UK Supreme Court decisions on private and commercial law: The role of public policy and public interest

Centre for Commercial Law Studies Conference 2015

Lord Neuberger

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1. Welcome to the Supreme Court. While the welcome is whole-hearted, I must confess that it is also tinged with apprehension. It is whole-hearted because there are a number of reasons to be delighted that the Centre for Commercial Law Studies has decided to have its third conference here, and to discuss our recent decisions.

2. First, it is very powerful evidence of the extent to which cooperation has developed over recent years between academic lawyers, judges and practitioners in this jurisdiction. Gillian Tett, the anthropologist and journalist, recently published an interesting and stimulating book entitled *The Silo Effect*[1], which laments the modern tendency for people to work in their own, relatively small and limited and rather closed and self-contained worlds, and identifies the risks and disadvantages of this trend. While her book concentrates on the industrial and financial worlds, I think that her concerns are equally appropriate to the world of law. In England at any rate, academic lawyers and practising lawyers used to be, as I put it in a talk three years ago in Germany, ships that passed in the night. The position was very different from Germany, or indeed France, where academics played, and continue to play, a great part, both directly and indirectly, in making the law.

3. The traditional view in this country was reflected in the characteristically conservative and crabby observation of Lord Eldon LC in a case in 1814[2] that 'One who had held no judicial situation could

[1] G Tett, *The Silo Effect: The Peril of Expertise and the Promise of Breaking Down Barriers* (2015)
[2] *Jones v Jones* (1814) 3 Dow 1,15

not regularly be mentioned as an authority'. And, of course, there was the absurd convention that a book or article could not be regarded as an authority unless and until the author had died. This convention, apart from being absurd has been recently memorably summarised as "better read when dead"[3]. *Donoghue v Stevenson*, long seen as a great step forward for English law, included a statement from Lord Buckmaster that "the work of living authors, however deservedly eminent, cannot be used as authority, though the opinions they express may demand attention"[4]. On the essential issue in the case, Lord Buckmaster was, perhaps unsurprisingly in the light of that observation, in the backward-looking minority.

4. Over the past fifty years, things have changed quite markedly, thanks both to a general change of attitude, and more specifically thanks to a number of individuals. The change of attitude may be attributable in part to the generally less hidebound, relatively open-minded and questioning attitudes, which developed during of the 1960s and 1970s, which were a significantly more iconoclastic and questioning period than what went before. The change of attitude may also be attributable to the influence of European legal traditions and experiences, which inevitably influenced British lawyers in all fields following the UK government's decision to give citizens the right to petition the Strasbourg court in 1966, and then to submit itself to the rulings of the Luxembourg court in 1973.

5. As to the individuals who encouraged a greater elision between academia and the courts, I shall mention two, but there are many others. Lord Goff of Chieveley, a Commercial Court practitioner and judge before he moved on to the Court of Appeal and the House of Lords, who was not just an outstanding barrister and judge. He was also a serious legal academic thinker and, of course, the co-author with Professor Gareth Jones, of the first book on what is now known as unjust enrichment, "the Law of Restitution", now renamed in its 8th edition as "The Law of Unjust Enrichment"[5]. Lord Goff made a point of citing and relying on academic writings in his judgments. The other comes from

[3] N. Duxbury, *Jurists and Judges: An Essay on Influence* (2001) at p 78.
[4] [1932] AC 562, 567
[5] (2011)

the Chancery Division, and he is Sir Robert Megarry, a Chancery Judge and Vice-Chancellor, who wrote outstanding books on property law, including most famously, also with a famous academic, William Wade, the leading book on real property, now in its 9th edition[6].

6. I have no doubt that both these judicial giants benefitted from having feet in the practitioner, judicial and academic camps; (for the benefit of the pedantic, this does not mean that they had three feet, as the feet in the practitioner and judicial camps were sequential rather than contemporaneous - although if one is to be pedantic, it is linguistically appropriate to be so in relation to feet). For those of us who are not lucky or able enough to have had feet in all three camps, there can be no doubt that academics, practitioners and judges have much to learn from each other, not least because they come at problems from different perspectives.

7. The academic has the advantage of being relatively free to choose the problem she wishes to address, whereas the practitioner and the judge substantially have to deal with the case their clients or the litigants choose to bring for advice or to court: the academic dines *a la carte*, whereas the practitioner and judge have to make do with *table d'hote*. The academic normally has a fair time to consider any problem, whereas a judge is under some pressure and a practitioner normally even greater pressure in terms of time. And an academic can look at any solution in the most dispassionate and rounded way, as she is not tied to a set of facts in the same way as a practitioner or judge, who will be dealing with a particular set of facts. Furthermore, a judge can be something of a prisoner of the arguments put before her: while a judge can and sometimes does do her own research, it is not very common and there is, as I say, limited time available for doing it. By the same token, a judge will often try and consider the wider implications of possible conclusions in the particular case under consideration, but is not always well placed to consider it as fully as an academic. On the other hand, the academic is, I think, normally less interested in practicalities than judges and practitioners, not least because she is

[6] Megarry & Wade *The Law of Real Property* (2012)

less likely to have come across them in past cases or to expect to come across them in subsequent cases.

8. A practitioner knows the solution which he wants (in order for his client to win) and is largely only concerned with the question of how to get there, whereas the judge and the academic have no vested interest in or bias towards, a particular solution, at least in theory. In practice, though, a judge may well be influenced by what are often called "the merits" of the particular case, whether on the particular facts or more widely. And the academic, I suspect, is sometimes interested in a new or controversial idea, so that she gets noticed – or gets published. Many practitioners are not really interested in ensuring the coherence or development of the law – unless it would help their client's case to raise such considerations, whereas any good academic or judge is always very conscious of the importance of these considerations. A practitioner is closer than a judge, and normally much closer than an academic, to the day-to-day world, and will often be particularly well placed to assess the likely and actual commercial and practical consequences of a judicial decision or of an academic's view.

9. An oft quoted remark contrasting the judge with the academic is to be found in Sir Robert Megarry's judgment in the 1969 *Cordell* case[7], when he reached a judicial conclusion which was the opposite to that he had expressed in his book. He described "[t]he process of authorship [as] entirely different from that of judicial decision", because, although the author "has the benefit of a broad and comprehensive survey of his chosen subject as a whole, … he lacks the advantage of that impact and sharpening of focus which the detailed facts of a particular case bring to the judge". "Above all" said Sir Robert, the author "has to form his ideas without the purifying ordeal of skilled argument on the specific facts of a contested case. Argued law is tough law.' The revenge of the academic is to be found in the fact that Sir Robert's decision in *Cordell* was subsequently overruled in the *St Edmundsbury* case[8], by the Court of Appeal, who thought (albeit reluctantly) that he had got the answer right in his book.

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[7] *Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch 9, 16-17
[8] *St Edmundsbury Diocesan Board v Clark (No 2)* [1975] 1 WLR 468

10. In the light of differences of outlook and experience, a conference such as this which brings distinguished academic lawyers and practising lawyers (and one distinguished former judge) together to consider decisions of judges is very much to be welcomed. It enables the academics and practitioners to share, and learn from, their respective inputs into issues which have troubled the courts and to give the judges feedback on their decisions and reasoning from a different perspective. And that input and that feedback are things which we can and should take into account when we consider subsequent cases and appeals.

11. The message from *The Silo Effect* also suggests that the judicial system should be more ready to accommodate academics. The need for diversity should not concentrate solely on the familiar issues of gender, sexuality, physical condition and ethnicity, important as they of course are. Diversity of approach, training and experience are also significant, and it is good that we now have academics at all levels of the senior and more junior judiciary, although some might say that they are more notable for their quality than for their quantity. And, for precisely the same reason, it is interesting and gratifying to see how many distinguished retired judges now accept visiting professorships – again we have one such person here today. It is not only good for them to contribute to academic discourse, but it must be excellent for law students – and not just law students – to attend lectures, seminars and discussion groups with former experienced judges.

12. My second reason for pleasure that this conference is taking place here and that the subject-matter is directed to the decisions of this Court is connected to the first. It is particularly appropriate for you to be discussing decisions of the UK Supreme Court. The nature of our decisions and the nature of our function means that the dialogue I have been discussing is especially apt when it comes to judicial decisions of the UK Supreme Court.

13. Last Friday, I attended the annual meeting of the Network of the Presidents of the Supreme Judicial Courts of the European Union. It is striking how most countries have much larger Supreme Courts,

which hear many, many more cases than we do. Indeed, the UK clearly has fewer Supreme Court Judges and fewer appeals to the Supreme Court than any other EU national Supreme Court. And when you remember that the population of most EU member states is much smaller than that of the UK, that suggests our Supreme Court is very different in nature – all the more so when one bears in mind that most European countries also have supreme administrative courts and constitutional courts. Italy has over 300 Supreme Court Justices.

14. If I may go briefly off-piste, I think that this is a difference which is representative of the much greater respect which our common law system pays to the role of judges in what are rather unattractively called lower courts, when compared with the civilian systems. Appeals on fact are deprecated in the UK systems. It is very difficult to justify adducing new evidence on appeals, as the Court of Appeal has explained more than once[9]. And, as the UK Supreme Court has recently emphasised in a couple of recent Scottish appeals[10], that an appeal court (in those cases the Inner House) should not revisit the factual findings of the trial judge save in very rare cases (where he has clearly overlooked or misinterpreted significant relevant evidence, or where he has reached a plainly wrong conclusion). In other words, the trial is meant to be the end of the dispute unless there is an issue of law. By contrast, in many, maybe most, other European systems the trial is often almost no more than a dress rehearsal or dummy run for a rehearing on an appeal. As a result, for instance, there are some 160 second-tier appeal judges for Paris alone, whereas Court of Appeal, which is more of a first-tier appeal court makes do with under 40 judges for the whole of England and Wales. Our system has the advantage of resulting in less litigation and quicker resolution of disputes, and it also emphasises the importance of the first instance judges. On the other hand, it may be that our system is partly caused by, and partly results in, litigation costs which are markedly higher than in almost every other European jurisdiction, a topic of great worry to anyone concerned about the rule of law, but that is a topic for another day.

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[9] See eg *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318

[10] *McGraddie v McGraddie* [2013] 1 WLR 2477 and *Henderson v Foxworth Investments Ltd* [2014] 1 WLR 2600

15. Reverting to my theme, the very limited number of cases which are taken by the UK Supreme Court emphasises that our function, unlike that of most other European Supreme Courts, is not to do justice in individual cases for the benefit of individual parties, or to correct any errors which may have been made by lower courts. That is a summary description of the role of the Court of Appeal (or in Scotland of the Inner House). The role of the UK Supreme Court is to take an appeal only if it raises one or more points of general public importance. In that connection I think that our functions can be summarised in six words, namely "to clarify, correct, declare and develop". (Or if you are a stickler for not splitting infinitives, nine words, namely "to clarify, to correct, to declare and to develop"). Clarification is needed when decisions in the lower courts have left the law in a state of uncertainty or doubt. Correction is required where the courts below have gone wrong on an issue of law of significance. Declaring the law arise when a new and significant point of law comes to light - often in relation to a new statutory provision. And development is appropriate where, although the law is clear, it has become outdated and needs to be changed. And, while I am in mission statement mode, let me add that I consider that our ultimate aim must be to seek to produce judgments, whose reasoning is clear, concise and principled and whose outcomes are clear, just and practical. These aims are not always mutually consistent, and I cannot pretend that we have lived up to this aim in every case we have decided.

16. One of the difficult questions when we take a case is whether, apart from any dissenting judgments, we should have more than one judgment. This is not a matter which is within the presiding Justice's control, as each Justice sitting on an appeal is entitled to decide for himself whether to write a reasoned judgment, and that is, of course, as it should be. The common law tradition is very different in this connection from that of the civilian law, as any reader of Luxembourg Court judgments appreciates. Sometimes I feel that a civilian law appeal involves a single hearing of one case before a single court which happens to have a number of judges, whereas a common law appeal involves simultaneous hearings before separate judges each of whom happens to be trying the same case. The extreme common law view is that effectively taken by the former Australian High Court Judge, Dyson

Heydon[11], namely that it is really desirable that each appellate judge writes his own judgment before he sees any of his colleagues' draft judgments.

17. The advantage of a single judgment is not simply that it requires less time and effort to read and understand, but it also avoids subsequent arguments and uncertainties based on subtle, and sometimes not-so-subtle distinctions between the ways in which what are substantially the same view or conclusion is expressed in concurring judgments, distinctions which were often unintended and normally unappreciated at the time. On the other hand, the most obvious disadvantage of a single judgment is that it is quite often the product of an unsatisfactory compromise between judges who do not agree, and this can lead to lack of clarity, internal inconsistency, even sometimes ducking the real issue. We can, I think, all point to decisions of the European Court of Justice, where this has occurred, but, to be fair, we can all think of decisions of common law Supreme Courts (including, I fear, the UK Supreme Court) where a plethora of concurring judgments have required a wearisomely long read, and some head-scratching when identifying the *ratio decidendi*.

18. In my view, there is no generally correct answer to the conundrum whether one should have several judgments or one. Where the court is laying down good practice for lower courts to follow, as we tried to do when considering the effect of article 8 on claims for possession against trespassers on domestic property[12], it is inappropriate to have more than one judgment, as we want to give very clear guidelines which should not be confused by having more than one judgment. Similarly, if an appeal is concerned with the meaning of a statutory provision, it would normally be questionable whether more than one reasoned judgment is appropriate. On the other hand, when we are seeking to develop the law, for instance in relation to unjust enrichment[13], there may be a lot to be said for having several judgments, as it may well assist and stimulate a dialogue with other courts and with academic lawyers. And sometimes, a Justice will feel that he cannot agree with the reasoning of the majority, even though he

[11] Justice Dyson Heydon AC, *Threats to Judicial Independence – The Enemy Within*, Middle Temple, 23 January 2012
[12] *Manchester City Council v Pinnock* [2011] 2 AC 104
[13] See eg *Benedetti v Sawaris* [2013] 3 WLR 351 and *Menelaou v Bank of Cyprus* [2015] UKSC 66

agrees with the result. As with dissents, I consider that there is something to be said for an appellate judge in such a case considering whether his disagreement is sufficiently great or important to justify adding a judgment. And while I agree with Dyson Heydon's view that an appellate judge's primary duty is, as any other judge, to be independent, I also consider that he has a collegiate function. I do not regard it as my function to dissuade colleagues from writing a concurring or dissenting judgment, but I do regard it as my duty to point out to a colleague any difficulties for the future which I foresee if his proposed judgment proceeds in its presently proposed form. I should perhaps add that this is not only my function: other colleagues have expressed such views to me about my draft judgments from time to time – and no doubt also to each other.

19. A third reason for pleasure that this conference is taking place here is the subject-matter. The role of public policy and the public interest when it comes to private and commercial law is a topic well worth discussing. It is interesting because it involves reconciling two wide-ranging and important topics with very different aims and pedigrees, in many different circumstances, which is challenging in terms of both principle and practicality. I suspect that it is a topic in respect of which judges develop the law on a case by case basis, and the academic lawyers and other legal thinkers can gather the decisions together and identify the general principles and the inconsistencies which they demonstrate. I think that this is a classic case of the less said the better so far as I am concerned at this stage. The Justices have had their say in the decisions you will be considering, and we should now listen to what you tell us.

20. The fourth reason I am very pleased that this conference is taking place here because I see so many people who I have come across, and whom I greatly respect and admire. I have had all sorts of different forms of contact with the speakers (with many of them more than one form of contact) – I have sat with them, talked to them, heard their submissions, been at University with them, read their books and articles, heard them lecture, read their articles saying why I was right and why I was wrong. Indeed, on one topic, as at least two people here know very well, I have been told that I was dead right

and dead wrong: inevitable as I decided the point one way in the Court of Appeal and the opposite way in the Supreme Court. The topic concerned, whether an agent who accepts a bribe holds it on trust for his principal, has been and no doubt remains a very hot topic in the academic world, with strong arguers on both sides. Unfortunately for me, I rather think that the two experts on the topic here today both thought that Neuberger MR was right and that Neuberger PSC was wrong.

21. And that brings me to why I am greeting you here today with some trepidation. Your discussions are scarcely likely to involve treating the judgments of this court as holy writ to be praised and worshipped. You are after all academics and practitioners, not priests, and although the Supreme Court has inherited the mantle of the Judicial Committee of the House of Lords and can therefore claim to be the voices of infallibility, I have no doubt that that description, even though it was coined at a time of respect and deference[14], was meant to be tongue-in-cheek. That is confirmed by the fact that, immediately after referring to the Law Lords' decision in a certain case as being the product of the voices of infallibility, Lord Justice Mackinnon added the words "by a narrow majority". If that was the best which the Law Lords could get from a Court of Appeal Judge in the deferential respectful 1940s, the Supreme Court Justices cannot expect much mercy, let alone deference, from academics and practitioners in 2015.

22. I suppose that the best we can hope for is to have our judgments kindly looked on. I am reminded of the aforesaid Sir Robert Megarry's valedictory speech on his retirement from the Chancery bench. He said that in his many years as a first instance judge, he had been upheld, reversed, not followed, disapproved, overruled, distinguished, followed, considered, approved, and doubted, but he had never, but never, had the indignity of being explained[15]. The melancholy truth for me and my colleagues today is that the best most of us can expect from most of you is to have our judgments explained.

[14] Per McKinnon LJ in *Salisbury v Gilmore* [1942] 2 KB 38, 51

[15] I cannot track this one down, but I quoted it in an earlier lecture, so it must be true - https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/mr-speech-chancery-bar-assoc-lecture-jan12.pdf

23. Now, I am not proposing to discuss, let alone to defend, any of our recent decisions. It is, of course, tempting to defend decisions to which I was party, especially those in which I gave a judgment. And it is even more tempting to attack those decisions where I dissented. But I think that it can be both undignified and dangerous for judges to discuss their decisions once they have given judgment. That is because, when discussing his own decision, a judge is no longer an impartial and detached decider, coolly deciding an issue, on the basis of the arguments and facts which the parties choose to put before him. The judge becomes an advocate, committed to one answer because he has made it publicly clear where he stands, and his reputation to defend, normally by justifying his judgment, but occasionally by explaining or excusing it. That does little for the standing of that judge as a judge, and little for the standing of the judiciary generally. Anyway, a judge who has given a judgment is rarely the best person to defend it. One of the great strengths of the independent bar is that an independent advocate with no axe to grind, and who is therefore able to take a cool dispassionate view, will be a much better defender of a cause than a person who has an obvious personal interest in it.

24. Similarly, for a judge to indulge in public criticism of a decision in which he dissented will tend to undermine either the decision itself or the standing of the judge concerned – or both. Each of those results inevitably risk harming the reputation and standing of the court, and, in turn, the collegiality of the court. Further, my experience is that the cases an appellate judge feels most strongly about tend to be those in which he dissented. As Lord Ackner is supposed to have said, "one dissents where one's sense of outrage at the majority decision outweighs one's natural indolence"[16]. Accordingly, as well as being more likely to undermine the court's standing, a dissenting judge is even less likely to be a good advocate than one in the majority.

25. A further problem with a judge speaking publicly about his judgment arises from the rather obvious and anodyne proposition that either he will add nothing to what is in the judgment or he will add something. If he adds nothing, then he might as well keep quiet. If he adds something, then there is an

[16] Alan Paterson, *Final Judgment* (2014), p 189

obvious problem, namely is what he has said after giving the judgment relevant when another judge is subsequently considering the judgment? It is embarrassing and unfair on legal advisers, advocates and judges if a senior judge, in a speech out of court, adds to or qualifies a judgment which he has given.

26. In the end, the simple truth is that a judge should expect to let his judgment speak for itself. And when it comes to writing a judgment in which a judge considers a colleague's judgment in the same case, I deprecate any sort of abuse or hyperbolic criticism. Any judge worth her salt should be able to marshal and express her arguments clearly and have the confidence to let those arguments speak for themselves. Hyperbole and insults can be great fun, particularly when they emanate from Justice Scalia, but they tend to betray a lack of confidence in the actual argument advanced by the judge concerned, and they do nothing for the reputation of the court – or for relations within the court. When we Supreme Court Justices discussed this among ourselves recently, one of my colleagues suggested that insults and hyperbole could be included in drafts of judgments when exchanged between ourselves, but would be deleted when the final version of the judgment was prepared for publication. I was happy to agree this, not least because one would then have the fun of seeing the insults without the embarrassment of having them deployed in public.

27. Although we all feel proprietorial about our judgments, our feelings manifest themselves in different ways. I have noticed that some of my colleagues like to have their judgments cited to them in subsequent cases, while other colleagues prefer to have their earlier judgments ignored. Whether it is self-confidence, arrogance, or self-centredness on the one hand and lack of confidence, modesty or self-denial on the other hand, is a matter of opinion and speculation.

28. I must confess that I have not always kept to my exhortation not to comment on my judgments in public, but I hope and think that I have stuck to my view that we Justices should not insult or criticise each other in our judgments – or, ideally, at all. My comment on a judgment I had given was, unsurprisingly in the light of what I have just said, in relation to a dissent in a case which is rather close

to my heart. I was dissenting on my own in the very first case on which I sat in the House of Lords[17], in an appeal which was in an area of law in which I was fairly experienced, and it was many weeks after the hearing that I first discovered that I was the sole dissenter, as until then I had understood that my view was shared by two other colleagues – ie that I was in the majority. I gave a speech where I am afraid I did attack the reasoning of my colleagues. I think that I may have been stung into action by a sense of having failed in tactics. Rather than sending round my draft judgment promptly, I had left it to others who then changed their minds – perfectly properly as it was their right. While it was understandable, I left it very late before circulating my draft judgment, so that it was rather optimistic to expect any colleague to be converted – or reconverted – to my view. I do not intend to repeat the solecism of a callow youth and therefore I do not expect to trespass into that area again. However, like many rules of practice, there can be exceptions, so it would be rash to make any firm commitment.

29. Having said what I will not do (at least this morning), let me turn to what I will do, and that is to consider where the Supreme Court has got to after its first six years of existence and where it may be going. The creation of this new Court was not intended to change its function and role from that of the Law Lords. At the time that the move was being contemplated, fears expressed by some (including, it must be said, me) that the change of name, location and administration might result in a rush of blood to the institutional head. That has not happened, I am glad to say, but other factors have served to change the nature of our work and given the UK's top court a more prominent and a more (small p) political role. I think that the creation of the Supreme Court has undoubtedly made us more visible: not many people knew who the Law Lords were, and their hearings were not easy to access. The Supreme Court is an eponymous entity, our hearings are easily accessible – physically and on stream - and our judgments are easily accessible through written and oral summaries. This means that our more controversial, accessible or interesting judgments are more likely to permeate public awareness.

[17] *Stack v Dowden* [2007] 2 AC 432

30. There are several factors which have given the UK's top court greater influence over the past twenty years or so, and I have mentioned them before. First, the increasing powers of the executive in many areas mean that there has been a much greater call for judicial scrutiny of administrative decisions. Secondly, revolutionarily for the UK, EU law requires judges to disapply primary legislation if it does not comply with EU law. Thirdly, because Parliament could often be controlled by the Prime Minister for much of the past few decades, parliamentary power has waned, and judges (perhaps along with the media) may have unconsciously filled the vacuum. Fourthly, the Human Rights Act of 1998 has for the first time given UK judges a quasi-constitutional function, as the Human Rights Convention is a sort of European mini-constitution. Fifthly, the courts have been and are being given another type of constitutional power as a result of the increasing devolution of central government to Scotland, Wales and Northern Ireland: the Supreme Court has to decide on the extent of the powers which have been devolved to the assemblies and parliaments in Edinburgh, Cardiff and Belfast. Sixthly, the legislature is sometimes too divided or too uncertain to take difficult or unpopular decisions and the courts therefore may be tempted to feel that they ought to step in. Seventhly, yesterday's judges came of age in the respectful and conventional forties and fifties, whereas today's judges grew up in the questioning and disrespectful sixties and seventies, and that affects the judicial outlook, as it is more widely reflected in society.

31. I am not supporting judicial activism: I am simply trying to describe what has been happening. While judges have a vital duty to ensure the rule of law and to protect fundamental rights, we must not be eager to expand our powers. On the contrary, we must always remember that Parliament has democratic legitimacy – but that has disadvantages as well as advantages. The need to offer oneself for re-election sometimes makes it hard to make unpopular, but correct, decisions. At times it can be an advantage to have an independent body of people who do not have to worry about short term popularity.

32. Reverting to the functions of the Supreme Court, we are not, of course, a constitutional court, because, in common with only Israel and New Zealand, the UK has no constitution. Some people like to say that we have constitutional conventions and some constitutional documents, and even that we have an unwritten constitution. To paraphrase Sam Goldwyn, I question whether an unwritten constitution is worth the paper it's written on. But more seriously, I find it hard to accept that a few random conventions and a few disparate statutes, all or any of which can be removed or varied by a simple majority in Parliament can amount to much of a constitution. But, as is so often the case with such arguments, it all depends on what you mean by "constitution".

33. However, I revert to the point that the UK Supreme Court is not a constitutional court, although there is no doubt that we have become more like a constitutional court. The Human Rights Act has constitutional overtones in the light of both the substantive rights and freedoms it declares and the powers it gives to the courts, namely to interpret statutes almost to the extent of re-writing them, and to grant declarations of incompatibility, both of which are seen by some as tending to undermine the supremacy of Parliament. However, the possibility of the UK having a constitution crops up from time to time, but it has never been taken forward.

34. Whether the UK should have a constitution is not an easy issue. On the one hand, we do look a bit anomalous in not having a constitution, and we could do with a principled framework within which to take forward whatever we do with human rights and the EU externally and whatever developments occur in the area of devolution internally. And a constitution may well give the UK some protection against having to implement decisions of the Luxembourg court. On the other hand, the UK has survived for centuries without a constitution, and we can proudly point to the fact that we have had a longer period of peace at home, with no tyranny, persecution, or invasion, than almost any other country in the world. If it ain't broke, don't fix it.

35. I was very interested to see that, on Wednesday, Michael Gove had said to a Parliamentary committee that he was thinking "hard about whether or not we should use the British Bill of Rights in order to create a constitutional long stop, similar to the German constitutional court. And, if so, whether or not the Supreme Court should be that body." So watch this space.

36. Meanwhile, the Supreme Court is a long way from limiting itself to Human Rights cases, as it still considers a fair number of private law cases. And it is in relation to many of those cases that your conference comes into its own. And, as to that, the very best of luck in your discussions today. Bearing in mind the talented collection of people who are or will be here today, if you cannot sort out the law in the areas you are discussing, what hope does the Supreme Court have of doing so?

37. Thank you very much.

David Neuberger UK Supreme Court, 4 December 2015