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'A Homemaker as Well as a Judge'

Lady Hale and Judicial Homemaking/Unmaking/Remaking

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INTRODUCTION

Biographies of Lady Hale refer routinely to her as a 'homemaker as well as a judge'. Although her career is not exactly short of alternative inspiration for the byline writer or public lecture compere, the phrase is almost ubiquitous. When introducing Lady Hale's recent Chatham House lecture on 'Legal Determinants of Health', Professor Lawrence Gostin emphasised the 'homemaker' motif in his introduction as he explained – while gesturing at Lady Hale – it 'just so expresses who you are' and the 'humility that you have'.[1] As Auchmuty and Rackley demonstrate, biographies of legal women so often 'insert men into the picture' by placing their successes in a heterosexual context.[2] Describing Lady Hale as a 'homemaker', they argue, follows this same pattern by emphasising her 'traditional' success in finding a husband and bearing children, rather than her unprecedented career.[3] The source is, however – as Auchmuty and Rackley recognise – Lady Hale herself. The full excerpt in her self-penned biography on the Supreme Court website reads: 'A homemaker as well as a judge, she thoroughly enjoyed helping the artists and architects create a new home for the Supreme Court.'[4]

In this chapter, we interrogate Lady Hale's self-declared status as a 'homemaker' in two ways. First, by underscoring her legal legacy in relation to law and the home, particularly in the fields of property, family and human rights law. Second – and more fundamentally – we build on an emerging literature on 'homemaking, unmaking, and remaking'[5] to create an interpretative lens for analysing the homemaking effects of her judgments. As our interest lies in social welfare law, we focus on Lady Hale's judgments in two sets of high-profile judicial review appeals: those challenging the 'bedroom tax' and 'benefit cap' policies,[6] and those challenging 'out of borough' placements and the meaning of 'vulnerable' under the Housing Act 1996.[7] We start by interrogating Lady Hale's status as a 'homemaker', before turning to the (burgeoning)

[1] Chatham House, 'Legal Determinants of Health' (29 October 2019): www.youtube.com/watch?v=d-LtqbIV7Ck.

[2] Rosemary Auchmuty and Erika Rackley, 'Feminist Legal Biography: A Model for All Legal Life Stories' (2020) 41 *Journal of Legal History* 186, 202–3.

[3] ibid.

[4] UK Supreme Court, 'Biographies of the Justices – Former Justices': www.supremecourt.uk/about/former-justices.html. See also UK Supreme Court, 'Valedictory Ceremony for Lady Hale' (2019): www.supremecourt.uk/news/valedictory-ceremony-for-lady-hale.html.

[5] See Richard Baxter and Katherine Brickell, 'For Home Unmaking' (2014) 11 *Home Cultures: The Journal of Architecture, Design and Domestic Space* 133, 134.

[6] See *R (on the application of Carmichael and Rourke) v Secretary of State for Work and Pensions* [2016] UKSC 58, [2016] 1 WLR 4550 and *R (on the application of DA and others) v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289.

[7] See *Nzolameso v City of Westminster* [2015] UKSC 22, [2015] 2 All ER 942 and *Hotak v London Borough of Southwark* [2015] UKSC 30, [2015] 2 WLR 1341.

literature on the home and our approach in more detail. We then deal with each set of cases in turn.

Our broader agenda here is to contribute to the shift in socio-legal scholarship on the home away from a focus on fleshing out various sub-features – the 'coterie of sub-terms' such as territory, identity, privacy, security and so on[8] – and towards a conceptual treatment of the home as a dynamic process. We want to understand law's role in the home as a 'dynamic archetypal system, a systemic hub, a network, a cluster, a container of complex interactions between a) space, b) time and c) relationships'[9] – not as a set of meanings with which 'the law' can be contrasted. By reading a selection of Lady Hale's judgments through this homemaking/unmaking/remaking heuristic, we seek to demonstrate the value of this approach.

'A HOMEMAKER AS WELL AS A JUDGE': LADY HALE AND THE CONTEXT OF HOME

As part of the British Library's *Legal Lives* oral history collection, Paula Thompson revisits this 'homemaker' label as a recurring line of questioning across twelve hours of interview recordings with Lady Hale. When prompting on her Supreme Court biography, she asks:

> **Thompson:** I suppose it's just quite a striking sentence, 'a homemaker as well as a judge', and deliberately so. Is there any more you'd like to say about that, or will I have to probe you?
>
> **Lady Hale:** . . . Well, I am a homemaker, in the sense that I – together with my husband – look after our home and look after one another. And I always have done, although I have been a career woman as well . . . So yes, 'women keep house'. But so do men and increasingly so.[10]

Themes of homemaking, unmaking and remaking run throughout this oral history. Dealing with everything from the early death of her father leading to a sudden move out of her childhood home, to dividing her life between homes in Manchester and London and later Richmond and London,[11] to the creation of a 'new home' for the UK Supreme Court (see Chapter 31, this volume), the interviews are imbued with recollections of homes 'made, unmade and remade across the life course'.[12]

The term 'homemaker' is not, however, confined to Lady Hale's description of herself. The term features prominently in her academic writing and legal judgments. Family law and the home are linked symbiotically,[13] and many of the same themes from Hale's oral history emerge within her extrajudicial writing. In *From the Test Tube to the Coffin: Choice and Regulation in Private Life*,[14] a book divided into the three sections 'Hatchings', 'Matchings' and 'Dispatchings', Hale underscores the centrality of the home throughout the life course, referring to the 'adoptive home'[15] for foster children, women and domestic abuse within the

[8] Jed Meers, '"Home" as an Essentially Contested Concept and Why This Matters', *Housing Studies* (forthcoming): https://doi.org/10.1080/02673037.2021.1893281.

[9] Renos Papadopoulos, 'Home: Paradoxes, Complexities and Vital Dynamism' in Sanja Bahun and Bojana Petric (eds), *Thinking Home: Interdisciplinary Dialogues* (Routledge 2020) 53, 55.

[10] British Library, 'National Life Story Collection: Legal Lives – Hale, Brenda Marjorie, Part 8': https://sounds.bl.uk/Oral-history/Law/021M-C0736X0008XX-0008V0; British Library, 'National Life Story Collection: Legal Lives – Hale, Brenda Marjorie, Part 4': https://sounds.bl.uk/Oral-history/Law/021M-C0736X0008XX-0004V0.

[11] British Library, 'National Life Story Collection: Legal Lives – Hale, Brenda Marjorie, Part 10': https://sounds.bl.uk/Oral-history/Law/021M-C0736X0008XX-0010V0.

[12] Mel Nowicki, 'Rethinking Domicide: Towards an Expanded Critical Geography of Home' (2014) 8 *Geography Compass* 785.

[13] See Dean Barros, 'Home as a Legal Concept' (2006) 46 *Santa Clara Law Review* 255, 291–95.

[14] Brenda Hale, *From the Test Tube to the Coffin: Choice and Regulation in Private Life* (Sweet & Maxwell 1996).

[15] ibid 31–33.

home,[16] the gendered nature of the 'family home',[17] and raising a distinction between a 'breadwinner and [a] homemaker' in marriage breakdowns.[18]

It is this recognition of the 'homemaker' as distinct from the 'breadwinner' that occupies most of the existing analyses of Lady Hale's legal legacy on the home. The term is tied to the ongoing evolution of property interests in the family home in the wake of the 'somewhat well-trammeled'[19] cases of *Miller* v. *Miller*, *McFarlane* v. *McFarlane*,[20] *Stack* v. *Dowden*[21] and *Jones* v. *Kernott*.[22] In these cases, in the division of property in the event of a marriage or cohabitation breakdown, an issue arises of ensuring equality between a 'breadwinner' (a spouse with the 'earning capacity') and a 'homemaker' (a spouse caring, child-rearing and maintaining the home, perhaps made possible by 'giving up lucrative work').[23] As Lady Hale summarises the position when writing in the *Child and Family Law Quarterly*, it is

> in the community's interests that parents, whether mothers or fathers, and spouses, whether wives or husbands, should have a real choice between concentrating on breadwinning and concentrating on homemaking and childrearing, and do not feel forced, for fear of what might happen should their marriage break down much later in life, to abandon looking after the home and the family to other people for the sake of maintaining a career.[24]

This 'choice' between 'breadwinning' or 'homemaking and childrearing' reflects the gendered nature of the practices of homemaking so often highlighted in the literature on the home.[25] Indeed, this quote was put to Lady Hale by Hunter at a plenary session of the Society of Legal Scholars conference in 2007, the latter noting that 'I don't think many feminists would sign on to a pure homemaking option or a straight choice between breadwinning and homemaking'.[26] In response, Hale emphasised her use of gender-neutral language and noted that, 'in my ideal world[,] caring responsibilities would be much more equally shared between the sexes than research tells us they are at present, although things are changing'.[27]

This 'homemaker' and 'breadwinner' distinction is significant for our purposes, as it spurred a literature drawing on the 'concept of home' to examine the '*context* of home' in property law. As Lady Hale puts it in *Stack* v. *Dowden*, 'in law, "context is everything" and the domestic context is very different from the commercial world'.[28] This focus on what Hayward and Hopkins have characterised as the 'context of home'[29] has led to theoretical arguments over the 'acquisition and quantification' of home interests, with a view to informing debates

16 ibid 45.
17 ibid 55.
18 ibid 59.
19 Chris Bevan, 'Challenging "Home" as a Concept in Modern Property Law: Lessons from the Supreme Court Post-Stack and Jones' in Warren Barr (ed), *Modern Studies in Property Law*, *Volume* 8 (Hart 2015) 195.
20 [2006] UKHL 24, [2006] 2 AC 618.
21 [2007] UKHL 17, [2007] 2 AC 432
22 [2011] UKSC 53, [2012] 1 AC 776.
23 Brenda Hale, 'Equality and Autonomy in Family Law' (2011) 33 *Journal of Social Welfare and Family Law* 3, 8–10.
24 Brenda Hale, 'The View from Court 45' (1999) 11 *Child and Family Law Quarterly* 377, 385.
25 See Emma Bimpson, Sadie Parr and Kesia Reeve, 'Governing Homeless Mothers: The Unmaking of Home and Family' (2020) *Housing Studies* [online first]: https://doi.org/10.1080/02673037.2020.1853069.
26 Brenda Hale and Rosemary Hunter, 'A Conversation with Baroness Hale' (2008) 16 *Feminist Legal Studies* 237, 240–41.
27 ibid 241.
28 *Stack v Dowden* (n 21) [68] (Baroness Hale).
29 Andrew Hayward, 'The "Context" of Home: Cohabitation and Ownership Disputes in England and Wales' in Michael Diamond and Terry Turnipseed (eds), *Community, Home and Identity* (Routledge 2012) 179, 191–99; Nicholas Hopkins, 'Regulating Trusts of the Home: Private Law and Social Policy' (2009) 125 *Law Quarterly Review* 310.

either on the division of assets for 'homemakers' or on the clash of proprietary claims between mortgagors and mortgagees.[30] This ranges from those arguing that the literature on the 'concept of home' underscores the argument that law can and should take better account of home interests,[31] to those who treat the viability of this proposition with scepticism.[32] More fundamentally, others have critiqued the distinction reflected in *Stack* v. *Dowden* between homemaking practices (such as housework and upkeep) as being capable of only 'preserving' the home, as opposed to bricks-and-mortar changes such as financing construction work as the only way of truly 'making' home.[33]

Many of these same arguments have been mirrored, albeit to a lesser extent, in debates over the interpretation of article 8 of the European Convention on Human Rights (ECHR). Across a series of cases, including *McDonald* v. *McDonald*[34] and *Kay* v. *London Borough of Lambeth*,[35] Lady Hale has revisited the context of home under article 8.[36] In *R (on the application of Countryside Alliance)* v. *Attorney General*,[37] she describes the private, home sphere it protects as 'the inviolability of a different kind of space, the personal and psychological space within which each individual develops his or her own sense of self and relationships with other people'.[38]

In common with debates in the law of property, legal writing on the concept of home has both critiqued the jurisprudence on article 8 for its failure to recognise adequately the home interests of claimants and raised scepticism that the 'concept of home' can offer much meaningful value. Jackson's critique of *McDonald* that the claimant's occupation of the property was 'dependent on her ability to pay rent, rather than her attachment to her home or any objective of human dignity',[39] can be compared with Bevan's analysis, rooted largely in a critique of the application of article 8 in *Manchester City Council* v. *Pinnock*[40] and *London Borough of Hounslow* v. *Powell*,[41] where he laments the capacity of the concept of home to offer much help to the judiciary.[42]

It is clear, therefore, that in her life, extrajudicial writing and legal legacy, Lady Hale is no stranger to the concept of home. Indeed, her judgments are a regular feature of socio-legal debates drawing on the concept of home in property law, family law and in relation to article 8 ECHR. However, our focus in this chapter is not to revisit these existing debates but instead to offer a new framework for analysing judgments about 'home' through an approach informed by the literature on the processes of homemaking, unmaking and remaking. In doing so, we

[30] Sarah Nield, 'Clash of the Titans: Article 8, Occupiers and Their Home' in Susan Bright (ed), *Modern Studies in Property Law, Volume 6* (Hart 2011) 101, 105.

[31] Lorna Fox, *Conceptualising Home* (Bloomsbury 2007) 524.

[32] Bevan (n 19).

[33] Ellen Gordon-Bouvier, 'Crossing the Boundaries of the Home: A Chronotopical Analysis of the Legal Status of Women's Domestic Work' (2019) 15 *International Journal of Law in Context* 479, 489–90.

[34] [2016] UKSC 28, [2017] AC 273.

[35] *Kay and others and another v London Borough of Lambeth and others; Leeds City Council v Price and others and other* [2006] UKHL 10, [2006] 2 AC 465.

[36] See ibid [185]–[187] (Baroness Hale).

[37] *R (on the application of Countryside Alliance and others and others) v Her Majesty's Attorney General and another; R (on the application of Countryside Alliance and others and others) v Her Majesty's Attorney General and another* [2007] UKHL 52, [2008] 1 AC 719.

[38] ibid [116] (Baroness Hale).

[39] Abigail Jackson, 'Home, Human Rights and Horizontal Effect: An English Approach to Article 8 of the European Convention on Human Rights' (2017) 4(1) *Queen Mary Human Rights Law Review*.

[40] [2010] UKSC 45, [2011] 2 AC 104.

[41] *Mayor and Burgesses of the London Borough of Hounslow v Powell; Leeds City Council v Hall; Birmingham City Council v Frisby* [2011] UKSC 8, [2011] 2 AC 186.

[42] Bevan (n 19) 201–4.

hope to illustrate how the judgments of Lady Hale – the self-proclaimed 'homemaker' who 'creat[ed] the new home' for the Supreme Court – can be analysed through their homemaking, unmaking and remaking effects. The next section outlines this approach.

FROM A JUDGE WHO IS A HOMEMAKER TO UNDERSTANDING JUDICIAL CONTRIBUTIONS TO HOMEMAKING/UNMAKING/REMAKING

Lady Hale's career has coincided with burgeoning academic interest in home as a concept, a place and a process. In part, this interest has been a response to the cultural turn in academia – very broadly, the idea that socially and historically situated processes of production of meanings are significant and worthy of serious analysis. For scholars of culture, the very ordinariness of home matters; it highlights the importance of social traditions as well as the social creativity involved in the emergence of new meanings of home. The shift has been productive. A burgeoning body of work within feminist geography on house and home has, as Domosh points out, 'reclaimed as an object of study that has often been ignored: house and home, the household and the domestic world'.[43]

If we attempted to summarise the extensive literature on the home in this chapter, there would be room for little else.[44] For our purposes, the recent focus on processes of homemaking, unmaking and remaking has been particularly productive. This has its roots in how scholarship on the home responded to the challenges posed by migration. As Papadopoulos describes, the home space of the migrant becomes almost magical, 'not limited to geographical, physical place, or architecture; it also refers to any space that is experienced as being intimate, and it extends to the sense of space understood in various contexts such as cultural, spiritual, historical, psychological, societal, financial, ethnic, political, climatic, etc'.[45] Recent scholarship in this area has underscored more critical and process-orientated conceptions of home. In a review of house and home for the *Cambridge Encyclopedia of Anthropology*, Samanahi and Lenhard suggest that a more 'processual notion of home, often as a form of ordering without necessarily being confined to localised spaces of houses', is increasingly characterising theoretical approaches in the literature.[46]

This 'processual' reconceptualisation of home has been incredibly influential, moving the literature away from a focus on the home's 'x-factor' qualities (such as a sense of territory, identity, security, etc.)[47] and towards what Alam and colleagues describe as the 'many "subtractive" and "reversal" processes and practices that "unmake" the traditional home'.[48] This is particularly evident in homelessness research. Watts and colleagues, for example, look at the destructive erosion of autonomy of homeless people living in temporary accommodation,[49] and Hoolachan considers homemaking by homeless young people living

[43] Mona Domosh, 'Geography and Gender: Home, Again?' (1998) 22 *Progress in Human Geography* 276.

[44] For a review of the literature, readers would be well served by Hazel Easthope, 'A Place Called Home' (2004) 21(3) *Housing, Theory and Society* 128; and Shelley Mallett, 'Understanding Home: A Critical Review of the Literature' (2004) 52 *Sociological Review* 62.

[45] Papadopoulos (n 9) 55.

[46] Farhan Samanani and Johannes Lenhard, 'House and Home' in F Stein and others (eds), *The Cambridge Encyclopedia of Anthropology* (Cambridge University Press 2019): http://doi.org/10.29164/19home.

[47] Fox (n 31) 106–7.

[48] Ashraful Alam, Claudio Minca and Khandakar Farid Uddin, 'Risks and Informality in Owner-Occupied Shared Housing: To Let, or Not to Let?', *International Journal of Housing Policy* (forthcoming): https://doi.org/10.1080/19491247.2021.1877887.

[49] Beth Watts and Janice Blenkinsopp, 'Valuing Control over One's Immediate Living Environment: How Homelessness Responses Corrode Capabilities', *Housing, Theory and Society* (forthcoming): https://doi.org/10.1080/14036096.2020.1867236.

in hostels. She considers not only homemaking practices that the hostel permits, such as doing laundry and displaying personal objects, but also prohibited practices such as cannabis use, graffiti and vandalism. These 'offered the residents ways of expressing autonomy, control, identity and of facilitating belonging'.[50] Her suggestion is that understanding such activities in this way provides a means by which they 'might be reimagined as attempts to construct a sense of "home"'.[51]

What this line of work suggests to us as social welfare and socio-legal scholars is that not only are there productive possibilities presented by home as a process of making, unmaking and remaking but that it offers an alternative to the impasse of current legal scholarship on home as an ideal that can be offered by law to those excluded. We are particularly attracted by the insights that recognising law as implicit in homemaking/unmaking/remaking might provide into the everyday practices of those who are not securely housed and its recognition of their agency. Law in this account becomes an important tool of home unmaking, something that Baxter and Brickell describe as a process through which 'material and/or imaginary elements of the home are unintentionally or deliberately, temporarily or permanently, divested, damaged or even destroyed'.[52] As Grossberg put it:

> [T]he fact that people do use the limited resources they are given to find better ways of living, to find ways of increasing the control they have over aspects of their lives and so on, is significant, not only in itself, but also in terms of understanding the structures of power and inequality in the contemporary world and the possibilities for challenging them.[53]

Our aim, then, is to develop scholarship in law by following the shift in wider scholarship from home as a stable resource to home as a dynamic process and integrating law into that shift. What we want to achieve is an exploration of law's role in home understood as a 'dynamic archetypal system, a systemic hub, a network, a cluster, a container of complex interactions between a) space, b) time and c) relationships'.[54] We want to incorporate law into the dynamic and polyphonic thinking about the home.[55]

In the next section, we seek to apply these insights by developing homemaking/unmaking/remaking as an interpretive lens. We suggest that this has the potential to reveal the role that law plays in resolving or exacerbating tensions between common understandings of home as a haven, a site of autonomy and a source of status, and the processes undertaken by those who have only a precarious hold on home, and the way that legislation and judicial decision-making impacts upon this process. Using Lady Hale's judgments in critical areas of social welfare law provides an important place to start this work, not only because of her acknowledged expertise in this area but because of the importance she attaches to homemaking in her personal and professional life. We deal with two sets of decisions in turn: the first dealing with high-profile cuts to social security (the 'bedroom tax' and the 'benefit cap') and the second with challenges to local authority decision-making under the Part VII Housing Act 1996 (on 'vulnerability' under s. 189 and 'intentional homelessness' under s. 191).

[50] Jennifer Hoolachan, 'Making Home? Permitted and Prohibited Place-Making in Youth Homeless Accommodation', *Housing Studies* (forthcoming): https://doi.org/10.1080/02673037.2020.1836329.

[51] Ibid.

[52] Baxter and Brickell (n 5) 134.

[53] Lawrence Grossberg, *Bringing It All Back Home: Essays on Cultural Studies* (Duke University Press 1997) 8.

[54] Papadopoulos (n 9) 55.

[55] Sanja Behun, 'Homing In on Home' in Sanja Bahun and Bojana Petric (eds), *Thinking Home: Interdisciplinary Dialogues* (Routledge 2020) 1.

'HOME UNMAKING POLICIES': CHALLENGING CUTS TO SOCIAL SECURITY PAYMENTS

This section applies our heuristic to Lady Hale's dissenting judgments in two judicial review challenges to housing benefit cuts. The claimants in the first, *R (on the application of Carmichael and Rourke)* v. *Secretary of State for Work and Pensions*,[56] challenged the Coalition government's 'removal of the spare room subsidy' (known by almost everybody else as the 'bedroom tax'), a housing benefit penalty for those in the social rented sector deemed to be 'under-occupying' their properties. The claimants in the second, *R (on the application of DA and others)* v. *Secretary of State for Work and Pensions*,[57] were affected by the revised 'benefit cap': a limit on total working-age social security payments for households out of work or working too few hours. Both polices are part of a package of austerity-driven welfare cuts that work through the homes of those affected. As Nowicki argues, they are 'home unmaking policies'.[58] Both function by cutting housing benefit and aim, among other things, to 'incentivise' households to downsize, find cheaper alternative accommodation or – to make up the shortfall between rent and housing benefit –find work or work more hours.

Lady Hale's dissent in *Carmichael* illustrates a response to the 'home unmaking' effects of the 'bedroom tax' that is distinct from the majority judgment. The 'bedroom tax' policy functions by imposing a housing benefit penalty for 'under-occupation' of a property in the social rented sector with reference to a room standard laid out in Reg B13 Housing Benefit Regulations 2006: a 14 per cent penalty for under-occupying by one bedroom, and 25 per cent for two or more. The joined appeals dealt with a range of claimant circumstances that fell broadly into two classes: the first were all households who required an additional room by reason of disability (disability discrimination), and the second was a claimant in a 'sanctuary scheme' for victims of domestic violence in a property fortified with a 'panic room' (sex discrimination). Neither class was exempted from the application of the 'bedroom tax' policy; instead, they were reliant on the 'discretionary housing payment' (DHP) scheme, awarded on a case-by-case basis by local authorities.[59]

A majority of the court allowed appeals for some of the claimants in the first class and dismissed the appeal for the claimant in the 'sanctuary scheme'. We focus on the latter. Lady Hale (with whom Lord Carnwath agreed) dissented on the outcome for this claimant, considering instead that the discrimination in her case could not be justified by the availability of DHPs. A long-standing literature has highlighted domestic violence and abuse within the home as a form of often concealed 'home unmaking' – indeed, this literature provides part of the foundation of Baxter and Brickell's arguments that we outlined earlier.[60] However, what is notable about Lady Hale's dissent is its focus on the 'home remaking' burden placed on victims of domestic abuse and the role that state interventions, such as sanctuary schemes, play in this process.[61] Lady Hale notes:

[56] [2016] UKSC 58.

[57] [2019] UKSC 21.

[58] Mel Nowicki, 'A Britain That Everyone Is Proud to Call Home? The Bedroom Tax, Political Rhetoric and Home Unmaking in UK Housing Policy' (2018) 19 *Social and Cultural Geography* 647, 650.

[59] For an overview of the long-standing problems with the DHP regime, see Jed Meers, 'Panacean Payments: The Role of Discretionary Housing Payments in the Welfare Reform Agenda' (2015) 22(3) *Journal of Social Security Law* 115.

[60] Baxter and Brickell (n 5) 136–38.

[61] Faten Khazaei, 'Ethnography of Police "Domestic Abuse" Interventions: Ethico-methodological Reflections' in Johannes Lenhard and Farhan Samanani (eds), *Home: Ethnographic Encounters* (Routledge 2020) 73, 74.

> The state has provided Ms A with such a safe haven. It allocated her a three-bedroom house when she did not need one. That was not her choice. It later fortified that house and put in place a detailed plan to keep her and her son safe. Reducing her housing benefit by reference to the number of bedrooms puts at risk her ability to stay there. Because of its special character, it will be difficult if not impossible for her to move elsewhere and that would certainly put the State to yet further expense.[62]

As Wilcox argues, it is rarely the victim of domestic violence that remains in the home. Instead, they must face the prospect of fleeing their home and community to find safety.[63] Drawing on interviews with domestic abuse survivors, she argues that, in doing so, they face the burdens of home remaking – what Wilcox describes as the problems of 'establishing a new home' – where domestic violence has disrupted the 'home as stable and permanent'.[64] Lady Hale's dissent recognises the importance of this 'fortified' remade 'safe haven', which she notes the 'bedroom tax' policy 'puts at risk'. Her recognition of the 'special character' of their home reflects the difficulties of this home remaking burden that Wilcox identifies. This contrasts with the broader requirement for a fixed amount of space for the other class of claimants in the appeal:

> [T]he disability cases are about whether people need extra space because of their disability. The link between the number of bedrooms for which housing benefit is paid and their needs is direct and obvious. The regulation denies them the benefit they need to pay for the amount of space they need. The case of A, and others like her in sanctuary schemes, is different. Her need is not for space but to stay where she is. The effect of the regulation is to deny her the benefit she needs in order to stay in the accommodation she needs.[65]

In contrast to the majority, Lady Hale's dissent does not consider the availability of discretionary funds through the DHP regime to be sufficient for a claimant in this position. Given the scheme's flaws – it is 'discretionary, cash-limited and produces less certainty', among other problems[66] – it is insufficient to provide the security that the claimant requires. As Lady Hale puts it, for 'a woman in a sanctuary scheme to have to endure all those difficulties and uncertainties on top of the constant fear and anxiety in which she lives cannot be justified'.[67] It is, therefore, a dissent that prioritises the remaking of the disrupted nature of the 'home as stable and permanent'[68] – a priority not recognised by the majority.

Lady Hale's dissent in *DA* reflects an altogether different response to the home unmaking effects of the 'benefit cap'. The challenge was brought by lone parents with children under school age. As childcare obligations mean that they are significantly less able to escape the cap by finding work or increasing their working hours, they argued that the policy was unlawfully discriminatory under article 14 ECHR – taken with article 8 or article 1 of the First Protocol (A1P1) – and was contrary to international obligations under article 3 United Nations Convention on the Rights of the Child (UNCRC).[69] The majority of the court dismissed the appeal on both grounds, finding that the discrimination was justified as the policy was not 'manifestly without reasonable foundation'.[70] Lady Hale and Lord Kerr dissented.

62 *Carmichael* (n 6) [76].
63 Paula Wilcox, *Surviving Domestic Violence : Gender, Poverty and Agency* (Palgrave Macmillan 2006) 96.
64 ibid 96–107.
65 *Carmichael* (n 6) [72].
66 ibid [77].
67 ibid [77].
68 Wilcox (n 63) 96–107.
69 *DA* (n 6) [9], [12]–[16].
70 ibid [88].

Lady Hale was not convinced that the government had struck 'a fair balance … between the interests of the community and the interests of the children concerned and their parents', and therefore considered the discrimination not to have been justified.[71] What is striking about her dissent is its emphasis on the risks posed by forcing parents of young children to 'work outside the home'. As Lady Hale puts it: 'It is dangerous for a judge to indulge in moral indignation but few mothers (and indeed few lone fathers) who have chosen to work also outside the home while their children are very young can have escaped being made to feel guilty that they may have been harming their children's healthy development by doing so.'[72] Her dissent continues by drawing on the 'classic work' *Child Care and the Growth of Love*, published by John Bowlby in 1953, to underscore the importance of children forming 'stable and healthy attachments' with their parent or parents.[73] To escape the benefit cap, a lone parent of a young child would have to 'work outside the home', and would therefore be forced away from the site where these attachments are developed.

Lady Hale's direct reference to Bowlby's work illustrates the homemaking concerns at play. His study focuses on the emotional work of the mother in the home – what Bowlby describes as the importance of 'mother love'.[74] Studies drawing on the concept of home have criticised its legacy in two ways: first, for failing to recognise that the 'home space is not necessarily a haven for children' but can instead be a site of trauma and abuse.[75] Second, Edwards argues that the study is part of a long line of work 'instilling … the virtues of homemaking' for women, where delinquency in their children is ascribed to their failure to discharge their homemaking responsibilities.[76] Indeed, McCarthy highlights how the study 'lent "scientific" respectability' to government and media rhetoric on the dangers of mothers leaving the home to work.[77]

As Lady Hale notes, the difference between the majority and her dissent is not founded in a disagreement on the correct legal tests to apply. Indeed, she suggests that 'there is no difference of opinion between Lord Wilson and me as to the legal principles applicable'.[78] Instead, the difference lies in her lending greater weight to the homemaking role of the parent, and to the capacity of the benefit cap policy to damage this through the home unmaking effects of requiring the parent to work outside of the home.

These two dissents exhibit a fundamentally different view of the importance of these homemaking/unmaking/remaking practices when compared to the majority decisions. In both cases, when faced with intentionally 'home unmaking policies',[79] Lady Hale's dissents place greater emphasis on the home remaking burden faced by victims of domestic violence and the homemaking practices of mothers in the exercise of a proportionality assessment under article 14 ECHR.

[71] ibid [157].
[72] ibid [143].
[73] ibid [143].
[74] Wendy Webster, *Imagining Home: Gender, Race And National Identity, 1945–1964* (UCL Press 1998) 93–96.
[75] Sarah Holloway and Gill Valentine, 'Spatiality and the New Social Studies of Childhood' (2000) 34 *Sociology* 763, 774–76.
[76] Sian Edwards, *Youth Movements, Citizenship and the English Countryside: Creating Good Citizens, 1930–1960* (Palgrave Macmillan 2018) 176–77.
[77] Helen McCarthy, 'Women, Marriage and Paid Work in Post-War Britain' (2017) 26 *Women's History Review* 46, 49–50.
[78] *DA* (n 6) [132].
[79] Nowicki (n 58) 650.

HOMELESSNESS LAW AND JUDICIAL HOMEMAKING

What we are concerned with in this section is the potential of law, specifically the homelessness provisions of Part VII of the Housing Act 1996, to respond to the crisis of home unmaking that is homelessness. The judiciary plays a key role in determining whether homelessness law works for homeless people; in Brickell and Baxter's words, the judge is a significant agent in either 'reproducing, or resisting, unequal structures'.[80]

In *Nzolameso* v. *City of Westminster*,[81] Lady Hale played a leading role in mitigating the home unmaking perpetrated by the state when it capped the amount of housing benefit payable for privately rented properties. Ms Nzolameso, a fifty-one-year-old single mother of five children aged between eight and fourteen, suffered from long-standing health problems including HIV-positive status and type II diabetes. She lost her home because of the cap; it meant her housing benefit was dramatically reduced, and she could no longer afford the rent. She applied under the legislation for housing assistance. Initially, she was housed with her family in two rooms in a hostel in Kensington and Chelsea on a bed and breakfast basis. The hostel provision was sufficiently close to the children's schools that their schooling was not interrupted. But that initial promise of home remaking was short-lived. Although Westminster Council accepted that it owed Ms Nzolameso what is described as 'the main homelessness duty' under s. 193(2) of the 1996 Act, the offer it made of temporary housing was in a five-bedroomed house in Bletchley near Milton Keynes – an 'out of borough placement'.

The statute requires that an offer of accommodation is suitable. From the authority's perspective, it was. Ms Nzolameso disagreed and applied for a review of the decision under s. 202 of the 1996 Act. She argued that the house was 'too far from people helping her with her children. There would be nobody there she knew. She had high blood pressure and wanted to stay with her GP. It would mean changing the children's schools. She had lived in Westminster for a long time.'[82] The reviewing officer confirmed the authority's decision; as Lady Hale recounts, 'I am not satisfied that the accommodation was unsuitable on the grounds that your medical and support needs are such that you have to live in Westminster'; the length of time she had lived in Westminster was 'not a particularly long time and does not mean that you cannot live anywhere else'; none of her children were 'currently sitting national exams and could . . . move schools without their education suffering'; and the accommodation offered was 'suitable and affordable'.[83] This was followed by an unsuccessful appeal to the county court and a refusal of an application for judicial review. At this point, in another devastating act of state home unmaking, the authority stopped providing the temporary accommodation, the children were separated among three different foster families and care proceedings were begun. Although Ms Nzolameso was granted permission to appeal to the Court of Appeal, that appeal was unsuccessful. Its decision – which followed the reasoning of the county court – was criticised by the Secretary of State for Communities and Local Government when he intervened in the case at the Supreme Court. His concern was that the Court of Appeal had been too willing to assume that the authority had properly applied statutory guidance, had considered and rejected the possibility of providing closer accommodation and had good reasons for its decision. Failing to take a critical approach in effect 'immunises from judicial scrutiny'[84] critical acts of home unmaking, decisions to house

[80] Baxter and Brickell (n 5) 139.
[81] [2015] UKSC 22, [2015] WLR(D) 165.
[82] ibid [4].
[83] ibid [7].
[84] ibid [35].

people far from their homes in the course of applying legislation designed as a homemaking intervention.

In the Supreme Court, Lady Hale goes back to basics to harness the homemaking potential of the legislation and to enhance the agency of those facing homelessness. She draws on the statutory provisions, the Code of Guidance and on children's legislation to interrogate what it means for accommodation to be suitable for the discharge of a local authority's duty and to reject the legitimacy of Westminster Council's decision-making. She points out that the default point is to offer accommodation within their own districts. She notes that the Code of Guidance recommends that

> authorities take into account the need to minimise disruption to the education of young people, particularly at critical points in time .... Housing authorities should avoid placing applicants in isolated accommodation away from public transport, shops and other facilities, and, wherever possible, secure accommodation that is as close as possible to where they were previously living, so they can retain established links with schools, doctors, social workers and other key services and support essential to the well-being of the household.[85]

Those responsibilities are strengthened by the provisions of the Homelessness (Suitability of Accommodation) (England) Order 2012[86] and by s. 11(2) of the Children Act 2004, which requires local authorities to ensure that their functions are discharged having regard to the need to safeguard and promote the welfare of children. The result is that local authorities have a statutory duty to accommodate within their area whenever this is reasonably practicable. This inevitably enhances the home remaking possibilities of homeless people. We suggest that understanding this decision through the lens of homemaking reveals Lady Hale's particular form of judicial activism as well as making explicit the complex and contradictory role of the state in unmaking and remaking Ms Nzolmeso's home.

In *Hotak* v. *London Borough of Southwark*,[87] Lady Hale plays a different role. While she supports the majority in overturning the decision in *R* v. *London Borough of Camden, ex parte Pereira*[88] and its rather bizarre formulation of how vulnerability is to be assessed under s. 189(1)(c) of the Housing Act 1996, she also in part dissents. She rejects the majority's position that any third-party services offered to homeless people should be taken into account when assessing an individual's vulnerability. In contrast, for Hale there is an important distinction between statutory services offered to homeless people such as medical and nursing care, counselling, and community services for people with mental disorders or disabilities, and services offered by charities and members of the family. While the first category of provision is relevant when it comes to assessing whether a person is more at risk of harm from being without accommodation than others might be, the last two categories are not. Hale points out that charities are not under any legal obligation: 'Charitable services may come and go – there may be a regular soup or sandwich run in some places at some times but not everywhere always. Charitable services will set their own criteria for whom they will help and whom they will turn away. Charitable services may run out of money.'[89] We would go further and suggest that soup kitchens and the like are offering homemaking services to people whose homes have been unmade. Hale's argument, that any third-party support for a vulnerable individual must be consistent and predictable before it should be taken into account, is even

[85] Para 17.41 of the Code of Guidance quoted in ibid [16].
[86] SI 2021/2601.
[87] [2015] UKSC 30, [2016] AC 811.
[88] [1998] EWCA Civ 863, [1998] 31 HLR 31
[89] *Hotak* (n 87) [95].

more relevant when the courts are focusing on family support. She highlights another, more important reason why support from family members should be discounted, a reason closely aligned with the relational practices of homemaking revealed in the literature. She suggests that most people who live together help one another, particularly if someone is vulnerable because of old age, mental disorder or disability, or physically disability. As she says: 'It would be a sad world indeed if they did not.'[90] She also notes the perverse incentive that taking into account help from household members would produce, not finding it credible that Parliament would have sought to penalise normal helpfulness by excluding those who offer it from protection. What Hale, we suggest, is drawing on here is an intuitive understanding of processes of homemaking. This drives her dissent:

> In my view, therefore, Sifatullah Hotak remains 'vulnerable' for the purpose of section 189(1)(c) of the 1996 Act despite the devoted care which he receives from his brother Ezatullah. As it is clear that the authority would have accepted that he was vulnerable were it not for his brother's support, I would allow the appeal and declare that the appellant is in priority need.[91]

Here, we can discern some useful insights about homelessness law. In seeking to protect vulnerable people from the adverse consequences of homelessness, the statute itself is an instrument of homemaking in the context of a crisis of home unmaking. Local authorities, frequently aided and abetted by the courts, resist the statutory push towards homemaking because of the resource implications involved, with dire consequences for the vulnerable. There is, however, an opportunity for judges, as Hale demonstrates, to mobilise broad conceptualisations of homemaking and resist domestic injustice.

CONCLUSION

Our analysis has revealed that Lady Hale's self-declared status as a 'homemaker' is well-founded. This is not just in terms of her more well-trodden legal legacy in the wake of *Stack* v. *Dowden* and other cases in the law of property, or her work in family law and the development of article 8 ECHR jurisprudence. Applying our heuristic of homemaking/unmaking/remaking to four social welfare cases, the homemaking and remaking reasoning and the effects of her judgments become clear. Indeed, in the two dissents we analyse, her points of departure from the majority are a result of her different emphasis on these homemaking and remaking processes – and the home unmaking effects of the government policy under challenge – that we seek to highlight.

The literature on the home could be said to suffer from a reputation problem. While our analysis might suggest that the home has become too muddled and confusing to be of value, Mallet points out there is a productive, creative tension in 'potentially contradictory theoretical approaches to the study of home'.[92] We hope that the heuristic we demonstrate in this chapter could be applied to other decisions with a bearing on the home. In applying the insights of the dynamic turn in scholarship on the home to the content of legal decisions, socio-legal scholarship can identify the role of the law – or, indeed, of individual judges – in homemaking/remaking/unmaking processes.

[90] ibid [96].
[91] ibid [101].
[92] Mallett (n 44).