Index

A and others v SSHD (2004, 2005), UK 107, 110–11, 115
action, concept 208
activism, judicial 21, 208–9
admissibility criteria 335, 337, 343, 344
adversarial procedure 139
Advisory Opinions 230, 234, 246, 317–18, 324, 326, 327
Afghan Supreme Court 254
Africa see African National Congress (ANC); African Union (AU); North Africa; South Africa; South African Constitution; South African Constitutional Court (SACC)
African National Congress (ANC) 64, 65
African Union (AU) 298, 299
Ahmed and others v HM Treasury (2010), UK 109, 113
Al Qaida 181
American Convention on Human Rights (ACHR) 309, 312, 316
American Federal Reserve Bank 65, 66
amnesty laws 312
Arab nationalism 212
Arab Spring 3, 202, 203
Argentinian Supreme Court of Justice 311, 318
argumentative legitimacy 336, 337, 338
asylum laws 300, 301, 302, 303, 359
Australia case law 45
High Court see Australian High Court legal interpretation 40
Australian High Court 14, 37
Austrian Federal Constitutional Court 248, 250, 269
authority, constitutional 7, 220
balancing 2, 7, 195, 197
judicial role 40–42
legal and judicial philosophy 47
SURVEILLE research project, methodology 23
Bank Mellat v HM Treasury (2013), UK 114
Barak, Aharon 77, 78, 80, 93, 102, 115, 165, 168
Ben Ali, Zine El Abidine 204, 205
best practice approach counter-terrorism 22–3, 167, 189
defined 190
binding precedent 22, 314
Blair, Tony 106
block of constitutionality 316–20
Bouazizi, Mohamed 202, 203
branches of government 59, 97, 137, 143, 164, 168, 175, 190, 192, 238, 369
dialogue 15, 356–7
Bratza, Nicolas 236
Brighton Declaration 2012 8, 86, 88, 89–90
Bush, George W. 106
Canada case law 45
legal interpretation 40
Canadian Supreme Court 14, 37
capital punishment see death penalty, indefinite suspension
Carter Center 216
Central and Eastern Europe 3, 268, 269
see also Eastern Europe
Chaskalson Court, South Africa 63–4, 65
China 2, 3
civil society 16, 161, 330, 339, 353, 367, 369
dialogue with international courts 361–2
CJEU see Court of Justice of the European Union (CJEU)
clientelism 204
CM difficulty see countermajoritarian difficulty (CM difficulty)
cognitive dissonance, institutional risk-assessments 166
Cold War 251, 258
collaboration, and surveillance 121–2
Colombian Constitutional Court 317
Colombia 87
Commission on Human Rights 189
common law, and interpretation 35–6
communication networks 16–17
Communications (Retention of Data) Act 2011, Ireland 157
Communism 251, 262, 264, 269, 270, 275
comparative law 2, 45–7
competence
contentious 324
and judicial independence 6, 7
Russian Constitutional Court 232
Complaints Referee, Ireland 157–8
conflict of interest, duty of judge to avoid 30
consensus 251–2, 266, 268, 286, 350
concept 361, 362
economically-driven 255
European 347, 349, 361, 362
international 261
and judicial legitimacy 54, 61
lack of 29, 39, 245, 347
liberal-democratic 271, 275
and margin of appreciation 347
rule of law 253, 277
constitution
duty of judge to protect 32
judges as guardians of 5, 21, 23, 72, 197, 253
constitutional authority 7, 220
constitutional complaints 123, 124
constitutional identity 76, 84, 85, 87, 89, 90, 91
constitutional legal order 360, 361
constitutional pluralism 17, 308
constitutional right status, assignment 317
constitutional supremacy 17, 215, 316–17, 357
Constitutional Treaty 77, 81
constitutionalism
constitutional complaints 123, 124
at International Criminal Court 281–305
internationalization of constitutional law 3, 22
as new ‘natural order of things’ 254–61
and popular sovereignty 52
protection of, and judicial independence 5
review of constitutionality 224, 262
task of courts in guarding 352–69
transitional, challenges of 261–3
constructive dialogue 237
contentious competence 324
contributive dialogue 236, 237, 355
control orders, UK 107
Convention against Torture 102, 112, 186, 205, 302, 323
Convention for the Prevention of Terrorism 108
Convention for the Suppression of Financing of Terrorism 106
Convention for the Suppression of Terrorist Bombings 106
conventionality, review of 321, 322, 323, 324, 327
convicts in custody, disenfranchisement 244–6
Copenhagen European Council Meeting 1993 265
Correspondence, Doctrine of 236, 267
Costa Rica, Constitutional Court of the Supreme Court of Justice 317–18
Council of Europe 238, 239
Convention for the Prevention of Terrorism 108
countermajoritarian difficulty (CM
difficulty) 52, 60–63
counter-terrorism
    best practice approach 22–3, 167,
    189
    judicial review, challenges 164–9
    heightened tensions 165–6, 175
    institutional conflicts 168–9
    legal relativism 166–7, 175–6,
    189
    procedural fairness, virtues 169–75
    and role of judiciary 12
    in United Kingdom 2, 97–116
    case law 110–15
    constitutional background 97–100
    dialogue process 103–5
    fundamental problem 100–103
    statutes, post-2000 105–10
Counter-Terrorism Act 2008, UK 108,
109
Counter-Terrorism and Security Act
2015, UK 109–10
Court of Justice of the European Union
(CJEU) 358
and courts as protectors of the people
82–3, 91
Data Retention Directive 3, 153–4
Google judgment 122–3
surveillance, German experience
122, 123
crimes against humanity 283, 285, 297,
301, 311, 354
Criminal Justice (Surveillance) Act
2009, Ireland 160
Criminal Justice (Terrorist Offences)
Act 2005, Ireland 156
crisis, judges as guardians of
constitutional and human rights in
times of 21, 23
cross-fertilization 17, 235, 296, 308,
358
see also International Criminal Court
(ICC)

Danish Constitution 79–80
Data Protection Commissioner (DPC),
Ireland 157, 159, 160, 162
Data Protection Directive 122, 155
data retention
    Data Retention Law, Netherlands
    155–6
    Directive 3, 153–4
    judicial oversight of surveillance,
    Ireland 156–60
    death penalty, indefinite suspension
    238–40
defensive democracy 32, 34
defence
    forms 191–5
    national security issues 192
    to national sovereignty 194–5
    to political legitimacy 194
    pull of deferentialism 23, 191, 192,
    195, 196, 197
    secrecy, due to 193
    to technology/technology expertise
    192–3
delayed modernity 263
democracy
    and access to courts 44
    constitutional 205
    defensive 32, 34
democratic legitimacy 74, 81
direct 74
duty of judge to protect 32–3
failed transition to in Egypt, role of
judiciary in 201–23
and judicial independence 12, 34
militant 34
in terrors and war 33
and transitions 272–3
waves of democratization 255, 256,
257, 272
Democratic Republic of the Congo
(DRC), detention of witnesses and
acquitted accused 299–304
Deng Xiaoping 257
Denmark/Danish Supreme Court 6,
82–4, 86
Copenhagen European Council
Meeting 1993 265
derogating control orders, UK 107
Derogation Order, UK 106
DETECTER project 177
detention, incommunicado 185–91
dialogue (judicial)
  constructive 237
  contributive 236, 237, 355
counter-terrorism 103–5
cross-fertilization 235
examples
  convicts in custody,
  disenfranchisement 244–6
  death penalty, indefinite
  suspension 238–40
  homosexuality and freedom of
  expression 246–7
  parents in uniform, rights and
  privileges 240–44
formal 235
horizontal 235, 307, 355
informal 234–5
inter-American jurisprudence 307–8
interfaces with international sources
  and international judicial
decisions (Russian Federation)
  231–4
international legal dialogues 248–50
levels 354–63
  between individual judges and own
courts 16, 362–3
  between international courts 15,
  358–9
  between international courts and
  civil society 16, 361–2
  between national and international
courts 16, 359–61
  between national and international
judges/other branches of
government 15, 356–7
vertical 235, 307, 355, 359
Digital Rights Ireland (DRI) 138
discretion 29–31, 48
discursive legitimacy 336, 337, 338
disenfranchisement 244–6, 346
dispute resolution, and judicial branch
  27
Doctrine of Correspondence 236, 267
Drug Enforcement Agency (DEA), US
  142
dualism 16

Early Warning System, Lisbon Treaty
  81, 85
Eastern Europe 90, 255
  see also Central and Eastern Europe
ECHR see European Convention of
  Human Rights
ECJ (European Court of Justice) see
  Court of Justice of the European
  Union (CJEU)
Egypt 3
  ancient régime 10, 276
  Arab Spring 3, 202, 203
demonstrations/
  counter-demonstrations 206
  entente cordiale, breaking up of 205
  and judicial independence 10
judiciary in
  limited independence 210
  ratione materiae 210–11
role in failed transition to
  democracy 201–23
uniqueness of 210–14
legality considerations 207, 208
Muslim Brotherhood 204, 209, 213,
  217, 221, 277
  nomos and demos 205
People’s Assembly 216
  political transitions 201–10
Presidency 20
Supreme Constitutional Court 20,
  210, 214–22, 273, 274
Supreme Council of the Armed
  Forces 20, 213, 223
Supreme Judicial Commission for
  Elections 216
  and transitions 272
  trias politica 210, 220
unemployment 202, 203
electoral performance 218
emergencies 21, 216
epistemological virtue, procedural
  fairness 170–72
e-Privacy Directive 155
equality of arms principle 183–4
Eurocentric cultural bias 167
European Charter of Fundamental
  Rights 339
judicial oversight of surveillance as requirement under 153–6
European Convention of Human Rights 86, 138, 304
Acts of Parliament compatible with 100
and courts as protectors of the people 89, 90, 91
judicial oversight of surveillance as requirement under 148–53
margin of appreciation 8
Protocol 15 8, 90, 342, 345
subsidiarity principle 8
and United Kingdom 100, 101, 106
European Court of Human Rights (ECHR) 2, 3, 7, 8, 10, 18, 353
and courts as protectors of the people 86, 89, 90, 91
criticism for poor quality of judges 335–6
as guardian of fundamental rights 329–51
homosexuality and freedom of expression 246–7
and International Criminal Court 291, 302, 303
judicial oversight of surveillance of surveillance, Ireland 136
judicial strategies, adapting 338–50
legitimacy, alleged lack of 336–8
and margin of appreciation 341, 347, 348, 349
moral capital 11, 338, 339, 350, 351
political and juridical environment 330–34
reforms 334–6
and United Kingdom 104
European Court of Justice (ECJ) see Court of Justice of the European Union (CJEU)
European integration 271
European Parliament 77, 82
European Union 2, 3, 83, 138, 195, 272, 339
see also Court of Justice of the European Union (CJEU)
Constitutional Treaty 71, 72, 77
Data Protection Directive 122, 155
Lisbon Treaty 81
Maastricht Treaty (Treaty on European Union) 82, 85
evidence
detention of witnesses in DRC 299–304
unlawfully obtained 184
exceptionalism 21
extra-state agents of power, as threats to freedom 120–21
fair procedures 171, 173, 174, 175, 176
see also procedural fairness, virtues unfair 172
fair trial, right to see right to a fair trial Falhi, Houcine 202–3
Federal Constitutional Law (FCL), Russia 225
flexibility requirement 32
fragmentation 304–5, 351
of jurisprudence between ICC, international tribunals and human rights courts 293–6
freedom of assembly and association 5
freedom of expression 5, 222
and homosexuality 246–7
and peace, balancing of 40–41
freedom of telecommunication 125–6
functional legitimacy 336, 337
fundamental rights see also European Charter of Fundamental Rights; human rights
confidentiality and integrity of IT systems 127–8
freedom of telecommunications 125–6
home, inviolability of 126
of individual, European Court of Human Rights as guardian of 329–51
informational self-determination 126
and legitimacy of courts 12–13
norms 14
objective protection of 128–9
gender equality 287, 348
Geneva Conventions 233
German Federal Constitutional Court 3, 6, 7, 14, 22, 38, 123–34, 269
see also Germany
and courts as protectors of the people 75, 82, 84
justification of surveillance measures 124–5
and Russian Federation 248, 250
standards
confidentiality and integrity of IT systems, fundamental right guaranteeing 127–8
freedom of telecommunication, fundamental right to 125–6
home, inviolability of 126
informational self-determination, fundamental right to 126
standing, expansion of 22, 123–4
as textbook example 248
Germany 34, 40, 45, 120
Basic Law 120, 125, 126, 128, 270
Constitution, interpretation 14, 22
constitutional principles 119
evolution of state into a prevention state 118–19
Federal Constitutional Court see German Federal Constitutional Court
prevention tools 118–19
Red Army Faction 3, 117
stop-and-search investigations 118
surveillance in actual circumstances, dealing with 129–32
barriers to surveillance measures 132–3
general trends 117–23
weighing of freedom and security 3
transitional constitutionalism 261
video surveillance of public spaces 118
governance 66, 205, 251, 252, 261, 275
multi-level 4
Greece 265
guarantor roles of the state 119–20
Hamilton, Alexander 52, 53–6, 66
hard cases 29, 47, 48, 189
hierarchy of law 18
of norms 16–19
historical determinism, Hegelian 260
home, inviolability of 126
homosexuality 90
and freedom of expression 246–7
horizontal dialogue 235, 307, 355
House of Commons, UK 97, 98, 107, 110
House of Lords, UK 98, 107, 110
human rights
American Convention on Human Rights (ACHR) 309, 312, 316–20
fundamental see fundamental rights
Inter-American Court of Human Rights (IACtHR) 2, 3, 246, 307
at International Criminal Court 281–305
international treaties, role in protection of 16, 22
procedural protection 5
and role of courts 87–9
and security 163
substantive protection 5
task of courts in guarding 352–69
and terrorism 100–101
UN procedures 9, 178–91
Human Rights Committee 178–82, 183, 190, 344
Special Rapporteur, role 182–91
Universal Declaration of Human Rights 233
violations of lack of access to courts 7
limitations of judicial independence against 6
Human Rights Act 1998, UK 99, 115
Human Rights Committee (HRC) 178–82, 183, 190, 344
cases
Ahani v Canada 180
Kavanagh v Ireland 179–80
Polay Campos v Peru 179
Sayadi and Vinck v Belgium 180–81
General Comment No. 29 181–2
Index

General Comment No. 32 182, 183
Human Rights Council 178, 182, 187
Hungarian Constitutional Court 256, 269

ICCPR see International Covenant on
Civil and Political Rights (ICCPR)

Icelandic Constitution 79, 80
Identity Clause, Lisbon Treaty 84
impunity 203, 204, 283, 299, 311, 316, 353, 354

independence, judicial see judicial
independence

Independent Reviewer of Terrorism
Legislation 137–8
Independent Surveillance Review 137–8
informational self-determination 126
Institute for Justice and Reconciliation
(IJR), South Africa 64
institutional justifiability 43, 73
institutional legitimacy 53, 63, 64, 72, 336
institutional virtue, procedural fairness 174–5, 176

intelligence agencies 9, 118, 121, 139, 140
good practice 187–8
judiciary in times of terrorism and
surveillance 185, 186, 187, 188, 191, 192

intentionalism 38

Inter-American Court of Human Rights
(IACHR) 2, 3, 246, 307, 315, 353, 354
block of constitutionality 316–20
international judicial review of treaty
compliance 316–20
interpretation, mandatory criteria
308, 309, 311, 312

Inter-American Human Rights
Commission 2, 3, 17, 307
international judicial review of treaty
compliance 324, 325, 326
Inter-American human rights system 15, 306–28
binding nature of Inter-American
jurisprudence 314–16
dialogue, fundamentals of 307–8
incorporation of ACHR 316–20
internal judicial review, treaty
compliance 321–4
international judicial review 324–8
mandatory criteria for interpretation
308–14

Interception of Communications
Commissioner, United Kingdom 162

International Convention on the
Suppression of Acts of Nuclear
Terrorism 108

International Court of Justice 234
International Covenant on Civil and
Political Rights (ICCPR) 177, 179, 238
Optional Protocol 178

International Criminal Court (ICC) 2, 3, 10, 353
applicable law 286–7
constitutionalism and human rights at
281–305
creation 282–5
fragmentation of jurisprudence
between ICC, international
tribunals and human rights
courts 293–6
impartial and independent judiciary
288–91
legal framework 285–93
procedural framework 285–6
right to a fair trial 291–3
role 281, 284

Rome Statute 232, 234, 283, 285, 286, 287
Art. 21 286–7
Art. 27(1) 296–7
Art. 40 290
Art. 63(1) 297
Art. 67(1)(a) 294

Rules of Evidence and Procedure 367

International Criminal Tribunal for
Rwanda (ICTR) 282–3
International Criminal Tribunal for the
former Yugoslavia (ICTY) 282–3, 358

international judiciary, evolution 282–5
International Labour Organization
Conventions 233
international law, evolution 282–5
International Tribunal for the Law of the Sea 282
interpretation 2
balancing of subjective-historical purpose and subjective-modern purpose 13–14
of German constitution 14, 22
judicial creativity 28
judicial lawmaking 28
judicial role 35–40
mandatory criteria, inter-American jurisprudence 308–14
of norms 8, 14–15
norms 8, 14–15
rules of 28
subjective-historical versus objective-modern purpose of constitutional texts 36, 37
teleological theory 13
in United States 38–9
interpretative techniques 13–16
Ireland
Communications (Retention of Data) Act 2011 157
Complaints Referee 157–8
Criminal Justice (Surveillance) Act 2009 160
Criminal Justice (Terrorist Offences) Act 2005 156
Data Protection Commissioner 157, 159, 160, 162
judicial oversight of surveillance in 136–62
data retention 156–60
as requirement in Irish law 145–7
see also judicial oversight of surveillance
Supreme Court 21
Taoiseach (Prime Minister) 157
Israel
legal interpretation 40
separation fence in West Bank 41
Supreme Court see Israeli Supreme Court
Israel
Israeli Supreme Court 11, 14, 37–8
Barak as President 80, 93
and courts as protectors of the people 73, 74, 92
and judicial legitimacy 53, 67–9
and public opinion 68, 69
Jackson, Robert 50
Japan 261
Jordan 213
judges
see also judicial activism; judicial discretion; judicial impartiality; judicial independence; judicial lawmaking; judicial oversight of surveillance; judicial role; judiciaries
common challenges faced by 2
democracy, duty to protect 32–3
discourse with academics 1
as guardians of the constitution 5, 21, 23, 72, 197, 253
non-accountability 12
objectives 31–2
role 31–5
single judge formations 343–4
judicial activism 21, 208–9
judicial creativity 28
judicial discretion 29–31, 48, 72
judicial impartiality 64, 75, 138, 207, 208, 364, 366, 367
see also judiciaries
and International Criminal Court 289, 290
judicial independence 4–10
see also judicial impartiality
and competence of courts 6, 7
and democracy 12, 34
in institutional 146
International Criminal Court 288–91
and legitimacy of courts 5–6
limitations 6, 7
link between legal and political decisions 8
at national level 4
objectivity requirement 30, 31
personal 146
and political culture 6
procedural fairness 174–5
and protection of constitutionalism 5
at regional and international levels
4–5, 10
and terrorism 34
and war 5, 12, 34
judicial lawmaking 2, 28
judicial legitimacy see legitimacy
judicial oversight of surveillance
136–62
see also surveillance
abuse, guarantees against 149
ad hoc 144
Cunningham principle 146, 147
Damache principle 146, 147
Data Retention Directive 3, 153–4
ex ante judicial control 140, 141, 149,
150, 154, 161
ex post judicial control 140, 141–2,
149, 152
foreseeability 148–9
in Ireland
data retention, judicial oversight of
surveillance of 156–60
judicial oversight as requirement in
Irish law 145–7
Klass v. Germany 136, 138, 149, 152
privacy 137, 139, 140, 145, 148, 151,
153, 161
reasons for 138–40
as requirement under European
Charter of Fundamental Rights
153–6
as requirement under European
Convention on Human Rights
148–53
rule of law 138
of surveillance 136–62
types 140–44
judicial philosophy 47–9
judicial restraint 21, 208
judicial review
challenges of counter-terrorism
judicial review
heightened tensions 165–6, 175
institutional conflicts 168–9
legal relativism 166–7, 175–6, 189
constitutional vs. administrative 143
counter-terrorism 189
inter-American jurisprudence 321–8
and public opinion 62
strong power 170
surveillance 143
treaty compliance 320–28
internal judicial review 321–4
international judicial review 324–8
whether European model a good
guide 266–77
judicial role 27–49
balancing 40–42
comparative law 45–7
discretion 29–31
disputes, deciding 27
interpretation 35–40
justifiability 42–4
legal and judicial philosophy 47–9
role of a judge 31–5
standing 44–5
judicial scrutiny see scrutiny
judicial strategies 338–50
adapting 344–50
reaction on ‘legal level’ 339–42
reaction on the political level 342–50
single judge decisions 343–4
judiciaries
evolution of international judiciary
282–5
as guides 253
impartial and independent 288–91
public confidence in 67–8
role of judiciary in failed transition to
democracy (Egypt) 201–23
in specific contexts 21–3
terrorism context, role 12
in times of terrorism and surveillance
177–97
in times of transition 251–77
United Kingdom 101
justifiability 42–4, 72
Kenya, Republic of 296–9, 298, 299
Khomeini, Ayatollah 213
labour law 82–3
Latin America 255, 316–17, 353
Inter-American Commission 17
Lawmaking, judicial 2, 27, 28
legal interpretation see interpretation
legal legitimacy 365–6
legal order 275, 337
  constitutional 360, 361
  domestic 334
  international 336
  national 235, 267
legal philosophy 47–9
legal reforms 263, 337
legal relativism 166–7, 175–6, 189
legality 42, 44, 73, 358
  and Egypt 207, 208
judicial oversight of surveillance 148, 152, 162
terrorism and surveillance 181, 187, 191
legitimacy
  alleged lack of, in European Court of Human Rights 336–8
  case-by-case 81, 88
  and counter-majoritarian difficulty 52, 60–63
democratic 74, 81
discursive 336, 337, 338
  functional 336, 337
  institutional 53, 63, 64, 72, 336
  of international courts, ensuring 363–9
  and judicial independence 5–6
  legal 365–6
  of means 35
migration of shift in understanding 63–9
moral 368–9
  normative 51, 63, 71, 72, 363
  political, deference to 194
popular see popular legitimacy
  and public opinion 11–13
social 366–7
sociological see sociological legitimacy
understanding of changing 50–70
counter-majoritarian difficulty as framework for exposing shift in 60–63
effect of rise of public opinion polling on 36–60
Libya 204, 205
Lisbon Treaty
  Early Warning System 81, 85
  Identity Clause 84
  living constitution 38
  Maastricht Treaty (Treaty on European Union) 82, 85
  Madrid European Council Meeting 1995 265
  Madrid terrorist bombings (2004) 184
  malware 127
  Mandela, Nelson 64
  margin of appreciation 8, 167, 245
  and European Court of Human Rights 341, 347, 348, 349
  Mexican Supreme Court of Justice 310
  Middle East 202, 203, 204
  see also Egypt; Iraq; Israel; Israeli Supreme Court; Jordan; Syria, conflict zones
Military Tribunals of Nuremberg and Tokyo 282
monism 16
Montesquieu, Charles-Louis de Secondat 288
moral capital 330, 361, 369
  and European Court of Human Rights 11, 338, 339, 350, 351
moral legitimacy 368–9
Morocco 205
Morsi, Mohamed 209, 212, 215, 218, 219, 220, 221
Mubarak, Hosni 204, 209, 212, 215, 221, 222
Muslim Brotherhood 204, 209, 213, 221, 277
  see also Egypt
  Freedom and Justice Party 217, 218
Nasser, Gamal Abdel 212
National Security Agency (NSA), US 142
national security issues, and deference 192
national sovereignty, deference to 194–5
necessity 133
Netherlands, Data Retention Law 155–6
New Zealand 261
9/11 terrorist attacks 3, 117
non-refoulement, principle of 301–2
Nordic countries 8
normative justiciability 42–3
normative legitimacy 63, 71, 72, 363
reach of 72–3
and sociological legitimacy 51, 52, 71
norms
fundamental rights 14
hierarchy of 16–19
interpretation 8, 14–15
North Africa 202, 203, 204
see also Egypt; South Africa
objectivity requirement, judicial role 30, 31
Office of the UN High Commissioner for Human Rights (OHCHR) 137
online searches 127
opinion polls see public opinion polls
Organization of American States (OAS) 324
originalism 38
parents in uniform, rights and privileges 240–44
Patriot Act, US 144
people, courts as protectors of 11, 71–93
see also popular legitimacy; public opinion; public opinion polls
Brighton Declaration 2012 8, 86, 88, 89–90
general elections reflecting will of the people 77
and German Federal Court 75, 82, 84
impact of role of courts on human rights protection 87–9
international courts 89–91
national European courts, gaining of popular legitimacy 81–7
public opinion polls 71, 72, 77, 78, 88, 92, 93
will of the people, expression of 76–9
Permanent Court of Arbitration (PCA) 282
Permanent Court of International Justice 282
personality, rights of 120
Peruvian Constitutional Court 318
philosophy, legal/judicial 47–9
pilot judgment procedure 242, 243, 334, 335
pluralism 204, 351
constitutional 17, 308
political, concept of 50, 70
political parties 98, 99, 213, 217, 219, 297
polls see public opinion polls
popular legitimacy
see also people, courts as protectors of
gaining by national European courts as protectors of the people 81–7
and political institutions/courts 74–6
through role as protector of the people 79–81
Portugal 256, 265
Prevention of Terrorism Act 2005, UK 107–8
prevention state 118–19
privacy
deerence 193, 194, 197
human rights procedures, UN 178, 181, 184
judicial oversight of surveillance 137, 139, 140, 145, 148, 151, 153, 161
surveillance, German experience 119, 120, 124, 130
private power holders and state authorities, collaboration between 121–2
pro persona principle 306, 308, 326
procedural fairness
and legal legitimacy 365
rule of law 170, 171, 175
virtues of 169–75
procedural rights 176, 287
proportionality analysis 27, 75, 111, 116, 162, 165, 171, 181, 196, 197, 310, 346
and balancing 41–2
surveillance, German experience 132, 133
public administration 254, 271
see also admissibility criteria; consensus; fragmentation; gender equality; legal order; legal reforms; pluralism; rule of law; transformation; transitions
public agency 44–5
public opinion
see also public opinion polls and the Court 55
culture 56
and Israeli Supreme Court 68, 69
role of and legitimacy of courts 2, 11–13
sampling 61
surveys 52, 67
public opinion polls 51, 56–60
and courts as protectors of the people 71, 72, 77, 78, 88, 92, 93
Gallup polls 58
public confidence 59

Qutb, Sayed 213

R (Gillan) v Commissioner of Metropolitan Police (2006), UK 109
R v Gul (2013), UK 114–15
Red Army Faction 3, 117
restitutio in integrum 306
restraint, judicial 21, 208
review of constitutionality 224, 262
review of conventionality 321, 322, 323, 324, 327
review of treaty conformity 322, 323, 324, 327
right to a fair trial 101, 291–3
Rome Statute see International Criminal Court (ICC)
rule of law 10
consensus 253, 277
judicial oversight of surveillance 138

procedural fairness 170, 171, 175
transitions 252, 253, 259
Russian Federation
see also Soviet Union, former (USSR)
Basic Law 360
Constitution of 1993 225, 226, 357
Constitutional Court 2, 15, 262
cases and standing 228–31
competence 232
in international legal dialogues 224–50
political questions, avoidance of 8
possible interfaces with international sources and international judicial decisions 231–4
protective function 267
social legitimacy 366
transition difficulties 19–20
Council of Federation 228, 229, 230
Federal Constitutional Law 225, 226
hierarchy of norms 17, 18
and Soviet Union 266
State Duma 228, 229, 232

Sadat, Muhammad Anwar 211, 212, 213
Schmitt, Carl 50, 70
scrutiny 101, 137, 141, 331, 341, 342, 356, 366
legislation, United Kingdom 98–9
legislative 105, 108
secrecy, deference due to 193
secret surveillance 143, 144
Secretary of State for the Home Department v AP (2010), UK 114
Secretary of State for the Home Department v JJ (2008), UK 112–13
Secretary of State for the Home Department v MB (2007), UK 113
security 3, 7, 9, 22, 23, 164, 165, 166, 168, 169, 170, 171, 172, 175, 176, 177, 178, 192, 193, 194, 197, 204, 205, 221
agencies 97, 139
and freedom 117, 118, 119, 303
Index

and human rights 163
judicial oversight of surveillance 138, 139, 145, 150, 151, 162
and judicial role 33, 42, 47, 48
proactive measures 120, 133
surveillance, German experience 118, 124, 130, 132, 134
self-service search warrants 145
separation of powers 5, 44, 73, 87, 89, 167, 168, 174, 175, 176, 209, 220, 256, 288
and judicial role 43, 44
Seventh Framework Programme for Research and Development 177
Shari’a law 211, 212
Singapore 261
single judge formations 343–4
Sisi (Abdel Fattah Saeed Hussein Khalil el-Sisi) 20–21, 210, 211, 212, 214, 222, 223
rule of and military intervention 220
social legitimacy 366–7
sociological legitimacy 12, 54, 56, 59, 63, 71, 363
see also legitimacy
and courts as protectors of the people 74, 78, 88, 92
and normative legitimacy 51, 52, 71
soft law 191
sources
and international judicial decisions 231–4
‘soft’ 22
South Africa 87
see also South African Constitution; South African Constitutional Court
African National Congress 64, 65
Chaskalson Court 63–4, 65
Institute for Justice and Reconciliation 64
South African Constitution 45, 46
South African Constitutional Court (SACC) 53, 63–6, 72
sovereignty
national, deference due to 194–5
popular 52
Soviet Union, former (USSR) 3, 90, 224
see also Russian Federation
and judiciaries in times of transition 258, 259, 260, 262, 266
Spain 265
Madrid European Council Meeting 1995 265
Madrid terrorist bombings (2004) 184
special advocates 185
Special Criminal Courts 179
Special Rapporteur 9, 140, 182–91
and equality of arms principle 183–4
evidence, unlawfully obtained 184
fair trial report 182, 184
incommunicado detention 185–91
and principle of normalcy 183
special advocates 185
speech act theory 355
stability
and change 31–2
role model, stabilizing effect of 263–6
standing
expansion of in German Federal Constitutional Court 22, 123–4
importance of 72
limited rules of old democracies on 6
procedural, extending of 22
rules 44–5
of Russian Constitutional Court 228–31
stare decisis principle 27
state
abuse of power 6
evolution into a prevention state 118–19
extra-state agents of power 120–21
guarantor roles of 119–20
structural virtue, procedural fairness 172–4
subsidiarity principle 8
Sunni Muslims 211
supremacy
constitutional 17, 215, 316–17, 357
parliamentary 170
Supreme Constitutional Court (SCC), Egypt 20, 210, 273, 274
see also Egypt
different positions of according to the ruler 214–22
Supreme Council of the Armed Forces (SCAF), Egypt 20, 213, 223
surveillance
barriers to measures 132–3
evolution of state into a prevention state 118–19
ex ante judicial control 140, 141, 149, 150, 154, 161
ex post judicial control 140, 141–2, 149, 152
extra-state agents of power, as threats to freedom 120–21
general trends 117–23
German Federal Constitutional Court
6, 7, 14, 123–34
actual circumstances, dealing with 129–32
barriers to surveillance measures 132–3
case law 3
justification of surveillance measures 124–5
legal consequences 134
objective protection of fundamental rights 128–9
standards 125–8
standing, expansion of 123–4
Google judgment (CJEU) 122–3
guarantor roles of state 119–20
judges as guardians of constitutional and human rights in times of 21
judicial oversight of surveillance see judicial review 143
justification of measures 124–5
post-9/11 ‘surveillance state’ 7
private power holders and state authorities, collaboration between 121–2
secret 143, 144
telephone tapping 148–9
and terrorism 177–97
defence 191–7
Special Rapporteur, role 9, 182–91
UN human rights procedures 178–82
threats, dimensions 117–18
SURVEILLE research project, methodology 23, 177, 196–7
Syria, conflict zones 105, 110
Tantawi, Mohamed Hussein 215, 220
technology
challenges for judges 13
data retention in Ireland, judicial oversight of surveillance 156–60
defence to 192–3
encryption 131
freedom of telecommunication, fundamental right of 125–6
IT systems, guarantee of confidentiality and integrity 127–8
malware 127
obfuscation of sensitive data 131
online searches 127
surveillance measures, justification 124
Trojan horses 127
telephone tapping 148–9
terrorism
see also counter-terrorism
allegations of 103
consequences 100
defence 191–7
and democracy 33
and human rights 100–101
judges as guardians of constitutional and human rights in times of 21, 23
and judicial independence 5, 34
9/11 terrorist attacks 3
Special Rapporteur, role 182–91
and surveillance 177–97
‘ticking bomb’ situations 49
UN human rights procedures 178–91
war against 35
Terrorism Act 2000, UK 105–6
Terrorism Act 2006, UK 108, 115
Index

Terrorist Asset-Freezing (Temporary Provisions) Act 2010, UK 109
Terrorist Prevention and Investigation Measures Act 2011, UK 109

threats
dimensions of 117–18
terrorism 102
torture, prohibition against 49, 102, 106, 111, 112, 180, 184, 185, 186, 187, 195, 222, 313
Egypt 203, 204, 205
Torture Convention 102, 112, 186, 205, 302, 323
transformation 206, 210, 256, 271, 273, 275

transitions
from authoritarian regimes 207
difficulties of transition 19–21
and economic prosperity 252
judiciaries in times of 251–77
as guardians of an existing constitutional order 253
as guides 253
liberal market economy 251
political 201–10
post-conflict 251
role model, stabilizing effect of 263–6
rule of law 252, 253
‘third wave’ of democratic transitions 255, 256, 257
transitional constitutionalism, challenges of 261–3
UN General Assembly Resolutions 252
whether European model of judicial review a good guide 266–77
treaties
see also specific treaties
treaty compliance, judicial review 320–28
treaty conformity, review of 322, 323, 324, 327
Treaty on European Union (Maastricht Treaty) 82, 85
Trojan horses 127
Tunisia 204–5

United Arab Republic 212–13
United Kingdom
Bills, scrutiny 98–9
case law 45
Ahmed and others v HM Treasury (2010) 109, 113
Bank Mellat v HM Treasury (2013) 114
R (Gillian) v Commissioner of Metropolitan Police (2006) 109
Secretary of State for the Home Department v AP (2010) 114
Secretary of State for the Home Department v JJ (2008) 112–13
Secretary of State for the Home Department v MB (2007) 113

constitutional background 97–100
counter terrorism in 2
case law 110–15
fundamental problem 100–103
statutes, post-2000 105–10
dialogue process 103–5
England and Wales Court of Appeal 187
executive 98–9, 101
Home Secretary, role of 97–8
House of Commons 97, 98, 107, 110
House of Lords 98, 107, 110
Interception of Communications Commissioner 162
judiciary 101
legislation 105–10
Counter-Terrorism Act 2008 108, 109
Counter-Terrorism and Security Act 2015 109–10
Derogation Order 106
Human Rights Act 1998 99, 115
legislature 98
Prevention of Terrorism Act 2005 107–8
Judges as guardians of constitutionalism and human rights

Terrorism Act 2000 105–6
Terrorism Act 2006 108, 115
Terrorist Asset-Freezing (Temporary Provisions) Act 2010 109
Terrorist Prevention and Investigation Measures Act 2011 109
Supreme Court 5–6, 83
universal suffrage principle 97
United Nations
see also specific conventions
fair trial report (Special Rapporteur) 182, 184
Human Rights Council 178, 182, 187
human rights mechanisms 9, 178–91
Office of the UN High Commissioner for Human Rights (OHCHR) 137
United Nations Charter 282
United Nations General Assembly (UNGA) 178
Resolutions 252
United Nations Mechanism for International Criminal Tribunals 283
United Nations Security Council (UNSC) 181, 191, 282
United States
see also Inter-American Court of Human Rights (IACtHR);
Inter-American Human Rights Commission; Inter-American human rights system; Latin America
American Convention on Human Rights 309
American Federal Reserve Bank 65, 66
case law 45
judicial interpretation 38–9
lack of consensus 39
Patriot Act 144
and public opinion 12
public opinion polls 56
Supreme Court 11, 12, 38–9, 51, 72, 249, 313–14
United States Foreign Intelligence Surveillance Court (FISC) 139
Universal Declaration of Human Rights 233
universal suffrage 97
values, role of 7
Venezuela, Bolivarian Republic of,
Constitution 19, 319
Venezuelan Supreme Court of Justice
19, 318–19, 360
Constitutional Chamber 15, 319, 320
Venice Commission 9, 140
vertical dialogue 235, 307, 355, 359
Vienna Convention on the Law of Treaties (VCLT) 240, 245
virtues, procedural fairness 169–75
epistemological 170–72
institutional 174–5, 176
structural 172–4
war
and democracy 33
and judicial independence 5, 12, 34
'We the People' 205–6
see also Egypt; people, courts as protectors of
Zorkin, Valery 224, 236