

The Role of the Supreme Court Seven Years On – Lessons Learnt

Bar Council Law Reform Lecture 2016

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1. The various parts of the United Kingdom, Scotland, Northern Ireland, England and Wales can be very proud of the high quality and long traditions of their different legal systems. Particularly following the Acts of Union of 1707 and 1801, which resulted in their coalescing into the UK, there has been an obvious need for a single top court, to ensure a degree of consistency and coherence in the law throughout the UK. From the 14th century, the House of Lords, representing the monarch in Parliament, performed that function. Looking at the reports of cases heard between the mid-17th and mid-19th centuries, appealing to the House of Lords seems to have been a somewhat unpredictable exercise: an appeal could be heard by any peer and any number of peers, including a peer with no legal qualifications and even a peer who had not heard the parties' submissions.
2. As part of the great reorganisation of the judiciary and courts in England and Wales in the 1870s, under Mr Gladstone's premiership, Parliament passed a statute¹ abolishing the jurisdiction of the House of Lords altogether. However, before the abolition could take effect, there was a change of government and with Mr Disraeli as Prime Minister, Parliament repealed that statute and enacted² a new system whereby senior judges were appointed to the House of Lords to hear appeals from all parts of the UK, as the Appellate Committee of the House of Lords. Thus, there came into being the Law Lords or, to give them their proper title, the Lords of Appeal in Ordinary.

¹ Judicature Act 1873

² Appellate Jurisdiction Act 1876

3. This had some curious consequences. Rather than being a court, the Law Lords sat as a committee of the House of Lords. Hence the judges were not robed, although the advocates were. Initially, appeals to the Law Lords were always heard in the chamber of the House of Lords. By the 1940s, appeals were being heard in a committee room, and that was the normal forum, although the Appellate Committee would hear appeals for one week every year in the chamber. As I discovered, it was not a very convenient place to hear appeals, and, so far as I could see, the Law Lords only sat there in order to make the point that they could do so. And, rather than giving judgment in court, the Law Lords always went into the chamber, sat on the benches and solemnly voted whether to allow or dismiss an appeal, as at the conclusion of any ordinary debate, with the senior Law Lord sitting on the woolsack, where the Lord Chancellor used to sit and the Lord Speaker now sits.

4. For around 130 years following its creation, the Appellate Committee did not merely constitute the top UK court, it was effectively the only UK court. The Law Lords performed the function of harmonising law across the UK where appropriate (eg in relation to the interpretation of a statute which applied throughout the UK or in relation to the appropriate standard to which to hold professional people), while maintaining respect for differences between the laws and practices of the different jurisdictions.

5. Over time, the number of Law Lords increased from an initial two (in 1876) to a final twelve (in 1994). The need for some Law Lords who were from Scotland and some who were not was self-evident, because Scots substantive law, procedural law and legal expressions are different from their equivalents elsewhere in the UK. From around the early 1990s, the composition of the Law Lords was nine Justices from England and Wales, two from Scotland and one from Northern Ireland.

6. Early in this century, Mr Blair's government decided that it was time to "put the relationship between the executive, the legislature and the judiciary on a modern footing, which takes account of people's expectations about the independence and transparency of the judicial system"³. As it was put by a respected constitutional lawyer, "in the twenty first century, it looked very odd, especially in a country committed to the rule of law, and to the appearance, as well as reality of fairness and impartiality, that the top domestic court was physically located in the same building as the national Parliament and whose judges were ex officio members of one of the two chambers of that Parliament"⁴.
7. Accordingly, in 2005, a statute⁵ was passed abolishing the Appellate Committee and replacing it with a new United Kingdom Supreme Court. There was a delay in implementation while a suitable building was found and fitted out, but in October 2009 the Law Lords to the east of Parliament Square were no more, and they decamped to the Supreme Court which opened up for business on the west side of Parliament Square. It was not quite a case of twelve Lords a-leaping over the Square, because one of the twelve, namely me, went off to the Royal Court of Justice as a result of what my colleague there, Sir Maurice Kay, elegantly characterised as an elective demotion, to become Master of the Rolls.
8. The creation of the Supreme Court as a new entity in a new building was not without its critics. Indeed, some traditionalists were disappointed that the majority of the Law Lords supported the idea. I have always had my suspicions that one of those included the House of Lords clerk responsible for the Law Lords. Can it have been a coincidence that the very last appeal he listed for judgment in the House of Lords was a case about assisted suicide⁶? It is only fair to add that I had mixed feelings about the move at the time. While appreciating the value of a separate court

³ Department for Constitutional Affairs, *Constitutional Reform: A Supreme Court for the United Kingdom* (CP 11/03 July 2003), p 10

⁴ B Dickson, *Human Rights and the United Kingdom Supreme Court* (2013), p 2.

⁵ Constitutional Reform Act 2005

⁶ *R(Purdy) v Director of Public Prosecutions* [2010] 1 AC 345

with its own building, I was concerned that it involved considerable capital expenditure and substantially increased running costs which the courts system could ill afford, and was only claimed to be justified on theoretical than practical considerations.

9. Having referred to my contemporary reservations, it is right to say at once that it seems to me that the consequences of the replacement of the Law Lords by the Supreme Court have been generally very positive. In terms of public perception and public understanding, the move from the House of Lords to the new building has resulted in a number of very significant improvements. And it is not a case of “I would say that wouldn’t I?” As already mentioned, I was not a member of the Supreme Court at the start, and indeed I was not a member of the Law Lords planning committee for the Supreme Court, which had been set up before I was appointed a Law Lord. That committee consisted of Lord Hope, Lady Hale and Lord Mance. It is they, together with the first President of the Court, Lord Phillips and the first Chief Executive, Jenny Rowe (as well as the people who worked with them) to whom any credit goes. As someone who joined three years after the Court opened for business, I can largely only hope to take credit for maintaining its initial successes. And I hope I am not deceiving myself when I suggest that it has been successful in a number of ways.

10. First, even quite a few lawyers did not really know who the Law Lords were or what they did: many thought that they were peers who were chosen to be judges rather than judges who were chosen to be peers. And although the term “Law Lord” was popular with lawyers in the know and judges, it is not a very clear job-description: to many it sounds more like a statute-maker than a judge. As for the Appellate Committee of the House of Lords, it sounds more like a vetting panel for bills or for peerages rather than a court of law. By contrast, virtually everyone knows what a Supreme Court is: forgive the cliché, but it does what it says on the tin.

11. Secondly, the UK Supreme Court undoubtedly has a clearer identity to the world, and indeed a clearer self-identity, than the Appellate Committee of the House of Lords, not only as a result of having the new title, but also, indeed I suggest probably more so, as a result of having its own building and its dedicated staff. We are physically far more accessible to the public, and we can, and do, make ourselves more electronically accessible as well. We are now free to choose how we present ourselves and our work, particularly our hearings and our judgments, and our choices are dictated by our aim of maximising public awareness of what we do, and why and how we do it.

12. Thirdly, we have taken advantage of this opportunity in a number of ways. The Committee Rooms in the House of Lords where the Law Lords sat were very difficult to access – even if you were an advocate in an appeal being heard there, as I can recall. By contrast, in the Supreme Court we have gone out of our way to encourage the public to attend our hearings, and to visit the building for guided tours whether or not a court is sitting. And if no court is sitting, a visitor can see recorded extracts from high-profile cases in our exhibition area, a space designed to explain more about our work. Almost 100,000 people visited the building last year – and we have four and a half stars on Trip Advisor. We annually hold a number of special open days, and during Open House London weekend this year we attracted nearly 4,000 visitors. We particularly encourage school visits and we hold moots in our court rooms, often with Justices as moot judges.

13. If you come to hear an appeal being argued, you will be given a piece of paper identifying the Justices and the advocates, and telling you in clear and reasonably simple terms what the case is about. And, when we give a judgment, it will be accompanied by a two-page summary explaining what the case is about, what the issues are and how we decided them and why. But you don't have to come and see us. We stream virtually all our hearings live via our website, and we make them available to watch afterwards as well. When we hand down our judgments, we explain our

decision in a filmed oral summary given by the Justice who gave the first judgment in the case; that oral summary is even more condensed than the two-page written summary.

14. The public interest in the Supreme Court is to a significant extent attributable to the dedicated Communications team which the Supreme Court now employs. They were recently awarded a Halsbury Legal Award, in recognition for their work in helping the media to report Supreme Court cases. Communications are particularly important given the high profile nature and the complexity of many of the cases which come before the court. Recent examples of high profile case include *Rhodes v OPO*⁷, which raised the question whether a popular musician's graphic, autobiographical account of child abuse should be prohibited from publication to protect the musician's child, and *R v Jogee*⁸ where the law on criminal joint enterprise was changed. Examples of controversial cases include the *Assange* extradition case⁹ and the *Chester* case on prisoners' votes¹⁰. Examples of complex cases (with long judgments) include the *Nicklinson* case on the lawfulness of criminalising any assisting of a suicide¹¹, and the *Keyu* case concerning the killing of many Malays by the British army 70 years ago¹².
15. The press summaries of Supreme Court decisions are published online, and the Supreme Court Twitter service informs any follower of forthcoming hearings and judgments, as well as speeches and other events involving any of the Justices. The official Twitter profile now has more than 200,000 followers, providing legal professionals, students and others with real-time alerts on judgments and other Court news.

⁷ *Rhodes v OPO* [2015] 2 WLR 1373

⁸ *R v Jogee* [2016] 2 WLR 681

⁹ *Assange v The Swedish Prosecution Authority* [2012] 2 AC 471

¹⁰ *R (on the application of Chester) v Secretary of State for Justice* [2014] 1 AC 271

¹¹ *R (on the application of Nicklinson) v Secretary of State for Justice* [2015] 1 AC 657

¹² *Keyu v Secretary of State for Foreign and Commonwealth Affairs & Anor* [2015] 3 WLR 1665

16. Our website contains a list of past and forthcoming decisions, past judgments, future hearings, and speeches and other events. The number of visitors to our website has grown considerably, and we are now regularly welcoming over 70,000 users over the course of a month. The Justices give quite a few talks and lectures at universities, lawyers' organisations and we also visit schools and universities to talk to students and answer questions. Law Lords made talks and lectures, and went on visits, but on a significantly smaller scale than we do now.

17. We are of course the Supreme Court of the United Kingdom, and one aspect of our work which I am in the process of trying to change is that, like the Law Lords in the past, we exclusively sit in London. The Justices are very conscious that the Supreme Court serves all parts of the United Kingdom, and there is a real risk that, by always sitting in London, with nine of the twelve Justices being English, and with the great majority of appeals heard being English cases, the public may perceive us as being orientated to England and indeed rather London-focussed¹³. We try to meet this perception by visiting Judges, lawyers, government institutions, and Universities in Scotland, Wales and Northern Ireland, as well as round England. But we could do more, and what, in particular, I would like to do is to have the Court actually sitting and hearing appeals in Edinburgh, Cardiff and Belfast.

18. Ideally, we would sit, say, in Edinburgh and hear not just one Scottish case, but also an English Welsh or Northern Irish case in order to remind people that we are a UK court. When I mentioned this to some English lawyers, they expressed doubts about having to travel from London to Edinburgh – or Cardiff or Belfast. “But that is the equivalent of what Scottish, Welsh and Northern Irish lawyers appearing in the Supreme Court have to do all the time”, I replied. I am sorry to say that the Supreme Court has not so far sat outside London, but glad to say that

¹³ *Judicial Innovation in the UK Supreme Court*, (2016) UK Supreme Court Yearbook Vol 7, Part I: Commentaries and Reflections, p12

the judiciary and politicians based in those capital cities have made it clear that we would be welcome to do so, and steps are being taken to achieve this.

19. So far, I have been concentrating on the perception of the Supreme Court. I make no apology for this. Judges are rightly very anxious to emphasise the importance of open justice, and we frequently do so. However, it is obviously right that we practise what we preach – perhaps especially if we are Justices who sit in the country’s top court. It is therefore important that we do as much as we can to ensure that the public understand the role of the courts in our constitutional arrangements, the importance of the rule of law, and how vital it is for the country to continue to have a respected, high quality and independent judiciary. Because the UK has enjoyed over 300 years without a revolution, invasion or dictator, there is a danger of taking the rule of law and, in particular, the importance of an independent high-quality judiciary, for granted. And this danger is reinforced if the public do not understand how and why the system works as it does.

20. I think that the move from the House of Lords to the Supreme Court has helped to get across to the public where we are, what we do and why we matter. I hope that this has resulted in the public having a better and clearer idea about the justice system in this country and about the rule of law. This is not merely appropriate in itself, but it is particularly fitting because the 2005 Act which created the Supreme Court also, for the first time, contains a statutory recognition of the rule of law¹⁴, and indeed of the independence of the judiciary¹⁵.

21. So what does the UK top court actually do?

¹⁴ Constitutional Reform Act 2005, section 1

¹⁵ *Ibid*, section 3(1)

22. The Law Lords heard appeals in all areas of law, and the Supreme Court performs precisely the same function. However, the UK Supreme Court, like the Law Lords before them, hear a very limited number of cases: only those which raise points of law of general public importance should be entertained. Therefore, we manage with twelve Justices (currently eleven), even though normally only five of us will hear any case. In that connection, we are very different from civil law countries (like all the countries in mainland Europe) which have separate Supreme Courts and Constitutional Courts. Indeed, many European countries have more than one Supreme Court – eg a separate Supreme Administrative Court. And many European countries have a very large Supreme Court - eg Italy and France each have a Supreme Court, or Court of Cassation, with over a hundred judges (Italy's has over 300) - because, unlike common law supreme courts, they cannot select the cases which come to them. Thus, you can take a challenge to a parking ticket on factual grounds to the Italian *Corte di Cassazione*.

23. We are also unusual, though not unique, for a common law Supreme Court in that, like the Law Lords at any rate in their last sixty years, we have never sat en banc (ie all together). In other words, only some of us (normally five, sometimes seven, and occasionally but rarely nine) sit on an appeal. In the forthcoming Brexit appeal¹⁶ I anticipate that all eleven of us will sit – which would be the largest panel since the Law Lords were created in 1876. The fact that we normally sit in panels of five rather than en banc enables us to get through around twice as many cases as we otherwise would. In addition, at least in my experience, hearings with five judges are normally more manageable both for the judges and for the advocates than hearings with more judges.

24. The fact that only some Justices sit on a particular case has the disadvantage that people may sometimes feel that the result of an appeal would be different if a different five Justices had been selected. This is a risk, but provided the panel constitution is never selected in order to achieve a

¹⁶ On appeal from R (*on the application of Miller*) v *The Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin)

particular result (and I can assure you that it is not), then there is no vice in the system. However the members of a court are selected, a losing party or disagreeing academic can always suggest that a differently constituted court might have reached a different result. Because we select panels, we can ensure that a panel of five (or more) hearing a case includes any Justice with special expertise in the relevant law, and that there will also normally be Justices who can bring their more general legal knowledge and experience to bear on the case. It also enables a fair distribution of the more important and interesting cases to be achieved.

25. Quite apart from this, I believe that a system in which all the judges of a particular court do not regularly and exclusively sit together has real benefits in terms of what might be called individual judicial profiles. Such is human nature that I suspect that judges' outlooks will become more entrenched if they are always sitting with the same colleagues rather than if their fellow judges are subject to a degree of variation. And I believe that ensuring that Justices sit in different combinations, rather than in a single immutable group, is good for intra-judicial collegiality. I will discuss the issue of diversity later and in a more familiar context, but I suggest that a limited degree of variation in the identity of the membership of the panels which hear appeals, in the sense of perming any five (occasionally more) from the twelve Justices, represents a good balance between consistency of judicial approach and diversity of judicial approach.

26. So far as our actual case-load is concerned, the great majority of appeals which come to the Supreme Court do so because the Court itself has given permission. Certain devolution cases come direct to us, and one or two cases come to us with the permission of the courts below. But that is unusual. Each year, we receive around 250 applications for permission to appeal ("PTA"s) each of which is considered by a panel of three Justices (although details of each PTA are circulated to all Justices, so any one of the other nine can express a view). On average we allow rather under one in three such applications to proceed to appeal.

27. Turning to judgments, although the jurisdiction of the Supreme Court is almost the same as that of the Appellate Committee of the House of Lords, one change was effected by the transfer of jurisdiction on devolution cases from the Judicial Committee of the Privy Council, where they were previously heard, to the Supreme Court. This has had the effect of bringing within the remit of the Supreme Court the adjudication of the boundaries of our constitutional settlement, and in particular the boundary between devolved and reserved matters, as set out in the devolution statutes. This function has been described in one judgment of the Court as being of a “fundamental constitutional nature”¹⁷.

28. The Supreme Court has had three references concerning the powers of the Welsh assembly to make specific laws, all in advance of the relevant bill becoming a formal Act¹⁸. Interestingly, by contrast, all the challenges to the Scottish Parliament’s powers to make specific laws have come after the law was enacted. Although the Welsh cases were of constitutional significance, they were all heard by panels of five Justices. It would not be appropriate in every case involving the question whether a proposed or actual statute was within the powers of a devolved legislature, but I accept the point recently made by the Welsh Counsel General that it would normally be right to have seven Justice courts sitting on any devolution case which raises a point of constitutional significance.

29. As a result of the devolution cases heard by the Supreme Court, there have been significant decisions in the field of devolved power in recent years. Although the Scottish Devolution legislation¹⁹ (like its Welsh²⁰ and Northern Irish²¹ equivalents) identifies a limited and specific number of circumstances in which the court can strike down a Scottish Parliamentary statute, in

¹⁷ Lord Hope (with the agreement of the other members of the court) in *H v Lord Advocate* [2013] 1 AC 413, para 30.

¹⁸ *Local Government Byelaws (Wales) Bill 2012 – reference by the Attorney General for England and Wales* [2013] 1 AC 792; *Agricultural Sector (Wales) Bill (Attorney General for England and Wales, Ref)*, [2014] 1 WLR 2622, and *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the Counsel General for Wales* [2015] UKSC 3

¹⁹ Scotland Act 1998, section 29

²⁰ Government of Wales Act 2006, section 108

²¹ Northern Ireland Act 1998, section 6(2)

the 2011 *AXA* case²² the Supreme Court held that the courts could additionally strike down statutes enacted by devolved legislatures if they “abrogate fundamental rights or ... violate the rule of law”²³. The Court took the view that the devolved legislatures do not have “unconstrained” power, because, at least to a significant extent, sovereignty remains with Westminster, and it therefore follows their statutes are amenable to judicial review²⁴. On the other hand, as the Court went on to say, devolved Parliaments are elected by universal suffrage and have democratic legitimacy, so the judiciary should exercise its power of intervention “only in the most exceptional circumstances”; in particular, it would not be right for the courts to strike down devolved legislation “on the grounds of irrationality, unreasonableness or arbitrariness.”²⁵ The outcome therefore was seen as striking an appropriate balance between ensuring the freedom of devolved power, according sufficient space to the devolved legislature to take innovative and individualistic decisions, whilst maintaining an emphasis on the rule of law and an exceptional jurisdiction to constrain this space, taking in to account a proper sense of judicial restraint.

30. This emphasis on identifying and maintaining an appropriate level of judicial restraint is key to the Court’s role. The Supreme Court, as the final appeal court, hearing only cases of general public importance, must try to be particularly sensitive to the delicate balance between the branches of the state in a constitutional settlement which is of a remarkably ill-defined and flexible nature. Although one of the clear principles in our system is the doctrine of parliamentary sovereignty, that does not preclude the necessity for a degree of judicial law-making. Indeed, the notion that judges have only recently taken it on themselves to make law is a fallacy. Fifty years ago, a Law Lord, Viscount Radcliffe, said “There was never a more sterile controversy than upon the question whether a judge makes law. Of course he does. How can he

²² *AXA General Insurance Limited v The Lord Advocate* [2011] UKSC 46.

²³ *Ibid*, para 153.

²⁴ *Ibid*, para 46

²⁵ *Ibid*, para 51.

help it?”²⁶. And, as he also pointed out, “[a] Constitution can live only by judicial reinterpretation”²⁷. Around the same time another Law Lord, Lord Reid, said “We do not believe in fairy tales any more, so we must accept the fact that for better or worse judges do make law”²⁸.

31. And this should not be a problem in a country which enjoys parliamentary sovereignty. Where the law has been developed by a judge through a decision which is thought to be inappropriate, Parliament can always reverse the decision by legislation. Of course, the very fact that we have parliamentary sovereignty and we do not have a formal overriding Constitution could be said to prevent the UK Supreme Court being a normal common law Supreme Court, let alone a civilian Constitutional Court. However, the United Kingdom’s unusually ill-defined and informal constitutional arrangements permit a flexible and practical response to problems.
32. Quite apart from its duties under the 1998 Human Rights Act, the Supreme Court has no more important role than to protect fundamental rights when appropriate to do so. Further, the Court, unlike Parliament, cannot, as Lady Hale has put it, “decide not to decide”²⁹: when a case comes before it, the Court has no choice but to determine the issues which it raises.
33. Interesting constitutional issues were raised in the *HS2* case³⁰ by Lord Mance and me, and they were repeated by Lord Reed in the *Pham* case³¹. These judicial observations raise issues but do not answer them, and in due course we will see whether they are taken up in whole or in a modified way – or whether they are discarded.

²⁶ Lord Radcliffe *The Lawyer and his Times', Not in Feather Beds* (1968) (published 1978), p 271

²⁷ *Ibid*, p 272

²⁸ Lord Reid *The judge as lawmaker* (1972) *The Journal of Public Teachers of Law*, p 22.

²⁹ Lady Hale, ‘*Law Maker or Law Reformer: What is a Law Lady for?*’ John Maurice Kelly Memorial Lecture (University College Dublin Faculty of Law).

³⁰ ³⁰ R (*on the application of HS2 Action Alliance Ltd*) v *The Secretary of State for Transport* [2014] 1 WLR 324

³¹ *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591, para 82

34. One of the tasks of the Supreme Court is to clarify and correct the law where it considers that it has taken a wrong turn, or that it has strayed out of line with other established legal principles or modern day values. In criminal law, as already mentioned, in *R v Jogee*³², the unanimous conclusion of the Supreme Court was that some 35 years earlier the Privy Council (subsequently followed by the House of Lords) had taken a wrong turning in holding that, in a joint enterprise case, mere foresight that the principal perpetrator would cause serious injury to the victim is a sufficient mental element for establishing secondary liability for murder. On the civil side, in the *Montgomery* case³³, we changed the law governing the duty of a surgeon proposing to embark on a procedure with risks, so that he or she ordinarily have a duty to consult the patient, which was not previously the law.

35. Probably the most high-profile topic dealt with by the Supreme Court, at least so far, is that of human rights. This is unsurprising: somewhat ironically for the country in which fundamental rights were first articulated, human rights, at least as a specific legislated topic, like devolution, only entered into UK law at the very end of the last century. The Human Rights Act 1998 may have reinforced the view in some quarters that there is increased judicial activism, perhaps particularly in the Supreme Court. Thus, it is sometimes suggested that human rights put unelected judges in conflict with elected politicians. This is a demonstrably misconceived argument: the 1998 Act was enacted as a statute by elected politicians, and it does not merely entitle judges to give effect to human rights: it positively requires them to do so. The revolutionarily activist course would have been for the judges not to do that which an Act of Parliament required of them.

36. The introduction of human rights into UK law has resulted in some important and interesting cases both on human rights themselves and in terms of refreshing parts of the common law. In

³² [2016] 2 WLR 681

³³ *Montgomery v Lanarkshire Health Board* [2015] AC 1430

2014 and 2015, for instance, there were the *Nicklinson*³⁴ and *Chester*³⁵ cases to which I have referred, *P v Cheshire* on the liberty rights of adults who lack capacity³⁶, the *Carlile* case on the government's right to deny an Iranian entry to the UK to speak to Parliamentarians³⁷, and a number of cases on immigration and asylum³⁸. And, so far as the common law is concerned, we have canvassed the possibility of a change to the basis on which courts review executive decisions and action from the classic irrationality test to the more structured proportionality test³⁹.

37. However, the image of the Supreme Court as a tribunal which concentrates almost exclusively on public and human rights law does not bear examination. The published figures for the legal year 2015-2016⁴⁰ suggest that of the 84 cases which were granted permission to appeal, 12 were concerned with immigration, 14 with other aspects of judicial review, two with discrimination and one with other aspects of human rights. In other words, only 35% of our case-load were in the public law or human rights field⁴¹. Of the 81 cases disposed of by judgment in the same period, five concerned judicial review, two dealt with immigration, two with discrimination, and nine concerned other human rights issues⁴². When giving a lecture in Australia in August 2014⁴³, I suggested that it was “striking that we ha[d] given judgment in nine equity cases⁴⁴ since June last year, and that excludes cases on tax law and insolvency”. In 2014-2015, for example, the Supreme Court has given judgment in important cases concerned with contractual penalties⁴⁵,

³⁴ R (*on the application of Nicklinson*) v Secretary of State for Justice [2015] 1 AC 657

³⁵ R (*on the application of Chester*) v Secretary of State for Justice [2014] 1 AC 271

³⁶ P (*by his litigation friend the Official Solicitor*) v Cheshire West and Chester Council [2014] 1 AC 896

³⁷ R (*on the application of Lord Carlile*) v Secretary of State for the Home Department [2015] 1 AC 945

³⁸ Eg R (*on the applications of Ali and Bibi*) v Secretary of State for the Home Department [2015] 1 WLR 5055

³⁹ See the discussions in *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591 and *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] 3 WLR 1665

⁴⁰ Supreme Court Annual Accounts Report 2015-2016

⁴¹ Supreme Court Annual Accounts Report 2015-2016, Table 5 *Applications for Permission to Appeal disposed of, by subject area, 1 April 2015 – 31 March 2016*, p 23

⁴² Supreme Court Annual Accounts Report 2015-2016, Table 6 *UKSC Appeals, Disposed of by Judgment, by subject area, 1 April 2015 – 31 March 2016*, p24

⁴³ *Equity – The Soul and Spirit of all Law or a Roguish Thing?* Lehan Lecture, 4 August 2014.

⁴⁴ *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*, *Prest v Petrol Resources Ltd*, *Szepietowski v The National Crime Agency*, *Marley v Rawlings*, *Coventry v Lawrence*, *Williams v Central Bank of Nigeria*, *R (Barkas) v North Yorkshire County Council*, *Shergill v Khaira* and, *FHR European Ventures LLP v Cedar Capital LLP*

⁴⁵ *Cavendish Square Holding BV v Talal El Makdessi* [2015] 3 WLR 1373

unjust enrichment⁴⁶, nuisance⁴⁷, medical negligence⁴⁸, and a number of cases relating to children. And of the 52 cases which the Supreme Court has decided so far this year, rather more than half involved private law issues. Where precisely one draws the line between private law and public law can be somewhat subjective, but the precise apportionment does not matter: the essential point is that private law is very much alive and kicking in the Supreme Court.

38. The final aspect of substantive Supreme Court jurisprudence I should mention is one with which I am particularly pleased. Following the enactment of the Human Rights Act 1998, many lawyers tended to focus on human rights to the exclusion of the common law and thus to the detriment of the development of the common law. Cases which could have been presented, at the very least in the alternative, on the basis of common law principles were argued solely by reference to human rights. Lawyers had treated human rights like children treat an exciting new toy: they had concentrated all their efforts on the new toy and had left the previously valued old toy (the common law) in the toy cupboard, where it was left rather to languish and to ossify (if toys can ossify).

39. This tendency was disparaged in a judgment in the Court of Appeal by Toulson LJ in 2012, when he said that “the development of the common law did not come to an end on the passing of the Human Rights Act”⁴⁹, and decided that a newspaper journalist was entitled to see evidence lodged in an extradition case, on common law grounds even though the case had been argued purely by reference to human rights law. Following that, the common law baton was taken up by the Supreme Court. It took a Scottish judge to explain precisely how the common law and human rights inter-related in the UK courts. In the 2013 *Osborn* case⁵⁰, Lord Reed said that “[t]he Convention cannot ... be treated as if it were Moses and the prophets” and that,

⁴⁶ *Bank of Cyprus UK Ltd v Menelaou* [2016] AC 176

⁴⁷ *Coventry v Lawrence* [2014] 1 AC 822 and [2015] 1 AC 106

⁴⁸ *Montgomery v Lanarkshire Health Board* [2015] 1 AC 1430

⁴⁹ *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)* [2013] QB 618, para 88

⁵⁰ *Osborn v The Parole Board* [2014] AC 1115, paras 56 and 57

while “[t]he importance of the [Human Rights] Act is unquestionable”, “[h]uman rights continue to be protected by our domestic law, interpreted and developed in accordance with the Act when appropriate.” And a year later in the *Kennedy* case⁵¹, Lord Mance and Lord Toulson not merely reiterated the point Toulson LJ had made in the Court of Appeal in 2012, but concluded that the common law might well give a journalist the right to see documents relating into a Charity Commission inquiry in circumstances where human rights law as developed in Strasbourg would not.

40. A rather different aspect of Supreme Court judgments is how they come to be written. I have been keen to encourage a more collegiate, even a collaborative, approach towards judgment-writing. Although the trend is somewhat variable⁵², there has been a greater tendency towards decisions with single judgments, and a definite increase in the number of jointly authored judgments. I regard this as a beneficial trend. I am not against concurring judgments *per se*: sometimes they may be appropriate because the author has different reasons for arriving at the same conclusion, or because the decision concerns a topic where more than one judgment would be beneficial as the law is in the process of development. Save in those sort of cases, however, writing a concurring judgment may be a questionable exercise. John Roberts, the US Chief Justice, said that Justices “should be worried when they are writing separately, about the effect on the court as an institution”⁵³.

41. So far as mechanics are concerned, following the sending round of draft judgments, we often have email discussions and we not infrequently have meetings, sometimes to see whether we can agree on a single judgment, sometimes to reduce or eliminate differences, and sometimes for

⁵¹ *Kennedy v The Charity Commission* [2015] 1 AC 455

⁵² Historically, the proportion of single judgment decisions each year has varied very greatly: in the years between 1981 and 2013, it was anything between 12% and 70% - A Paterson, *Final Judgment* (2013), p 106

⁵³ Interview with Jeffrey Rosen in *The Atlantic*, 13 July 2012

competing views to be discussed. These discussions often, but I must admit not always, result in some re-drafting and a greater measure of agreement than existed before.

42. I hope – and believe – that these practices not only help foster good relations, a good sense of collegiality, between the Justices, but also serve to produce judgments which are of a better quality than if we did not adopt them. These practices do however have two disadvantages. First, greater collaboration means that Justices have to give more time to each decision than they otherwise would have to give. In one or two cases, Justices have found themselves writing the eleventh version of a judgment in order to deal with different colleagues' different concerns – or even the same colleague's changing concerns. Secondly, for the same reason, it means that litigants may have to wait a bit longer for their judgments. In case there is a suspicion that I want to move towards a single judgment of the court generally, nothing could be further from the truth. Although a system which has judgments from individual judges has its downsides as against a system which mandates single judgments of the court, I consider that they are vastly outweighed by its upsides.

43. I have not said anything so far anything about hearings. The UK Supreme Court is unusual for a UK court in that the judges physically sit on the same level as the advocates – indeed a slightly lower level, as the Justices sit and the advocates stand. This reflects the position in the Committee Rooms in the House of Lords, and helps ensure that hearings are less adversarial and more like a seminar, which seems appropriate for the UK's top court which should be dealing only with important cases, and which never has live witnesses.

44. The hearings in the UK Supreme Court are of a similar character and length as hearings before the Law Lords in the last twenty years. An appeal can last anything between half a day and four days, with the great majority lasting between four hours and two days. The present President may be, and may seem to be, rather more impatient than his immediate predecessors, but I do

not believe that this has had a notable effect on times of hearings. However, a maximum hearing period of four days is quite a contrast both with the House of Lords in earlier times and with many other top courts currently, although in different directions. Thus, it was not unknown for a House of Lords appeal to last twenty days in the 1980s⁵⁴. And, at the other end of the scale, the US Supreme Court, like the Luxembourg and Strasbourg courts, hardly ever allows advocates more than half an hour.

45. Impatient though I may be, I am strongly against significantly cutting down hearing times in the Supreme Court. As is inevitable, we sometimes turn out to have been a little generous (and, it must be added, sometimes a little mean) in our time allocation. However, in general, I believe that, with the assistance of the advocates who can have input into the time estimate, we normally do pretty well. From my experience, the oral argument is invariably of some help, it is normally very helpful, it is frequently determinative, it sometimes causes me to change my mind about the outcome - and it is almost always enjoyable.

46. I turn now to the administration of the Supreme Court. The 2005 reforms were, very properly, aimed at ensuring that the governance and management of the court had as much independence from the executive and legislature as was practicable under our system of government. The Chief Executive of the Court holds a statutory office⁵⁵, and, subject to complying with the standards of behaviour required of a civil servant and with his responsibilities as Accounting Officer, he must carry out his functions in accordance with any directions given to him by the President of the Court. The Supreme Court has its own budget and is classified as a non-ministerial Department. The Lord Chancellor must ensure the Court is provided with appropriate resources and the Court's Chief Executive must ensure that the Court's resources are used to provide an efficient and effective system. The Chief Executive is also an Accounting

⁵⁴ See eg *British Leyland Motor Corp v Armstrong Patents Company Ltd* [1986] AC 577 [1986] AC 577 (20 days) and *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 (27 days)

⁵⁵ Created by section 48 of the Constitutional Reform Act 2005

Officer in his own right, accountable directly to the House of Commons Public Accounts Committee.

47. In terms of more outward-looking aspects of administration, the Supreme Court has a court users' committee which meets at least twice a year. It includes a number of public spirited solicitors and advocates who appear in the Court and are generous enough to give up their time and experience to provide invaluable advice and suggestions, as well as acting as a sounding-group for any proposals which the Court may have.
48. The Registrar is responsible for all procedures connected with applications for permission to appeal, appeals, and interlocutory applications, including communications with parties and their lawyers, receiving, checking and circulating papers, giving preliminary informal directions, deciding on fee exemptions and the like, and the preliminary allocation of Permission Applications and the preliminary listing of cases and constitutions of panels to hear them.
49. The challenges of ensuring access to justice in an age of relative austerity remain very real for the Supreme Court as they do for any court in the UK. Part of our income arises from fees, and, like all courts and tribunals, we have to increase the fees from time to time. A draft consultation paper on some proposed increases, which have been discussed with the court users group, is currently being considered by the Lord Chancellor.
50. Last, and by no means least, I turn to the issue of the constitution of the Supreme Court. As I have mentioned, there is statutory provision for twelve Justices, although we currently only have eleven, following the retirement of Lord Toulson in September this year.
51. Recruitment is clearly a most important issue. The Supreme Court has no problems in that connection so far as excellent applicants are concerned. Indeed, the problem has been choosing

between outstanding candidates. But the higher echelons of the judiciary in the United Kingdom suffer from a marked lack of diversity and here I must admit the Supreme Court does not score at all well. We have one white woman and ten white men, and, although two of the eleven were not privately educated, none of us come from disadvantaged backgrounds. Now, to a large extent, this reflects the profile of the pool of people who were eligible for appointment to the High Court twenty or more years ago, and things have changed in that connection: many more women and ethnic minorities come to the Bar although there are still serious problems so far as retention and promotion are concerned. However, the fact that around 20% of the English and Welsh High Court and Court of Appeal judges are women represents a marked improvement on the past cannot alter the fact that it is way lower than it should be. The fact that things may be getting better does not of course justify our sitting on our hands and waiting for things to improve. We should do as much as we can in terms of encouraging excellent potential candidates to apply for Supreme Court appointments, in particular from outside the traditional pool – the senior national judiciaries.

52. Over the next two and a half years there is a significant opportunity to recruit new members of the Court. I can confirm this evening that, last month, both Lord Clarke and I communicated to the Lord Chancellor our intention to retire at the end of next summer, and during the course of 2018, three other Justices will reach retirement age (Lord Hughes, Lord Mance and Lord Sumption). So, in the space of thirty months, there will have been a very significant turnover of Justices – at least half of us will have retired and will need to be replaced.

53. Lady Hale, the Deputy President, and I are both keenly aware that the profession and wider society are looking to the Supreme Court to lead the way on diversity rather than simply waiting for a “trickle up” effect from natural developments and efforts made lower down the system. One of the main reasons why we have not sought to replace Lord Toulson when he retired this summer (which would have represented the almost invariable practice in the past) was because

we wanted to have two composite recruitment competitions, one starting early next year to recruit three new Justices, and the other starting in the first half of 2018 to recruit another three new Justices. This has the advantages of much better use of time and much less of a burden on candidates. Even more importantly, it improves the prospect of a more diverse and more coherent recruitment to the Court.

54. Following the last recruitment of three new Justices in 2013, I asked the Court's then Chief Executive to consult widely and produce a report on recruitment, not least with a view to encouraging applications from people who would make good Justices but who might feel, strongly but wrongly, that they did not fit the profile of a Supreme Court Justice. Jenny Rowe produced her report in July 2015. And now that the recruitment of the first trio of new Justices is about to be launched, we have made some preliminary plans in that connection.
55. Our current proposals include offering a half day "insight session". This would include a tour conducted by a senior member of Court staff, followed by an opportunity to sit in court, and a meeting with a Justice (not one on the appointment panel). These sessions would be conducted on a one-to-one basis (to avoid putting off those who may not want others to know they are thinking of applying) and tailored to the applicant. Those interested in such a programme would need to meet the minimum statutory requirements (which are not as restrictive as many may think) for becoming a Justice and we would particularly encourage those who come from an under-represented group. More details of what is being offered are about to be published on our website.
56. Further initiatives may be announced once the selection panel has had its planning meeting next month. However, I would expect the panel to publish a new policy on implementing the new Equal Merit Provision, based on the work of the Judicial Appointments Commission for England & Wales. Given that the Supreme Court can now include Justices who want to work

part-time, I would also expect the Commission to set out guidance on flexible working options in the job information pack. And I would expect wide advertising in print and online when the vacancies become available, with a redesigned advert stressing the fact that the Commission encourages applications from the widest variety of those eligible.

57. In addition to this, I hope that the panel will be supported in promoting vacancies by relevant committees or groups of the Law Society, Bar Council and the Society of Legal Scholars, the Government Legal Service and equivalent government legal departments in the devolved nations (although it is fair to record that, at least so far as the currently known retirements are concerned, the Justices are all from England and Wales).

58. I am conscious that the title of this talk includes the words “lessons learnt”, and there is little in terms of self-criticism, and rather a lot which may be seen as self-praise. I acquit myself of the latter largely because I cannot take much credit for any success: if my period as President has been successful, it has largely been because I have not damaged what was when I started my present job a successful institution. On proof-reading this talk, I thought that one important message may well be to beware of complacency. And some recent newspaper headlines over the past week or so rather underline that point. But one also has to beware of being too ambitious. I am reminded of what the third Marquess of Salisbury is alleged to have murmured to his private secretary when entering 10 Downing Street after winning the 1886 General Election: “If things are no worse than they are now when I leave office in six years’ time, I will count my time as Prime Minister a success.” A little unambitious, I accept, and I hope that, so far at least, I have done a bit better than that statement may suggest, but that is a matter for others to assess.

59. Thank you very much.

David Neuberger

London, 21st November 2016