SPECIAL FEATURE

The Supreme Court of the United Kingdom

LORD PHILLIPS*

In March 1996 I had the great pleasure of spending a period at Victoria University as Judge in Residence at the Law Faculty. I had just presided over the trial of the Maxwell brothers, who had been acquitted of being party to their father's fraudulent activities. The trial had lasted many months and left me with a good batch of leave outstanding, hence my trip to New Zealand. It was a very happy visit, which included tramping the Routeburn Track. It is a great joy to be back and to have the chance to see a lot more of your wonderful country.

Just before the end of the Maxwell trial I was promoted to the Court of Appeal, an event that took me completely by surprise. Certainly, I then had no inkling of the course my judicial career would follow. It did not occur to me that we would ever have a Supreme Court, let alone that I should have the privilege of finding myself the first President of it.

I well remember when I first learned that we were to have a Supreme Court. It was on the 12 June 2003 — almost midsummer day. The administration of justice in England and Wales was then firmly in the hands of the Lord Chancellor and his Department. I was then Master of the Rolls. I had persuaded Lord Woolf, the Lord Chief Justice that it would be a good idea for the most senior members of the judiciary to spend a few days with the most senior members of the Lord Chancellor's Department discussing matters of mutual interest. So we all went off to the Swan Inn at Minster Lovell in the Cotswolds, one of the most beautiful parts of England. The Inn had been tastefully converted into a conference centre. Such an event had never taken place before, and so far as I know has never taken place since.

We all came down to breakfast on the first day to learn that there had been an announcement from Downing Street of some important constitutional changes. The office of Lord Chancellor was to be abolished and replaced by a Secretary of State for Constitutional Affairs, who would have no judicial functions. Lord Irvine, the incumbent, was standing down, to be replaced by Lord Falconer, who would be Lord Chancellor as a kind of night watchman until its abolition, while being at the same time the first Secretary of State for Constitutional Affairs. There would be a Judicial Appointments Commission to select judges — previously the prerogative of the Lord Chancellor — and last, but not least, the Law Lords would be abolished to be replaced by a Supreme Court.

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No one at Minster Lovell had had any inkling of these dramatic changes. The senior members of the Lord Chancellor's Department were flabbergasted to learn that their Department was being abolished and with it their Minister. There had been no consultation about this at all. Not even the Queen had been informed of the imminent demise of the official who had, for a millennium or more, been the sovereign's most senior Officer of State. The shadow leader of the House of Lords, Lord Strathclyde, described the proposed changes as "cobbled together on the back of an envelope".[1]

For a long time the chain of events that had led to the sudden decision to introduce these constitutional changes remained a matter of speculation, because those in the know, and in particular Lord Irvine, kept a discrete silence. The truth came out about six years later when the House of Lords Select Committee on the Constitution, which was looking at the role of the Cabinet Office, took evidence from Lord Turnbull, who had been Cabinet Secretary at the time of the changes. He described the manner in which the changes had been introduced as "a complete mess up".[2] There had been no consultation because the Lord Chancellor, Lord Irvine, had been strongly opposed to the changes and had not been prepared to lead the consultation.

This provoked Lord Irvine to submit to the Committee a detailed paper giving chapter and verse as to what had in fact occurred. It was an astonishing story. He had not been consulted about the changes. They first came to his attention when he read rumours of them in *The Times* and *The Telegraph*. He accosted the Prime Minister, his old friend Tony Blair, to ask whether there was any truth in them. To his astonishment Blair admitted that the rumours were accurate.

When Lord Irvine learnt what was proposed, he submitted a paper to Blair stating that the abolition of the office of Lord Chancellor was a massive enterprise, involving primary and secondary legislation, and that the whole process had been botched as a result of poor advice and the failure to involve himself and his Permanent Secretary, Hayden Phillips. Lord Irvine pointed out that he was about to go out to consultation on a raft of important reforms. He suggested that these should proceed and offered, after they had been completed, to pilot through the legislation necessary to abolish the office of Lord Chancellor and to create a Supreme Court, leaving the Government when this legislation received the Royal Assent. This offer was rejected by Blair, whereupon Lord Irvine resigned.

This account provoked a letter to the Select Committee from Tony Blair himself, sent from somewhere abroad. He admitted that the changes were all done on his initiative. He accepted that the process had been "extremely bumpy" and "messy".[3] He paid tribute to Lord Irvine, but said that because he was unsympathetic to the changes, he had decided to make a change of Minister as well as a change of Office.

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1 Patrick Wintour and Clare Dyer "Blair's Reforming Reshuffle" The Guardian (United Kingdom, 13 June 2003).

2 Constitution Committee The Cabinet Office and the Centre of Government (29 January 2010) at 82.

3 At 86–87.

What Blair did not explain was what had motivated him to make these changes. The creation of a Supreme Court had long been advocated by some, including the Senior Law Lord, Lord Bingham, on constitutional grounds, but many are not convinced that it was primarily these grounds that motivated Tony Blair. It is at least possible that the creation of a Supreme Court was seen as a logical accompaniment to the abolition of the Lord Chancellor and that the motivation for the latter was political. There were, however, sound constitutional reasons for the changes. They were a final step in the separation of powers between the judiciary and the legislature.

For most who lived outside the United Kingdom and for many within it, the status and functions of the Law Lords was something of a mystery, so I am going to give you a little potted history lesson, with apologies to those who know it all already.

Most modern democracies recognise that each of the three arms of state should operate independently of the other two. The three arms of state are, of course, the legislature, the executive and the judiciary. This is known as the separation of powers. In countries with a written constitution, the separation of powers is embodied in that document. When our colonies have gained independence it has been on terms of carefully prepared written constitutions. But we do not have a written one of our own, and the separation of powers has only gradually, and incrementally, become part of our unwritten constitution.

The King used to live in the Palace of Westminster in London. He would summon his advisers to Westminster. Initially these were noblemen, the Lords created by the King. Once the King had made a man a Lord, the title passed on his death to his heir, so that there grew up a body of hereditary peers or Lords. Later the King also took to summoning, to advise him, representatives of the different regions of the country who were not Lords. These two bodies of advisers developed into the two Houses of our Parliament, the House of Lords and the House of Commons. They still sit at Westminster, though this no longer serves as the royal palace. They are the first arm of state, the legislature. Their role is no longer advisory. They enact our laws. To become effective, the laws have to be approved by the Queen, but this is a mere formality.

The second arm of state is the executive, which consists of all the officers and officials who are responsible for the administration of the United Kingdom. The most important are the Ministers. The King used to appoint the Ministers, to whom he delegated his executive powers. The Queen still appoints her Ministers, but she does so on the recommendation of the Prime Minister, who is normally the leader of the party that has most seats in the House of Commons.

By convention Ministers have to be Members of Parliament so that Parliament can hold them responsible for their actions. This arrangement is in conflict with the theory of the separation of powers. Ministers have to abide by the laws of the land, but they are involved in making those laws.

But apart from the Ministers, there are literally millions of officials who are part of the executive, responsible for running the country in accordance with its laws. All members of the executive, including Ministers, are subject to supervision by the judges, the third arm of state.

In the Great Hall at Westminster, the King's judges used to sit to administer the law on his behalf. He appointed them and he could dismiss them. However, the judges soon acquired a fierce independence. This was underwritten by Parliament in 1700 when it passed the Act of Settlement which provided that judges should be appointed for as long as they should be of good behaviour and could only be removed if both Houses of Parliament agreed that they should be. In the whole of our history no High Court Judge has been removed from office.

Because our laws and our political institutions evolved peacefully, we never had the revolution that would have resulted in our drawing up a written constitution. And the evolution from an all-powerful King to the sharing out of his powers among the three arms of state did not result in a situation where the separation of powers was all that obvious. Take the Lord Chancellor for instance. His is one of the most important offices of state and it used to be the most important. He was the King's right hand man and adviser. As such he used to hear petitions and administer justice in his own court. In recent times, the Lord Chancellor retained both his administrative and his judicial duties. He was appointed by the Prime Minister, so that his office became a political office. He was the most important member of the Prime Minister's Cabinet, so he was a leading member of the executive. He had particular responsibility for the administration of justice and the upholding of the rule of law. One of his most important duties was recommending who should be appointed as judges. But he was also a key member of the legislature, for he presided over the legislative business of the House of Lords. He was, in effect, the speaker of the House of Lords. Nor was that the end of it. The Lord Chancellor retained his judicial functions. He sat as a judge — the most senior judge in the land, and so he was head of the judiciary. He was the very antithesis of the separation of powers. He was the combination of powers. So you can see that the abolition of the Lord Chancellor was a logical step in furthering the separation of powers.

In the event, as Lord Irvine had advised, it proved more difficult to abolish the office of Lord Chancellor than Tony Blair had imagined. He had about 5,000 different statutory functions. Primary legislation was required and the House of Lords, affronted by the manner in which these changes had been decided, was not prepared to rubber stamp the abolition of the office. Ultimately, the office was preserved, but stripped of its judicial functions. And now, for the first time, we have a Lord Chancellor who is not a lawyer.

How about the abolition of the Law Lords? Like the Lord Chancellor, they were, on the face of it, an affront to the separation of powers. From the time of its creation, Parliament, and more specifically the House of Lords, had entertained petitions from citizens, sometimes brought directly and sometimes by way of appeal from the decisions of the lower courts of

England and Wales. After the Act of Union, appeals were also brought in civil matters from the Court of Session.[4] In the 18th and early 19th century the House of Lords sat in the morning to transact its judicial business, which consisted largely of appeals from the courts. Peers who had no judicial, or even legal experience, could take part in the debate and vote on the result of an appeal, but they would receive advice from the judges and the Lord Chancellor would preside. Sometimes justice was neither done nor seen to be done. One such occasion was in 1783 in the case of the *Bishop of London v Ffytche*.[5] The judges advised the House that Ffytche had the merits, but the Lords Spiritual packed the House and the decision went in favour of the Bishop. In defiance of the doctrine of separation of powers, legislators were acting as judges.

The transition from this state of affairs to that prevailing at the start of the 21st century is a complicated and confusing story. The turning point was 1876, when the Appellate Jurisdiction Act provided for professionally qualified judges to be made members of the House of Lords in order to transact its business as, in effect, the final court of appeal of the United Kingdom.[6] They were called Lords of Appeal in Ordinary and from then on only they, and peers who had held high judicial office, were permitted to sit and vote on appeals that were made to the House of Lords. The number of these so-called "Law Lords" was increased from time to time until it reached the number of 12.

The Law Lords had the same rights and privileges as other peers. They were permitted to take part in the legislative business of the House, and initially quite freely did so, although, by convention, not when the business was political in character. More recently some Law Lords, and I was one of them, decided not to exercise this right. The Law Lords functioned very much like any other appellate court, usually sitting in constitutions of five, so two panels could sit at the same time. They were independent of any political influence and enjoyed a high reputation. In theory, however, legislators were sitting as judges in violation of the principle of separation of powers.

The announcement that we were to have a new Supreme Court received a mixed reception. Many thought that it was high time that the most senior judges were removed from Parliament, so that their independence from the legislature was clear to all and their role properly understood. Those opposed to the creation of a Supreme Court argued that it was unnecessary and undesirable. It was unnecessary because the Law Lords already functioned in practice as a fiercely independent final court of appeal. No one sought to exert political influence over them. Their judgments showed no improper deference to Government. Law Lords by convention had ceased to take part in the legislative business of the House. They made, however, a valuable contribution by chairing apolitical Committees.

4 Union with Scotland Act 1706 (Eng) 6 Ann c 11.

5 *Bishop of London v Ffytche* (1783) 2 Bro PC 211, 1 ER 892 (HL).

6 Appellate Jurisdiction Act 1876 (UK), s 6.

It was also argued that it was valuable for them to rub shoulders, in their working environment, with the wide range of personality and experience represented in the House of Lords rather than retreating into an ivory tower. Furthermore, the ivory tower was likely to be extremely expensive. The expenditure could not be justified.

I was one of those in favour of a Supreme Court. Judges should not only be independent; they should be seen to be independent. Futher, justice could not readily be seen to be done by members of the public when hearings took place in a remote Committee Room in the House of Lords and judgments were delivered on the floor of the House in a ceremony that might have been designed to bemuse anybody who happened to observe it.

Working conditions were not ideal in the Law Lords' corridor, even if they were the envy of other members of the House. Judicial assistants had to be housed in an attic, their numbers restricted by constraint of space. The time had come to sever the judiciary's links with Parliament and, with hindsight, I think that it proved a pretty good time to go. It was not, however, until 2009 that the new Supreme Court opened its doors. Several years were spent in identifying the old Middlesex Guildhall as the building that was to house the new Court, and then converting it.

I had nothing to do with the planning of the new court, and little time to take an interest in it. I had my own challenges dealing with the constitutional changes as the first Lord Chief Justice to have inherited the Lord Chancellor's role as head of the judiciary. Like most others, including Lord Bingham, the Senior Law Lord, I had not been impressed with the selection of the Middlesex Guildhall to be the new Supreme Court. On one hand, its position was ideal, facing the Houses of Parliament and flanked on one side by Westminster Abbey and on the other by the Treasury. But on the other, the merits of the building itself were not immediately apparent. When no longer needed for local government, it had been converted into a criminal courthouse. This is how it was described in an official publication:[7]

Designed by JS Gibson and built in Portland stone, it is a typical late gothic revival building — simple and largely unpretentious, apart from the windows and central porch.

Such pretentions as the building had were hidden under the grime of ages, so that it would not even have been noticed by the average passer-by.

A small committee of Law Lords, headed by Lord Hope and Lady Hale, joined with officials from the Ministry of Justice in planning its transformation. The stone was cleaned, inside the building and out, emerging a gleaming white with a wealth of carving. The number of courts was reduced to three, two for the Supreme Court and one dedicated court for the Judicial Committee of the Privy Council. This, to my regret, replaced the lovely Privy Council Court in Downing Street, designed by Sir John Soane, with which I suspect some here will be familiar. A floor was removed to

7 Peter Jepson "A Supreme Court for the United Kingdom" (January 2008) <www.peterjepson.com>.

enable a magnificent library to be constructed, spanning the building from top to bottom, and the cells were converted into a public cafeteria. Furniture and fabrics were specially designed and manufactured and wall-to-wall carpeting was designed by Peter Blake, a pop artist, whose most famous work was a sleeve for a Beatles LP.

A year before the Court opened, I returned to the Lords to take over as Senior Law Lord from Lord Bingham, who had reached his retirement age of 75, and to preside over the transformation of the Law Lords into Justices of the Supreme Court. Tom Bingham was the greatest English jurist of his generation. It was a misfortune that he had to retire before the Supreme Court opened its doors and a tragedy that he died so soon thereafter.

The primary object of the move to the Supreme Court was to make clear to the public the nature of the final court of appeal of the United Kingdom, the independence of that Court, and to enable the public to follow work that the court was doing. Transparency was the name of the game. The Justices were to expose themselves to the public gaze. I arrived in the Lords to find that my new colleagues were split evenly between those who were in favour of the change and those who were opposed to it. Indeed, I found that some of my colleagues were not greatly in favour of change of any kind. This was a disappointment to me as I had a number of ideas as to how we might improve on our working methods, even before the move to the Supreme Court, but having just arrived as a new boy I did not think that it would be a good idea to try to impose these in the face of opposition.

I think that within a week of moving into the Supreme Court there was not a member of the Court who would have gone back to the House of Lords. Our living and working conditions were incomparably better. We had an elegant dining room where we could all have lunch together, something that had never been possible in the House of Lords. We had spacious open-plan offices for our secretaries and our judicial assistants. This enabled us to increase the number of the latter so that anyone who wanted to could have a dedicated judicial assistant.

Lord Hope, the longest serving Law Lord, was appointed Deputy President of the Court. He was one of the two Scottish representatives on the Court. He may well have been disappointed not to have become its President but, if so, he gave no sign of this. I could not have had stronger or more loyal support. And with that support and usually the support of the majority of the other members of the Court, we set about introducing some changes to our working methods.

One thing that my colleagues were determined should not change was what we wore when sitting. Because the Law Lords sat, in theory, not as judges but as members of the House in committee, they did not wear judicial robes but sat in suits like any other member of the House. I would have favoured wearing a simple black gown when we were transformed into Justices of the Supreme Court, but none of my colleagues favoured any form of judicial uniform. I had had a fairly torrid time, when Lord Chief Justice,

in simplifying judicial dress for civil hearings with the abolition of wigs, wing collars and bands, and I was not going to seek to impose my views on my colleagues, though I thought the public might be puzzled that we did not look like judges. Sure enough, when I was showing a visiting lawyer round the Court and we went into the back of a hearing where a wigged and gowned counsel was addressing the Court, the visitor asked me why the judge was standing up.

When judicial wigs were abolished in civil hearings I gave the Bar Council the choice of whether or not counsel would follow our example. To my surprise, the Bar opted to retain wigs. So I was a little surprised when the barristers on the Supreme Court User's Committee asked if they could follow our example in dispensing with legal dress in our Court. We have permitted them to decide whether or not to appear robed, only requiring uniformity. Since then it has been very rare for counsel to robe. I think that most, if not all of us, preferred being addressed by advocates whose appearance was not disguised.

The first change of our own procedure that we made was to have regular meetings of all the Justices of the Court once a month or so. That was, in fact, a change that I had introduced before the move to the Supreme Court. These meetings enabled us to give regular and unhurried consideration to our working methods.

The second change that we made was for the panel hearing an appeal to meet for a brief discussion before the start of the hearing to identify the issues that needed exploring in the hearing. In the old days some judges and Law Lords made a practice of not reading any of the papers before a hearing in order to approach it with a completely open mind. Appellate hearings lasted two or three times as long as they do today. Today the pressure of time is such that counsel expect the Court to have read at least the judgments below and the written cases on each side. These set out the argument in great detail. It is sometimes not easy to do this pre-reading without forming a provisional view on the merits, but it is not the practice to exchange these views. We felt it important to do our best not to prejudge an appeal. In this the Supreme Court differs from the Court of Appeal of England and Wales, where the Lords Justice freely exchange their provisional views on the merits before the appeal is heard.

Sometimes I found myself without sufficient time to read into a case before the hearing and, on occasion, I did not identify a point of significance, not raised in the written cases, until after the hearing was over. I am not sure that the Court has yet got the balance quite right between the time spent working out of court and the time spent in oral hearings. More time should, I believe, be spent both reading into cases before the hearing and discussing them after the hearing.

In the House of Lords it was very unusual to sit in a composition of more than five Law Lords. One reason for this was perhaps the physical constraint of the Committee Rooms in which the appeals were heard.

Decisions of a panel of five are unsatisfactory where there were dissents, for it is obvious that a different composition of the Court might have brought about a different result. The larger of the two Supreme Courts can accommodate nine Justices. We took a decision that where an appeal was particularly important we would sit seven, and when it was exceptionally important, or there was a possibility that we might reverse one of our previous decisions, we would sit nine strong.

I am often asked how the decisions to sit more than five are taken and how the panels are selected. The Court divides into panels of three to consider applications for permission to appeal. Those panels identify the cases that justify sitting more than five, although the final decision is taken by the President and the Deputy President at a meeting with the Court's excellent Registrar, Louise di Mambro. With her help they decide who should sit on each panel. Where the appeal involves a specialist area of the law, the panel will usually include at least one member of the Court with particular experience in that field. As to the remainder, in the House of Lords it used to be the practice for a Law Lord who was particularly interested in a case to ask to sit on it, and for these requests, and the seniority of those making them, to be taken into account when making up the panel. We decided that it was better that selection of the members of the panel should be done on a random basis and that is the practice that has been followed.

With my new found leisure I have been doing a little analysis of cases where we have sat more than five. I looked at fourteen of these decided in the last two years in which I presided. In five of these we sat nine and in nine of them we sat seven. In only one of the appeals in which we sat nine was the result a close one. That was the case of *R (Adams) v Secretary of State for Justice*.[8]

The three appellants in the case had been convicted of murder but their convictions were subsequently reviewed and quashed. The issue was whether they were entitled to compensation under s 133 of the Criminal Justice Act 1988. That provides that a person is entitled to compensation where a "new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice". The question was what was meant by a "miscarriage of justice". At the end of the day this proved to be very much a matter of impression. A minority of four held that the newly discovered fact had to demonstrate that the defendant was in fact innocent. The majority of five did not go that far. We held that the new fact had so to undermine the evidence against the defendant that no conviction could possibly be based upon it. It is, I think, obvious that if the Court had had a different composition the result might have been different. Sitting nine did little for the credibility of that decision. In the other four cases, however, the majority consisted of six or more members of the Court. In those cases I was very glad that we had sat nine.

8 *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC 48.

Of the nine cases in which we sat seven, we were unanimous in four, six to one in the fifth, and five to two in a further two. Sitting seven added credibility in those cases. It did not do so in the final two cases where we split four to three. One of those was *AB v Ministry of Defence (Atomic Veterans)*.[9] This raised a very tricky question of limitation. With hindsight I wish that we had sat nine on that appeal, and that is not just because I was one of the minority. The other case was *Edwards v Chesterfield Royal Hospital NHS Foundation Trust*,[10] which raised the question of whether there was a common law right to damages for breach of contract in relation to the *manner* of being dismissed in addition to the claim for damages for being wrongly dismissed. I was in the majority of four who held that there was not, but once again, with hindsight, it might have been better had we sat nine.

In these cases of enlarged courts it will not surprise you that not everyone wrote. Usually a number of the Justices would subscribe to a single judgment. The exception was *Sienkiewicz v Greif (UK) Ltd*.[11] This case involved the law of causation in relation to mesothelioma, an area where the House of Lords had diverted the common law in a manner that many now regret. Although the court of seven was unanimous in dismissing the two appeals, every member of the court wrote a judgment. The case has wider implications in respect of causation of personal injuries and I fear that we may not have done much to clarify the law.

One change in our practice that was inevitable was in the manner of giving judgment. The procedure in the House of Lords was based upon what used to happen in the olden days when Lords debated whether or not an appeal should be allowed and then voted on the result. The Law Lords who had sat on the appeal would gather in the Chamber at 9.30 am, before the normal business of the House began. With them would be the duty Bishop. The senior Law Lord would sit on the woolsack. The mace would be carried in and all would stand and bow to it, before it was put in place upon the woolsack. The Bishop would then read prayers, while the Law Lords knelt on the benches. Counsel and solicitors in the case would then be called in. The Law Lords would each then rise in turn to deliver their speeches, which were in effect their judgments. Once they used to read them out in full, but more recently each would simply say, "for the reasons in my speech, a written copy of which has been made available, I am of the opinion that the appeal should be allowed (or dismissed)". The presiding Law Lord would then put to the vote the motion that the appeal should be allowed, instructing all content to say "content", and then do the same for the motion that the appeal be dismissed. Finally, he would announce the result of the vote. It was, I have to say, a complete charade, and one that would have been unintelligible to any member of the public. There was, however, never any member of the public present.

9 *AB v Ministry of Defence* [2012] UKSC 9, [2013] 1 AC 78 [*Atomic Veterans*].

10 *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58, [2012] 2 AC 22.

11 *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10, [2011] 2 AC 229.

Because each Law Lord had to deliver his own speech, or judgment, there was no scope for joint judgments, although you could of course simply say that you agreed with someone else's speech. This was, however, an encouragement to each Law Lord to write his or her own judgment in his or her own words, so you often got an unnecessary, and most would say undesirable, proliferation of judgments. In the Supreme Court there is no impediment to a single judgment of the court, to joint majority judgments and joint dissenting ones. We have been experimenting with different forms of judgment, but generally trying, and I believe, succeeding, to avoid giving judgments that support the lead judgment but add nothing significant to its reasoning.

Judgments are delivered in open court and because we encourage visitors to come into our building, there will often be members of the public present in addition to those who have a personal interest in the appeal. We introduced a practice under which the Justice delivering the lead judgment gives, in his or her own words, a very short explanation of what the case has been about and the result of the appeal. This is intended for the layperson who knows nothing about the case. Where the appeal is one that has attracted wide public interest, the Justice's summary, if he has cut it short enough, may well feature as an item on the television news. That is a considerable innovation. Apart from this, a more detailed press notice is released, prepared by a judicial assistant and approved by the lead Justice, which summarises the decision in terms more suited to the needs of legal correspondents. This is all part of the campaign to get across to the general public what the role of the Court is and how it is performed.

There are permanent television cameras in the four corners of each court, and when a sitting is in progress these are monitored from a control room to ensure that the image shown on the screen is always of the counsel or Justice who is speaking. The proceedings are broadcast within the court building on closed circuit television, but they are also broadcast live online. Unusually, Lord Hope and I decided to permit this without putting it to the vote. I am not sure that there would have been a majority in favour. Presented, however, with a fait accompli, the Justices accepted this and very soon were persuaded that the decision had been the right one.

Some of the Justices were less enthusiastic about the decision that was taken to allow two television films to be made, not simply of the Court proceedings, but of the working of the Court behind the scenes, and even of the private lives of some of the justices. Four of us, I myself, Lord Hope, Lady Hale and Lord Kerr permitted the cameras to follow us about our daily lives. Lord Kerr was shown taking his wife breakfast on a tray. Lord Hope was shown pushing a trolley round the supermarket and I was shown cycling up to Hampstead Heath and taking my morning swim. We believed that it would be a good thing for the person in the street to see that Justices of the Supreme Court led a normal existence and shared their experiences of daily life, though I am not sure that that is true of swimming in the Hampstead

ponds. Some felt quite strongly that this exposure was a mistake and that it was better that the delivery of justice should be impersonal. The films were sympathetic, and everyone who spoke to me about seeing them was enthusiastic about them. I believe that we made the right decision.

How does the Court reach its decision? There is no prescribed approach, but by the end of three years we had refined our practice so that it normally goes like this: immediately after the hearing the Court will meet and, starting with the most junior, each member will be invited to say what he or she provisionally thinks should be the result. Usually it will then be agreed that one member of the Court, obviously one in the majority if the Court is divided, will write the lead judgment.

Where there is dissent, one of the minority will typically also write a judgment. The others will not usually circulate a judgment until they have seen the lead judgments. Then they can decide whether they have something of value to add. This differs from what used to happen in the Lords. Quite often there was a race to circulate the first judgment in the hope of influencing colleagues to adopt the writer's own view.

There were those who predicted that the Supreme Court would be more assertive and more inclined to challenge government action and even legislation than were the Law Lords. One of those who made that suggestion was Lord Neuberger, and it will be interesting to see whether he makes his own prediction come true. I do not believe that it has been true during the three years of my Presidency, although it has suited Ministers from time to time to give the impression that we have been thwarting the will of Parliament. A good example of this was when we ruled that it was incompatible with the Human Rights Convention to put sex offenders on the sex offenders' register for life, without giving them the chance, in due course, to demonstrate that they no longer posed a danger and should be taken off it.[12] That was a decision reached under the previous Labour administration and steps were initiated by the Home Office to make an appropriate amendment to the law.

David Cameron said publically that he was appalled by our decision, a comment that was echoed by the Home Secretary. This gave the impression, and was no doubt intended to give the impression, that we were forcing the Government to amend the legislation, when it was perfectly open to them to take no notice of our decision. Using the Supreme Court as a political punching bag is not desirable, and I have reason to believe that Ken Clarke performed his duty as Lord Chancellor by making this clear to the Prime Minister. I hope that the present Lord Chancellor will be similarly robust should the need arise.

So far I have been talking about things that have gone well over the first three years of the Supreme Court. What has not gone well? The worst blow to the Court was the sudden and untimely death of Lord Rodger from a brain tumour in June last year. He was one of the most senior members of the

12 *R (F (A Child)) v Secretary of State for the Home Department* [2010] UKSC 17, [2011] 1 AC 331.

Court, having been made a Law Lord in 2001. A classicist, a distinguished Roman lawyer and an outstanding intellect, he combined a dry sense of humour, humanity and personal charm with a robust and well-crafted use of language. He was much loved and his death was a great loss to all of us.

The previous year we had been deprived of the services of Lord Collins, the first solicitor to be a member of the Court of Appeal and subsequently of the Supreme Court. He was made a judge after the retirement age had been reduced from 75 to 70, so he had to leave us on his 70th birthday, when he was still firing on all his very powerful cylinders. I had made representations to Jack Straw, the Lord Chancellor, that the retirement age of Justices of the Supreme Court should be put back to 75 in order to enable the Court to have full benefit of their wisdom and experience, but my plea fell on deaf ears.

The provisions of the Constitutional Reform Act 2005 for the appointment of Justices of the Supreme Court are not satisfactory. An ad hoc commission is formed, made up of the President and the Deputy President of the Court and one representative of the Judicial Appointments Commission of England and Wales, and one each of the equivalent bodies in Scotland and Northern Ireland. The views have to be taken of statutory consultees, who include the Lord Chancellor. The Commission then makes a recommendation to the Lord Chancellor, who has to consult all over again the same statutory consultees. He then enjoys a very limited power of veto. This cumbersome system, involving duplicate consultation, takes far too long.

The arrangements for providing the Supreme Court with funding have also proved unsatisfactory. When debating the Constitutional Reform Bill in 2004 Lord Falconer said this:[13]

> I have made clear in all that I have said that the intention is that the money, once granted by the Commons in its Estimates, is passed not from the [Department of Constitutional Affairs] but directly from the Consolidated Fund to the chief executive who, working to the direction of the president and the other members of the Supreme Court, decides how it should be spent. It is hard to imagine more financial independence than that.

Unhappily, things have not turned out like that. Section 48 of the Constitutional Reform Act provided that the Lord Chancellor should appoint the chief executive after consulting the President of the Court.[14]

That was a poor start. The section goes on to mandate that the Chief Executive must carry out his functions in accordance with any directions given by the President of the Court, but in my time the Ministry of Justice never accepted that Jenny Rowe, our outstandingly efficient chief executive, owed her loyalty to the President and the Court rather than to the Lord Chancellor. Nor has all of the Court's financing come straight out of the consolidated fund. Although approved by the Treasury the payment of

13 (14 December 2004) 667 GBPD HL 1247.

14 Constitutional Reform Act 2005 (UK), s 48.

part of the Court's funding is under the control of the Lord Chancellor. His department has been slow to make up the full amount of the funding that it had been agreed that the Court should receive. There are signs, I am happy to say, that a more satisfactory system is being put in place.

Let me end by saying a few words about Human Rights, although this is a topic on which I am speaking in detail in another public lecture that I am delivering on this trip. The Supreme Court has been criticised by some, including Lord Irvine, for being too subservient to the European Court of Human Rights at Strasbourg. I think that there is some force in that criticism. Lord Bingham famously said in a case called *R (Ullah) v Special Adjudicator*, that it was the duty of the English Court to define human rights in a way that was "no more but certainly no less" than their considered interpretation by the Strasbourg Court.[15] And, as usual, there has been a tendency to treat the word of Lord Bingham as the last word on the topic.

However, in a case called *R v Horncastle*,[16] we declined to follow a decision of the Strasbourg Court that purported to outlaw hearsay evidence in criminal proceedings, explaining courteously why we were doing so, and inviting Strasbourg to think again. Strasbourg did so, and in a subsequent decision accepted that it had gone too far. More significantly, Nicholas Bratza, the President of the Strasbourg Court, commended our approach as representing a valuable dialogue between the two Courts. I shall watch with interest the intensity of the dialogue that takes place between the Strasbourg Court and the Supreme Court under my successor.

I hope and believe that I have laid firm foundations on which Lord Neuberger may build.

15 *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 at [20].

16 *R v Horncastle* [2009] UKSC 14 [2010] 2 AC 373.