Second annual BAILII Lecture[1]

Decision-making in the UK's top court

9th December 2013

Introduction

At the risk of sounding like an Oscar winner's panegyric – can I begin by giving some general thanks to those involved in the book being launched tonight, lest I omit to do so at the end. Firstly, to the Nuffield Foundation and the Leverhulme Trust for funding key parts of the research; to the interviewees for their patience and generosity of spirit; to my long suffering research assistants and to my understanding publishers- Hart Publishing. Finally, with respect to tonight's lecture I should thank the BAILII Trustees for the honour of being invited to deliver it and to the partners of Freshfields for hosting the event.

The topic for Lord Neuberger's first Bailii annual lecture last year was 'No Judgment – No Justice. In it he explored with characteristic lucidity the need for legal judgments to be accessible to the public – both in terms of understanding and of availability. Of course that is what BAILII is all about. It owes its existence to the sterling work of Graham Greenleaf and his colleagues in Australia who founded AUSTLII in 1995. Their motivation was the belief that access to the basic law (cases, statutes and delegated legislation) in a jurisdiction should be free to all – as a fundamental constitutional entitlement. What price the rule of law – particularly in an era of legal aid cutbacks - if citizens cannot access the law governing their country without having to subscribe to the services of commercial providers? BAILII continues to perform its essential work despite these times of austerity – but without help of lawyers in general, and the judiciary in particular, it could not long survive. We need your support still.

Transparency and openness

Like last year, the theme of transparency and openness will feature strongly in this lecture for it lies not just at the heart of the BAILII project but also that of the Supreme Court. It is

[1] This lecture is also the launch event for A Paterson, *Final Judgment : The Last Law Lords and the Supreme Court* (Hart Publishing, 2013) (http://www.hartpub.co.uk/Paterson.pdf)

not difficult for commentators such as Richard Cornes to mount a compelling case[2] that the Supreme Court has completely eclipsed the Appellate Committee of the House of Lords in this regard. Welcoming visitors to the new building in their thousands is a far cry from the quiet ways of the House of Lords. The very fact that it has a strong communications section on its staff, with a highly impressive website that far outstrips that of the Appellate Committee is a very clear declaration of intent by the Court that it wishes to engage in a dialogue with the public, which the Appellate Committee had largely neglected. Cornes enumerates a wide range of communications vehicles used by the Court to achieve its objective, ranging from Annual Reports to press releases and from SKY broadcasts of oral hearings to television documentaries illustrating how the Court goes about its business. None of these existed in the case of the Appellate Committee. The Justices believed that by embracing YouTube and Twitter for the delivery of their judgments they would give the Court a higher profile with the public than that of the Appellate Committee without turning themselves into publicly recognised figures.

Dialogues and the Court

However, I am running ahead of myself. The central thrust of the book is to argue, as I did 30 years ago in the Law Lords[3] that decision-making in the UK's top court is a social and collective process. In short, that a key avenue for understanding how appellate judges decide cases is not through reductionist theories based on economics, power or attitudes, but by looking at dialogues in which the judges engage – with counsel, with other courts, with academics, with the other branches of the state and above all with themselves.

The dialogue with the public

Now, as we have just seen the Supreme Court has begun to engage in another dialogue - that with the public – as Lord Neuberger argued that they should in last year's lecture. And they have achieved a very considerable measure of success. And yet as we will see at different stages in this lecture, it can be argued that in relation to transparency and the dialogue with the public – there is more work to be done. As I have observed elsewhere[4] the new court, unlike the US Supreme Court has no register of the Justices' interests which, in the light of the Pinochet debacle can only be described in the words of Sir Humphrey as 'a brave

[2] See R Cornes, 'A constitutional disaster in the making? The communications challenge facing the United Kingdom's Supreme Court' [2013] *Public Law* 266.
[3] (Macmillan, 1982)
[4] See A Paterson, *Lawyers and the Public Good* (CUP, 2012) and A. Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing, 2013).

decision'. Again, the system of appointment to the Supreme Court is still arguably lacking in sufficient transparency, given the large measure of influence exerted by the senior judiciary over it, through the system of consultations.[5]

The first big challenge for the Court in the eyes of the public: the 'unfair bank charges case[6] was also arguably an opportunity missed for the new Court. The public at large, the media, the Office of Fair Trading and the lower courts all thought that the case was about whether the bank charges for accidental overdrafts were unfair. The Supreme Court did not. Lord Phillips makes this abundantly clear in the first words of his broadcast delivery of the judgment: 'This appeal was not about whether bank charges for those who overdraw on their current accounts are fair. It was about a much narrower issue. On what basis can the OFT investigate the fairness of those charges'. Assuming that the Supreme Court's analysis of the law was correct on the narrow and determinative point, it does not account for the Court's failure to explain to the waiting public that however penal the charges levied by the banks, the relevant consumer protection legislation in this country (as opposed to that of some other countries who had implemented the EU Directive) was not couched in a way that would protect them.

The correct answer to Lord Phillips' introduction was that there was effectively no basis on which the OFT (or anyone else) could realistically challenge the fairness of the bank charges – in terms of price. Some of the Justices (including Lord Phillips) sought to soften the blow by saying that there might be other avenues for challenging the fairness of the charges. Since the OFT had neither the finances nor the will to return to the fray and because in any event the 'other avenues' of challenge proved legally illusory, this palliative designed to show that the Court had not missed the point of the case served only to rub salt in the wounds. The Court had missed an opportunity to demonstrate that it had grappled as effectively as it could with the aspects of its first big case to touch the lives of millions of ordinary citizens. A bold challenge to Parliament and Executive to address the deficiency in our consumer protection laws might have been more apposite. Lord Walker's brief but well intentioned suggestion along this line was too little, too late. So the dialogue with the public is work in progress.

The dialogue with counsel

[5] See A Paterson and C Paterson, *Guarding the Guardians?* (Centre Forum and CPLS, 2012).
[6] *Office of Fair Trading v Abbey National plc and others* [2009] UKSC 6.

With counsel on the other hand, the Court's dialogue has become sharper and more focused. Less time for hearings has placed greater emphasis on the written materials submitted before (and sometimes during and after) the oral arguments, despite oral advocacy inviting greater participation from the judges than written advocacy. Forty years ago the role of counsel as partners in the decision-making process was a very significant one. Then counsel could occasionally take advantage from the fact that none of the Law Lords read the written materials seriously in advance – now almost all of them do.[7] Then, the expectation derived from the adversarial system was that decisions would only be based on arguments that that counsel had had the chance to explore with the judges. Now, the strength of that expectation seems to have been somewhat eroded. It arose graphically in the *Assange*[8] case (concerning the attempt to extradite Julian Assange, the founder of Wikileaks, to Sweden and whether a Swedish public prosecutor could be a 'judicial authority' for the purposes of the Extradition Act 2003). When the decision against Assange was handed down, Assange's legal team considered that the majority of the Supreme Court panel had decided the case on a point relating to the Vienna Convention on the Law of Treaties 1969 that had neither been argued by counsel nor put to them by the Justices. Dinah Rose QC was permitted to make a detailed submission to the Court on the point but the Supreme Court, dismissed the submission within two days with five short paragraphs which asserted that Assange's team had got it wrong, Lord Brown had put the point to Dinah Rose QC during the argument and accordingly her submission had been without merit. The actual exchange was revealing, and is set out in full in the book.[9] Here are the key elements:

> Dinah Rose QC:
>
> > The next question is about events subsequent to the implementation of the Framework Decision and the [2003 Extradition] Act. The first point I make is, of course, one has to proceed with considerable caution because the task of this Court is to construe a provision in the 2003 Extradition Act in accordance with the obligations on the state pursuant to the Framework Decision and events subsequent to both the Framework Decision and 2003 Act are of questionable significance in relation to that task….
>
> Lord Brown:
>
> > But surely the Vienna Convention allows subsequent events, and the way it's been interpreted and applied, to operate in terms of [construing] the … Framework Decision. *But I'm not sure that then it can bear similarly on the interpretation of the 2003 Act* (emphasis added).
>
> Dinah Rose QC:
>
> > Quite, my Lord.

[7] In Lord Neuberger's words the era of the impressionists has been replaced by that of the pre-Raphaelites.
[8] *Assange v Swedish Prosecution Authority* [2012] UKSC 22, [2012] 2 WLR 1275.
[9] See *Final Judgment* Chapter 2.

Lord Brown:

I'm not sure that isn't pulling oneself up by one's own bootstraps.

In fact, this proposition – that the Vienna Convention can be used to interpret the Extradition Act 2003, which as we can see was somewhat tentatively made, was indeed the basis of the majority Justices' judgments in the *Assange* case. While it is true that counsel had had an opportunity to argue the point, it was a somewhat oblique invitation.

The incident, however, highlighted another aspect of the dialogues with the wider world that the Supreme Court has not been able to resolve. Although the US Supreme Court and the Australian High Court produce publically available contemporaneous transcripts of the oral arguments in these courts, the House of Lords and the UK Supreme Court did and do not – on expense grounds. Yet they do have video recordings of the hearings, taken from the Sky broadcasts. It might have been more satisfactory for all involved in the *Assange* case if the video recordings had been available to counsel and the Justices (not to mention the enthralled court watchers) in reviewing what turned out to be the key 10 minutes in the whole of the two day hearing. The argument that the videotapes of hearings should be more widely available, is one made recently by Adam Wagner,[10] and is, of course, ironically a plea for even greater transparency by the Supreme Court.

Reverting to the dialogue with counsel, both counsel and the judges continue to value the contribution that expert advocates can make in the oral argument to the decision-making process. For counsel and their clients who are interested in playing for rules, as Galanter would put it,[11] a better outcome in terms of the law even if the case is lost can still justify the decision to fight on to the end. For the Justices, effective assistance to achieve better answers justifies the retention of extended hearings. Cost pressures will undoubtedly in time lead to a further reduction in the length of oral argumentation, yet few in the Court consider that more use of judicial assistants and written advocacy from counsel will be an adequate substitute for the flexibility of oral argumentation.

The dialogue with themselves

The key dialogue in the UK's top court remains what it was under the House of Lords, namely, the dialogue between the Justices themselves. More discussion occurs before

[10] 'Court of Appeal broadcasters must learn the Supreme Court lessons' UK Human rights blog 31st October 2013.

[11] Marc Galanter, 'Why the "Haves" Come Out Ahead' (1974) 9 *Law and Society Review* 96, 100

the hearing, and more after it, than was the case in the House of Lords, but as with the dialogue with counsel, there has been a shift in emphasis from oral to written discourse, especially when judgments are being circulated. Which Justices are sitting in a case influences the exchanges which occur in that case, although such variations can be attributed primarily to (1) the Justices' views on team-working, (2) their skills in small group leadership and (3) the links between them (in terms of physical and philosophical geography).

Team-working

One of the most significant developments in the Supreme Court has been the growth in team-working. This did not happen overnight – it evolved over the first three years of the Court. However, most of today's Justices now perceive themselves as part of a team – in a way that the Law Lords almost never did. [12] Of course the 'team' metaphor should not be taken too far. The Justices do not go on team-building exercises; there is no manager, no opposing team, no team strips, no team mascot and no league table of supreme courts. However, 'coaching'[13] sessions have been known to take place in the Court, and other team-related characteristics do exist such as team selection, team-work, team leaders, team-players and team spirit. This aspect of collective decision-making in appellate courts has attracted considerable commentary in the United States, where it appears under the soubriquet of 'Collegiality'.[14] The term does not refer to how well the Court's members get on with each other, but to how much they work together as a team pursuing a common enterprise (the pursuit of the 'right answer in law' in the case) and how much they function as individuals. The English Court of Appeal is a highly collegial court in this sense.[15] Its members regularly sit on the same panel for several weeks, they meet before cases to discuss points on which they wish to hear argument, to allocate who will write and to express preliminary views on the case. There may be subsequent meetings when the opinion has been circulated, especially if it is a composite judgment. The sheer pressure of business coupled with the need to play to the specialist strengths within each panel of judges only emphasise their inter-dependence and the necessity for team-playing. However, curiously, although the great majority of Law Lords were promoted from the Court of Appeal, the House of Lords relatively rarely operated

[12] See B Dickson, 'The Processing of Appeals in the House of Lords' (2007) 123 *LQR* 571, 595.
[13] See T Nesterchuk, 'The View from Behind the Bench' chapter 11 in A Burrows, D Johnston and R Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press, 2013).
[14] See HT Edwards, 'The Effects of Collegiality on Judicial Decision-Making' (2003) 151 *University of Pennsylvania Law Review* 1639.
[15] See, P Darbyshire, *Sitting in Judgment* (Hart Publishing, 2011) ch 14.

in such a collegial fashion. It was not – at least in Lord Bingham's era – that the members of the Court did not get on with each other. It was more the ever changing panels of the appellate and appeal committees, the lack of pre-meetings and the scarcity of re-convened conferences, and Lord Bingham's support for multiple judgments in most cases, that entailed that the Law Lords were rarely required to work together as they had done in the Court of Appeal. In most situations therefore they did not see themselves as members of a team as opposed to a set of individuals.

Nonetheless, there were exceptions, thus the two Scots judges seem very largely to have worked as a team in Scots appeals both in the final years of the House and now in the Supreme Court to the extent of sharing the burden of writing the lead judgment and rarely showing a disunited front in Scots cases.[16] There is also evidence of small, ad hoc examples of team-working emerging. Justices with offices on the second floor, perhaps because of their slightly isolated location, have generally talked to each other about cases in which they are involved on a regular basis. Again, in the *Axa* case[17] in 2011 three of the Justices would meet in the afternoons after the hearing to discuss where the case had got to. As one recalled, 'We wouldn't necessarily have the same ideas but it was very useful…just speaking out loud forces you to form your ideas in articulate language'.

An even more striking example of team-working in the early years of the Supreme Court was the relationship of Lords Brown and Rodger. Fast friends from towards the end of the Bingham era in the House of Lords, they shared a judicial assistant and in 2009–10 began the practice of 'coaching sessions'[18] in which they debated the cases in which they were sitting together with their then shared judicial assistant. Working together certainly seems to have brought their thinking closer. The two judges voted together in 92 per cent of the cases that they sat with each other in the House of Lords and the Supreme Court (the overall norm for the two courts at that time was around 86 per cent). Indeed, they voted together an very impressive 97 per cent of the time in the 28 cases (23 times in the majority and five times in

[16] See chapter 6 of *Final Judgment* (Hart Publishing, 2013). Lords Hope and Rodger only disagreed once on the outcome in a Scots case. Lords Hope and Reed never disagreed on the outcome of the 29 cases in which they sat together until Lord Hope retired at the end of June 2013.

[17] *Axa General Insurance Ltd and Others v Lord Advocate and Others (Scotland)* [2011] UKSC 46.

[18] The description was Lord Rodger's and it was Lord Rodger's habit to treat the judicial assistant as 'the coach'. See Tetyana Nesterchuk, 'The View from Behind the Bench: The Role of Judicial Assistants in the UK Supreme Court' chapter 11 in A Burrows, D Johnston and R Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford, Oxford University Press, 2013).

dissent[19]) in which they sat together in the Supreme Court in the last year of Lord Rodger's time there (June 2010–May 2011).

Single majority judgments

However, the clearest illustration of the Court's commitment to team work is evidenced by their attitude to single majority judgments. In Bingham's era single judgments were only favoured in a smallish minority of cases, often criminal ones, entailing that fewer than 20% of cases in his time ended with a single majority judgment. Today a majority of Justices favour having many more single majority judgments, which has led to a dramatic rise in single judgments. By mid-2013 single judgments were running at 55 per cent of the cases determined by the Supreme Court in that year, and that remains the pattern today. This is a level last attained in the mid-1990s, making it probably the most dramatic change from the House of Lords under Lord Bingham. Such a rate of single judgments has been achieved by greater exchanges between the Justices with multiple drafts of judgments being circulated, amended or withdrawn.

There is now a prevailing view amongst the Justices that concurrences should be curbed unless they are going to add something to the lead judgment. As one Justice put it,

> If I wanted some comments added I would tend to go to the person that I was agreeing with and say, 'Can you see your way to adding these observations?' If he says, 'No' I would then think very carefully whether the comments were important enough to warrant a separate judgment, and the answer would probably be not.

As this quote reveals, suggestions for additions or amendments to the lead judgment were not unusual in the House of Lords: now they are commonplace as the team strives for a 'judgment of the court', albeit one that it is still published under the name of one or more of the Justices.[20] Even in cases where the Justices are fiercely divided there is now pressure, as in *Waya*,[21] the *Bank Mellat* cases[22] and in *Smith v Ministry of Defence*,[23] to narrow the disagreement, if possible, to one majority and one or two minority judgments. Such team-working requires a different skill set in the participants than was once required of Law Lords. The ability to negotiate, to compromise, to persuade whilst robustly defending a position of principle are skills which until a few years ago were more associated with a member of the

[19] On two of them they were joined by Lord Walker – a mutual friend.
[20] See chapter 3 *Final Judgment*
[21] *R v Waya* [2012] UKSC 51.
[22] *Bank Mellat v Her Majesty's Treasury (No 1)* [2013] UKSC 38; *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39.
[23] *Smith v Ministry of Defence* [2013] UKSC 41.

Law Commission than a member of the final court, yet they are now being actively applied in the pursuit of more collaborative judgments.[24]

Those of you who were here for Lord Neuberger's BAILII lecture[25] last year will recall that then he called for fewer and shorter concurrences – although it was accompanied by a disavowal of any intention to move to a compulsory single judgment. This call seemed only likely to reinforce the trend to more single majority judgments in the Supreme Court, and so it has proved, as we have seen. As the book shows almost all of the Justices who regularly wrote concurrences have now retired. Lord Neuberger and Lady Hale[26]are aware that there are dangers associated with too great a trend to single or single majority judgments - but the trend continues.

Let me identify four of the dangers:

1) Single judgments have had a major impact on the length of judgments. Whilst the length of the Law Lords' opinions and judgments varied depending on whether they were dissenting or writing the lead or sole opinion or merely a concurrence, the average length of opinions per case in the House of Lords was 68 paragraphs. In the Supreme Court the average number of paragraphs per case had risen to 89 by March 2013. In short, whilst fewer judges are writing judgments in the Supreme Court as compared with the House of Lords, those that do write, are writing more.[27]

2) Team-working and the pursuit of single judgments requires greater circulation of judgments and more second case conferences than was the case in Lord Bingham's era, and despite the presider's efforts, such conferences have the potential to reinforce existing tensions rather than contribute to cohesiveness. That may explain why the dissent rate in the Supreme Court is a little higher than it was in the House of Lords. That said, there are signs that the dissent rate has fallen since its peak in 2011 (when the Court was at its most divided)[28] in part perhaps because dissenting on ones' own seems to have become proportionately less common than in the House of Lords.

[24] It may be no coincidence that a third of the current Supreme Court are former members of law commissions.
[25] Lord Neuberger, 'No Judgment – No Justice', delivered on 20 November 2012 (see Bailii website).
[26] See Baroness Hale, 'Judgment writing in the Supreme Court' First anniversary seminar 30th September 2010.
[27] In fairness, some judges use shorter paragraphs than others, however, the difference between the two courts is a real one.
[28]Nevertheless, the overall dissent rate in the Supreme Court at 24% of all cases involving one or more dissents, remains slightly higher than in the House of Lords in its last 40 years. For a detailed discussion of dissents in the Supreme Court see chapters 3 and 4 of *Final Judgment.*

It may also be a sign that greater team-working and Lord Neuberger's plea for a self-denying ordinance in relation to dissents in last year's BAILII lecture is having an impact. Curiously, when the comparative rates of dissent are examined in the Supreme Courts of America and Canada and of the High Court in Australia it is clear that the dissent rate in the House of Lords and the Supreme Court are lower than theirs. Indeed even Lord Neuberger is probably surprised that between 19th June and 27th November 2013 there was not a single dissent in the Supreme Court – easily the longest patch of unanimity – and even then the dissents which broke this drought, in the Christian Bed and Breakfast owners' case,[29] were not over the outcome but only on reasoning.

3) Team-working potentially has another drawback – a loss of individualism in our Justices. The glory of the common law and its final court has included the individuality and idiosyncrasy of its top judges. The myth of judicial fungibility which sustains the arid judgment style of the European Court of Justice is not a feature that hitherto has attracted many supporters in the United Kingdom. Single judgments representing the outcome of the internal debates within the Supreme Court which are not publicly rehearsed, remove the humanity of individual difference and *potentially undermine transparency*.[30] For those who believe in the virtues of diversity (including diversity in thought) within the final court this is not necessarily a welcome development. Fewer dissents and concurrences in return for more single judgments mean more judgments devised by a committee and consequently more compromise. It is interesting that after years of lauding Earl Warren for so patiently crafting a unanimous decision in *Brown v Board of Education*[31] with a view to ending desegregation in the South, commentators have begun to suggest that the compromise that Warren had to make to achieve this – the phrase, 'with all due speed ' which allowed the pace of desegregation to be glacial at times was a price that was too big. Lord Rodger of Earlsferry, opposed such compromises. As he wrote,[32]

> If the powers that be have their way, and the new Supreme Court of the United Kingdom adopts more single judgments, then there will be less scope in future for humour or indeed for

[29] *Bull and another v Hall and another* [2013] UKSC 73

[30] Lord Neuberger, while in the Court of Appeal considered that where single judgments are taken to extremes 'decisional independence and accountability is lost'. 'Developing Equity – a View from the Court of Appeal' Chancery Bar Association conference 2012, London, 20 January 2012. (Available on the Court of Appeal website).

[31] *Brown v Board of Education* 347 US 483 (1954)

[32] Lord Rodger, 'Humour and the Law' 2009 SLT (News) 202.

> any other expressions of the judges' individuality. By definition, the author of a composite[33] judgment is not writing just as himself and will alter his voice accordingly...Indeed, not only humour, but any form of distinctive good writing, is even harder to bring off in a composite judgment than in an individual judgment …The much touted efficiency savings of a single judgment will be dearly bought if, as a result, we lose individual hallmark contributions of [the] quality [of Lords Macnaghten, Wilberforce and Bingham].

4) The pursuit of single judgments has one final consequence. The practice of the Court, as in the House of Lords under Lord Bingham, was for the presiding judge to allocate who was to write the lead or leading judgment setting out the facts. Today, with single judgments of the court running at 37 per cent of cases decided in the court from 2009 to July 2013, and 55% in 2013 alone and concurring judgments no longer encouraged as they were under Lord Bingham, the opportunities for writing are becoming fewer. Already this has led in some cases to a competition to give the lead judgment, with one presider jokingly referring to the judges' presentations at the first case conference as a beauty contest. We know that Lords Phillips and Hope followed the example of Lord Bingham in choosing to write the lead judgment in many of the significant cases. Lord Neuberger has not followed the example of his predecessors in this regard; nevertheless, it is clear that despite the efforts of the presiding Justices to share the lead judgments more fairly, there are marked differences between the Justices in terms of the percentage of lead judgments given for cases sat in. In the US Supreme Court this problem is dealt with by the convention that each Justice gets around the same number of lead judgments to write a year.[34] Such a solution would not work so easily in the UK Supreme Court given its more specialist caseload,[35] because the UK Court does not sit *en banc* and, it would appear, because some Justices through their persuasiveness are more adept than others at moving the lead judgment away from the original lead writer. Nonetheless, if the problem is left unaddressed, and the pursuit of single judgments continues unabated, there is a danger that the impression may come to be given, however unfairly, that all Justices are equal but some are more equal than others.

[33] By this term he means not simply the relatively rare composite or joint judgment where two or more Justices share the task of drafting the judgment equally, but also the now quite commonplace single judgment of the court.
[34] Approximately eight majority judgments.
[35] Which tends to mean that a Scots Justice will tend to write the lead judgment in a Scots case.

Leadership skills

More than 50 years ago David Danelski argued that effective team-working in appellate courts[36] required two forms of leadership. 'Task leadership' which focused on persuading a majority on the court towards a particular outcome, and 'social leadership' which endeavoured to keep the court socially cohesive despite the inevitable conflicts which arose when important issues were at stake. Danelski showed that although it was possible for a Justice to perform both roles – and particularly the Chief Justice – more often the roles were played, if at all, by different Justices. My study of the House 40 years ago suggested that leadership analysis could fruitfully be applied to the House of Lords and it appears just as true of the last decade also. In part this is because of the overlap between task leadership, group-orientation and team-working. In practice, therefore, those who have exercised task-leadership effectively in the final appeal court have almost all regarded collective decision-making as a central element in their decision-making role either through group-orientation or being a tactician or lobbyist. Thus it is clear that Lords Reid, Wilberforce, Diplock, Bingham and Dyson, for example, all exercised task leadership effectively, although not in the same way.

After the first case conference the best opportunity for exercising task leadership is at the circulation of judgments stage. Lord Diplock thought nothing of writing his judgment before the oral hearing was over and Lord Hoffmann occasionally did likewise. Lord Bingham did not do that, but he was celebrated by his colleagues for writing as soon as the hearing was over. In fact, Lord Bingham produced his 30 manuscript pages a weekend, because that was how he liked to work – he wanted to get the thing off his desk before he was into another case. Although he recognised that it was sometimes a weakness he had a great reluctance to revisit an opinion which he had circulated some time before.[37] If he was writing what he thought was to be the leading opinion he would entertain his colleagues' requests for tweaks here or dropping a phrase there. But if he was not, he was reluctant to comment on others' opinions even where he thought they were misconceived – because he considered judicial independence involved independence from one's colleagues. This was a clear limitation on Lord Bingham's willingness to exercise task leadership. His approach to collective decision-making was not that of a tactician such as Lord Diplock or Lord

[36] 'The Influence of the Chief Justice in the Decisional Process' in Walter F Murphy and C Herman Pritchett (eds), *Courts, Judges and Politics: An Introduction to the Judicial Process* (New York, Random House, 1961) 497–508.

[37] One case in which he did was *R v Rahman* [2008] UKHL 45, but he didn't change his position and as a result ended up in a 3:2 minority on a sub-issue in the case.

Hoffmann. Nor was he generally an intentional consensus builder. If he didn't win his colleagues over at the first conference or with the circulated opinion, that was largely it. In this respect he was not very far apart from Lords Reid and Radcliffe, or indeed Lord Phillips. Occasionally, this had its downside. As Lord Wilberforce in an earlier era had observed,

> One learns to one's surprise that some people who are thought of as wonderful judges are lacking in the art of persuading their colleagues to adopt their point of view. Whereas others who are not much on the record in print are extremely good at directing a decision in a particular way.

One way to assess the efficacy or otherwise of Law Lords as task leaders or group decision-makers is to look at their records in 'close call' cases (cases in which two or more judges in the final court dissent from the majority outcome).[38] The Law Lords in the last decade of the House had widely contrasting records in such cases. However, amongst the more interesting judges are those, including Lords Brown, Hoffmann, Hope and Millett who were twice as likely to be on the majority side of close calls as on the minority side. All of these were collectively minded judges who would talk to their colleagues throughout case including the circulation of judgments stage. All of them may have exercised task leadership skills but other factors may have played a part e.g. the exercise of social leadership or a preference not to dissent if it served no useful purpose.

Turning to the Supreme Court, there were 34 'close calls' in its first four years. Lord Phillips presided in 15 of them and he was on the majority side in 11 of them. Since Lord Phillips was a 'group-oriented' judge, this could indicate that in these cases he exercised a considerable degree of task leadership. Closer examination of the cases does not entirely support this hypothesis. His support for a team or collective approach to decision-making was rarely of a tactical or lobbying kind. Indeed, he tended to keep an open mind in difficult cases far later than most of his colleagues, leading him in several of the close calls either to reject the majority's reasoning (but not their result)[39] or, it is thought, to change his position – if not his vote – relatively late in proceedings.[40]

Lord Hope as Deputy President undoubtedly provided considerable leadership to the Court. He presided in more Supreme Court cases than any other Justice (109) and gave the

[38] Definition derived from B Dickson, 'Close Calls in the House of Lords' ch 13 in J Lee (ed), *From House of Lords to Supreme Court* (Oxford, Hart Publishing, 2011). See *Final Judgment* Chapter 1.
[39] *Stone Rolls Ltd (in liquidation) v Moore Stephens (a firm)* [2009] UKSC 39*; Al Rawi and Others v The Security Service and Others* [2011] UKSC 34; *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58.
[40] *Jewish Free School* [2009] UKSC 15; *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58; *Ministry of Defence v AB and others* [2012] UKSC 9.

lead or single judgment in 46 cases (33 per cent of the cases he sat in), ahead of his nearest rivals (Lord Phillips 32%) and Lord Sumption (29%). He, too was a collectively minded Justice but he was more of a tactician than Lord Phillips and he would negotiate changes in his own or others judgments with a view to achieving a desired outcome. Yet in close calls he was less successful than he had been in the Lords (where he was twice as likely to be on the majority side as on the minority side). In the Supreme Court he was on the majority side in only 11 of the 20 close calls in which he took part. On the other hand, he gave the lead judgment in four of these (36%), he fought hard, and successfully in *Martin*[41] to keep his majority, and it seems clear also that he wrote what was to have been the lead judgment in the *Jewish Free School* case,[42] only to lose out to what seems to have been a switch of votes by Lord Phillips at a late stage.

Task leadership is not confined to the President and Deputy President. At least two other Justices played the role of task leader in the Court's first three years, with considerable success. First was Lord Collins. In the space of two years he took part in eight close calls and was in the majority in seven of them. Indeed in his 51 appearances in the court he only dissented on one occasion. His colleagues in turn rarely dissented against him. His contribution as an intellectual leader of the Court probably accounts for the fact that his mean agreement rate with his colleagues was 90% – considerably higher than the average for the whole court of 86% – and equal with Lord Dyson as the highest on the Court at the time. As we will see geography possibly played a part since his neighbours on the second floor were amongst his highest levels of agreement, namely Lord Kerr (94%), Lord Rodger (91%) and Lord Clarke 89%. However, there can be little doubt that the most successful task leader in the Supreme Court in its first three years was Lord Dyson. His overall agreement rate with his colleagues (90%) was equalled only by Lord Collins. Lord Dyson was the Justice with whom several of his colleagues had their highest levels of agreement,[43] namely, Lords Walker (97%), Hope (95%), Clarke (94%) and Phillips (93%). Indeed there were only two Justices whose agreement rate with him fell below the Court average. His high agreement rate with his colleagues stemmed partly from the fact that in all nine close calls in which he sat whilst a full-time member of the Court he was on the majority side and indeed in the 18 cases in which he sat as a full-timer which had any dissent in them, it was not his, since he

[41] *Martin v HM Advocate* [2010] UKSC 10.
[42] Not only does he have the fullest statement of the facts, he also deals with the issue of costs (with which his colleagues all agree) which is unusual in a *dissenting* judgment.
[43] See Chapter 5 *Final Judgment*

did not dissent once in 64 appearances on the Court, until he returned as Master of the Rolls in the *Bank Mellat* cases.[44] It might be argued that such statistics are compatible both with being a task leader and with being a follower of others' leads. The latter is not Lord Dyson. Lord Dyson wasted few opportunities to tell his colleagues (senior and junior) in his judgments precisely where he did and did not agree with them. Moreover his lack of dissents was down to a very good reason. In four or possibly five cases he was in a minority at the first conference. Yet on each occasion his efforts to write a clear and persuasive dissent were so successful in winning round one or more colleagues, that they became the lead judgment.[45] In his two years on the Court no other Justice succeeded in bringing over so many votes to his side after the first conference. In all Lord Dyson gave 14 lead or single judgments (21 per cent of his cases) ranking him (whilst he was a full-time member of the Court) as the most prolific lead writer after Lords Phillips and Hope.

Vote switching

I discussed changes of mind and vote with all of my judicial interviewees and detected no reluctance to discuss the topic, often in relation to specific cases. However as any oral historian could have told me it was unlikely that the interviewees would have a precise recall of how often such changes occur – especially in relation particular stages of a case – and so it proved.

> That's very difficult to answer numerically. I haven't really thought of trying to analyse that numerically, but I would think that people are less certain during the oral hearing…Once they've expressed a provisional view the general tendency is for people to stick with that provisional view… (Lord Mance).

My main interest is the changes that take place after the first conference at the end of the hearing. Here, I am reminded (somewhat wickedly) of the first line of a judgment of the Court by Lady Hale earlier in the year: 'The issue in this case is whether and in what circumstances a judge who has announced her decision is entitled to change her mind.'[46] On such matters I was exceptionally fortunate to be the first scholar that I am aware of to be given the opportunity to scrutinise a sizeable proportion of the judicial notebooks of Law Lords and Justices, notably Lords Reed of Drem and Lord Bingham. These notebooks contain not just details of counsel's arguments but also the only extant records that exist of

[44] *Bank Mellat v Her Majesty's Treasury (Nos 1 and 2)* [2013] UKSC 38/39.
[45] See Chapter 5 *Final Judgment*.
[46] *In the matter of L and B(Children)* [2013] UKSC 8 at [1].

the first case conferences in the final Court. By comparing these notes with the final published judgments in a case it is sometimes possible to detect where there have been changes of vote between the first conference and the final judgment. Interestingly, the results from a significant sample of both these Law Lords' notebooks produce a similar figure. For Lord Reid it was 13 out of 70 cases and for Lord Bingham it was 15 out of 96 cases – suggesting that in around 16% of cases in the House there was a change in vote on outcome between first conference and final judgment. Nothing in my studies of the Supreme Court suggests that the figure is much different for that court either. Amongst Lord Reid's cases where there seems to have been a late change of mind and vote include such famous cases as *Rookes v Barnard,*[47] *White and Carter (Councils) Ltd v McGregor,*[48] *Anisminic Ltd v Foreign Compensation Commission,*[49]*Home Office v Dorset Yacht Co,*[50] and *Cassell v Broome.*[51]

I am not going to show you anything from the Bingham notebooks however we will look briefly at two cases from that era which involved attempts at task leadership and pragmatic decision-making. The first was *Twinsectra*.[52] It was 4:1 at the first conference and 4:1 when the judgment was published 153 days later (twice the average gap between the hearing and the handing down of the final judgment in all cases in 2002). Yet it was a rather more lively affair than it appears. The delay was caused because of a sustained campaign by Lord Millett to win over Lord Hoffmann to dismiss the appeal. Lord Hoffmann and his colleagues were arguing that the test for 'dishonesty' in financial transactions was a combined test of subjective and objective elements. Lord Millett asserted that the test was purely objective:

> The problem was Lennie because … he has such influence that I knew that in order to persuade the majority I had to persuade him. If I could persuade him the rest would fall into line, or most of them. But he was absolutely adamant and I went in to see him several times. I went into his room and we discussed it and we circulated, but he never budged. I offered everything. I said 'If you are sorry for the defendant I am quite prepared to write in a way which will let him off the hook on the facts so long as you give me the law'. 'No'. Then I went away and eventually I came back and I said 'I'm prepared to write *dishonesty* right out of the equation and go back to *knowledge* provided you define it as actual knowledge' and define it the way Donald Nicholls had. Because this *dishonesty* is going to be a trap and he said 'I thought you'd come round to that view, Peter, but I'm not prepared to change my mind'. So that was a failure and I think the last thing I did after I'd circulated, I went and I

[47] [1964] AC 1129.
[48] [1961] UKHL 5.
[49][1969] 2 A C 147.
[50] [1970] UKHL 2,[1970] A C 1004.
[51] [1972] UKHL 3, [1972] A C 1027.
[52] *Twinsectra Ltd v Yardley and Others* [2002] UKHL 12, [2002] 2 AC 164.

> saw him and I said 'You know, Lennie that your view means that you are going to draw a distinction between procuring a breach of trust and procuring a breach of contract and that is nonsense, especially as in this case they could have pleaded it as procuring a breach of contract as the trust was contractual', and his response to that? 'Yes, Peter, that's your best point'. Now it's not a best point, actually it's a devastating point. (Lord Millett)

Lord Millett in a self-deprecating way blamed his ineffectualness at persuading his colleagues for this unfortunate case, however his success rate in 'close calls' was the same as Lord Hoffmann's. They were both twice as often on the majority side as on the minority. Ironically, the Privy Council in *Barlow Clowes* revisits the whole question three years later. As James Lee notes in a hard-hitting critique,[53] Lord Hoffmann in giving the judgment of the Council, effectively accepts that the position supported by Lord Millett in *Twinsectra* was right all long, but without admitting that he had changed his position from *Twinsectra.*

Similar pragmatic tactics by Lord Hoffmann emerged in the famous causation cases in the Lords in the Bingham era, of which *Barker* was the fourth and *Fairchild* the first. It seems that in *Barker*, Lords Hoffmann and Rodger, the only Law Lords left from the original panel in *Fairchild*, were at loggerheads from an early stage as to the interpretation to be given to the test developed in *Fairchild.* It is understood that Lord Rodger felt that he had a majority of the panel in *Barker* on his side, when he was struck by a bout of flu. By the time he returned Lord Hoffmann had persuaded them all that his arguments in *Fairchild* had been accepted by the majority of the panel, when it is far from clear from the judgments that this was so.[54] Lord Rodger is understood to have been unimpressed at this re-writing of the judgment in *Fairchild* and the stinging tone of his dissent (which his colleagues steadfastly avoid engaging with) shows this clearly. It is to be doubted that his irritation would have been in any way diminished by Lord Hoffmann's much later confession[55] that he had indeed been indulging in 'some judicious re-writing of history' in the case (as Lord Rodger had asserted in his dissent), with a view to some pragmatic damage limitation in relation to the anomalies created by *Fairchild*).[56]

Social Leadership

[53] J Lee, 'Fidelity in Interpretation: Lord Hoffmann and *The Adventure of the Empty House*' (2008) 28 *Legal Studies* 1.
[54] See J Lee, 'Fidelity in interpretation: Lord Hoffmann and the Adventure of the Empty House' (2008) 28 *Legal Studies* 1.
[55] Ironically in a volume of essays in tribute to Lord Rodger. See Lord Hoffmann, *'Fairchild* and After' in A Burrows, D Johnston and R Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press, 2013).
[56] Whilst Lord Hoffmann is unrepentant about his role in *Barker* he does regret the *Fairchild* decision which he now feels is an example of a hard case making bad law, see *'Fairchild* and After'.

So much for task leadership but almost as important for collegiality and team-working to flourish is social leadership. There is little doubt that for later years of the Bingham Court and the early years of the Supreme Court the pre-eminent social leader was Lord Brown. Arguably, however, he was even more effective in this role in the House of Lords than he was in the Supreme Court. Part of the reason is a phenomenon which I believe has been unjustly neglected in the study of appellate judicial decision-making – namely Geography.

One of the curiosities of studying appellate judicial decision-making and the recent writings on the architecture of the courts[57] is the complete neglect of the topic of the office location of the judges. In reality geography does make a difference to appellate judicial decision-making, since judges – like other social beings – tend to interact more frequently with their neighbours than those who are situated at some distance from them, or on another floor. In the House of Lords the Law Lords' rooms were located on a long corridor on the second floor of the House of Lords.[58] Almost all of them were on one side of the corridor while the Secretaries' office and the coffee machine were located on the other side at on eend of the corridor. Room allocation was largely based on seniority which entailed that in the main the more senior Law Lords were located adjacent to one another and closest to the Secretaries' office and the more junior Law Lords were to be found at the far end of the corridor,[59] near the Library.[60] The main exceptions were Lord Saville (located at the end of the corridor, because he was elsewhere[61] for much of the Bingham era), and Lord Brown who had the office next to the Secretaries' office and the coffee machine. The key location of this office entailed that any Law Lord who visited the Secretaries or the coffee machine was likely to engage with Lord Brown in conversation. Frequently several Law Lords were to be found in his office. As Lord Phillips (whose office was directly opposite Lord Brown's) told me,

> I tend to drop in on Simon Brown in particular because he always sits with his door open and you walk past … and if he's with me on a case when I come in in the morning I shall probably just exchange views with him, or even in advance, simply because of his geographical proximity, so we tend to know much more about the way we're looking at things than I will with people down the corridor, simply because I don't walk past their door.

[57] J Resnik and D Curtis, *Representing Justice: Invention, Controversy and Rights in City States and Democratic Courtrooms* (New Haven CT, Yale University Press, 2011).
[58] Known as the 'Law Lords' Corridor'.
[59] Which can only have heightened the perception of isolation which they felt, having been used to the camaraderie of the Court of Appeal.
[60] Lords Hope and Rodger who were in the middle of the corridor, had adjacent rooms, which assisted them when working together on Scots appeals.
[61] Conducting the Bloody Sunday Inquiry.

In the Supreme Court the geographic layout is quite different. The original plan to locate all 12 Justices on the top floor had to be abandoned on space grounds, leading to a solution which placed four offices on the second floor and eight on the third floor situated on three sides of a hollow square, with the tea room and open plan space for the law reporters and judicial assistants on another side, near to the Secretaries. As before, the room allocation is largely by seniority, placing the President and Deputy President in adjacent rooms on the top floor and three of the more junior Justices on the second floor. As in the House, room location has a major influence on interactions. The junior Justices on the second floor often kept their doors open and would chat amongst themselves on almost a daily basis; however, their visits to their colleagues on the top floor are far less frequent. Similarly the Justices in the five contiguous offices on the top floor corridor tended to visit each other more frequently than their colleagues on the lower floor or even the President and Deputy President. As one of the juniors in the early days remarked, 'if you have to go upstairs, you don't know whether they are there. I suppose you could ring. Whereas with [Lord Kerr] I just walk a few paces along the corridor'.

As will be apparent from this description there is no *one* strategically located office which forms the focal centre of the Court as there used to be in the House of Lords. This has had an impact on information flows in the Court. Lord Brown continued to play the social leadership role but perhaps with less impact than in the House. However, as we have already seen the move to the new Court led to him team-working closely with Lord Rodger who was in contiguous room which as we saw earlier led to them voting together in the majority and in dissent 93% of the time in 2010/11. Once Lord Brown had retired, however, several Justices remarked on the loss of fun that went with him. It is not clear who, if anyone, now performs this important role on the Court.

So much for the dialogue between the Justices – much the most significant of the dialogues. I have devoted most of the lecture to it, and the less observed elements of this dialogue in particular, because I disagree with those scholars who argue that judgments should be left to speak for themselves. That may be the legal position, but I believe that in a democracy its appropriate for us to have an appreciation as to how judgments are made, how they change in the drafting, and how and why judges change their minds – a perfectly normal and healthy practice.

Time does not permit much by way of discussion of the other important dialogues in which the Court engages – but I shall essay a brief reference to three. The comparatively new

discourse – that with judicial assistants has been transformed with the move across Parliament Square. From a Hogwarts style garret which few Law Lords visited the Judicial assistants have doubled in number and now occupy a strategically placed open-plan setting between the Justices and their secretaries. Yes, geography has made a difference to them too.[62] Their influence has also grown, as the book describes.[63] That is very much the pattern with law clerks in the US Supreme Court – which may be a caution for us.

However, it is with respect to the other two arms of government, Parliament and the Executive, that the Supreme Court has arguably its most problematic dialogues. Lord Sumption's recent lecture on the *Limits of Law*[64] underlines the fact that the Supreme Court and Parliament are no nearer to attaining a mutual recognition of the institutional competencies of each institution when it comes to delimiting parliamentary sovereignty or judicial law-making.[65] Indeed, with regard to transparency in relation to judicial law making, I argue that there has been something of a retreat towards formalism and a down-playing of the creative role of the Court. As Lord Sumption has remarked elsewhere, 'The declaratory theory is back again in full force'.[66] Overt exercises of the power to depart from their own precedents are fewer than those that go under the radar. Some commentators consider that the Court has become more transparent in its approach to law making than the House of Lords was. The findings of my book[67] do not point in that direction. Lords Devlin and Radcliffe would feel quite at home with the 'softly, softly' approach of today's treatment of precedent. True the Justices freely admit to making choices but for some of them this is indistinguishable from pursuing the better answer even if there is no single right answer. Justices still give lectures on judicial law making but few that have the bold directness of Lord Reid's evisceration of the declaratory theory 40 years ago – 'we do not believe in fairy stories'.

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[62] The different geography of the House of Lords and the Supreme Court also impacted on the interaction between judicial assistants and the judges. See *Final Judgement* chapter 6 and T Nesterchuk, 'The View from Behind the Bench' chapter 11 in A Burrows, D Johnston and R Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford, Oxford University Press, 2013).

[63] *Final Judgment* Chapter 6.

[64] Lord Sumption, *The Limits of Law* (20th November 2013) 27th Sultan Azlan Shah Lecture, Kuala Lumpur, on the Supreme Court website.

[65] What for example should the Supreme Court do if it was established that Parliament had passed a piece of legislation understanding it to mean one thing, based on ministerial assurances, and it subsequently emerges that Parliament had been misled. See Lord Mance's dissent in *Assange v The Swedish Prosecution Authority* [2012] UKSC 22.

[66] Interview with the author, 2013.

[67] See *Final Judgment* Chapter 7.

With the Executive, channels of communication are also a work in progress. As is well known Lord Bingham declined to meet with the Home Secretary after the Belmarsh case, deeming it improper to provide him with guidance as to what the Court might say if a new set of reforms were introduced. Yet the courts are familiar with Attorney-General's References, and the Canadian Supreme court has jurisdiction to entertain Government References where the Government seeks guidance on what are hypothetical issues.[68] Perhaps this is a reform worth considering. The UK Supreme Court has remained as robust as the House under Lord Bingham in national security cases and contrary to Lord Bingham's expectations and – to a certain extent - Lord Phillips' remarks last year,[69] it has been even stronger than the House in challenging the Executive in immigration and asylum cases.[70] Lord Bingham was careful to avoid unnecessary strains in the relationship between the UK's top court and the Executive, which explains his deliberately low key judgment in the Belmarsh[71] case. Lord Neuberger shows all the signs of understanding the value of this example,[72] but he and Baroness Hale are to be commended for boldly attacking the recent cuts in legal aid and access to justice. There are signs then that in its dialogues with the Executive, the Court is conscious, as Lord Bingham was, of the importance of engaging appropriately with the public.

To sum up. It is clear to all that many significant and worthwhile changes have taken place in the transfer of the final judicial authority from the House of Lords to the newly independent UK Supreme Court. We have seen that dialogues lie at the heart of understanding how appellate judicial decision-making works in the final court and we have also seen that whilst the Court has taken great strides in its dialogue with the public there is still some distance to go. Further, even though the dialogues with Parliament and the Executive are challenging, they are challenging in ways that have the potential to strengthen the unwritten constitution in the United Kingdom. Finally, the dialogue between the Justices is being transformed through a commitment to team- and collective-working. This has advantages in increasing certainty for the lower courts but it also has potential risks – including to transparency. In short, there is much to be admired. The architects and

[68] Under s. 53 of the Supreme Court Act 1875 (as amended), the Governor in Council may refer to the Supreme Court, for its opinion, important questions of law or fact concerning the interpretation of the Constitution and the constitutionality or interpretation of any federal or provincial legislation.
[69] Lord Phillips of Worth Matravers, 'The Birth and First Steps of the UK Supreme Court' 1 (2012) *Cambridge Journal of International and Comparative Law* 9
[70] See *Final Judgment* Chapter 7.
[71] *A v Secretary of State for the Home Department* [2004]UKHL 56.
[72] See Lord Neuberger, 'Judges and Policy: A Delicate Balance' Lecture to the Institute for Government, 18 June 2013. (On the Supreme Court website)

implementers of the transformation have done their jobs well. The debate will necessarily continue over whether all of the changes are for the better or not, or whether some have gone too far and others not far enough but those seem to be the proper questions that arise with respect to institutional change in an ever-changing world. That is surely healthy in a modern democracy.