

Lord Neuberger gives The Conkerton Lecture 2014, Liverpool Law Society

The Supreme Court and the Rule of Law

9 October 2014

1. It is a great honour for me to be asked to give this, the eleventh, Conkerton Lecture and to be following in the footsteps of such legal luminaries as Lord Bingham, Lady Hale and Sir Brian Leveson. The title I have chosen was, I must confess, selected partly with a view to maximising my freedom when it came to the detail, because the rule of law is so multi-faceted a topic. However, it seemed an appropriate topic for four reasons.
2. First, the Judge under whose wise aegis the Supreme Court was developed was the late lamented Tom Bingham. He is a shining example for any serving or prospective judge, and his contributions to the rule of law were unmatched both on and off the Bench. Indeed, almost his last contribution before his untimely death was a peerless book with the title *The Rule of Law*¹. Secondly, having read the fine tribute by Barrie Marsh to John and Mary Conkerton in the *Liverpool Law Review*², it is hard to cover all their contributions to the legal world, which were multifarious and substantial, and only as broad and fundamental a subject as the rule of law would do them justice. Thirdly, although the rule of law has received a lot of attention as a lecture topic, it seems to me important and worthwhile to place it in its context. Finally, I hope that it is not vainglorious to suggest that the contribution of the Supreme Court over its short life to the rule of law deserves to be celebrated, and it is now almost exactly five years since the foundation of the Supreme Court.

¹ *The Rule of Law*. By Tom Bingham (2011) Allen Lane

² *Liverpool Law Review* (1984) Vol VI (1) pp 1-3

3. As well as being an honour to give this lecture, it is also a great pleasure to be here in Liverpool, an iconic city – particularly for someone such as me, who learnt his British history in the conventional and traditional 1950s and who became aware of popular culture in the edgy and questioning 1960s. Liverpool has been as productive in the field of commerce and the professions, perhaps most notably in connection with the shipping industry, as it has been in terms of the academic and artistic worlds, most remarkably in the field of music. However, in the past fifty years, like all cities, Liverpool has had to learn to adapt itself to a very fast-moving world. I have in mind (i) the enormous advances in technology leading to increase in the ease of travel, surveillance and, perhaps above all, communication, (ii) the growth of global competition and markets, particularly in Asia, Africa and South America, (iii) internal and external threats to peace and security, (iv) the geo-political change in the status of the UK, (v) international and national economic crises, and (vi) fast-changing social and moral values.

4. The pace of change in our material and abstract lives is plain for all to see, but I think that it is often perceived as being even more extraordinary, indeed more revolutionary to our way of life, than it really is, as a result of coverage in the mass media. That is not meant as a criticism: it is inevitable that newspapers, tweeters, bloggers, and TV stations want to get attention, and they therefore concentrate on events, reports, opinions, speeches which result in readers or listeners being scared, indignant or excited. A bit of reassurance and good news does not come amiss, but on its own, it's pretty pallid stuff for the average reader. Normally, good news needs to be born out of bad news to be exciting – lives saved after earthquake, a person, or even better, an animal, walking after losing legs in accident and so on. That has always

been the case. But, with the explosive growth in communications, the pressure to stand out and the difficulty of standing out, are greater than they ever have been.

5. This brave new world of change coupled with intense media coverage presents two obvious challenges to law and lawyers. First, it is an important feature of a sensible legal system that any reform is carefully considered and is based on long term or structural changes rather than temporary passing fads. This approach is difficult to maintain at a time when the pace of change is so fast, so that some changes to the law appear to be urgently needed, and that problem is reinforced by the 24/7 approach to news and current affairs, which increases the demand for speedy change. As usual, there is a balance to be struck between (i) responding to change so as to maintain the reputation and the coherence of our laws, and (ii) not being rushed into ill-considered and unnecessary new laws. Secondly, at a time when the pressure for change is so great, I think that it is particularly important that we distinguish between the essential ingredients of our constitution and way of life, which should not be changed, and the rest of our laws and conventions, which we should be more ready to change to reflect developments in society, technology and ethics.

6. In that connection, it is relevant to mention that the UK is a fortunate country. We have not suffered a successful invasion for 950 years, any tyranny for 500 years, or any revolution for 350 years – a history which I think no other country in the world can claim. In the past century, we have survived with remarkable equanimity (i) two pretty cataclysmic world wars, (ii) the growth of the welfare state, and (iii) the evolution from being the strongest nation in the world to being one of four or so major western European powers, all against the background of the enormous changes I have already mentioned. The United Kingdom is a country which people want to

live in. But, while we are entitled to congratulate ourselves on this happy state of affairs, we must avoid taking it for granted. The risks of complacency can be summarised in the well-known adages that the price of liberty is eternal vigilance³, and all that is necessary for the triumph of evil is for good men to do nothing⁴.

Furthermore, however much we are proud of our system of governance, we should never think that it cannot be improved or that we cannot learn from others.

7. In that connection, whatever one thinks of the outcome of the Scottish referendum⁵, the debate to which it has given rise is generally to be welcomed. It has made us all think about and discuss the way in which we are governed, and that cannot be a bad thing, provided the discussion is reasonably civilised and rational. Of course, the consequences of the referendum are something of an elephant in the room today, and I do not propose to say very much about them for two reasons. First, the detailed terms and implications of increased devolution are very much still to be worked out, and it would be unwise to speculate about them. Secondly, the fundamental principle of separation of powers and, in particular, the independence of the judiciary, points firmly in the direction of serving judges not getting involved in such detailed issues in public speeches. Just as politicians should keep their peace about issues which are for the courts so should judges keep their peace about matters which are for politicians. While there are areas of overlap into which they both can tread, such as issues relating to the rule of law, questions relating to the terms on which increased devolution occurs are very much for the politicians.

³ A statement attributed to many people, but probably most convincingly to Leonard Courtney, 1st Baron Courtney or to John Philpot Curran

⁴ A statement attributed generally to Edmund Burke, but nobody has tracked down a precise source

⁵ This talk was largely written before the result of the referendum was known

8. However, what I can say is that any negotiations and any outcome must take into account, indeed must accord full respect to, the two basic inalienable principles, which govern and underwrite our constitutional settlement, namely democracy and the rule of law.

9. Until the second half of the last century, there were two sources of law in this country – the courts and parliament. Following the Norman Conquest, the great majority of the law was made by the judges through decided cases, which laid down principles which became the common law. Alongside the common law were statutes, originally enacted by the Monarch, and gradually over the centuries by Parliament – Acts of Parliament. Because in the UK our system involves parliamentary supremacy, statutes trump the common law, but judges still have a role in relation to statutes, in that, where there is a dispute as to the meaning or effect of a statute, it is the courts which interpret them – ie it is the judges who decide what a statute means. However, unlike most other countries, the UK does not have a constitution, so judges cannot decide that a statute is invalid on the ground that it infringes the UK constitution – save possibly in exceptional circumstances.

10. In the past fifty years or so, there has been a significant perceived change, arising out of the UK's involvement in post-Second World War European developments. The effect of our accession to the European Union in the 1970s is that UK judges now have to apply EU law, including decisions of the Luxembourg court – the EU court – even if that appears to conflict with statutes or common law. Secondly, the Human Rights Act 1998 has, famously, introduced the European Convention on Human Rights into UK law. This has given judges the duty to do their best to interpret statutes so that they comply with the Convention, and, if not possible, to

declare statutes non-compliant with the Convention; it has also given the judges the duty to develop the common law so that it accords people their rights under the Convention.

11. These developments have a number of interesting features. First, given that we have a set of rules which governs our approach to law and protects individuals, it is almost as if we have a constitution. Secondly, in any civilized society, if you give people rights, they also must have the right to enforce them, and people have indeed sought to invoke Convention rights through the courts. Thirdly, this in turn has resulted in the courts developing a UK human rights jurisprudence. This is in general very beneficial. Of course, there can be arguments about some individual decisions, the role of the Strasbourg court, and similar topics, but rights such as those embodied in the Convention are fundamental to the rule of law, particularly in a time of ever-increasing government powers. Fourthly, our common law has been reinvigorated by new thinking inspired by the Convention.

12. With the 1998 Act, we are in a brave new world of human rights in this country, and although we have had had a bit longer to digest EU law, it has expanded significantly this century. When one turns to significant decisions of the Supreme Court, it should come as no surprise that many of them are concerned with European law, and that the great majority of those involve Human Rights. However, it is important to emphasise that no more than a third of the diet of the Supreme Court consists of cases involving human rights under the Convention, and even those cases involving human rights frequently raise, and even ultimately turn on, points which have nothing to do with the Convention.

13. So far as EU law is concerned, the aspect with which the Supreme Court has had to grapple most frequently is the European Arrest Warrant, which is intended to provide a speedy system whereby people who are wanted for prosecution in one member state can be returned from another member state, clearly part of the rule of law. Fundamental to the notion of the warrant is so-called “mutual trust and confidence” in each other’s court systems – the warrant-issuing court should trust the warrant-receiving court to deliver up the person concerned, and the warrant-receiving court should trust the warrant-issuing court to have cause for the warrant and to give that person a fair trial. By far the most famous case in this area is something of an ongoing saga, and involves Julian Assange⁶. The actual issue in his case, on which the Supreme Court split 5-2 against him, was whether the Swedish prosecutor who had issued the warrant had sufficient judicial status to justify a UK court acting on the warrant and treating it as validly issued.

14. When it comes to cases on human rights, the decision of the Supreme Court in *Smith v The Ministry of Defence*⁷ is worth mentioning not least because it reportedly caused some concern in military circles. The issue was whether families of soldiers killed on active service in Iraq or Afghanistan were entitled to pursue claims against the Ministry of Defence for contributing to their deaths by failing to give them adequate protection (in the form of bomb-proof vehicles or clothing). Such claims were said by the families to be justified under article 2 of the Convention which imposes a duty on the state to take reasonable steps to protect the lives of its citizens. The Supreme Court upheld the families’ argument. However, there are two important

⁶ *Assange v The Swedish Prosecution Authority* [2012] UKSC 22

⁷ [2013] UKSC 41

points to be made about the decision. First, the court was not holding that the claims succeeded: the court was simply saying that the claims should proceed to trial.

Secondly, the families' principal criticism was not against army officers' decisions and orders in a battle, but with civil servants' decisions in the Ministry of Defence some distance from the theatre of war.

15. The second human rights case I would like to mention concerns the vexed question of assisting a suicide, which is, at the moment at any rate, a crime in this country, however understandable and well-intentioned the assister's motives may be⁸ - even though suicide itself ceased to be a crime more than fifty years ago⁹. In the *Nicklinson* case¹⁰, the court had to consider the tragic plight of three men who had become completely paralysed and could only communicate with utmost difficulty – in one case by the painfully slow process of blinking individual letters of the alphabet. They wished to put an end to their lives but could only do so if someone else assisted. They contended that it was contrary to their rights under article 8, the right to respect for private life, in effect to respect for individual self-determination, that it was illegal for anyone to assist them. The Strasbourg court had held that it was a matter for each country to decide its own law on the topic of assisted suicide (no doubt because of the very wide differences between member states on the law on this topic). In the Supreme Court, where we unusually sat nine, we all thought that this did not prevent the court from deciding whether the present law in the UK was consistent with article 8 as a matter of principle. However, four of us thought that it was, in practice, such a controversial and fraught issue that it should be left to parliament, and that the court

⁸ Section 2 of the Suicide Act 1961

⁹ *Ibid* Section 1

¹⁰ *R (Nicklinson) v Secretary of State for Justice* [2014] UKSC 38

should not get involved save in the most extreme circumstances. However, five of us thought that there was no reason why the court should not get involved, although three of the five considered that it was such a controversial issue that parliament should be given an opportunity to consider the position before we finally ruled on it.

16. Discrimination is an area where both human rights and national law have played a part. A significant decision of the Supreme Court in this area was the Jewish Free School case¹¹, where the court held that it was unlawfully discriminatory for a school to determine who was admitted as a pupil by reference to the racial characteristic of his or her parents. The school only admitted a child if his or her mother was recognised by the Office of the Chief Rabbi as Jewish – ie if she was born Jewish or converted to Judaism according to the orthodox rites. Another case where religious belief was held to conflict with anti-discrimination law arose in *Bull v Hall* where a devout Christian couple who ran a bed-and-breakfast business from their home refused to let a gay couple a double room because they considered sexual activity between people of the same sex (or, indeed, unmarried straight couples) to be morally and religiously wrong¹². These decisions are difficult, partly because the judges may have personal feelings one way or the other. The rule of law involves every judge seeking to put aside those sorts of beliefs and prejudices and deciding the case according to the law.

17. Human rights inevitably give rise to tensions, both between individual rights and the interests of society and between conflicting rights enjoyed by different individuals, in *Bull v Hall* the rights of same-sex couples against the rights of believing Christians.

¹¹ *R (on the application of E) v Governing Body of JFS* [2009] UKSC 15

¹² *Bull v Hall* [2013] UKSC 73

The most frequently encountered area of conflicting rights is the right of free speech, especially freedom of the press, and the right to respect for privacy, especially when it comes to celebrities. In an early case decided by the Supreme Court, this issue arose and the late lamented Lord Rodger famously said “What's in a name? ‘A lot’, the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature.”¹³ And, much more recently, the Supreme Court had to decide whether to permit the BBC to name somebody in circumstances where a lower court had banned his name being published on the ground that it might put his life at risk¹⁴.

18. Two well-known areas where there is tension between the public interest and individual rights are prisons and asylum. It is in the public interest that criminals, particularly those who have committed serious crimes or are a danger to society, are locked up, but it is particularly important that such people’s rights are not ignored. The Supreme Court has had a number of cases on the interrelationship between the rights of prisoners under article 5 of the Convention (which ensures that any incarceration is in accordance with the law), due partly to the remarkable complexity and mutability of our sentencing statutes and partly to the impenetrability of some of the Strasbourg court decisions on the topic¹⁵. As to asylum seekers, the Supreme Court has also had a number of cases on them, and I will discuss that aspect a little later.

¹³ *Re Guardian News and Media Ltd, HM Treasury v Ahmed* [2010] UKSC 1, para 63

¹⁴ *A v British Broadcasting Corporation (Scotland)* [2014] UKSC 25

¹⁵ The most recent example is *R (on the application of Whiston) v Secretary of State for Justice* [2014] UKSC 39, which also suggests that decisions of the Supreme Court and House of Lords have not helped

19. Inevitably, there is undoubtedly room for tension not merely as between substantive rights, but also as between the UK courts and the European courts. Such tensions should ideally lead to a dialogue which is conducted in a mutually respectful manner. Let me mention two contrasting examples involving the Supreme Court and the Strasbourg, human rights, court.

20. The first arises from claims for possession against residential occupiers. In English law, the position is simple: whether the occupier was a trespasser from the start or was someone who had a tenancy which has terminated, a court has no option but to require him to vacate; the most it can do is to give him a few weeks to vacate.

However, the Strasbourg court suggested that, at least where the property owner was a public body (eg a local authority), a court had to consider whether article 8 of the Convention, which includes a right to respect for one's home, might protect an occupier from eviction even where he was plainly a trespasser. The House of Lords was reluctant to accept this, and in two successive cases, effectively held that a residential occupier has no such rights on the basis that the existing UK legislation which afforded residential tenants a degree of protection drew the appropriate balance between the article 8 rights of residential occupiers and the public interest¹⁶.

However, the Strasbourg court stuck to its position in a number of decisions.

Eventually, in the *Pinnock* case¹⁷ in 2010, the Supreme Court decided that it would be wrong not to follow the Strasbourg line.

21. The future of the Human Rights Act 1998 has now become a matter of some party political controversy and I do not wish to enter that arena. It is a matter of

¹⁶ *Kay v Lambeth LBC* [2006] 2 A.C. 465; *Birmingham City Council v Doherty* [2009] 1 A.C. 367

¹⁷ *Manchester City Council v Pinnock* [2010] UKSC 45

record, however, that one of the justifications for the Act was to put an end to the undesirable situation of UK judges deciding cases against a litigant who could then complain to the Strasbourg court that the domestic courts had infringed his human rights: by bringing the Convention into our law, the 1998 Act enabled UK judges to give effect to those rights for the first time, thereby avoiding individuals having to exhaust their domestic rights before incurring cost and delay in going to Strasbourg, and also avoiding the UK government having to foot the bill in terms of costs and damages of having to defend a successful Strasbourg court claim. Furthermore, in *Pinnock*, the Supreme Court, seizing on remarks made in some of the Strasbourg court decisions, took the opportunity of making it clear that human rights defences to possession actions could only succeed in extreme cases – and even then would only serve to delay possession.

22. In the *Pinnock* saga, the Supreme Court's view did not prevail, but in relation to another issue it did. In one decision of a section court¹⁸, Strasbourg had decided that an English statute which enabled defendants to be convicted on the basis of hearsay evidence violated article 6(1) of Convention, the right to a fair trial. This was regarded by the UK prosecution authorities as a seriously problematic decision, and they brought the issue before the Supreme Court in the *Horncastle* case¹⁹. The Supreme Court produced a judgment which set out in some detail the justification for the ability of courts to convict on hearsay evidence (death or intimidation of essential witnesses), the safeguards for defendants which existed in the statute, and the differences between the common law (which prevails in the UK, Ireland and one or

¹⁸ *Al-Khawaja* (2009) 49 E.H.R.R. 1

¹⁹ *R v Horncastle* [2009] UKSC 14

two other small European countries) and civilian law (which prevails in other European countries and with which the great majority of Strasbourg judges were much more familiar). The Strasbourg court not merely considered the arguments, but effectively accepted them and reversed its previous ruling²⁰.

23. A rather different sort of tension between domestic and European courts was recently brought to light in a decision of the Supreme Court earlier this year in relation to EU law and the Luxembourg court's approach. In a case involving the legal consequences of the environmental impact of the HS2 high speed train proposals²¹, the Supreme Court made some fairly trenchant criticisms of certain decisions of the Luxembourg court on environmental directives, suggesting that the European court had not so much interpreted what the Directives had said as rewritten them to accord with what the European court thought that they should say. We thought that, if Luxembourg was adopting such an approach, it could lead to a number of problems.

24. The Supreme Court decision in the *HS2* case was interesting for another reason. We expressed concern about observations in decisions of the Luxembourg court, which were directed to a court's duty to ensure that the environmental impact of certain projects had been properly considered. The observations appeared to suggest that, in a case where the environmental impact had been considered by parliament, it would be the duty of the national court to examine the quality of the debate, how much parliamentary time was allowed, whether the vote was free and so on. In our view this raised the point, namely whether the European Communities Act 1972,

²⁰ *Al-Khawaja* (2012) 54 E.H.R.R. 23

²¹ *R (HS2 Action Alliance Ltd) v The Secretary of State for Transport* [2014] UKSC 3

which effectively imported EU law into this country, had the effect of overriding section 9 of the Bill of Rights Act 1689, which, for over 300 years, had ensured that the courts in no circumstances get involved with what goes on in Parliament. We were concerned about the notion that what we in this country regard as a fundamental aspect of the separation of powers was being questioned, indeed undermined, almost by a European sidewind. It was not a point which had to be decided in the HS2 case, but I suspect that it may be waiting there to be decided in another case.

25. As this aspect of the *HS2* case shows, there is potential for tension not only between national courts and the European Courts, but also between national governments and the European Courts. At least on the Government's part, such tensions can result in rather less restraint when it comes to the debate, but that is the nature of the democratic process. In fact, although there has been much criticism of the Strasbourg court's decisions in general, the only areas where there has been specific vocal complaint are in relation to (i) asylum and (ii) the right of prisoners to vote.

26. So far as asylum is concerned, many people may think that it is hard to fault most of the individual decisions of the Strasbourg court, and many of its decisions would also seem to be mandated by other international agreements to which the UK is party, such as UN Convention on refugees²². However, some people understandably think that it may be too easy for asylum-seekers to resist being returned. Thus, in one case in 2012, the Supreme Court held that a Zimbabwean asylum-seeker could stay because, if he was forced to return home, he would be expected to declare his support

²² The UN Convention and Protocol Relating to the Status of Refugees 1951

for the Mugabe regime which he did not in fact support, although he had no strong political views²³.

27. So far as prisoner votes are concerned, the Strasbourg court's view⁷ is, at least in legal terms, a rather limited issue, and it has led to no problems in many countries other than the UK which had a blanket rule against convicted prisoners voting: Ireland, for instance, simply changed its laws without any controversy. However, in this country, it has become a contentious and topical issue. The Strasbourg court's position was considered in some detail by the Supreme Court last year in the *Chester* case²⁴, where some members of the court did question the appropriateness of the Strasbourg court's position. In what may well be an indication that the Strasbourg court is listening, it recently held that prisoners denied the vote were not entitled to compensation, and one judge gave detailed reasons for disagreeing with the view that the UK's law on the topic infringed the Convention at all²⁵.

28. The introduction of the Convention into UK law has for a time rather hampered the development of the common law, as UK lawyers, and indeed some UK judges, like children with a new toy, concentrated on the exciting new topic of human rights and rather left the common law toy in the cupboard. However, English law, like I think Scots law, has for many centuries benefitted from taking principles and notions from mainland Europe and incorporating them into our domestic law. In other words, rather than being either insular and arrogant or being subservient and craven,

²³ *RT (Zimbabwe) v Secretary for State for the Home Department* [2012] UKSC 38

²⁴ *R (Chester) v Secretary of State for Justice* [2013] UKSC 63

²⁵ *Firth and others v The United Kingdom* (Application no 47784/09), 12 August 2014

English common law has maintained its fundamental principles, while pragmatically and sensibly being open to new ideas and concepts.

29. This year, we decided a significant case²⁶ in this connection. Mr Kennedy, a journalist working for the Times newspaper, wished to obtain the report of a Charity Commission tribunal investigation into the affairs of charities run by the controversial MP, George Galloway. His claim was based entirely on Article 10 of the Convention, which provides for the very important right of freedom of expression. Mr Kennedy's case was that article 10 extended to give a right to demand information from the government, at least when the person seeking the information was a respectable journalist, acting in the public interest. While it is fair to say that there were one or two dicta or outlying decisions of the Strasbourg court which gave some support for such an argument, we decided that article 10 did not in fact go that far. However, despite the fact that Mr Kennedy's team were not very enthusiastic about arguing the point, we decided that there was a strong case for saying that application of common law principles would enable Mr Kennedy to see the Charity Commission report. While the Commission had a discretion whether or not to disclose the report, the common law had developed a principle that such a discretion entrusted to a public body had to be exercised in accordance with certain principles, which the courts could and should enforce. We did not feel it was appropriate for us to decide how the matter should be resolved, as neither the Commission nor the courts below had had the opportunity to consider the issue, as the arguments had all been based on the Convention. Accordingly, we remitted Mr Kennedy's claim to be reconsidered.

²⁶ *Kennedy v The Charity Commission* [2014] UKSC 20

30. Let me turn to a class of cases which, by contrast, represents a new and important departure for the Supreme Court. It is a class of case which reflects a fundamental change to our constitutional settlement which has, as much as the European influences, caused the Supreme Court to have an entirely new constitutional role. I have so far mentioned this change only in general terms, and it is the devolution of power to Scotland, Wales and Northern Ireland. This devolution has given the Supreme Court important powers, in that, unlike in the case of the Westminster Parliament, it can effectively strike down legislation enacted by the Scottish Parliament or Welsh Assembly, whose powers derive from statutes made by the Westminster parliament. In relation to Wales, we have ruled on the validity of proposed legislation relating to powers given to Welsh local authorities²⁷ and legislation seeking to fix agricultural wages²⁸, and we have yet to rule on a bill whose purpose is to enable the NHS to recover the cost of treating asbestosis victims from employers' insurers. In relation to Scotland, where substantial devolution was accorded earlier, a number of significant issues came before the House of Lords, before the Supreme Court came into existence. However, the Court has ruled on some important Scottish devolved issues such as the lawfulness of not permitting a suspect to have access to a lawyer before being interviewed by the police²⁹, and on the lawfulness of Ministerial schemes and orders relating to the construction of a by-pass

²⁷ *Local Government Byelaws (Wales) Bill 2012 - Reference by the Attorney General for England and Wales* [2012] UKSC 53

²⁸ *Agricultural Sector (Wales) Bill – Reference by the (Attorney General for England and Wales* [2014] UKSC 43

²⁹ *Cadder v Her Majesty's Advocate* [2010] UKSC 43

round Aberdeen³⁰, as well as ruling on the lawfulness of an asbestosis-treatment costs recovery proposal³¹.

31. I have referred to a fairly large number of cases so far, but I would not want to leave you with the impression that the Supreme Court has been starved of serious, classic, domestic law cases. We have had a number of important family law cases, involving issues such as the role of the court in protecting children³², the effectiveness of pre-nuptial agreements³³, and husbands trying to avoid paying off their ex-wives³⁴. We have had many Chancery cases, including the proper characterisation of a bribe³⁵, the nature of trusteeship³⁶, the effectiveness of a wrongly executed will³⁷, and the proper treatment of pension liabilities in an insolvency³⁸. We have had to deal with fundamental common law issues such as defamation³⁹, ability to delegate responsibility⁴⁰, vicarious liability for sexual abuse⁴¹, unjust enrichment⁴², many aspects of the law of nuisance⁴³, and whether accountants have the right to claim legal professional privilege⁴⁴. And we have had to interpret statutes dealing with matters as

³⁰ *Walton v The Scottish Ministers* [2012] UKSC 44

³¹ *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46

³² *Eg re B (a Child)* [2013] UKSC 33

³³ *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42

³⁴ *Prest v Petrodel Resources Ltd & Ors* [2013] UKSC 34

³⁵ *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45

³⁶ *Williams v Central Bank of Nigeria* [2014] UKSC 10

³⁷ *Marley v Rawlings* [2014] UKSC 2

³⁸ *Re Nortel Companies* [2013] UKSC 52

³⁹ *Flood v Times Newspapers Ltd* [2012] UKSC 11

⁴⁰ *Woodland v Essex County Council* [2013] UKSC 66

⁴¹ *The Catholic Child Welfare Society v Various Claimants* [2012] UKSC 56

⁴² *Benedetti v Sawiris* [2013] UKSC 50

⁴³ *Coventry v Lawrence* [2014] UKSC 13

⁴⁴ *R (on the application of Prudential plc) v Special Commissioner of Income Tax* [2013] UKSC 1

diverse as VAT⁴⁵, the rights of sewerage companies⁴⁶, competition law⁴⁷, protection of whistle-blowers⁴⁸, and confiscation of the proceeds of crime⁴⁹.

32. In the first part of this talk, I discussed the role and importance of the rule of law in fairly general terms. As a concept, it is fundamental to a fair, just and civilised democratic modern society. But the adage that the devil is in the detail is as true of the rule of law as it is in relation to almost every other important concept and principle. Maintaining and ensuring the rule of law is not, of course, just for the courts, let alone just for the Supreme Court. If they go to court at all, the average citizen will normally only come across the Magistrates Court or the County Court, which is why the judges in those courts are so important. But the judges in the Supreme Court, together with the Courts of Appeal and (in Scotland) the Inner House, and indeed the High Court, lay down and develop the law, and they are the judges responsible for the principles which are applied by other courts. And, of course, legislators and civil servants also have parts to play which are just as vital.

33. The public interest in Supreme Court cases is sometimes significant, but we Justices should remind ourselves that we cannot live up to the public interest in a really interesting criminal trial involving issues such as sex and poisoning. And such a trial took place in this very room 125 years ago when Florence Maybrick, an American, was tried for murdering her husband, who was 23 years older than her, by administering arsenic⁵⁰. Despite having married her only eight years before he died, Mr Maybrick seem to have taken a fairly relaxed view of their marriage vows, having

⁴⁵ *Revenue and Customs v Marks and Spencer plc* [2014] UKSC 11

⁴⁶ *The Manchester Ship Canal Company Ltd v United Utilities Water Plc* [2014] UKSC 40

⁴⁷ *Deutsche Bahn AG v Morgan Advanced Materials Plc* [2014] UKSC 24

⁴⁸ *Clyde & Co LLP v van Winklehof* [2014] UKSC 32

⁴⁹ *R v Ahmad* [2014] UKSC 36

⁵⁰ Kate Colquhoun, *Did She Kill Him? A Victorian Tale of Deception, Adultery and Arsenic* (2014)

had a mistress who bore five children. Mrs Maybrick seems to have responded in kind. The jury found her guilty, and her conviction inevitably led to a sentence of death, but it was commuted to life imprisonment on the ground that the Home Secretary and Lord Chancellor thought that she had administered the poison but it had been insufficient to kill him. The Lord Chief Justice apparently tried to get her released but that only happened in 1904. Earlier this year, a book devoted to that trial was published. I rather doubt that a book will be written in 125 years' time about any of the Supreme Court cases I have been discussing this evening, but I hope that you don't think that means that they are not important cases.

34. Thank you very much indeed.

David Neuberger

Liverpool, 9 October 2014