Cambridge Freshfields Annual Law Lecture 2014 – The British and Europe – Lord Neuberger, President of the Supreme Court

Introductory

The period around 1960 was a fertile time in the UK for satire and music – That Was The Week That Was and Beyond the Fringe to take two examples. At the Drop of a Hat was a double act which was at the gentler end of the spectrum and which (sadly, some might say, for a teenager in the 1960s) appealed to me then, and fifty years on still does. Michael Flanders, bearded, sceptical and in a wheelchair, wrote the lyrics and did the singing, and Donald Swann, bespectacled and earnest, composed the tunes and played the piano1. Probably their most famous number was the hippopotamus song – Mud, mud, glorious mud

But another of their many clever, funny songs was "A Song of Patriotic Prejudice". The song started with what Flanders called "a typical English understatement", namely "The English, the English, the English are best, I wouldn't give tuppence for all of the rest" (With my voice, I don't apologise for not singing it: now, if I had tried to do so, that would have been cause for a fulsome apology.)

As with all the best humour, this song is based on a significant truth. At least at some levels many English people see themselves as different from foreigners, and, by "foreigners" they primarily mean Europeans4. The English do have a somewhat singular attitude to foreigners, and perhaps

to mainland Europeans in particular. This is reflected in the current debates about the UK's involvement in the European Union ("the EU") and the Council of Europe ("the Council").

These debates are ultimately political, and therefore a Judge has to tread very warily when discussing them. So it is right to begin by emphasising that I am not seeking to advocate any particular view on the issues of Britain in Europe. I have two aims in giving this talk.

The first aim is to try and put the arguments about our membership of the two institutions in their historical and cultural context. Any political debate carries with it a danger of generating more heat than light, and this is particularly true when the issues are seen by those on both sides as being fundamental to their country's economic and political future. Understanding the historical and cultural context is essential to a proper understanding of such debates – to explain what the issues are, and how and why they arise. Without that, there is little prospect of appreciating the real nature of the underlying issues. The historical context also serves usefully to remind us that things often look very different after the event, even to those in the thick of the argument.

My second aim also involves providing a context, but it is a more parochial context. That aim is to address the notion that UK law, and in particular the common law, is being subjected to undesirable mainland European civilian law influences, from the jurisdiction of the Court of Justice of the European Union, the CJEU in Luxembourg and of the European Court of Human Rights, the ECtHR in Strasbourg. While judges should not normally take public positions in political debates, different considerations apply if those debates relate to the legal system or the rule of law. Those are areas where the judiciary has unique experience and authority, which sometimes carries with it a positive duty to speak out. By the same token, it is part of our function to explain the legal implications of any

important issues being publicly debated.

Before turning to these two areas of discussion, it is right to acknowledge that, in the debate about our membership of European institutions, there is a great risk of eliding or confusing the UK with England. I have already been guilty of it myself less than five minutes into this talk. It is inevitable not least because England represents over 85% of the UK's population.

The attitude of many English people to Europe is more suspicious or hostile than that of people in Scotland and Wales, though not, I think, of many people in Northern Ireland. And this no doubt mirrors the fact that some of the reasons for such suspicion or hostility are either English or at least apply more to England. If I were to identify and discuss every distinction between England and other parts of the UK on the points made in this talk, it would become tedious – or perhaps I should say even more tedious. So I apologise in advance if, at times, I appear to be subsuming the other parts of the UK into England.

The special position of the UK in terms of history and culture

7. The decision whether we should change the terms of, or even put an end to, our membership of the EU and/or our membership of the Council, raises very difficult issues, which involve assessing what will happen in this country, on Mainland Europe and in the world. As the great quantum physicist, Niels Bohr allegedly said5, prediction is very difficult, especially about the future. And, as Nate Silver has demonstrated in his thought- provoking recent book6, prediction is an uncertain business. In many areas of life, the more confident a prediction the less reliable it is. Silver asserts and demonstrates that "economists have for a long time been much too confident in their ability to predict the economy"7, and he also shows convincingly that political pundits are more often wrong than they are right

As he further says, experts, like other people, are heavily influenced by their convictions and prejudices. Unsurprisingly, the lessons of history do not speak with a clear voice on the question of the future of the UK in Europe. I suspect that, like the Delphic oracle, the lessons of history are always fated to be ambiguous, or at least are always capable of being interpreted as the particular student, historian, pundit, politician, or even lawyer, wants.

Two centrally important aspects of the context in which the controversy about our future in Europe is taking place are our history and our culture. A consideration of our history and culture doesn't give us the solution to the controversy, but it informs any search for a solution. And it reminds us that history will judge our decisions – a thought which is rather frightening. Future generations will assess our decisions through what for them will be the relatively clear lens of ascertainable recent history, whereas we have to reach those decisions by looking through the impenetrable fog of the unknowable future. But we owe it to those generations, and indeed to ourselves, to understand the context in which the issues are being debated.

There are, I think, a number of reasons why, when compared with people in other European countries, the British are peculiarly averse to, and particularly suspicious of, being told what they can and can't do by pan- European bodies. Some of those reasons can be encapsulated in the simple point that over the past millennium, the UK, and in particular the three nations of Great Britain – England Scotland and Wales – have enjoyed a more self-contained and stable existence than any other nation in Europe. This may be demonstrated by referring to three fundamental features of our history.

First, since Wales was effectively united with England in the

13th century9, there have been no changes to the boundaries of the countries of Great Britain, there has been a union with Scotland in 1707, but that was consensual, as would be any secession if there was a positive vote in the forthcoming referendum. It is only across St George's Channel, in Ireland, that there have been problems, but they have never seriously threatened the integrity of Great Britain. Many European countries, including Germany and Italy, did not exist 150 years ago, and even France's borders have moved significantly even in the past 200 years. Of the other large European countries, perhaps Spain gets the closest to having had consistent boundaries, albeit only since 149211. Accordingly, unlike any other European country, England and Wales have had a clear and consistent national identity in geographical terms for over seven hundred years, and even the union with Scotland is over three hundred years old – or over four hundred if you take it from the accession of James VI to the English throne. This makes it more difficult for us to accept a loss of borders, even for limited purposes.

Secondly, since 1066, the UK has never been successfully invaded by a foreign power. It is true that there have been serious attempts at a foreign invasion, eg in 1216, in 1588 and in 1940, but they utterly failed; it is also true that the throne was successfully claimed from abroad in the 12th, 14th and 15th centuries, but that was by English or Welsh Kings and Queens with hereditary claims, not by foreigners; and it is true that in the Glorious Revolution of 1688, the Dutch William of Orange became King, but he was married to the King's daughter and was invited over by many of the English lords in a bloodless coup. 950 years without a single foreign occupation is a record which I think no other European country can claim.

So the need to lose a degree of autonomy for the sake of increasing the prospects of peace in Europe resonates far less strongly in the UK than on mainland Europe.

Thirdly, since the 17th century, this country has never had any sort of revolution. We have evolved, but, unlike almost any other country on mainland Europe, no government of the UK has been brought down by violence, for over three centuries. That is a very different story from all large mainland European countries. Indeed, although British governments feared a revolution, for instance after the events in France in 1789, we never got near. Even 1848, 1918 and 1989, the great years of European revolutions, passed this country by with scarcely a peep. So, again, the need for some supra-European institution to lessen the risk of revolution seems less persuasive to the British than to other Europeans.

These points are all a matter of legitimate pride, but we should be very wary of self-congratulation. All three features can at least in part be explained by geography. Unlike almost every other European countries and unlike any other large European country, the UK is a separate island, or, more accurately, a group of separate islands, divided by the sea from mainland Europe. This has provided the UK with a clear and secure national boundary, protected us from invasion, and assisted government control.

Further, self-congratulation assists those who suggest that we are safe from tyranny or interference with our freedoms. As to that, there is no truer statement than that eternal vigilance is the price of liberty (although in the light of the recent revelations of Mr Edward Snowden, some might say that preventing eternal vigilance is the price of liberty). Our independent and relatively trouble-free history makes most Britons almost blithely unconcerned about internal or external threats to the rule of law, as well as having a very clear national identity. With their more turbulent experiences, one can well understand how mainland European countries are much more aware of the fragility of the rule of law and perhaps less jealous of national sovereignty. And it is easy to see why they are more ready to live under a system which includes

Europe-wide institutions and courts which can enforce the rule of law across the continent and ensure a degree of harmony between its different nations and governments, and a judiciary which sometimes can ensure the rule of law, over the heads of legislatures.

he frightful experiences of German National Socialism and Russian communism during the last century have given such concerns a particularly sharp focus. It is no coincidence that both the Council and the EU arose out of initiatives in the late 1940s and early 1950s, following the rise and fall of totalitarian Nazi Germany and its military domination of Europe and the start of totalitarian Communist Russia's domination of Eastern Europe. Nor is it a coincidence that these initiatives were given a fresh imperative following the collapse of Russian communism and domination in 1989.

The horrors of the Second World War are notorious, but the horrors which immediately followed in Europe are less well known. They have recently been illuminatingly chronicled and discussed in a very readable and informative study by Keith Lowe, in which he recounts the frightening and far-reaching consequences of the break down of the rule of law throughout mainland Europe in 1945. He compares the war with a "vast supertanker" with engines which were "reversed in 1945", but whose "turbulent course was not finally brought to a halt until several years later". As he writes:

"After the desolation of entire regions, after the butchery of over 35 million people, after countless massacres in the name of nationality, race, religion, class or personal prejudice, virtually every person on the continent had suffered some kind of loss or injustice. … Amidst all these, to hate one's rivals had become entirely natural. … Indeed, the leaders and propagandists of all sides had spent six long years promoting hatred as an essential weapon in the quest for victory. … There were many reasons not to love one's neighbour after the war."

Europe nonetheless recovered remarkably fast – physically, economically and politically – from the savage physical, institutional and moral destruction wreaked by World War II and its aftermath. And, not least because all those aspects of the recovery were markedly more successful in democratic western Europe than in totalitarian eastern Europe, it has, I think, been seen by many mainland Europeans as underlining the benefit of institutions such as the EU and the Council.

For all these historical reasons, it appears to me unsurprising that mainland European peoples, governments and media are more ready than their UK counterparts to join and to support institutions which involve trading a degree of national sovereignty or self-determination in return for closer mutual cooperation, inter-governmental coordination, and supra-national dispensation of justice.

But it by no means stops there. The UK enjoys other characteristics which render it less ready to join in such ventures. Two of those characteristics are, like those which I have so far been discussing, fairly general in nature, and two others involve what may be described as more cultural, or really legal, features. However, unsurprisingly, all four features, again like those I have been discussing, are very much wrapped up in our history.

It is easy to forget that, until recently, the United Kingdom was a premier league World power, and, less than a century ago17, was perceived as being what the writers of 1066 And All That18 called the "top nation". Over 20% of the world's landmass in terms of both area and population was incorporated in the British Empire as recently as 75 years ago. At that time, and for decades thereafter, the notion that the UK should be one of a number of equal European states would have been greeted with a reaction which fell little short of contempt by the great majority of people in this country.

Even Winston Churchill, whose Zurich speech in 1946 was the

starting signal for the Council of Europe, and who, with one eye on history and the other on posterity, was a strong supporter of European integration after the War, saw no need for UK involvement in Europe during the post World War Two period. This was consistent with what he had said in 1930, when he explained that, although he supported Aristide Briand's proposal to create a European federal union, he believed that the UK could never be part of it, because "we have our own dream and our own task. We are with Europe, but not of it. We are linked, but not comprised. We are interested and associated, but not absorbed"

The loss of the Empire and the loss of world premier league status has inevitably caused problems to the national psyche, although I think it is a tribute to the UK that those problems have been accommodated without significant unrest or threat of revolution. Nonetheless, a transformation from a global pre-eminent status to just one of many EU or Council members requires an almost super-human attitudinal adjustment. It is true that France and Spain also had empires, but France's was nothing like that of Britain in size, at least since 1763, and Spain's largely fell apart over the course of the 19th century.

The other general distinguishing feature of the UK is one whose force has diminished markedly over the past century, but I believe that it is still a factor. It is religion. Most of mainland Europe is preponderantly Roman Catholic (although only just over half the German Christian population is Catholic and the Scandinavian countries are preponderantly Protestant), and much of south-eastern Europe is orthodox. England and Wales, on the other hand, have been dominated by Anglicanism for some 375 years. The
influence of religion on European politics is difficult to assess, but the fact that it exists is perhaps most clearly demonstrated by the number of major political parties in European countries which have "Christian" in their name or

aim21. This has never been a feature of UK politics. Furthermore, not only is the UK not a Roman Catholic country, but it has, rather peculiarly, a national religion, which may serve to emphasise in the minds of some its difference or exclusiveness.

For much of the past 450 years since the accession of Queen Elizabeth I, the British have been very suspicious, even fearful, of the Roman Catholicism – or Papism. In the 17th century, James II was deposed because of a fear he was trying to bring the country back to Rome, in the 18th century fear of Papism led to the Gordon riots; even in the 19th century, Catholic emancipation was hotly opposed. I suspect that the historical penumbra of a rather unique concern about the Church of Rome has influenced feelings in some quarters about the influence of Europe in the UK. The contrasting absence of such concern in Ireland may be explained by the fact that it is a Roman Catholic country.

Turning now to the two cultural or legal characteristics, I think that it is very significant that the UK has a very different constitutional arrangement from every other European country. Unlike every other European country, we have no written constitution and we have parliamentary sovereignty. Indeed, it may be said with considerable force that we have no constitution as such at all, merely constitutional conventions, and that it is as a consequence of this that we have parliamentary sovereignty. The relatively pragmatic outlook of a system with no written constitution and parliamentary sovereignty involves a very different approach to government from the more principled, but less flexible, system enjoyed by the rest of Europe. But the point goes further than that.

The absence of a written constitution and the existence of Parliamentary sovereignty mean that we have no history of the courts overruling Parliament. Over the past thirty years there has been an academic debate sputtering away about whether, in

extreme circumstances, the courts could overrule a statute, but it is very much an academic issue – and I hope that it remains so.

However, there are three significant consequences of our having no formal constitution for present purposes. The first is that, subject to that sort of marginal debate, the legislature in the UK has always been able to trump the judiciary: Parliament can reverse a judicial decision with a statute, but the courts cannot overrule a statute through a judicial decision. In a country with a written constitution, the courts can overrule, or set aside, a statute if it infringes the constitution. So, mainland European countries, like almost all other countries across the world, are used to judges overruling legislation enacted by parliaments. The UK is not. This means that the idea of courts overruling decisions of the UK parliament, as is substantially the effect of what the Strasbourg court and the Luxembourg court can do, is little short of offensive to our notions of constitutional propriety. All the more so, given that the courts concerned are not even British courts.

Of course, it must be acknowledged that there is nothing strictly revolutionary in all this: the European courts' powers in this country all derive from Parliament itself – when effectively accepted our accession to the Council in 1952 and the EU in 1973, and when it passed the European Communities Act in 1972 and the Human Rights Act in 1998. And what Parliament gives, Parliament can take away. But that point takes the present issues no further, not least because it begs the question, namely whether Parliament should reclaim the powers it has ceded to the European courts.

In other words, the notion, familiar to any reader of British newspapers, that it is unacceptable for "unelected judges … [to] impos[e] a diktat"23 on a democratically elected

parliament, is peculiarly British. Most countries accept the notion that there are times when it is a good thing for the rule of law that independent judges, who do not need to court short term popularity or worry about re-election, should be able to act as a control on what would otherwise be an unbridled legislature. Again, that may be reflected in their histories – Hitler and Mussolini, for example, both came to power as a result of a democratic election, and democratically elected governments did not protect Czechoslovakia or Romania from Communist take-overs in the 1940s.

The absence of a written UK constitution has a second effect, namely that the Convention has much greater prominence in our judicial decisions, than in decisions of judges in countries which have written constitutions. So when a case involving freedom of expression, privacy, the right to marry, or other infringement of alleged civil rights is heard in this country, any decision is likely to be determined by reference to the Convention, as that is where such rights are, at least very often, primarily to be found in the UK legal system. However, such rights are just the sort of rights which are likely to be included in a written constitution. But in Germany, for instance, when it is alleged that such rights have been infringed, the case will be primarily decided by reference to the German Constitution: the Convention does not loom nearly so large in German Federal Court decisions as in our decisions.

Because a relatively high proportion of court decisions which attract media attention are concerned with human rights, the Convention receives a lot more publicity in this country than in other European countries. And because the media are inevitably much more interested in decisions which are controversial, the Convention and Human rights generally receive inappropriately unfavourable media coverage in this country.

A third consequence of not having a constitution is that one

way of fighting off some EU decisions, or decisions of the Strasbourg court, which is available to many other European judges is not open to us. The point may be graphically illustrated by the decision last week of the German Constitutional Court, the Bundesverfassunsgericht, which was considering the legality of an essential aspect of the European Central Bank's scheme for supporting the Euro, the so-called outright monetary transactions programme.

While the German Constitutional Court has played for time by referring to the CJEU the question whether the programme infringes EU law, it has left open the possibility that it, the German Court, may decide that the programme infringes German law, which would, according to some commentators, throw the future of the Euro into doubt. More centrally for present purposes, the fact that Germany has a Constitution enables a German court to say that German law sometimes trumps EU law. This is an option which is much more rarely, if at all, open to a UK court as we have no constitution to invoke.

A second cultural factor which distinguishes the UK from almost all other countries in Europe is that we have a common law system, whereas they have a civilian law system. This may appear to be a rather esoteric point, but it has two aspects of relevance. First, in a broad sense, rather like the religious difference, it indicates or reflects a rather different cast of mind or approach. Like the absence of a formal constitution, the common law reflects a relatively pragmatic, as opposed to a more logical, approach. A vital feature of the rule of law, namely the legal principles by which legal disputes are decided, are developed by common law judges, who actually make and develop the principles, rather doing what their civilian equivalents do, namely to take those principles from a detailed code.

Francis Bacon, when not allegedly writing Shakespeare's plays, and when not accepting bribes or sitting as Lord Chancellor, wrote wonderful essays on science and philosophy. He drew a

distinction between the ant and the spider in these terms:

"Those who have handled sciences have been either men of experiment or men of dogmas. The men of experiment are like the ant, they only *collect and use; the reasoners resemble spiders, who make cobwebs out of their own substance."*

Applying the metaphor to the law, the ant is the common lawyer, collecting and using forms of action, seeing what works and what doesn't, developing the law on an incremental, case by case, basis. The spider is the civil lawyer, propagating intricate, principle-based codes, which can be logically and rigidly applied to all disputes and circumstances. In Europe, the common law ants are heavily outnumbered by the civilian law spiders.

In particular, the Luxembourg and Strasbourg courts are manned by judges whose knowledge and experience are almost exclusively civilian law rather than the common law. This leads to the risk of an approach to our forensic procedures, indeed sometimes to our whole forensic attitude, which, at least from an English lawyer's perspective, misunderstands how we work.

Having said that, it is fair to say that there are occasions where, for instance, the ECtHR has been prepared to take into account these differences in a realistic way.

Finally, a feature of history and culture which renders it more difficult for the UK to identify itself unequivocally with any sort of federal Europe is our link with the United States and the Commonwealth. As the US, the origins of the link lie in a combination of geography, history, politics, culture, and language28. It was not merely in the 18th century that there was enthusiasm about uniting the UK and what is now the US in a single country. Within the past century, it was part of Winston Churchill's vision, as Linda Colley explains in her recent book29. The precise nature and future of the

special relationship is a matter of debate and speculation. For today's purpose the central point is that both those who see the Atlantic partnership as more significant than the European partnership and those who wish to maintain a foot in both camps are obviously going to be antagonistic to an unequivocal commitment to Europe. The links between the US and some other European countries (especially France and Germany, albeit for different reasons), while real and strong are, I think, less significant in terms of culture, and, obviously, language.

The Commonwealth also provides us with an alternative international organisation or club to the EU. To many people countries such as
Australia, Canada, New Zealand, India, and South Africa, as well as smaller places such as Hong Kong and Singapore, represent political and cultural traditions which are much closer to ours than mainland European countries. This is a point which a lawyer is particularly aware of, and is partly explained by the fact that Commonwealth countries are, like us, common law jurisdictions, whereas, as discussed later, virtually every other European country is a civilian law jurisdiction. As a UK judge, I can and do sit, and feel at home, in the Hong Kong Court of Final Appeal; that could not be said about any European court, other than Ireland. But geographical proximity favours Europe and Commonwealth countries are building other ties, mostly to neighbouring countries.

Of course, the factors which I have been discussing are by no means the only ones which play a part in the European debate, but, as explained already, I believe that they are important, if only to set the debate in its proper context.

The present discussion is not of course about whether we should join the European venture. That was the issue debated after the Second World War before we joined the Council in 1952, and until 1972, when we were wondering whether, and then

seeking, to join the EU. The present debate centres round the issues of whether we should pull out or whether we should weaken our involvement. Accordingly, it is appropriate to consider not only the UK's historical and cultural context outside the European tent. We must also consider our more recent experience of being in the tent.

The effect of membership of the EU and the Council on our law

Britain's membership of the Council since 1952, and its membership of the EU since 1973, have had an inevitable effect on our politics, on our economics, and on our law, indeed on our whole outlook on life. When dealing with this aspect, I would like to concentrate on the influence of our European involvement on the law, partly because that is my area of expertise, but it is also because changes in the law both reflect and influence wider changes in society – witness the effect of the anti-discrimination legislation (racial, gender, sexual) of the 1960s.

Thirty-five years ago 30, Lord Denning famously observed, in terms which may have particular resonance with those living in the Somerset levels, that:

"the flowing tide of Community law is coming in fast. It has not stopped at high-water mark. It has broken the dykes and the banks. It has submerged the surrounding land. So much so that we have to learn to become amphibious if we wish to keep our heads above water."

The point was reinforced fourteen years later when Lord Bridge famously said in the House of Lords decision in the Factortame case that "it was the duty of a United Kingdom court … to override any rule of national law found to be in conflict with any directly enforceable rule of Community law"32. And ten years later, lawyers, and indeed the media, became acutely aware of the effects of the Convention since 2000, when it

became the duty of our courts to apply its provisions in domestic law following the Human Rights Act 1998.

The experience of more than thirty years applying EU directives and regulations, and of more than twelve years applying the Convention, coupled with considering, following or distinguishing decisions of the Luxembourg and Strasbourg courts, has made a great difference to the approach of UK judges when deciding cases. EU law has introduced new topics like VAT and new concepts such as subsidiarity; and Convention law has introduced the judges to new topics like privacy and new concepts such as the margin of appreciation, and they have therefore self-evidently changed our law.

Thus the common law has developed to take into account the need for the law to accommodate a right to respect for privacy and for family life. Twenty years ago, the Court of Appeal held that the common law did not recognise any right to privacy, so that a TV star lying unconscious in hospital after a near-fatal accident, had no right to complain about a newspaper publishing photographs of him taken by a paparazzo who managed to trespass into his room and photograph him33. Following the passing of the Human Rights Act, there was a very different result when a newspaper published photographs secretly taken by another paparazzo, of a model entering a rehab clinic, or unauthorised photographs of the wedding of a couple of film stars34 taken secretly. And, of course, the common law has not just had to accommodate respect for privacy and family life; it has also had to accommodate a positive right to freedom of expression, freedom of religion, freedom to marry, and much more besides.

When I say that UK law has changed as a result of our European involvement, I am not just referring to the inevitable fact that the courts have had to adapt to and apply new principles arising from EU and Convention law. Studying judgments of the

CJEU and the ECtHR has led to the courts of this country taking a more principled approach to decision- making than in the past. This is scarcely surprising: as I have already mentioned, the common law has tended to be pragmatic and therefore very ready to incorporate good ideas from other systems.

Thus, Lord Denning's incoming tide is no more than the latest inflowing of waters which have already left rich deposits on the flood plains of English law. It is perhaps easy for us to forget that the English common law and equity have, as Professor van Caenegem put it, a 'continental origin.35' The common law started as feudal law administered in England by the early Norman kings, and it was the same law as that which they administered in Normandy, from where it originated. Indeed as Maitland put it, the law which prevailed in England in the 12th century was:

"in a sense very French. It [was] a law evoked by French-speaking men, many of whom [were] of the French race, many of whom (had only just) begun to think of themselves as Englishman; in many respects [the common law was] closely similar to that which prevailed in France."

It was the combination of English forms of action with Norman writs which formed the basis of the developing English common law; a system which lasted procedurally until 1852 and lives on substantively today through its effect on the development of our substantive law of contract, tort, and restitution. The jury trial dates back to at least 1087, when William the Conqueror's half-brother and sometime Chief Justiciar of England, Odo, Bishop of Bayeux (of tapestry fame) presided over the first recorded 12 man jury.

As for equity, the Court of Chancery's processes developed out of a particular form of canon law procedure, probably also introduced with the Norman Conquest, namely the denunciatio evangelica. One of its special features was discovery, or what

we now call disclosure, which, while currently regarded with suspicion in many parts of continental Europe, was originally imported from there to England. Admiralty law was always predominantly civilian in its make up, following and applying as van Caenegem put it, ‘the European ius commune.’

But one does not have to go back to the middle ages to see mainland Europe’s influence on the development of the common law. Many of the innovations which served to justify the great Lord Mansfield’s reputation as “the founder of commercial law of this country”40, were based on mainland European civilian law, the lex mercatoria. In one case, Mansfield stated that “Mercantile law is not the law of a particular country but the law of all nations”41. More specifically, many of his landmark decisions such as Miller v Race42 (that promissory notes are negotiable), Carter v Boehm43 (that uberrima fides applies to contracts) and Pillans v Van Mierop44 (abolishing consideration in contracts) all involved Mansfield drawing on mainland European law. (In the first he was wholly successful in permanently changing the law of England45, in the second partly so, at least in relation to insurance contracts46, and in the third he failed.)

So the idea that English law developed as a self-contained system is quite misconceived. Indeed, even Blackstone stated that the affairs of commerce were regulated by a lex mercatoria “which all nations agree in and take notice of and it is particularly held to be part of the law of England which justifies the causes of merchants and the general rules which obtain in all commercial countries.”

We have thus long drawn from continental waters. Indeed, it seems to me that the great success that is the English common law and equity, like the English language, stems to a large extent from its ability to absorb those influences for its own purposes enriching itself as it does so. Our legal story is

not one of ‘splendid isolation’49 but rather of splendid synthesis.

Furthermore, the flow of legal ideas and concepts between Britain and mainland Europe has been and is a two-way process. Since the 17th century, England and Wales have had been in the forefront of liberty. We executed our King more than 140 years before the French. The famous 18th century case of Entick v Carrington50, decided before Louis XVI had even come to the throne51, provided the basis for the right to liberty, security and property. And, as Lord Bingham stated more recently, the common law’s condemnation of torture is a ‘constitutional principle.’ Most famously of all, we have long guaranteed the right to fair trial, or as the Magna Carta put it nearly 800 years ago ‘due process of the law.’ The version which remains on the statute book reads as follows,

“No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor [condemn him], but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.”

With our longstanding commitment to the rule of law, it is unsurprising that the United Kingdom played a key role in drafting the Convention, the Council of Europe’s first substantive contribution to post-War redevelopment, although, as Brian Simpson’s study of its genesis56 makes clear, it was not always a straightforward or entirely consistent role.

A more specific point from Magna Carta’s perspective is the role the UK played in drafting Article 6(1) of the Convention. The rationale behind the drafting of the substantive limitations that can be placed on the right to fair trial provided for by the Article were to a large degree a product of our law. The UK government secured the incorporation of a number of limits into the right, which reflected the nature

of, as well as the limits placed on, the common law right to fair trial, primarily to the principle of open justice as it had been articulated by the Law Lords a century ago in Scott v Scott.

Conclusion

Having identified some of the reasons why the British may feel a degree of exceptionalism not found on mainland Europe, and having discussed the relationship between our law and European law, it cannot, I think, be confidently suggested that they justify any particular outcome for the present debate. The various factors identified in the first part of my talk help explain, rather than justify, reservations which many people in this country have about being part of the European venture, and the second part of my talk demonstrates that cross-fertilisation between British and European law is happening, but also that it happened well before the current European venture was under way.

Those who favour pulling out of the European venture, or at least reducing the UK's involvement in Europe, would no doubt rely on the fact that the UK's historic and cultural DNA includes many genes which encode for separation and exceptionalism. Whatever changes there may have been to our status, they point out that we remain an island, with very different experiences and conventions from mainland Europe. They would also say that we were perfectly well able to draw from European culture without being part of a European polity.

Those committed to Europe would rely on the fact that the UK has never been disengaged from Europe, and that the current European ventures involve no more than a natural evolution, so that no genetic manipulation is needed. They also argue that the seismic shifts in the world political order, and in the mobility of ideas, individuals, information, and assets,

require much greater engagement with Europe.

In their Song of Patriotic Prejudice written in the late 1950s, Flanders and Swann contrasted the British and foreign attitudes to sport. As they put it, unlike England, “All the world over, each nation’s the same/ They’ve simply no notion of playing the game/ They argue with umpires, they cheer when they’ve won/ And they practise beforehand which ruins the fun”. Well, anyone who watches Match of the Day or followed the 2012 Olympics will realise how this country is capable of radically changing its culture in a few decades.

Whether this change in English culture is to be welcomed or regretted is a matter of opinion. Whatever their view, I expect that most people would agree that it was inevitable. So, too, whatever the outcome of the present debate on Britain’s future in Europe, I suspect that future historians will conclude that that outcome was inevitable, and will give convincing reasons for it. It’s so easy when you know the answer, or as Niels Bohr would no doubt have agreed, prediction is very easy, especially when it’s about the past.

David Neuberger, February 2014