Over the recent years, the role of the judiciary has become of increasing importance. In countries which practise a democratic form of government, the judiciary has been looked upon as the defender of any encroachment to the Rule of Law.

This duty to uphold the Rule of Law, I may add, is not only imposed on the judiciary but also on the executive and the legislature by recognising that they can never be above the law; by giving an unstinting support for the courts which administer the law; and, in constructing the law, to give an honest account of what is practical and not merely a rhetorical account of what is desirable.

HRH Sultan Azlan Shah
Creativity of Judges
Official Opening of the Fourth International Appellate Judges Conference and the Third Commonwealth Chief Justices Conference
20 April 1987, Kuala Lumpur

LECTURE BY

First Sultan Azlan Shah Fellow

Lord Phillips of Worth Matravers

at the

OXFORD CENTRE FOR ISLAMIC STUDIES, UNIVERSITY OF OXFORD

On 12 February 2014, Lord Phillips of Worth Matravers, the first Sultan Azlan Shah Fellow, delivered a lecture on "The Elastic Jurisdiction of the European Court of Human Rights" at the University of Oxford.

Lord Phillips, formerly President of the UK Supreme Court, and Visiting Fellow, Mansfield College, University of Oxford, was introduced by the Director of the Oxford Centre for Islamic Studies, Dr Farhan Nizami. Baroness Helena Kennedy QC, Principal of Mansfield College, who delivered the Twenty-First Sultan Azlan Shah Law Lecture (2007) in Kuala Lumpur entitled "Legal Challenges in Our Brave New World", gave the vote of thanks. His Royal Highness Raja Dr Nazrin Shah, The Crown Prince of the State of Perak (now His Royal Highness Sultan Nazrin Shah, Sultan of Perak) and Trustee of the Oxford Centre for Islamic Studies, graced the occasion.

In 2011, the Oxford Centre for Islamic Studies established the Sultan Azlan Shah Fellowship in honour of His Royal Highness Sultan Azlan Shah with the following aim: "The Sultan Azlan Shah Fellowship will enable the Centre to broaden and enrich the teaching of law at Oxford and help promote understanding between different legal traditions and the societies by which they have been nurtured. It will create an enduring legacy for the visions and

achievements of His Royal Highness and most appropriately it would do so at the alma mater of the Crown Prince of Perak, HRH Raja Dr Nazrin Shah [now His Royal Highness Sultan Nazrin Shah, Sultan of Perak], and at the first Muslim institution of its kind to be established in the 900-year history of the University of Oxford."

Lord Phillips of Worth Matravers was appointed the first Sultan Azlan Shah Fellow in 2013. Lord Phillips also delivered the Seventeenth Sultan Azlan Shah Law Lecture in 2003 entitled "Right to Privacy: The Impact of the Human Rights Act 1998".

The Oxford Centre for Islamic Studies is a Recognized Independent Centre of the University of Oxford. It was established in 1985 to encourage the scholarly study of Islam and the Islamic world. HRH The Prince of Wales is the Patron of the Centre. It is governed by a Board of Trustees consisting of scholars and statesmen from different parts of the world, alongside representatives of the University of Oxford.

The Elastic Jurisdiction of The European Court of Human Rights

The Lord Phillips of Worth Matravers, KG, PC
Sultan Azlan Shah Fellow, Oxford Centre for Islamic Studies
Visiting Fellow, Mansfield College

Text of lecture delivered by the First Sultan Azlan Shah Fellow at the University of Oxford on 12 February 2014.

I selected the title of this evening's lecture several months ago. I had not anticipated how topical it would be. Sir John Laws, who sits in the Court of Appeal, three serving members of the Supreme Court, Lord Sumption, Lady Hale and Lord Mance, the recently retired Lord Chief Justice, Lord Judge and, most recently, Lord Dyson, Master of the Rolls, have all now given lectures that have focused on the European Court of Human Rights at Strasbourg.

Some of those speakers have attacked the Court for getting too big for its boots, for invading territory that should properly be left to individual members of the Council of Europe. This criticism has not been confined to judges. Decisions of the Strasbourg Court have been attacked by Ministers and Members of Parliament as representing unwarranted challenges to parliamentary sovereignty. Nearly three years ago, Sir Nicholas Bratza, who had just been elected President of the Strasbourg Court, complained in a public seminar in Edinburgh:

> The vitriolic—and I am afraid to say, xenophobic – fury directed against the judges of my Court is unprecedented in my experience, as someone who has been involved with the Convention system for over 40 years … The scale and the tone of the current hostility directed towards the Court, and the Convention system as a whole, by the press, by members of the Westminster Parliament and by senior members of the Government has created understandable dismay and resentment among the judges in Strasbourg.
>
> Nothing has changed over the last three years.

The Strasbourg Court is the creation of the European Convention on Human Rights,[1] agreed by the members of the Council of Europe. Its role is to enforce the human rights that the signatories to the Convention have agreed that they will observe. The original signatories to the Convention, of which the United Kingdom was the first in 1950, would be astonished at some of the interpretations given by the Strasbourg Court to the fundamental rights to which they signed up.

They would also be astonished at the circumstances in which the Strasbourg Court has held that the obligation to observe those rights arises. Is this cause for complaint or does it reflect a commendable determination on the part of the Strasbourg Court to move with the times? That is the question that I hope that you will be asking yourselves at the end of this lecture. I am going to try to give you the material that you will need to form a view by illustrating the ways in

[1] Section II, European Convention on Human Rights.

which the Strasbourg Court has enlarged its empire. As I do so I shall venture some personal views about these.

I am, I suspect, one of very few here who was affected by the horrendous events that led to the European Convention on Human Rights. My mother was Jewish and when in 1940 it seemed on the cards that the Germans would succeed in invading England, my father sent her with me and my even smaller sister across the Atlantic, a crossing which, with hindsight, was more perilous than staying put. After the war, the threat of Nazi Germany was replaced by the threat of Communism.

This led in 1949, at the instigation of Winston Churchill, to the founding of the Council of Europe, open to all European States that accepted the principle of the rule of law and were able and willing to guarantee democracy and fundamental human rights and freedoms. This excluded the Communist block up to perestroika and the fall of the Berlin wall, since which time Russia and almost all the new democracies of Central and Eastern Europe have become members. One of the first tasks of the initial members of the Council of Europe was to draw up the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The first Article of that Convention recorded that the parties to it agreed to secure to everyone "within their jurisdiction" the rights and freedoms set out in the Convention. This was an unusual treaty. Normally treaties

govern some aspect of the relationship between those who sign them. In this treaty each signatory agreed with the others the manner in which it would treat individuals within its own jurisdiction. This talk is going to focus on the meaning of that word "jurisdiction".

The Convention had one other unusual feature. It made provision for the institution of the European Court of Human Rights, a transnational court to which individual citizens could bring applications against their own States for infringement of their human rights. The jurisdiction of the European Court and the right of individual petition to this Court were, however, optional extras. The United Kingdom did not sign up to these until 1966, under a Labour administration. After that, United Kingdom citizens, indeed anyone within the United Kingdom's jurisdiction, could bring a claim at Strasbourg against the United Kingdom for violation of their Convention rights. What they could not do was to bring such a claim within this jurisdiction. Not until 1998 did another Labour administration pass the Human Rights Act, which incorporated the Convention rights into our domestic law. This imposed an obligation on the executive to observe the Convention rights and entitled individuals to sue the executive if it failed to do so. When ruling on such suits, the English courts look for guidance to decisions of the Strasbourg Court.

In a case called *Ullah*,[2] to which I shall revert, Lord Bingham declared: "The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves

[2] *R (Ullah) v Special Adjudicator* [2004] UKHL 26 at paragraph 20.

over time: no more, but certainly no less". This brought judgments of the Strasbourg Court into the public eye.

It is judgments of United Kingdom courts striking down executive action on Convention grounds, or holding legislation to be incompatible with the Convention, as defined by the Strasbourg Court, that have provoked the antagonism to which I referred at the beginning of this lecture.

The "rights and freedoms" that the signatories to the Convention agreed to secure within their jurisdictions are stated in very general terms. They include the right to life (Article 2), freedom from torture and degrading treatment or punishment (Article 3), the right to liberty (Article 5), the right to a fair trial (Article 6), the right to respect for private and family life (Article 8), freedom of thought, conscience and religion (Article 9) and freedom of expression (Article 10). Article 14 forbids discrimination when giving effect to these rights.

Because these rights are expressed in general terms, the Strasbourg Court often has to make a ruling as to whether or not conduct constitutes an infringement of a particular right. When it does so, the Court is not concerned with the meaning or scope that those who originally signed the Convention would have intended the right to have. The Court treats the Convention as what it has described as "a living instrument".

This means that in defining the scope of a right, the Court will have regard to changes in social attitudes in the Member States of the Council of Europe. The Court laid down this principle when ruling in the case of *Tyrer v UK*[3] that a sentence imposed on a 15-year-old youth of three strokes of the birch constituted inhuman and degrading punishment contrary to Article 3 of the Convention. Such punishment would not have been considered untoward in 1950.

I do not believe that many challenge the proposition that when defining human rights the Strasbourg Court should move with the times. Lord Bingham described this as the protection of rights "in the light of evolving standards of decency that mark the progress of a maturing society".[4] But the effect of this approach is inevitably to expand the scope of the rights protected by the Strasbourg Court and is one aspect of the elasticity in the title of my talk that I believe to be unobjectionable, indeed beneficial.

The parties to the Convention agreed to secure the Convention rights to everyone "within their jurisdiction". What did they mean by "jurisdiction"? And does the living instrument principle apply so that it is legitimate for the Strasbourg Court to give "jurisdiction" a wider meaning than it bore when the Convention was negotiated? These were questions with which the Grand Chamber of the Strasbourg Court had to grapple in the case of *Bankovic v Belgium*.[5] The claims in *Bankovic* were in respect of deaths or injuries caused in Belgrade by airstrikes by NATO forces

[3] (1978) 2 EHRR 1.

[4] *Reyes v R* [2002] UKPC 11 at paragraph 26.

[5] (2001) 11 BHRC 435.

intervening in the Kosovo conflict in 1999. The issue was whether the victims were "within the jurisdiction" of the NATO countries involved. The applicants sought to equate jurisdiction with control in the context of individual human rights. Because the lives of the victims came under the control of the NATO forces, they were bound to observe the "right to life" respected by Article 2. The Grand Chamber rejected this submission.

It also rejected the suggestion that the meaning of "jurisdiction" could vary over time under the "living instrument" doctrine. The Court held that the concept of "jurisdiction" was essentially territorial. The Convention primarily governed the manner in which the Member States treated those within the territories that they governed, although there were some exceptions recognised by international law.

The Court also rejected the suggestion that you could divide and tailor the obligations under the Convention so that there could be circumstances in which only some of the Convention rights had to be secured by a State. Applying the Convention on a territorial basis engaged a State's obligations in relation to all the Convention rights. On one view, however, the Strasbourg Court had already made a very significant departure from the territorial basis of jurisdiction.

In 1986 a young German called Soering was arrested in England, who admitted to having murdered

his girlfriend's parents in Virginia. The United Kingdom proposed to extradite him to stand trial for these murders in the United States. Mr Soering applied to Strasbourg arguing that if the United Kingdom surrendered him to the United States he would there be subjected to inhuman and degrading treatment on death row, so that his extradition would involve a violation of Article 3 of the Convention. The Court upheld his claim.[6] In doing so, it emphasised the abhorrence of torture and held that an act of extradition that directly exposed an applicant to a real risk of being subjected to torture or to inhuman or degrading treatment or punishment would violate Article 3.

This case was followed by another, which caused much greater concern to the United Kingdom Government. Mr Chahal was a Sikh separatist leader who had unsuccessfully sought asylum in the United Kingdom. The Secretary of State had concluded that his presence in the United Kingdom posed a threat to national security and proposed to deport him to India.[7] Mr Chahal applied to Strasbourg arguing that his deportation would infringe Article 3 because he would be exposed to the risk of torture or inhuman treatment if sent home. His claim succeeded, so that the United Kingdom was obliged to allow him to remain in this country. Furthermore, Strasbourg held that this unwelcome guest could not be held in detention without being charged with a criminal offence.[8]

I had reservations about these decisions. I shared the reaction that it was abhorrent to send someone off

6 *Soering v UK* (1989) 11 EHRR 439.

7 *Chahal v Secretary of State for the Home Department* [1995] 1 All ER 658; [1995] 1 WLR 526.

8 *Chahal v The United Kingdom* (1996) 23 EHRR 413.

to a country where he would suffer torture or inhuman treatment. But I was not convinced that this fell within the scope of the European Human Rights Convention.

The Convention that dealt with this situation was the UN Convention on the Status of Refugees, concluded in 1951, at about the same time as the Human Rights Convention, and including the same parties. That Convention imposed an obligation on State parties to grant asylum to those within their territory who would be at risk of persecution if sent home to their countries of nationality. However, there was an exception to this where there were reasonable grounds for considering that the refugee posed a threat to national security. Furthermore, if the Human Rights Convention precluded sending an alien back to a country where his rights under Article 3 would not be respected, why would not the same principle apply in the case of all the other Convention rights? Had Members of the Council of Europe signed up to an obligation to give shelter to aliens whose own countries did not respect fundamental rights? Indeed, on a number of occasions the Strasbourg Court had considered whether Article 6, the right to a fair trial, would be infringed by deporting an individual to a country where he would not receive a fair trial and had indicated that it would not exclude this possibility if the person risked a *flagrant* denial of a fair trial in his own country. There was, however, no case in which Strasbourg had held that this test was satisfied. In one case where the test was not satisfied, the Strasbourg Court explained:

> What the word "flagrant" is intended to convey is a beach of the principle of a fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction, of the very essence of the right.[9]

Six years or so elapsed from the decision in *Chahal*, without a single case where the Strasbourg held that an expulsion or deportation of an alien satisfied this exacting test. Then the case of *Ullah*[10] came before me when I was presiding over the Court of Appeal as Master of the Rolls. In that case, and one that was heard with it, applicants who had unsuccessfully sought asylum challenged the decisions that they should be sent back to their own countries, namely Pakistan and Vietnam, on the ground that they would be denied their right to practise their religions there so that their deportation would infringe Article 9 of the Convention. Because the Strasbourg Court had never actually entertained such a claim, I and my colleagues propounded the following statement of principle:

> Where the Human Rights Convention is invoked on the sole ground of the treatment to which an alien, refused the right to enter or remain, is likely to be subjected by the receiving state, and that treatment is not sufficiently severe to engage Article 3, the English court is not required to recognise that any other article of the Human Rights Convention is, or may be engaged.[11]

Nemesis followed swiftly. The House of Lords held that we could not sweep aside Strasbourg's statements that

[9] *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 494, Joint Partly Dissenting Opinion of Judges Sir Bratza, Bonello and Hedigan.

[10] *Ullah v Special Adjudicator* [2002] EWCA Civ 1856.

[11] Ibid, at paragraph 65.

expelling an alien might, exceptionally, constitute a violation of other fundamental rights, and these included freedom of religion.[12] But still as the years went by the Strasbourg Court did not uphold any challenge to the deportation of an alien from a member State on the ground that human rights, other than Article 3, would be violated by his home country.

Indeed, this significant step was first taken not by Strasbourg but by the House of Lords in the case of *EM (Lebanon) v Secretary of State for the Home Department*.[13] A mother and her young son had unsuccessfully claimed asylum in the United Kingdom and faced being returned home to Lebanon. There, under Shari'a law, when the son reached the age of seven he would be removed from the custody of his mother and placed in the custody of his father, from whom his mother was estranged. The House of Lords held that these facts satisfied the stringent test of a flagrant breach that destroyed the very essence of the right to respect for family life under Article 8 and allowed the mother's appeal. This was a watershed case and one that evidenced a conflict between Shari'a law and the European approach to family life.

There remained a dearth of cases in which Strasbourg held that the Convention would be infringed by deporting an alien to a country where his Convention rights would not be observed. Then came the case of *Abu Qatada v UK*.[14] Mr Abu Qatada was a Jordanian citizen who faced trial in Jordan on terrorist charges. The United Kingdom was anxious to deport him to Jordan because they believed that

[12] *R (on the Application of Ullah) v Special Adjudicator*; *Do v Secretary of State for the Home Department* [2004] UKHL 26.

[13] [2008] UKHL 64; [2009] 1 AC 1198.

[14] [2012] ECHR 56.

he posed a threat to national security in this country. He resisted deportation on the ground that there was a real risk of a flagrant breach of his right to a fair trial if returned to Jordan because of the likelihood that evidence obtained by torture would be used against him. I presided over this case in the House of Lords and we rejected his claim,[15] but it was subsequently upheld by the Strasbourg Court. Ultimately Mr Abu Qatada returned to Jordan of his own volition, relying on assurances that evidence obtained by torture would not be admitted against him, but before he did so, Strasbourg's decision provoked a wave of hostile reaction in this country.

This case, and the earlier cases of *Soering* and *Chahal* were, in my view, examples of the Strasbourg Court extending the meaning of jurisdiction beyond the territorial concept that had been agreed by those who signed the Convention. It has resulted in an overlap, and a degree of conflict, between the Human Rights Convention and the Refugee Convention. Strasbourg has, however, always been very sensitive to the importance attached by Member States to control of immigration, which explains perhaps the paucity of cases in which Strasbourg has struck down deportation on the ground of the treatment that an alien will receive when returned to his own country. So this extra-territorial extension of jurisdiction under the Convention has had limited practical impact.

There is another respect in which Strasbourg has recently extended the meaning of jurisdiction in the

[15] *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10.

Convention, but before I come to that I want to place it in its context by talking a little about Article 2 of the Convention. This provides a good example of the manner in which the Strasbourg Court has tended to enlarge the scope of individual human rights.

Article 2(1) provides:

> Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

The primary meaning of this article is obvious: "thou shalt not kill". The obligations imposed by the Convention are imposed on States and State Officials, not private persons. So Article 2 prohibits the State from taking life and the importance of that Article was readily apparent after the holocaust. The obligation not to kill is what is called a "negative obligation". But the Strasbourg Court has held that Article 2, and other Articles, implicitly impose not merely negative obligations but positive obligations, that States which have signed up to the Convention have undertaken to take positive steps to safeguard the human rights to which the Convention gives effect. This duty to take positive steps is a duty to take such steps as are reasonable, having regard to, among other matters, resources. Such a test opens up the possibility of conflict between the Strasbourg Court and domestic courts as to what is reasonable.

So far as Article 2 is concerned, Strasbourg identified one particular positive obligation in relation to the right to life that has led to a lot of litigation in our courts. In 1995 Strasbourg held the United Kingdom to have violated Article 2 in the circumstances in which British troops killed three IRA terrorists who were trying to blow up Gibraltar—the famous "death on the rock" case.[16] In that case the Court said this:

> The obligation to protect the right to life under [Article 2], read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within its jurisdiction the rights and freedoms defined in [the] Convention" requires by implication that there should be some form of official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State.[17]

Strasbourg subsequently extended this so-called procedural obligation so that it applied whenever a person died who was under medical care, whether public or private. And Strasbourg has laid down stringent requirements as to the thoroughness of the investigation that must be conducted. This quite exacting obligation to hold an investigation into the circumstances of a death was, for a long time, held by Strasbourg to be ancillary and parasitic to the primary obligation to protect the right to life under Article 2.

[16] *McCann v United Kingdom* [1995] ECHR 31; (1995) 21 EHRR 97.

[17] Ibid, at paragraph 161.

The Strasbourg Court only has jurisdiction over a State in respect of matters that occur after the State has ratified the Human Rights Convention. No question of a breach of Article 2 by a State can arise in relation to the causation of a death occurring before that State ratifies the Convention. For a long time the Strasbourg jurisprudence indicated that if a death occurred in a State before it ratified the Convention no ancillary obligation to investigate the death could subsequently arise under Article 2. The death and all that followed it fell to be considered as a single occurrence falling outside the temporal jurisdiction of the Court.

Then, in 2009, in a case called *Silih v Slovenia*,[18] the Grand Chamber ruled that the obligation to carry out a full investigation into a death resulting from an unnatural cause was a free-standing obligation under Article 2. Even if the death occurred before the State in question had ratified the Convention, if that State chose subsequently to conduct an inquiry into the death, that inquiry had to satisfy the stringent procedural requirements of Article 2.

This enlargement of the scope of Article 2 resulted in the United Kingdom, to the Government's surprise and dismay, being held by the Supreme Court, under my Presidency, to be subject to claims under the Human Rights Act for infringement of Article 2 in respect of the contemporary conduct of inquests into killings of members of the IRA that had occurred a decade or more before the Human Rights Act came into force.[19]

[18] [2009] ECHR 537.

[19] *McCaughey & Anor, Re Application for Judicial Review* [2011] UKSC 20.

Claims under the Human Rights Act for failures to carry out investigations into deaths occurring outside the territory of the United Kingdom raised a stark issue as to whether those deaths occurred within the jurisdiction of the United Kingdom for the purposes of Article 1 of the Convention. That issue came before the House of Lords in the case of *Al-Skeini*.[20]

Members of the British armed forces had killed four Iraqi civilians and were alleged to have killed a fifth. Their relatives brought judicial review proceedings against the Secretary of State alleging that he had a duty under Article 2 to investigate these deaths. The House of Lords, other than Lord Bingham, who preferred to reserve his opinion on the point, dismissed the claims. The others held that the Iraqi victims had not been within the jurisdiction of the United Kingdom for the purposes of Article 1 of the Convention when they were killed. This conclusion was firmly founded on the decision of the Grand Chamber in *Bankovic*. Conflicting dicta in a subsequent decision of a single section of the Strasbourg Court called *Issa v Turkey*[21] were dismissed as incompatible with *Bankovic*.

The victims in *Al-Skeini* were Iraqi nationals, who were not subject to the law of the United Kingdom. This was not true of the claim subsequently brought against the Secretary of State for Defence by Mrs Smith.[22] Her son had died of hypothermia while serving with the Territorial Army in Iraq. Just as in the case of *Al-Skeini* her claim was

[20] *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26.

[21] (2004) 41 EHRR 567.

[22] *R (Smith) v Secretary of State for Defence* [2010] UKSC 29.

for a full investigation of the circumstances of her son's death pursuant to Article 2 of the Convention. She claimed that as a member of our armed forces he was subject to the jurisdiction of the United Kingdom while in Iraq and thus within the jurisdiction of the United Kingdom for the purposes of Article 1 of the Convention.

Her claim succeeded in the Court of Appeal, one member of which was Dyson LJ. I presided over the appeal by the Secretary of State in the Supreme Court. Because of the importance of the case we sat nine strong to hear the appeal, instead of the usual five. By a majority of six to three we allowed the Secretary of State's appeal. I gave the leading judgment for the majority. We accepted that Private Smith, as a serving soldier, was subject to the jurisdiction of the United Kingdom as a matter of domestic law, but held that this did not mean that he fell within the jurisdiction of the United Kingdom for the purposes of Article 1. That jurisdiction was essentially territorial, as laid down in *Bankovic*.

I had the support, among others, of Lord Collins, an international jurist of the highest standing. He began his conclusions as follows:

> *Bankovic* made it clear that Article 1 was not to be interpreted as a "living instrument" in accordance with changing conditions … It is hardly conceivable that in 1950 the framers of the Convention would have intended

> the Convention to apply to the armed forces of Council of Europe states engaged in operations in the Middle East or elsewhere outside the contracting states.[23]

That was precisely my view. However, Lord Mance wrote a lengthy and powerful dissent, to which Lady Hale and Lord Kerr subscribed. He stated:

> In my judgment the armed forces of a state are, and the European Court of Human Rights would hold that they are, within its jurisdiction within the meaning of Article 1 and for the purpose of Article 2, wherever they may be.[24]

It was not long before Strasbourg proved that Lord Mance was right.

In 2011 the unsuccessful Iraqi claimants in *Al-Skeini* took their case to the Grand Chamber.[25] The Grand Chamber held that the House of Lords had got it wrong in *Al-Skeini*. It propounded clearly for the first time the following principle:

> It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored" …[26]

[23] Ibid, at paragraph 303.

[24] Ibid, at paragraph 199.

[25] *Al-Skeini & Ors v UK* [2011] ECHR 1093; (2011) 53 EHRR 18.

[26] Ibid, at paragraph 137.

The Court held that the British soldiers engaged in security operations in Basrah exercised sufficient authority and control over the Iraqis who were killed to bring them within the jurisdiction of the United Kingdom for the purposes of Article 1.

So Lord Mance and those who supported him in *Al-Skeini* have been proved correct. In a lecture delivered at Exeter University at the end of last month, Lord Dyson hailed this decision as putting the Strasbourg jurisprudence back on track. He stated:

> *Bankovic* put the jurisprudence off course for around ten years; but since *Al-Skeini*, it has now returned to a position that many would regard as more principled and more acceptable … once it is appreciated that the fundamental principle is that of the exercise of control and authority, then the territoriality principle loses its special significance. It goes without saying that a State exercises authority and control over all persons and things within its territorial limits. Surely, it is clearer simply to say that, whenever the State exercises control and authority over an individual, it is under an obligation under Article 1 to secure the rights and freedoms of the Convention to that individual wherever he or she happens to be.

Lord Dyson's conclusion echoed that in the concurring judgment of the Maltese member of the Court, Judge Bonello, who used language that excoriated the United Kingdom. Here is one purple passage:

> Any State that worships fundamental rights on its own territory but then feels free to make a mockery of them anywhere else does not, so far as I am concerned, belong to that comity of nations for which the supremacy of human rights is both mission and clarion call. In substance the United Kingdom is arguing, sadly, I believe, that it ratified the Convention with the deliberate intent of regulating the conduct of its armed forces according to latitude: gentlemen at home, hoodlums elsewhere.[27]

I am inclined to agree with Lord Dyson that the test of "control and authority" subsumes the test of territoriality. And it is arguable that it is a more principled test. I do not accept, however, that it is the test of jurisdiction that those responsible for the Convention intended to apply. *Bankovic* was a very carefully considered decision of the Grand Chamber intended to provide definitive guidance on the meaning of jurisdiction.

And I believe that the Grand Chamber in *Bankovic* was correct to identify that the meaning that those responsible for the Convention intended jurisdiction to bear was essentially territorial. I also believe that the Grand Chamber was correct, in principle, to hold that the "living instrument" doctrine did not apply to the meaning of jurisdiction. I view the decision in *Al-Skeini* as an extension by the Strasbourg Court of its jurisdiction which cannot be reconciled with *Bankovic*.

Whether or not it was legitimate, is this extension a matter for regret? I believe strongly in the protection of

[27] Ibid, at paragraph 18 of Judge Bonello's Concurring Judgment.

fundamental human rights and there is much to be said for States being required to respect the rights of all within their authority and control. The consequences of *Al-Skeini* are, however, far reaching.

In *Smith v Ministry of Defence*,[28] claims were brought under Article 2 by relatives of soldiers killed in Iraq when Snatch Land Rovers in which they were patrolling were blown up. The breaches of Article 2 alleged included failure to provide better armoured vehicles and allowing soldiers to patrol in the Snatch Land Rovers.

The majority of the Supreme Court declined to strike out these claims. Giving the leading judgment for the majority Lord Hope held:

> … there have been many cases where the death of service personnel indicates a systemic or operational failure on the part of the State, ranging from a failure to provide them with the equipment that was needed to protect life on the one hand to mistakes in the way they are deployed due to bad planning or inadequate appreciation of the risks that had to be faced on the other. So failures of that kind ought not to be immune from scrutiny in pursuance of the procedural obligation under Article 2 of the Convention.[29]

I was present in the Chamber of the House of Lords when the effect of this judgment was being debated and some suggested that it would lead to judicial review of decisions taken by commanders on the field of battle. This

[28] [2013] UKSC 41.

[29] Ibid, at paragraph 63.

was to exaggerate the consequences of the decision, but its full impact has yet to be worked out.

I spoke at the outset of the current hostility to Strasbourg. That hostility is not primarily attributable to the extensions of Strasbourg's jurisdiction that I have been describing.

One habitual ground of complaint is the effect of Article 8 on the deportation of undesirable aliens. Article 8 protects the right to family life. Where an alien becomes part of a family in this country, and particularly when that family includes children born here, the interests of that family have to be taken into account when considering whether to deport the alien. A balance has to be struck between the interests of the State in excluding from this country those whose presence is contrary to the national interest and the interests of the family. It seems to me desirable that such a balance should be struck. The immigration tribunals and the courts are the ones who have to strike it. I do not believe that the Strasbourg Court often differs from the decisions reached by these bodies. Sometimes I read a report that, if accurate, suggests that a tribunal has been more generous to the interests of the family than Strasbourg would have required. I do not believe that Article 8 cases provide a legitimate ground for complaint about Strasbourg.

More significant is the complaint that the Strasbourg Court sometimes acts as a Court of Appeal in cases where our law provides satisfactory protection of the human right

in issue and our courts have applied the right principles, so that all that is in issue is the individual decision itself. In effect the complaint is that the Strasbourg Court grinds too small.

There has undoubtedly been force in this complaint. It was addressed at a meeting of all 47 Members of the Council of Europe at Brighton under our Presidency in 2012. The Members agreed that the Convention should be amended with the consequences that Ken Clarke described as follows:

> Cases to be considered by the Court will be restricted to allegations of serious violations of the Convention or major points of its interpretation. The Court will not normally intervene where national courts have clearly applied the Convention properly.

This is the right way to approach dissatisfaction with the working of the Court, although it is no mean feat to procure agreement on the part of all Member States.

There have, however, recently been complaints about the Strasbourg Court that are not addressed by the Brighton Declaration. These have attacked Strasbourg decisions holding legislation passed by Parliament to be incompatible with the Convention. It is said that such decisions are an attack on the sovereignty of our Parliament by judges who are unelected and unaccountable and from whose decisions there is no appeal. Let me give you three examples.

The first involves a decision not of the Strasbourg Court, but of the Supreme Court under my Presidency. The Sexual Offences Act 2003 provided that anyone sentenced to more than 30 months imprisonment for a sex offence would be put on the Sex Offences Register for life, which involved quite significant restrictions, including obligations to report to a police station. We ruled,[30] upholding a decision of the Court of Appeal,[31] that this was a disproportionate interference with the right to private life under Article 8. Those on the Register had to be given the right to seek a review after a specified period. David Cameron and the Home Secretary, some considerable time after our decision, saw fit to state that they were appalled by it.

The second example is the attack that the Grand Chamber made in the case of *Vinter & Ors v UK*[32] on "life" within the meaning of life sentences. The Court held that to send someone to prison for life without any chance of a review constitutes "inhuman punishment" contrary to Article 3. Mr Cameron has said that he profoundly disagrees with this judgment.

The third example is the prisoners' voting case. In *Hirst v UK (No 2)*[33] the Grand Chamber held that it was contrary to Article 3 of the First Protocol to the Convention, which guarantees free elections, to deny *all* convicted prisoners the vote. I am going to say a little about this case, but first some general comments.

Each of the three examples that I have given has one thing in common. What Strasbourg objected to was the

30 *R (F (A Child)) v Secretary of State for the Home Department* [2010] UKSC 17.

31 [2009] EWCA Civ 792.

32 [2013] ECHR 645.

33 (2005) ECHR 681.

absolute nature of each statutory provision: you are on the sex register for life, without review; you are in prison for life, without review; all prisoners are disenfranchised, without exception. Strasbourg does not like restrictions on liberties that make no provision for the exceptional case. In this I have some sympathy with Strasbourg. Furthermore it is usually possible to satisfy Strasbourg by a small amendment to the law that does not alter its main thrust. What harm does it do to give a person convicted of a sex offence many years ago the chance to demonstrate that he no longer poses any risk? What harm does it do to give a life prisoner the right to a review—perhaps only after 20 years—to see whether there are exceptional circumstances that justify his release before he dies? And would it really be earth shaking to give some short-term prisoners the right to vote, which most of them would not bother to exercise?

The decision in *Hirst* has, however, provoked an extreme reaction in this country. Mr Cameron has said that the idea of a prisoner voting makes him feel sick. On 10 February 2011 the House of Commons voted overwhelmingly in favour of a motion stating that the House continued to support a total ban on prisoners' voting and that "legislative decisions of this nature should be a matter for democratically-elected law makers". This motion had, of course, no legislative effect. Nor did this statement, made by David Cameron to the House at Prime Minister's Questions, the following month:

> The House of Commons has voted against prisoners having the vote. I do not want prisoners to have the vote,

> and they should not get the vote—I am very clear about that … no one should be in any doubt: prisoners are not getting the vote under this Government.

A month later, the Labour Shadow Justice Minister made a press release that stated:

> Labour's policy is, and always has been, that prisoners shouldn't be given the vote. Committing a crime so serious that a judge has deprived you of your liberty means you should lose your ability to vote in elections.

Then on 22 May 2012 the Strasbourg Court gave the United Kingdom six months to bring forward proposals to amend our law to comply with the *Hirst* judgment. On the last day of this six-month period the Government published a draft Bill.[34] This set out a choice of three responses to Strasbourg. To give the vote to prisoners serving less than four years; to give the vote to prisoners serving less than six months; or to persist in denying the vote to all prisoners. The first two options represented attempts to comply with the judgment in *Hirst*. The third option was a direct defiance of Strasbourg.

A joint Parliamentary Committee was set up to advise Parliament which, if any, of these three options to adopt and I accepted an invitation to serve as the only cross-bench member of this Committee. I was impressed by the thoroughness with which the Committee set about its task. Apart from the Parliamentary recesses we sat almost every

[34] Draft Voting Eligibility (Prisoners) Bill.

week from June to December, hearing evidence from about 40 witnesses. It soon became apparent that the question of whether some prisoners should get the vote was of comparatively minor significance.

The critical issue was whether Parliament should attempt to comply with the Strasbourg Court's judgment, or enact a statute designed to defy Strasbourg. A minority of the Committee, including its chair, was resolutely determined from first to last that the latter course was the one that should be adopted. Happily, the majority, of which I was one, were not persuaded to follow this course.

The most important part of our Report was that in which we considered the argument that to defer to the Strasbourg Court would be to derogate from parliamentary sovereignty. The Committee concluded that this was not the case.

Let me try to explain this in my own words. There are two different types of law. There is domestic law, which varies from State to State and determines how the individual State is governed. Domestic law is almost always governed by a written constitution. Unusually our constitutional rules are unwritten.

At the same time there is international law, which governs relations between States. International law has developed by custom, but today it includes a large number of treaties, or agreements reached between States. It is a basic

principle of international law that States should comply with the treaties that they conclude.

Under the constitutions of some countries, international conventions become part of their domestic law automatically. That is not so in the case of the United Kingdom. Under our unwritten constitution, conventions only become part of our law if Parliament passes a statue to give domestic effect to them. And under our unwritten constitution, Parliament is supreme; Parliament can pass any law it chooses.

The United Kingdom has signed up to the European Convention on Human Rights, including Article 46, which obliges it to comply with any judgment of the Strasbourg Court to which it is party.

So under international law, the United Kingdom is under a duty to comply with the *Hirst* judgment. It is, however, open to Parliament to flout that judgment if it chooses to do so. If it does, it will place the United Kingdom in breach of international law.

I do not believe that Parliament should behave in this way.

If the demands of the Strasbourg Court have become intolerable the correct course is either to get the other signatories to the Convention to amend it so as to restrict Strasbourg's powers, or to extricate ourselves from the Convention itself.

This is how our Report puts it:

> … the principle of parliamentary sovereignty is not an argument against giving effect to the judgment of the European Court of Human Rights. Parliament remains sovereign, but that sovereignty resides in Parliament's power to withdraw from the Convention system; while we are part of the system we incur obligations that cannot be the subject of cherry picking.

The Report continues:

> A refusal to implement the Court's judgment would not only undermine the international standing of the UK; it would give succour to those States in the Council of Europe who have a poor record of protecting human rights and who may draw on such an action as setting a precedent that they may wish to follow.

This is surely the point.

We did not sign up to the Human Rights Convention because of concerns about our own respect for human rights. We did so because of concern for the behaviour of others. The Convention and the Strasbourg Court have been and remain a powerful force for good in Europe. This country has had an admirable record before the Strasbourg Court, but has on occasion rightly been found wanting—by way of example, in denying basic rights to prisoners, in discriminating against homosexuals, in detention of terrorist suspects without trial, in permitting decisions to be

founded on evidence not disclosed to the losing party. But these shortcomings have been insignificant compared with the violations of human rights of which other Members of the Council of Europe have been indicted by Strasbourg.

I have not concealed my dissatisfaction with some aspects of the Strasbourg jurisprudence. The Brighton Declaration needs to be properly implemented. The Court needs to be more sensitive to the requirements of subsidiarity and of the margin of appreciation. But Europe needs the Convention and Europe needs the Court.

The recommendation that the Joint Committee has given to Parliament is, first, that prisoners serving less than 12 months should be permitted to vote in UK parliamentary and local and European elections, and secondly, that any prisoner who is within six months of his scheduled release date should be permitted to vote. I hope very much that this recommendation will find favour with Parliament and that, if it is implemented, it will also find favour with Strasbourg.

It is axiomatic that
though our courts are not
strictly speaking bound by
decisions of the House of Lords,
we have always recognised
and continue to recognise
their peculiarly high
persuasive value.
Moreover the reasoning
of any judgment delivered
in the House of Lords,
whether dissenting or
concurring, commands
and must always command
the utmost respect.

per Raja Azlan Shah J

Raja Mokhtar bin Raja Yaacob v Public Trustee, Malaysia

[1970] 2 MLJ 151, High Court

“Integrity, justice, courage,
temperance and prudence
—these are virtues that constitute
the moral character of
a good professional,
indeed that of a good man.
Integrity is a fundamental
requirement of justice.
Without integrity
there can be
no rule of law.”

His Royal Highness Sultan Azlan Shah
The New Millennium: Challenges and Responsibilities
Universiti Kebangsaan Malaysia,
23 August 1997