country's top court have to be experts in Scottish law. It is now also a tradition that one of the judges comes from Northern Ireland. In an internal review of the selection process conducted in 2011, the Court's Chief Executive recommended that the need to have judges with knowledge and experience of the law of each part of the United Kingdom should be made part of the definition of 'merit' when appointments are being made.[50] The logic of that proposal is that the need to have judges with knowledge and experience of all areas of law (commercial, criminal, public, family, etc) should also be made part of the definition of 'merit'.

The net effect of the eligibility criteria is that the people appointed to serve as Justices of the Supreme Court are extremely likely to be serving judges and to have been practising barristers for at least 15 years prior to first becoming a judge. Indeed, when the Supreme Court was first established, 10 of the 11 Justices in post from the first day fell into that category, the exception being Lord Collins of Mapesbury, who, when

[43] Section 23(2). The number can be increased but not decreased by an Order in Council laid before and approved by resolution of each House of Parliament: s 23(3) and (4).

[44] Ibid, s 25(1).

[45] Tribunals, Courts and Enforcement Act 2007, Pt 2 (ss 50–61) and (in particular) Sch 10, para 41, which took effect on 21 July 2008.

[46] The Tribunals, Courts and Enforcement Act 2007, s 51(1), allows the Lord Chancellor to specify other qualifications as making someone eligible for appointment to a judicial position, but no such specifying order has been made in relation to the UK Supreme Court.

[47] Ibid, s 52(2)–(4).

[48] Ibid, s 52(5).

[49] Constitutional Reform Act 2005, s 27(8).

[50] Supreme Court Annual Report and Accounts 2010–11, HC 976, 16.

he was appointed as a Lord of Appeal in Ordinary just six months before the demise of the Appellate Committee in 2009, was the first ever solicitor to achieve that status. The last Lord of Appeal in Ordinary to have been appointed from judicial ranks below the appellate level was Lord MacDermott in 1947,[51] and the last Lord of Appeal to have been appointed from outside the ranks of the judiciary altogether was Lord Radcliffe in 1949.[52] Today, more than three years after the commencement of the Supreme Court, the collective profile of the Justices does not differ greatly from that of the House of Lords at any time during the last 60 years of its history. The one solicitor judge retired in 2011, after just two years in the role, and was succeeded by a judge who had previously been a barrister, Lord Sumption. Lord Sumption, however, like Lord Radcliffe, had not previously served as a full-time judge in the United Kingdom, although he was appointed a Deputy High Court Judge in 1992, served as a Recorder from 1993 to 2001, and was a Judge of the Courts of Appeal of Jersey and Guernsey from 1995.[53]

Selection commissions for vacancies on the Supreme Court are provided for by Schedule 8 to the Constitutional Reform Act 2005.[54] For vacancies as Justices the selection commission comprises the President and Deputy President of the Supreme Court together with one member from each of the United Kingdom's three judicial appointment bodies—the Judicial Appointments Commission, the Judicial Appointments Board for Scotland, and the Northern Ireland Judicial Appointments Commission. At least one of these three members must be non-legally qualified. An internal review of the selection process by the Court's Chief Executive in 2011 recommended that neither the President nor the Deputy President should sit on the panel appointing his or her successor, but in fact Lord Philips did sit on the panel which in 2012 appointed Lord Neuberger as his successor to the Presidency.[55]

The characteristics of Supreme Court Justices

The Supreme Court, just like the Appellate Committee of the House of Lords before it, cannot by any stretch of the imagination be described as a body which is representative

[51] At the time of his appointment he was a High Court judge in Northern Ireland.

[52] A leading QC at the time. See Duxbury (2011).

[53] Lord Sumption's appointment was criticized in some quarters, especially as there were rumours that he had effectively been promised the position after having withdrawn from an earlier competition due to alleged opposition from serving members of the Court of Appeal, who did not think it appropriate that Lords Justices should be 'leapfrogged' in this way. Jonathan Sumption was also criticized for delaying his take-up of the position until he had completed his involvement in lucrative civil proceedings between two Russian oligarchs, and for delivering the FA Mann lecture on judicial activism (Sumption, 2011) just before he assumed office. The lecture led to a stinging rejoinder from Sir Stephen Sedley, a recently retired Lord Justice of Appeal: Sedley (2012). See too <http://ukscblog.com/twelfth-justice-further-revelations> (last accessed 4 December 2012); <http://www.guardian.co.uk/law/2011/nov/09/sumption-shows-certain-naivety> (last accessed 4 December 2012) (Joshua Rozenberg); and <http://business.timesonline.co.uk/tol/business/law/article7013960.ece> (last accessed 4 December 2012) (Frances Gibb).

[54] Given effect by s 27(6) and further regulated by ss 27–31.

[55] Lord Neuberger seems to have been preferred to Lord Mance and Lady Hale: see Joshua Rozenberg at <http://www.guardian.co.uk/law/2012/jul/12/lord-neuberger-announced-supreme-court-president> (last accessed 4 December 2012). Rozenberg adds, in relation to Lady Hale: 'Shaking the place up a bit, as she is wont to do, may go down well with the *Guardian* and its readers but it hardly endears a judge to her colleagues.'

of the society it serves. The persons appointed to it are overwhelmingly elderly, white, Christian, males. No person of colour has ever been appointed to one of the United Kingdom's top judicial posts, although several have come to the United Kingdom from other countries in their youth and some have even retained a non-British nationality. Several persons from a Jewish background have been appointed, but no-one who is an openly practising Muslim, Hindu, or Buddhist. As far as is known, none has been openly homosexual, and none has had a notable disability. Perhaps most remarkable of all is the fact that only one woman has ever been appointed, Lady Hale. There are at least two schools of thought on this phenomenon. Putting it bluntly, the first believes that the gender of a judge is irrelevant: if intellectual ability in the application of the law is the main criterion for appointing our top judges, they can all be relied upon to be gender-blind when they are considering appeals and issuing judgments. The second school believes that being gender-blind is not always appropriate and that to properly understand the particular perspective of a woman it is necessary to be a woman oneself. Lady Hale, it would seem, strongly adheres to the second school. It is certainly clear from both her judicial and her extra-judicial pronouncements[56] that she believes female judges see many legal issues in a different light, especially when they arise in the areas of family law, child law, or social care law. The publication of *Feminist Judgments* in 2010[57] demonstrates that there clearly *are* alternative feminist perspectives on standard legal problems, and Lady Hale, writing in the foreword to that book, states:

> Reading this book ought to be a chastening experience for any judge who believes himself or herself to be both true to their judicial oath and a neutral observer of the world . . . If lawyers and judges like me have so much to learn from reading this book, then surely other, more sceptical, lawyers and judges have even more to learn . . .

In the human rights context there is also a feminist approach which potentially affects the outcome of cases.[58] Most notably, many women would disagree with where the dividing line is traditionally drawn between public law and private law, arguing that what goes on within families, for example, should be reclassified as public and therefore more comprehensively regulated.[59] They have in mind, in particular, the phenomenon of domestic violence. In addition, a significant number of theorists now hold that women have human rights which men do not have (eg to reproductive health care) and that these ought to be reflected in national and international legal documents.[60] In the nine years that Lady Hale has already been a member of the United Kingdom's top court she has certainly tried to influence her brethren to adopt a more feminist point of view on human rights but, as is made apparent later in this book,[61] she has had mixed success.

Many would argue that the most obvious trait of those who are appointed to the top UK court is their long immersion in traditional legal thought processes. The people

[56] Hale (2007) and (2001a). More generally, see Sumption (2012b); Rackley (2006).

[57] Hunter et al (2010). Of the 23 feminist judgments supplied for that book to supplement those issued in real cases, eight related to decisions of the House of Lords, six of which were human rights cases.

[58] For how feminists might view the European Convention on Human Rights, see Dembour (2006), Ch 7.

[59] Pateman (1987).

[60] eg MacKinnon (2007) and (2006); Brems (1997); Charlesworth et al (1991).

[61] See Ch 11 below, at 327.

appointed come to their appellate task as individuals who have already been socialized into acting in predictable ways when faced with arguments about what the law should be. They will bring to the job a mindset which, for instance, believes very much in the importance of the doctrine of precedent and the concept of Parliamentary sovereignty. They will have a shared view as to what qualifies as an authoritative argument in an appeal, what kind of empirical evidence is deserving of consideration, and how they should word their judgments so as to influence the future path of the law. They will, in short, be familiar with 'judicial discourse'.[62] Whether they will be prepared to look at how foreign courts have dealt with the kind of problem before them, or at what academic commentators have written about the matter, will also be determined by their previous experience as judges or lawyers who have focused on legal practice within the United Kingdom. If they have served some time as a legal academic they will have imbibed similar values, although mixed with these might be a more sceptical approach to tradition and a greater openness to change.

None of this is to deny that Justices will all be individuals with lives outside of the law.[63] They will be exposed to the plurality of influences that assail everyone from a variety of media outlets—even if their listening and viewing may be focused on Radio 4 and BBC 2, and their reading to *The Times*. But when sitting to hear appeals, when discussing with their colleagues what the result of appeals should be, and when composing their judgments, they are bound to be 'limited' by what is expected of them as holders of the office in question. They will not want to gain a reputation for being non-collegiate, nor for being someone who writes judgments incautiously. They will be conscious of their legacy and of the fact that what they write will be exposed to close scrutiny, if not by journalists then at least by practising lawyers (some of whom will be their former colleagues) and legal academics.[64] On some occasions what they say will be scrutinized by an international court too. Unlike their counterparts on the US Supreme Court, who are appointed for life, they know how long they may potentially serve on the country's highest court and can look forward in due course to a relaxing retirement. Just as importantly, unlike their American counterparts, they do not have clerks to assist them in the drafting of their judgments.

Life experience is particularly likely to influence Justices when they are confronted with human rights arguments, because those arguments will relate to what it is that every human being is entitled to expect from the state. The fact that all of the Justices will be of a certain age when appointed (the average age at appointment of those currently in post was 63) means that their approach to such arguments will be affected by long personal experience. Today's Justices will have begun attending primary school in the 1950s and will not have experienced military service, as many of their predecessors would have done, nor the pre-welfare state era. As adolescents, they will have lived through the sexual revolution of the 1960s and 1970s and will have benefited from free university education (even if prior to university they

[62] On which see Burton and Carlen (1979), Ch 5.

[63] A point well demonstrated on several occasions by Darbyshire (2011).

[64] However, Posner argues that academic critiques of judges have little impact on their behaviour: Posner (2008), Ch 8. For the view of Lord Bingham on judicial activism, see Bingham (2010).

attended private schools).[65] As lawyers they will have built up considerable financial security and numerous esteem indicators. They will have acquired significant legal experience, including perhaps as a lower level judge, before the Human Rights Act was enacted in 1998. Until then they will not have had the opportunity to plead, or adjudicate on, Convention rights. By the time they get to the Supreme Court their confidence should be riding high. They will most likely have endured a sharp drop in salary when first taking up a judicial appointment, but will have gained entitlement to a generous state-funded pension. The relative relaxation they enjoy at the appellate level through no longer having to sit through tedious evidence-gathering sessions in order to decide questions of fact will no doubt be much appreciated by most of them. They will be thinking that now is their chance to display their intellect on paper and to make a significant contribution to the development of the relatively new field of human rights law.

Influences on the processing of appeals

Human rights issues can arise in both civil cases and criminal cases, but no appeal can be heard in the Supreme Court unless express permission has first been granted. In civil cases, whether it is a lower court or the Supreme Court which is considering whether to grant permission to appeal, and with the exception of Scotland as already noted, the test applied is whether the case involves an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time. This is not a test laid down by Parliament: it is a creation of the Law Lords. It was not expressly set out in the Standing Orders or Civil Practice Directions of the House of Lords, but it is now included in the Practice Directions of the Supreme Court.[66] In criminal cases in England and Wales or Northern Ireland a similar system applies, with the difference being that before either court can consider whether permission to appeal should be granted the lower court must have issued a certificate stating that the case involves a point of law of general public importance.[67]

These idiosyncrasies of the system for seeking permission to appeal would not matter too much if there was greater clarity as to what is meant by 'an arguable point of law of general public importance'. But the Supreme Court, like the House of Lords before it, has refused to provide any kind of definition of the phrase. Contrary to its position regarding the use of benches of more than five Justices to hear appeals,[68] the Supreme

[65] Lord Neuberger notes that there may have been a change in judicial temperament concerning issues of social policy because 'yesterday's judges were children of the conventional and respectful 40s and 50s, whereas today's judges are children of the questioning and sceptical 60s and 70s': Neuberger (2011a), para 62.

[66] Practice Direction 3.3.3: 'Permission to appeal is granted for applications that, in the opinion of the Appeal Panel, raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal. An application which in the opinion of the Appeal Panel does not raise such a point of law is refused on that ground. The Appeal Panel gives brief reasons for refusing permission to appeal.'

[67] Criminal Appeal Act 1968, s 33(2).

[68] See n 12 above.

Court has not published any criteria indicating the sorts of considerations it will bear in mind when deciding if the test for granting permission has been satisfied. Usually the decisions are taken on the basis of documents only, in private deliberation by panels of three Justices. Very occasionally the Justices will call the parties to an oral hearing.[69] The Justices' decisions on applications for permission to appeal are announced without any reasons being given for them other than a statement that the test in the Practice Direction has or has not been met. The whole process remains one of the most opaque aspects of the Supreme Court's work and even seems to contradict the Court's own Practice Direction. This concludes by saying that '[t]he Appeal Panel gives brief reasons for refusing permission to appeal',[70] which surely implies that something beyond the earlier wording of the same Practice Direction will be supplied.

Notwithstanding this lack of transparency, it is hard to argue that it has had any negative impact on the readiness of the Supreme Court (or the House of Lords before it) to hear appeals concerning the protection of human rights. The proportion of all applications for permission to appeal which is granted each year is quite high, although it appears to be diminishing, being 47 per cent in 2009–10, 36 per cent in 2010–11, and 28 per cent in 2011–12.[71] Given the number of successful applications which involve human rights issues (almost one-third), there is very little evidence that novel human rights arguments are not getting an airing in the Supreme Court on account of a restrictive attitude on the part of permission to appeal panels.[72] There are some instances where permission to appeal to the House of Lords or the Supreme Court from decisions on human rights issues taken by a lower court has been refused, but very few of these stand out as examples of the law being left in a unacceptable state of uncertainty.[73]

[69] UKSC Annual Reports reveal that from October 2009 to March 2010 there were just two oral hearings; from April 2010 to March 2011 there were three and from April 2011 to March 2012 there were again two. That makes a total of seven oral hearings out of 612 applications received in a 30-month period (1.1%).

[70] See n 66 above. Some very recent Panel decisions have been slightly more informative.

[71] UKSC Annual Reports show that from October 2009 to March 2010 44 applications for permission to appeal were granted and 50 were refused; from April 2010 to March 2011 67 were granted, 117 were refused, and four had some other result; and from April 2011 to March 2012 64 were granted, 156 were refused, and five had some other result. For figures for the House of Lords between 2001 and 2005, see Dickson (2006a), 331. See too Shah and Poole (2009), and also Poole and Shah (2011), which examines the period 1994 to 2007, and the project by Stirton and Arvind (2011).

[72] UKSC Annual Reports do not classify appeals in accordance with the subject-matter they deal with, but 18 of the 57 cases decided by the Supreme Court in the legal year 2009–10 can be labelled as ones which involved human rights issues to some significant extent (taking that category to include cases on discrimination and entitlement to asylum). The figures for 2010–11 are 18 cases out of 60, and for 2011–12 they are 19 cases out of 58. Thus, 31% of all the cases decided by the Supreme Court in its short life to date have been human rights cases. The President of the Court estimates that human rights issues arise in about one quarter of the cases dealt with: Phillips (2012), 11. In its Annual Reports the Supreme Court summarizes a handful of cases which are 'particularly high profile'; of the 20 such cases summarized in the three reports so far, at least 14 could be classified as human rights cases.

[73] For an example of a pre-Human Rights Act decision by the Court of Appeal from which the Law Lords refused permission to appeal but which went to the European Court and resulted in a finding that a Convention right had been violated, see *R v Ministry of Defence, ex p Smith* [1996] QB 517, which led to *Smith and Grady v UK* (2000) 29 EHRR 548. For a post-Human Rights Act example, see *Smith v Buckland* [2007] EWCA 1318, [2008] 1 WLR 661, which led to *Buckland v UK* App No 40060/08, judgment of 18 September 2012.

Even after conceding the adventitiousness of the appeals process, we have to realize that the content of judgments issued by Supreme Court Justices, whether in human rights cases or in any other kind of case, is very largely determined by the arguments put before the Justices by counsel for each of the parties. In most instances the judgments will be structured around those arguments, with answers being given to the specific points raised by counsel. During the oral hearing of the appeal, Justices are free to raise arguments which counsel seem to have neglected, but they cannot suggest different grounds of appeal than those presented in the parties' lodged documents. Nor, of course, do the Justices hear in person from witnesses, even expert witnesses: they may occasionally appoint a barrister as *amicus curiae* to help guide them on the state of the current law, and they may allow expert or concerned parties to intervene both in writing and orally. If, in their judgments, the Justices rely on an argument which was neither thoroughly debated during the course of the oral hearing nor set out clearly in the written documents lodged for the appeal, there may be grounds for re-opening the appeal.[74] In the vast majority of cases the outcome will be determined by principles derived from 'binding' precedents, and the Supreme Court has made it clear that it will adopt the same position as the House of Lords regarding the need to follow previous decisions of the country's highest court unless there are exceptional reasons not to do so.[75] Justices may voice misgivings about the acceptability of the outcome they are adopting but nevertheless view themselves as constrained so to decide the case. In particular, they may see it as much more appropriate for elected politicians in Parliament to reform the law, not judges. Throughout this book we will encounter numerous instances of such judicial restraint.

Subsequent chapters

This introductory chapter has tried to show that the UK Supreme Court has wide-ranging opportunities to protect human rights because its jurisdiction is very broad. The top judges have been noticeably willing to grant permission for appeals to be heard on human rights issues and in many such appeals have chosen to sit as a bench of seven or even nine judges. The judges have displayed a strong desire to adopt an agreed approach, but dissents are still common. The men and women who reach these elevated judicial positions tend to be cut from the same cloth in that they have had similar experience of legal practice and are attuned to a form of legal reasoning which makes it difficult for them to be truly creative in their judgments.

[74] Following the Supreme Court's decision in the challenge by Julian Assange, of Wikileaks, to a request for his extradition (*Assange v Swedish Prosecution Authority* [2012] UKHL 22, [2012] 2 AC 471, his counsel complained that the decision was significantly influenced by the Court's reliance on the Vienna Convention on the Law of Treaties 1969, which she suggested had not been fully discussed during the appeal. Following further consideration of her arguments on this point, the Supreme Court unanimously refused to allow a further hearing and confirmed its original decision: see *Assange v Swedish Prosecution Authority (No 2)* [2012] 3 WLR 1. On the *Assange* case see Kerr (2012b).

[75] *Austin v Southwark London Borough Council* [2010] UKSC 28, [2011] 1 AC 355, [25] (per Lord Hope). See, more generally, Lee (2012).

Chapter 2 considers the way in which Supreme Court Justices conceptualize human rights, paying particular attention to the top court's reluctance to develop a category known as 'constitutional rights'. The approach of the common law to human rights is also critiqued, as is the Supreme Court's adherence to the *Ullah* (or 'mirror') principle concerning judicial activism and to the *Shabina Begum* (or 'outcome not process') approach concerning judicial assessments of public authorities' decisions affecting human rights. The chapter closes with a suggestion that the most appropriate way in which Justices could develop their conception of human rights is by focusing on the role that an apex court needs to play in a democracy founded on the rule of law.

The issues examined in Chapter 3 are the degree to which the Supreme Court is prepared to allow the Human Rights Act to operate retrospectively, the respect it accords to decisions of the European Court of Human Rights, the Court's preferred definition of 'public authority', the way in which Justices make use of their duty to interpret legislation as compatible with Convention rights if it is possible to do so, the occasions on which the top judges have issued declarations stating that legislation is incompatible with Convention rights, the extent to which the Court will allow public authorities to use the so-called 'primary legislation defence', the willingness of the Court to apply the Human Rights Act within private law, the remedies it is prepared to issue, and the approach of the Justices to applying the Act to actions taken abroad. It will be argued that on all of these issues, even bearing in mind the constraints imposed upon the top judges by the country's constitution, precedents, and traditional practices, they have shown themselves to be cautious and rather unimaginative.

Chapters 4 to 12 consider in detail the pronouncements by the House of Lords and Supreme Court on specific Convention rights, attempting to evaluate how supportive they are of arguments in favour of human rights, especially when compared with the views of judges in the European Court of Human Rights. Chapter 13 briefly draws some threads together to present an overall picture of where the UK Supreme Court currently stands in relation to international human rights standards, especially those contained in the European Convention.