Lord Neuberger at a conference at the Supreme Court of Victoria, Melbourne

The role of judges in human rights jurisprudence: a comparison of the Australian and UK experience

8 August 2014[1]

1. The history of Human Rights and the United Kingdom in the last 100 years can be divided into several periods. First, there are the dark ages, the period before 1951, when the UK simply did not recognise human rights other than through the common law. That would sound very odd to British philosophers, political thinkers and lawyers of the 18th and 19th centuries – and even in the first half of the 20th century. They thought, with a mixture of patriotism and justification, that the British had led the world in promoting individual freedoms, with the signing of the Magna Carta and the formation of the mother of Parliaments in the 13th century, sampling republicanism and the Bill of Rights in the 17th century, judicial decisions such as *Somersett's* case[2] and *Entick v Carrington*[3] in the 18th century, and the effective and peaceful replacement of monarchical power by parliamentary supremacy in the 19th century.

2. However, while there is no doubt that the common law was in many ways the origin and promoter of individual rights, it developed such rights in a somewhat haphazard and leisurely way. As a result, in the aftermath of the Second World War, the UK in many ways risked falling behind other European countries, which, with the spectre of totalitarianism and invasion fresh in their memories, were sharply aware of the need for strong, clear and codified set of human rights.

[1] I wish to thank Zahler Bryan for all her help in connection with this talk
[2] R v *Somersett* (1772). 20 St Tr 1
[3] *Entick v Carrington* (1765) 19 St Tr 1029

3. After the dark ages came the middle ages, between 1951 and 1966. Until 1966, UK citizens could not go to the Strasbourg court and claim against the UK government that their Convention rights were being infringed. With their more fortunate history, the British, while happy to help draft the European Convention on Human Rights ("the Convention"), even to sign and ratify it in 1951, perhaps rather complacently, did not really think that they needed the Convention. Rather mirroring its attitude to the European Union, the UK initially regarded the purpose of the Convention as being more *pour encourager les autres* than it was for the UK. So the Convention played no real part in our political or legal thinking in this period. Thus, even as late as the 1990s, the Court of Appeal held that the common law did not recognise a free-standing right to privacy[4].

4. The years between 1966 and 2000 were the years of transition. UK citizens could complain to Strasbourg that their human rights were being infringed. However, they could not enforce, or even rely on, those rights in UK courts, as the Convention was not part of UK domestic law. English law degree students didn't learn much about the Convention in the 60s and 70s, although it started to impinge on their consciousness by the 1980s. As for UK judges, it was rather a frustrating time, as they realised that they were deciding cases which they knew would be held to be wrong by the Strasbourg court, while being unable to do anything about it, because the Convention was not part of UK law. As thinking developed over this period, UK judges were prepared on occasion to take the Convention into account when deciding common law and statutory issues, but in a somewhat inchoate and inconsistent way. Nonetheless, human rights started to leak into the judicial cerebellum. But not very far: as I have said, no common law right to privacy even in 1991.

[4] *Kaye v Robertson* [1991] FSR 62

5. In 1998, Parliament fired the starting gun for the next period, the age of enlightenment, with the Human Rights Act, which formally brought the Convention into UK law. From 2 October 2000, judges throughout the UK were obliged to give effect to human rights under the Convention, and, indeed, all "public bodies" were generally under a duty not to infringe the Convention. To use Dame Sian Elias's words UK judges were pitchforked into ruling on the most contentious issues of the day – asylum seekers' rights, balancing press freedom and privacy, prisoners' rights, the rights of soldiers on active service, prisoners' votes, the right to be assisted to die.

6. These are still early days in the age of enlightenment, but Judges are already approaching human rights issues in a different way from that in which they approached such issues fourteen years ago. For instance, the House of Lords initially held that, despite Article 8 of the Convention which recognises the right to respect for privacy, there was no freestanding right to privacy[5] in English law. However, only a year later, the House recognised a right to privacy[6], albeit not as a freestanding right, but by what Lord Phillips referred to as "shoe-horning"[7] the right into the common law principle of confidentiality, thereby expanding that principle beyond all recognition.

7. So, since 2000, we have had the Convention effectively incorporated into our legal system, and in its fourteen years of life, it has already had a marked effect on our constitutional settlement. The balance between the three institutional arms of government have been affected, so that, at least as it seems at the moment, the judiciary has been given more power both as against the legislature and as against the executive.

8. The UK famously has no constitution. Some legal experts argue that it has constitutional documents – including Magna Carta, and certain statutes, the

[5] *Wainwright v Home Office* [2004] 2 AC 406
[6] *Campbell v MGN Ltd* [2004] 457
[7] *Douglas v Hello! Magazine (No 5)* [2006] QB 125, para 53

Bill of Rights, the Act of Settlement, and the Act of Union. However, only three of Magna Carta's eighty or so chapters survive, and, like Magna Carta, the three statutes simply reflect the particular exigencies of a significant historical event (the Glorious Revolution, the Hanoverian succession, and the Union of Scotland and England) and scarcely represent even an attempt at any sort of constitutional set of rules. Furthermore, so long as the UK enjoys parliamentary supremacy, any provision in any of these instruments can be overturned by a simple majority of one in the House of Commons. It may be said with real force that that is scarcely the hallmark of a constitutional provision.

9. In a country which has no constitution and does have parliamentary sovereignty, the Judges traditionally enjoy a relatively limited function as against the legislature. They cannot quash any statutes enacted by the legislature. Judges also know that any decision they take which a majority of the legislature does not like can be overturned by a simple majority in Parliament. Indeed, while the judiciary are an independent arm of government, in a parliamentary democracy without a constitution, I think that it is fair to say that there is a pecking order. First, there is the legislature who can always overrule court decisions; second come the judiciary, who have to give effect to statutes and respect to parliament, but are otherwise free to develop and enforce the law; and third comes the executive, who are must comply with the law as laid down by the legislature and judiciary.

10. I pass over the interesting point whether the judiciary could override an outrageous statute, such as one which abolished the right to judicial review. But I do pause to mention that the role of the judiciary has become particularly important. That is because although the executive is technically third in the pecking order, it is in practice very powerful. Indeed, its powers are ever increasing, with its enormous budget, now well over 40% of GDP, and its millions of employees. Its power is reinforced by what can sometimes appear to be the relative lack of independence of a legislature which can be

said to be controlled by the head of the executive, namely the prime minister, especially when he or she has a decent majority. However, the point remains that the judiciary in a parliamentary democracy has no real control over the legislature, at least where there is no constitution.

11. That was at least the position of the UK judiciary on 1 October 2000, the day before the Human Rights Act 1998 ("the HRA") came into force. In terms of legal principle, the HRA did not alter the position. If a statute does not comply with the Convention, we are not entitled to quash it; we merely have power under section 4 of the HRA to declare the statute to be incompatible, in the same way as the Supreme Court in Victoria can make a declaration of inconsistent interpretation under section 36(2) of the Victorian Charter of Human Rights and Responsibilities. Such a declaration may be made in the UK by a High Court Judge, the Court of Appeal (and their Scottish and Northern Irish equivalents) and the Supreme Court. Where such a declaration is made, it is then up to Parliament to decide what to do about it. Furthermore, the only reason the courts can do this is because Parliament has given them the power by statute – and what parliament can give, parliament can take away. And, I might add, the Conservative Party appear to be seriously considering whether to take away this power, or at least to modify it, if they win next year's General Election. Like the Victorian Charter, the HRA is under political review.

12. In addition to this power under section 4, by section 3 of the HRA, parliament has given the judges of the UK a new and significant power, in that we are positively enjoined to construe statutes in such a way as to enable them to comply with the Convention, a provision which is equivalent to section 32(1) of the Charter. This section 3 power has been interpreted by the UK Supreme Court as permitting courts to interpret statutes in a way which some may say

amounts not so much to construction as to demolition and reconstruction[8]. In other words, we can give provisions meanings which they could not possibly bear if the normal rules of statutory interpretation applied.

13. Thus, as Lord Nicholls said, it enables the court to "go further" than usual, and is "apt to require a court to read in words which change the meaning of enacted legislation" and permits the court to "modify [its] meaning"[9] It is clear from what was said when the HRA was introduced into Parliament that the then-Government intended that the courts should have this new power of "interpretation plus" or "construction on speed". In this we differ from Victoria, in the light of the majority of the High Court's views in *Momcilovic v The Queen*[10], which limited the effect of your section 32(1) to ensuring the principle of legality. It is interesting to note that in the early days of the HRA some UK judges, including Lord Hoffmann[11], were initially inclined to give our section 3 that same limited effect, but, as he now accepts[12], we have been more radical. This section 3 power has been surprisingly uncontroversial since its enactment among politicians, but it has been unsurprisingly controversial among academic writers. It has been described as both "the 'genius' of the HRA model"[13] and "not a legal remedy, but a species of booby prize"[14]

14. Whether booby prize or genius, section 3 of the HRA enables judges to give a statutory provision a meaning which it does not naturally bear and which Parliament never intended it to bear. It is true that this power was bestowed by Parliament, and it can therefore be said that when judges rewrite statutes under section 3, they are giving effect to Parliament's will, but Parliament has written us judges something of a blank cheque in this connection. The way in which

[8] See eg *Ghaidan v Godin-Mendoza*[2004] 2 AC 557 and per Lord Phillips in *HM Treasury v Ahmed* [2010] UKSC 2, [2010] 2 AC 534
[9] *Ghaidan* at para 32
[10] [2011] HCA 34, as interpreted in *Slaveski v Smith* [2012] VSCA 25
[11] See *R v Secretary of State ex p Simms* [2000] 2 AC 115
[12] *R (Wilkinson) v. Inland Revenue* [2005] UKHL 30, [2005] 1 WLR 1718, and Hoffmann, *The Continuing Importance of the Protection of Fundamental Human Rights at Common Law,* Gray's Inn Lecture, 15 November 2013
[13] Conor Gearty *Can Human Rights Survive?* (Cambridge 2006)
[14] Marshall, *Two kinds of incompatibility* [1999] PL 377, 382

section 3 of the HRA has been interpreted by judges is not a case of the UK courts making their own grab for power. Although it was intended by Parliament, this new judicial power of quasi-interpretation can be said to involve a subtle but significant adjustment to the balance of power between the legislature and the judiciary of the UK. As the majority of the High Court said in *Momcilovic*, the UK approach can be seen as effectively conferring a law making function on the judiciary. The UK courts have developed new rules which control the way in which this power can be exercised. For instance, the section 3 power cannot be used in a way which would involve an apparently incompatible statutory provision having a meaning which was inconsistent with the scheme of the Statute concerned, or if it is not clear how an apparently incompatible statutory provision would have been rewritten.[15]

15. Even the power to make a declaration of incompatibility represents an important shift in the balance of power in a country whose institutions have such a deep respect for the rule of law such as the UK. As Dyson Heydon has pointed out[16], a common law judge's power to make a declaration of incompatibility is revolutionary, as it does not affect the rights of the parties to the relevant case, and it is ultimately advisory. Unlike a normal declaration which binds the parties to the litigation, a declaration of incompatibility binds nobody. In that sense it can be said to represent a role for the judiciary which is subordinate to that of parliament, but, as I have mentioned, in a parliamentary democracy without a constitution, the judiciary can in other ways fairly be seen as ultimately subordinate to the legislature. In more practical terms, however, the power now given to judges in the UK by section 4 of the HRA is demonstrated by the fact that, with one exception, Parliament has always acted on every such and cured any incompatibility. The one exception is prisoners' right to vote which is a very contentious political issue in some quarters in the UK, in marked contrast, I believe, to Australia.

[15] And see *Ahmed* footnote 8
[16] *Are bills of rights necessary in common law systems?* [2014] LQR 392

16. In the recent case of *Nicklinson*[17], which raised the question whether the statutory blanket criminalisation of assisted suicide infringed the article 8 (privacy, right to life) rights of some people who wished to die and needed help to do so, some us held that it, even of article 8 was infringed, the courts should hold off giving a declaration of incompatibility so that parliament could consider the issue with the benefit of our judgments. We felt that a declaration was a strong thing in the context of the relationship between parliament and the judges, especially in a field which was so emotive and when the House of Lords had held nine years ago that Article 8 was not engaged at all[18]. My colleague Nicholas Wilson took the view that this was part of a "collaboration"[19] between the courts and the legislature, which is an interesting idea which may prove to have some traction. I am inclined to think that risks devaluing the gravity of a declaration of incompatibility, and blurring the lines which mark the separation of powers. However, Lord Wilson's observation may be supported by at least one commentator, who has said, "at the heart of the HRA [like] the Charter lies the attempted reconciliation of judicial and political power, or – put another way – of interpretive and legislative power"[20].

17. I believe that the points made in the brief discussion so far serve to demonstrate why the Convention, through the medium of the HRA, has had much more of an impact on the UK constitutional settlement between the courts and the legislature than on those of other countries which have written and coherent constitutions. In Germany, for example, not only has a Constitution, but it is one which generally grants parallel or even greater rights to citizens than they are accorded by the Convention. Therefore, unlike in the UK, (i) Germans are used to their courts challenging statutes and (ii) judgments of German courts, involving issues on which UK courts' decisions would be based on the Convention, are based on constitutional rights and

[17] *Nicklinson v Secretary of State* [2014] 3 WLR 200
[18] Ibid para 116
[19] Ibid at para 204
[20] Masterman *Interpretations, declarations and dialogue: rights protection under the [HRA] and the [Charter]* [2009] PL 112,119

either involve no consideration of the Convention or include a throw away paragraph, sometimes a cross-check, on the Convention. This means that the effect of the Convention seems far more revolutionary in the UK than in other European countries. There is little danger of the Convention leading to what Dame Sian referred to as public suspicion of judicial aggrandisement in such other countries, particularly in the light of their history which gives rise to rather less confidence in the democratic process than that of the UK.

18. In the UK, for the first time, the courts have duties under the HRA which in many ways are those which would normally arise under a written constitution. The notion that the UK Supreme Court is almost drifting into being a constitutional court is reinforced by two further recent factors. The first is the UK's membership of the EU which, revolutionarily means that judges have to disregard statutes if they conflict with EU law; secondly, with the existence of Scottish, Welsh and Northern Irish parliaments, the Supreme Court has duties which are hard to characterise as anything other than constitutional, not least because they are super-parliamentary. Having said that, it should be added that these powers have been conferred on the courts by statute.

19. One other effect of the HRA on statutes can be characterised as being, as it were, in advance rather than in arrears. Section 19 of the HRA states that, where a Bill is laid before parliament by a Minister of the Crown, he must provide a written statement which states either that the provisions of the Bill comply with the HRA, or that he is unable to so to state but nonetheless wishes the Bill to be proceeded with. This is very similar to section 31 of the Charter.

20. I have so far dealt with the effect of the HRA on the relationship between courts and parliament. Let me turn to the effect on the relationship between the courts and the executive. Under our common law, parliamentary supremacist, non-constitutional system, the courts have no more fundamental

role than to review executive action and decisions. It is up there with the court's criminal law function. The second half of the last century saw an explosion in the amount of judicial review. This was attributable to a number of factors, including, I think, (i) the enormous increase in the powers of the executive, (ii) the expansion of executive bodies, (iii) a plethora of new laws, most of them secondary legislation, which were themselves judicially reviewable, (iv) a more questioning and litigation-inclined society, (v) the growth of legal aid, (vi) the weakness of the legislature, which for most of the time enjoyed comfortable government majorities, and (vii) a general public awareness of rights, prompted partly by the Convention.

21. Judicial review is largely concerned with the procedural aspects of a decision or action: a decision or action must be taken in accordance with the law, which sometimes means general legal principles (eg natural justice) and sometimes means following the procedure laid down by the relevant legal code. Quashing a decision or action on the merits is traditionally normally only possible if the decision or action was one which the body or person who took it could not have taken it rationally (or if relevant factors were ignored or irrelevant ones taken into account). Irrationality is a stiff test. Since 2 October 2000, judicial review is still alive and well, but there is another set of standards by which the action of all public bodies, from Government departments to parish councils, from the Bank of England to providers of TV licences, must be judged: they are all statutorily enjoined not to act incompatibly with the Convention[21].

22. So if a local housing authority decides to evict a residential tenant by court action, the fact that the tenant has no defence in common law does not prevent him or her raising respect for the home (article 8 again) as a reason for holding up the order for possession – albeit that only very exceptional circumstances would justify much suspension[22]. So, too, if a school requires a

[21] Section 6(1) of the HRA
[22] *Manchester City Council v Pinnock* [2011] 2 AC 104

girl to remove her burqa at school, she can challenge the requirement as interfering wither rights of religion under Article 9 (she failed)[23]. And if a city council refuses a licence to a pornographic bookshop, it can raise an Article 10 (freedom of expression) claim (which failed)[24].

23. However, in all such cases, the exercise carried out by the court can be characterised as far more intrusive or far less technical than under traditional judicial review. Under the HRA, the court is primarily concerned to make its own assessment as to the validity, indeed the key word is "proportionality", of the decision or action bearing in mind (i) the reasons for the decision or action and (ii) the extent of the interference with the human right in question. As Lord Reed has explained in some very helpful remarks in the *Bank Mellatt* case[25], this sort of assessment involves the court striking the balance, and therefore making a value judgment for itself. This is very different from any "merits" assessment under traditional JR, where, as already mentioned, irrationality is normally the only issue.

24. The role of the court when balancing the reasons against the interference is quite sensitive, and the extent to which the court will have regard to the view of the executive decision maker will depend very much on this nature of the issues. As Lord Reed put it: "the degree of restraint practised by courts in applying the principle of proportionality, and the extent to which they will respect the judgment of the primary decision maker, will depend upon the context, and will in part reflect national traditions and institutional culture"[26]. On matters such a national security, foreign affairs, and economic consequences, the court is likely to give very great weight to the views of the executive decision-maker, whereas on more mundane issues demanding less specialist expertise and knowledge, the court will feel greater confidence about forming its own view. The decision is more likely to be upheld if the decision-

[23] *R (Begum) v Denbigh High School* [2007] 1 AC 100
[24] *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420
[25] *Bank Mellatt v HM Treasury (No 2)* [2013] 3 WLR 179, paras 68-76
[26] Ibid, para 71

maker has expressly taken into account the human right involved – and has done so in a sensible way[27].

25. There are high judicial statements which suggest that human rights assessments of executive decisions involve greater scrutiny of such decisions than JR assessments[28]. I am not sure that I agree. There is no reason why that should be the case: judges should examine a decision or action, or the relevant aspects of a decision or action, with the same degree of care and detachment, whether it is for the purpose of JR or a human rights claim. The difference is in the nature of what the court is looking for, not in the care with which the court is looking.

26. In summary then, the effect of the HRA's requirement that all public authorities have to comply with the Convention is that there is an increase in the number of cases where executive decisions can be challenged in court, and the court for the first time is required to make its own assessment of the merits of a decision, has to carry out its own balancing exercise. It may seem to some people that it is almost as if judges have had to remove the referee's whistle from their mouths and take the decisive penalty themselves. In my view, and in agreement with Dame Sian, there is a strong case for JR and Convention review coalescing or at least cross-fertilising, and I think that that is starting almost imperceptibly to happen in the UK.

27. Where a UK court concludes that an individual's Convention right has been infringed by a public authority, section 8 of the HRA entitles the individual to seek damages. Thus contrasts with the Charter which precludes any such damages save under the rather quaint section 39(1).

[27] See *Belfast v Miss Behavin'* footnote 24
[28] See eg *Re S (FC) (a child)* [2005] 1 AC 593, para 17, per Lord Steyn

28. Also in contrast with the Charter as I understand it, the HRA expressly states that the courts are public authorities for all purposes[29]. This raises a difficult point on which we have yet to rule. It is best illustrated by reference to a point I have already alluded to, namely the position of a residential tenant whose right of occupation under domestic law has ceased. If his landlord is a public authority then the landlord is bound to take into account the article 8 rights of the tenant, and so the court must take them into account when asked to make an eviction order. On the face of it, however, that would not apply when the landlord is a private company or individual. However, in order to evict a tenant, a private landlord must go to court and obtain an order for possession. So the question is: must the court, as a public authority take into account the tenant's article 8 rights when considering whether to make an order for possession. We have yet to hear such a case. This means that the room for the Convention to have horizontal effect in the UK may well be potentially significantly greater than for the Charter in Victoria.

29. Another important aspect of the HRA is the interrelationship of the Convention and the common law. Initially at least, the attitude of many lawyers and Judges in the UK to the Convention was not unlike that of a child to a new toy. As we became fascinated with the new toy, the old toy, the common law, was left in the cupboard. Recently, the Judges have tried to bring the common law back to centre stage. The most dramatic example of this is the UK Supreme Court's decision earlier this year in *Kennedy v Charity Commissioners*[30]. A journalist wished to see the results of a charity commission inquiry into the affairs of a charity run by a controversial politician, and based the claim on article 10, on the basis that freedom of expression extended to a claim by a journalist, or another member of the public to see such documents. We considered the claim, as based, to be over-optimistic (although there was limited support for it in a couple of Strasbourg court cases). However, we sent the claim back to the trial judge on the basis that we thought that there was a

[29] Section 6(3)(a) of the HRA
[30] [2014] UKSC 20, [2014] 2 WLR 808

stronger case based on common law, despite the fact that counsel had effectively declined to argue his case on that basis, despite being invited to do so.

30. This case illustrates the fact that there are now two separate seams, common law rights and Convention rights, which can overlap, but each of which also has its own different area of exclusivity. There are those who feel that the common law should develop so as to incorporate Convention rights, and to some extent it has done so, but in other ways, the two strands of law have been like ships passing in the night. Thus, on the one hand, I have already explained how it was held that article 8 did not justify a new tort of privacy, but that the law of confidentiality should be expanded to incorporate article 8 privacy rights. On the other hand, the general tortious duty of public bodies to prevent injury may be different from the Convention duty of such authorities to prevent death or serious injury under articles 2 and 3 of the Convention (the right to life and the right not to suffer cruel and unusual punishment), as interpreted in the Strasbourg court. The issue was discussed in the *van Colle case*, where Lord Bingham agreed with dicta in the Court of Appeal that "there is a strong case for developing the common law action for negligence in the light of Convention rights" and "where a common law duty covers the same ground as a Convention right, it should, so far as practicable, develop in harmony with it"[31]. However, he was in a minority on the issue[32], and Lord Brown for example thought that such alignment was inappropriate because "Convention claims have very different objectives from civil actions. Where civil actions are designed essentially to compensate claimants for their losses, Convention claims are intended rather to uphold minimum human rights standards and to vindicate those rights". On this topic, I think we are, as in many other matters raised by the HRA, very much in a transitional period.

[31] *Van Colle v Hertfordshire Police* [2009] 1 AC 225, [2008] UKHL 50, para 50
[32] *ibid* paras 81-82 (per Lord Hope), 98-99 (per Lord Phillips) and 136-139 (Lord Brown); the quote in the next sentence coming from para 138

31. Quite apart from this, I think that the introduction of the Convention into UK law has been a breath of fresh air for the judiciary, the legal profession a legal academics. It has, I think, made us more questioning about our accepted ideas and assumptions. That is partly because the introduction into the law of any new set of principles and concepts will, as it were, wake all lawyers up, and make them less complacent. More particularly, it makes one realise how, in some respects, we have much to learn from mainland Europe, but let me make it clear that the UK has just as much to offer as it has to learn. The HRA has also spurred the UK judiciary into fresh thinking about the law, because we now have new ideas to grapple with and to apply to our domestic law, such as the concept of proportionality. But we are also wondering whether, for instance, it makes sense to have such different approaches between a traditional JR challenge to an executive decision on the merits, and a Convention challenge to an administrative decision. On that issue, the judgments in *Kennedy* have something to offer as well.

32. That leads me to one of the most controversial aspects of the Convention, namely that it is an international set of rules with the Strasbourg court as its final arbiter. The international character of the Convention, with its treaty status and the Strasbourg court role, is of course wholly lacking for Victorian Judges when it comes to the Charter, save to the extent that the federal High Court has a role, as is apparent from the *Momcilovic* case[33]. The Strasbourg court has one judge from each country, and it can decide cases in Chambers which consist of six or seven judges or it can refer cases to the so-called Grand Chamber on which many more judges sit.

33. This international aspect has a number of strands. First, there is the statutory duty in the HRA on UK judges, which is not to follow Strasbourg decisions, but to take them into account[34]. In a case in 2011, the Supreme Court said that it was "not bound to follow every decision of the [Strasbourg court]. Not only

[33] See footnote 7
[34] Section 2(1) 0f the HRA

would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue with the [Strasbourg court] which is of value to the development of Convention law. … Of course, we should usually follow a clear and constant line of decisions by the [Strasbourg court] :…. But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber"[35]. As we get more confidence with the passage of time, it is conceivably that we will take a more robust view.

34. On occasion, we have already taken the view that a decision of the Strasbourg court adverse to the UK was wrong and should be reconsidered. In such cases, the fact that the Strasbourg court's decision may have seemed a little surprising or even inappropriate from the UK perspective is often because the court is very largely made up of lawyers with a civilian, rather than a common law, background, and they have misunderstood or misappreciated our system. In such a case, we have engaged in dialogue, in the form of giving a detailed judgment not following the Strasbourg jurisprudence, and explaining why. On one occasion, concerned with the ability to convict on hearsay evidence[36], we have been successful in getting Strasbourg to change its mind. In another, involving article 8 and possession actions, we were not, and we eventually followed Strasbourg[37]. It should be added that the Strasbourg court also changed its mind on another issue, namely the ability of a UK court to strike out a hopeless human rights claim[38].

35. Save where we feel that Strasbourg has misunderstood or misappreciated our common law system, we UK judges have, I suspect, sometimes been too ready to assume that a decision, even a single decision of a section of that court, represents the law according to Strasbourg, and accordingly to follow it. That approach is attributable to our common law attitude to precedent and to our

[35] *Pinnock*, see footnote 17, para 48
[36] *Al-Khawaja v United Kingdom* [2011] ECHR 227
[37] See *Pinnock* footnote 17
[38] *Osman v United Kingdom* [1998] ECHR 101, *Z v United Kingdom* [2001] ECHR 33

relatively recent involvement with Strasbourg. I think we may sometimes have been too ready to treat Strasbourg court decisions as if they were determinations by a UK court whose decisions were binding on us. It is a civilian court under enormous pressure, which sits in chambers far more often than in banc, and whose judgments are often initially prepared by staffers, and who have produced a number of inconsistent decisions over the years. I think that we are beginning to see that the traditional common law approach may not be appropriate, at least to the extent that we should be more ready not to follow Strasbourg chamber decisions.

36. Further, the current thinking is that, on any issue the UK courts should go as far as the Strasbourg court but no further. In a famous dictum, Lord Bingham said that "[t[he duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less"[39]. This has already not been followed in a case where Strasbourg's direction of travel seemed clear[40] and in the recent *Nicklinson* case we expressly left open the question whether it was right.

37. On the other hand, if a UK judge is considering not following Strasbourg jurisprudence, he or she should bear in mind that one of the purposes of introducing the HRA was to prevent litigants whose human rights were not recognised domestically having to go to Strasbourg to vindicate their rights against the UK government. If UK judges are too ready to depart from Strasbourg, we get back where we were before the HRA came into force.

38. The absence of a constitution means that UK judges cannot easily refuse to follow a Strasbourg court decision on the ground that it would involve infringing our constitution, as the German courts are able to do. Some may think that this provides support for the argument that the UK should move towards adopting a constitution. As it is, however, there is a recent decision of

[39] *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, para 20
[40] *Re P (Northern Ireland)* [2008] UKHL 38, [2009] 1 AC 173

the Supreme Court on EU law (so the Luxembourg court not the Strasbourg court) which suggests that the absence of a written constitution may not always prevent us from relying on our fundamental constitutional conventions. In a case concerned with the question whether a high speed train proposal conflicted with EU environmental laws[41], we had to consider the suggestion that, in order to see if a statute conflicted with those laws, the courts might have to assess the quality of the debate in Parliament on the statute. In a judgment I wrote jointly with Jonathan Mance, the Supreme Court made it clear that it would have reservations about following any such suggestion in the light of section 9 of the Bill of Rights and the well-established principle that the courts do not poke their nose into parliamentary business, and, by the same token, politicians do not get involved with the courts.

39. The fact that the Strasbourg court is an international court has two other significant features, at least from the point of view of the UK judiciary. The first is that the decisions sometimes seem a little quaint because they have to apply across thirty-odd member states with very different traditions and institutions – from Sweden to Turkey, from Luxembourg to Russia. If uniform standards are to be imposed, and the Convention has to have the same meaning in each state, there has to be a degree of give and take between individual states. Secondly and o the other hand, this very point means that on some topics, the Strasbourg will accord a "margin of appreciation" to member states. A topical example is assisting a suicide: in some states (eg Switzerland and Belgium) it is entirely lawful to assist from compassionate motives a suicide of a mentally competent person who has a firm desire to die. In other states (eg Poland and Spain) there is blanket illegallity. Accordingly, the Strasbourg court has held that it is a matter for each member state what the law should be on the topic[42].

[41] R (*HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] 1 WLR 324
[42] *Pretty v UK* [2002] ECHR 427, *Haas v Switzerland* [2011] ECHR 2422

40. That raises an interesting UK domestic law point, given that there is a current blanket ban on assisting suicide in a primary statute, namely in section 2 of the Suicide Act 1961. The point is whether that means that the law on the topic is purely for Parliament or whether the courts can say that, even though there is a clear statutory prohibition which is within the margin of appreciation afforded to the UK by Strasbourg, the court can say to Parliament that that is contrary to the Convention as it applies in the UK. In our recent decision of *Nicklinson*[43], we unanimously held that the courts did have that power. However, we differed on whether it would be appropriate to exercise it.

41. The fact that "unelected" judges, especially foreign judges, are perceived to have been given powers which they previously had not enjoyed, coupled with the distaste in some political quarters for all things European, and the media's concentration on prisoners' votes and asylum seekers, has rendered the Convention something of a whipping boy for some politicians and newspapers. This appears to many people to be unfortunate. There are decisions of the Strasbourg court with which one can reasonably disagree, indeed with which I disagree. This is scarcely surprising; indeed, it would be astonishing if it were otherwise. However, to my mind, there are very few of its decisions which can fairly be said to be misconceived.

42. Further, it is a feature of all constitutional courts that that they generously interpret the constitution and tend to bestow power on themselves: *Marbury v Madison*[44] is merely the best known example. Particularly in the light of their recent history, Mainland European countries appreciate the need for checks and balances, and realise that undiluted democracy is risky. The tyranny of the majority is bad enough and, as the last century demonstrated, it can lead to far worse things. However, you only have to look at the history of Germany over

[43] *R (Nicklinson) v Secretary of State* [2014] UKSC 38, [2014] 3 WLR 200
[44] (1803) 5 US 137

the last one hundred years to see how valuable it can be for judges to be given a substantial role, supported by the rule of law, in protecting individuals against the might of the modern state. Having said that, I strongly believe that Judges should not be anxious to increase their powers, and indeed should not even be enthusiastic about using any powers they have. A degree of judicial self-restraint is always appropriate.

43. My colleague Jonathan Sumption has suggested that the Strasbourg court suffers from a democratic deficit, and this undoubtedly has some force. However, the development of pan-European law after centuries, indeed millennia, of separate development and frequent wars, and with different political and legal traditions, and different historical experiences and different traditions, was never going to be easy. It is therefore inevitable that the Convention, like the EU, would be a controversial topic in the UK. Watch this space.

David Neuberger
Melbourne, Victoria
8 August 2014