

THE SUPREME COURT - HONG KONG JUDICIARY 2013

One of the first visitors that I had after our Supreme Court had opened its doors was Andrew Li. He had come to ask whether I would agree to two justices of the Court sitting for a month a year in the Court of Final Appeal of Hong Kong. My first reaction was to ask myself whose permission I ought to seek. And then in a blissful moment I realised that there was no one. The creation of the Supreme Court had been designed to make that Court clearly independent of the legislature and the executive and there was no one who could challenge my decision. And so of course I said yes. The Court of Final Appeal shines as a beacon for the rule of law in Asia and I was delighted that Justices of my Court should be associated with it. And now I have the pleasure and privilege of serving on it myself, and a very great pleasure that is proving to be.

But why, in 2009, did the United Kingdom, one of the world's oldest democracies, create a Supreme Court? One answer is that it was because of the importance in our constitution of the separation of powers. That might provoke the question, what constitution, for the United Kingdom is one of the only three countries in the world that has no written constitution. The other two are Ireland and Israel.

We none the less have an unwritten constitution and this today gives effect, in its own way, to the separation of powers. This is the way Lord Mustill, one of our greatest jurists, described that principle when giving judgment in *R v Home Secretary, ex parte Fire Brigades Union* [1995] AC 513 at p. 567:

“It is a feature of the peculiarly British concept of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws and see that they are obeyed.”

It would be quite wrong to conclude from this that the principle of the separation of powers has long been entrenched in our unwritten constitution. Today, as Lord Mustill stated, we have three arms of state, the legislature, the executive and the judiciary, but each of these has inherited powers that used to be exercised by the Crown, that is the King or Queen, and each still exercises those powers in the name of the Queen.

The King used to live in the Palace of Westminster in London. The King would summon to Westminster his advisers. 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 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 Commons and the House of Lords. They still sit at Westminster, although this is no longer the royal palace. They are the first arm of state, the legislature.

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. Their successors are the independent judiciary, of whom I was one. They are the second arm of state, the judiciary.

The third arm of state, the executive, consists of the Ministers and officials who control the ever more complex administration of the country.

Once again the power that they exercised was originally delegated to them by the King, who appointed them and who could dismiss them. They also are now independent of such control.

The Queen remains the constitutional Head of State, She has to assent to Acts of Parliament before they can take effect as laws. She appoints the judges; the Ministers are her Ministers. But her powers are largely illusory. The ways that she exercises them are determined by others.

I now propose to describe the three arms of state in a little more detail.

Parliament

The transfer of the power to make laws from the King to Parliament has its origin as long ago as the Magna Carta in 1205, before a formal parliament even existed. Half a century later, in 1689, after the so called Glorious Revolution, glorious because it took place without bloodshed, Parliament passed the Bill of Rights, limiting the power of the monarchy and establishing the supremacy of Parliament. This was the foundation of the most important principle of our unwritten constitution. Parliament is supreme. Parliament can make any laws that it chooses. The judges have to apply the laws that are made by Parliament. There are no constitutional principles that restrict the law that Parliament has power to make.

Parliament can make any laws that it chooses, including laws that alter its own composition and powers.

The executive

The executive 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, the leader of the party that has the majority in the House of Commons. By convention Ministers have to be Members of Parliament, so that Parliament can hold them responsible for their actions.

Having Ministers who are members of the legislature is strictly in conflict with the pure doctrine of the separation of powers. Parliament makes the laws and the Ministers have to apply them, but when one party has a large majority in the House of Commons Parliament will normally enact the laws that the Ministers wish to introduce, so that the separation of the legislature from the executive is far from total. Apart from Ministers there are, however, literally millions of officials who run the country subject to its laws. In the United Kingdom these officials are subject to the supervision of the same judges who deal with all other legal disputes. Let me now say something about those judges, who make up the third arm of the state.

The judiciary

The King was the source of justice in England, but he delegated the administration of justice to his judges. It was their task both to try those accused of committing crimes, or breaches of the King's peace, and to resolve disputes between the King's subjects. Although the judges were appointed by the King and exercised powers delegated by the King, they soon acquired a fierce independence. This was underwritten by Parliament in 1701 when it passed a statute, the Act of Settlement, which provided that judges should be appointed for so 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. The independence of the judiciary is critical to the rule of law.

Because our laws and our political institutions had evolved peacefully we never had the revolution that would have resulted in the drawing up of 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. Let me deal first of all with the Lord Chancellor. His is probably the oldest office of state, dating back at least to 1066, 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, the High Court of Chancery, where the principles that he applied were those of equity rather than the common law. Until very recently 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 an important 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.

In my time in the law, and that is 50 years, the Lord Chancellor always performed his judicial duties in a manner that was impartial and free from any political bias. When he sat as a judge, he was careful to see that it was in cases in which the Government did not have an interest.

When he made judicial appointments he consulted widely, taking in particular the views of the senior judiciary, and the appointments were made on merit.

I said that the Lord Chancellor sat as a judge, but I did not say where he sat. Where he sat was in the House of Lords, and the judges who sat with him, under his presidency, were also members of the House of Lords.

This calls for a little explanation. From the time of its creation Parliament would entertain petitions from citizens, sometimes brought directly and sometimes by way of appeal from decisions of the courts. In the eighteenth and early nineteenth century the House of Lords sat in the morning to do 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, albeit that they would usually follow the advice of the Lord Chancellor, or the judges who would be summoned to advise them. They did not always do so, however, sometimes justice would neither be done nor seen to be done.

One such occasion was in 1783 in the case of *The Bishop of London v Ffytche*. The judges advised the House that Ffytche had the merits but the Lords Spiritual, that is the Bishops who were members of the House of Lords, packed the Chamber and the decision went in favour of the Bishop. In defiance of the doctrine of the 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 and I am going to cut it short. 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. 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 judicial 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.

England and Wales, Northern Ireland and Scotland each have their separate jurisdictions and judiciaries, but from all these jurisdictions an appeal could be brought to the House of Lords, with the one exception that no appeal in a criminal matter lay from Scotland.

The Law Lords were full members of the House of Lords. They were permitted to take part in the legislative business of the House, and sometimes did so although, by convention, not when that business was political in character. The Law Lords functioned very much like many other appellate courts. Unlike the US Supreme Court they did not sit en banc. They usually sat in a constitution of five, so two panels could sit at the same time. They were independent of any political influence and enjoyed a high reputation.

The Law Lords performed one other judicial function. Appeals from the courts in the British Colonies had always lain to the King or Queen in England. The monarch decided these appeals in accordance with advice that she received from members of her Privy Council. These members were none other than the Law Lords, with some additional members, sitting as the Judicial Committee of the Privy Council.

Our Colonies shrank, but on obtaining independence some of these Colonies retained the right of appeal to the Privy Council and these were heard in a special, and very elegant, court in Downing Street. Some here may well be familiar with that Court.

So let me summarise the position in 2003. The Lord Chancellor was the highest judge in the land. Under his presidency the 12 Law Lords sat in Parliament as the final court of appeal of the United Kingdom. And they also sat as the Judicial Committee of the Privy Council. For members of the public this was a confusing picture and few understood what it meant when a decision of the Court of Appeal was appealed to 'the House of Lords'. Certainly those outside the United Kingdom found our system particularly hard to understand.

On 12 June 2003 I was Master of the Rolls. I had persuaded the Lord Chief Justice, Lord Woolf, that it would be a good idea for England's most senior judges to go off to a few days' retreat with the most senior civil servants in the Lord Chancellor's Department to hold strategic discussions about the future of the justice system. So we had gone off to a delightful conference centre, converted out of a country inn at Minster Lovell in the Cotswolds, one of the most beautiful parts of England.

When we came down to breakfast on the first day it was to learn that there had been an important announcement from the Prime Minister's residence at No 10 Downing Street. The Law Lords were to be abolished to be replaced by a Supreme Court, a new Judicial Appointments Commission was to be established that would appoint all judges and the Lord Chancellor was to be abolished, to be replaced by a Secretary of State for Constitutional Affairs, who would have no judicial functions.

The current Lord Chancellor, Lord Irvine, was standing down and Lord Falconer would become the temporary holder of that office, until it was abolished. He would also be the Secretary of State for Constitutional Affairs. No one at Minster Lovell had had an inkling of the proposed abolition of the Lord Chancellor. Lord Woolf, the Lord Chief Justice had not been consulted. It seems that 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 leader of the opposition in the House of Lords, Lord Strathclyde, described the proposed changes as "cobbled together on the back of an envelope".

For a long time the chain of events that had led to the sudden decision to introduce these dramatic constitutional changes remained a matter of speculation, for those in the know, and especially 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 the Cabinet Secretary at the time of the changes. He described the manner in which the changes had been introduced as “a complete mess-up”. He said that 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, two of our more respectable daily newspapers. He accosted the Prime Minister, his old friend Tony Blair and asked him if there was any truth in the rumours. To his astonishment Blair admitted that the rumours were accurate.

When 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, Sir 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, standing down from the Government when the 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”. He paid tribute to Derry Irvine, but said that because Derry was unsympathetic to the changes, he had decided to make a change of Minister as well as a change of Office.

What Blair did not explain was what had motivated him to make these changes. The creation of a new Supreme Court had long been advocated by some, including the Senior Law Lord, Lord Bingham, on constitutional grounds, but many, and I was one of them, were not convinced that this was the primary motive for Blair's decision. Things became a little clearer last month, when Queen Mary's College at London University organised a little seminar – by invitation only – to mark the 10th anniversary of Blair's announcement. With the exception of Blair himself and Derry Irvine, almost all the key players who had been involved took part. The seminar was held under Chatham House Rules, which means that I am not allowed to say who said what. I can however tell you of one or two matters that were revealed.

The first was that Tony Blair had deliberately decided not to consult on these changes because he believed that, if he did so, he would never succeed in getting them through. In this I think that he was correct. The second matter is that one of the factors that motivated Blair was political in-fighting between Derry Irvine, the Lord Chancellor, and David Blunkett, the Home Secretary. Blair had decided that the time had come for Irvine to leave the Government. But Irvine was one of his oldest friends; Blair had been his pupil when he started at the Bar.

Blair could not bring himself to sack Irvine, but reasoned that if he introduced these changes Irvine would object to them and that they would lead Irvine to resign. This is precisely what occurred.

But as Lord Irvine had predicted it proved less easy to abolish the office of Lord Chancellor than Blair had anticipated. He had a huge portfolio of 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. The Lord Chancellor became simply the Minister for Justice.

This followed six months of negotiation between Lord Woolf, who had deferred his retirement as Lord Chief Justice for the purpose, and Lord Falconer, Lord Irvine's replacement as Lord Chancellor, in relation to the division of functions between the Lord Chancellor and the Lord Chief Justice. The judges were particularly concerned because the Lord Chancellor, although a Government Minister, had been a staunch upholder of the rule of law and had always fought their corner.

Ultimately agreement was reached in the form of document termed 'the Concordat', which formed the basis of the Constitutional Reform Act 2005. Most of the transfer of functions for which that Act provided came into force at the beginning of April 2006, six months after I had replaced Lord Woolf as Chief Justice.

The Act gives to the Lord Chancellor responsibility for ensuring that there is an efficient and effective system to support the carrying on of the business of the courts and that the appropriate services are provided for the courts. In short he is responsible for the infrastructure of the justice system. This was the primary task of the new Department of Constitutional Affairs, which was intended to replace the Lord Chancellor's department. So the Lord Chancellor and the Secretary of State for Constitutional Affairs were one and the same person.

Subsequently his title was altered to Lord Chancellor and Minister for Justice, which more accurately reflects his role.

At the instigation of the Judges the Constitutional Reform Act makes provision for the protection of the rule of law and the independence of the judiciary. Section 2 requires the Lord Chancellor to be qualified by experience and the list of factors to which the Prime Minister can have regard include experience as a law practitioner or a teacher of law in a university.

When Blair replaced Lord Falconer as Lord Chancellor he chose a member of the House of Commons, Jack Straw, who had practised as a barrister before going into politics. The same was true of his successor Ken Clarke. But David Cameron, our current Prime Minister has appointed as his replacement Chris Grayling, a Minister who has had no practical experience of the law of any kind. He is a career politician who no doubt sees his appointment as a stepping stone to a more important office. He has brought a new broom to legal administration and is seeking to make significant economies, as are all Ministries, including swinging cuts in free legal aid. As you may imagine his appointment has not been universally welcomed by the judiciary and the legal profession

The justification advanced for the transfer of judicial functions from the Lord Chancellor to the Lord Chief Justice was that it gave effect to the doctrine of the separation of powers. No longer would the most senior judge in the land be a senior Government Minister. The same justification was advanced for the creation of the Supreme Court. 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.

And so, at least in theory, and in outward appearance, judges were acting as legislators in violation of the principle of the 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.

It was also 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.

Nor could justice very readily be seen to be being 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 be there 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 and 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, of course, 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. 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 the merits of the building 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:

“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 the central porch.”

Such pretensions 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 David Hope and Brenda Hale, joined with officials from the Ministry of Justice in planning its transformation. The stone was cleaned, inside 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.

A floor was removed to enable a magnificent library to be constructed, spanning from top to bottom of the building, 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.

The primary object of the move 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 reveal themselves to the public gaze. I arrived in the Lords to find that my new colleagues were split about 50/50 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.

David 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. Rather to my surprise the Bar soon requested permission to follow our example and appear before us unrobed. We gave this permission, I think that most 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.

That was, in fact, a change that I had introduced before the move to the Supreme Court. These meetings enabled us to give considered and unhurried consideration to our working methods.

The second change 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. It is important to do one's best not to prejudge an appeal.

Sometimes I found that I had not had 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.

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 our 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, these will usually include at least one member of the Court with particular experience in that area sits on the panel. 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.

One change of 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, 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 next to 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.

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 judgments. 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 delivers, 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 layman 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, and not, one hopes of the justice who is picking his nose. The proceedings are broadcast within the court building on closed circuit television, but they are also broadcast live by Sky on a website. Unusually, David 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, David Hope, Brenda Hale and Brian Kerr permitted the cameras to follow us about our daily lives. Brian Kerr was shown taking his wife breakfast on a tray.

David 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 man 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 s 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 of the Court will be invited to say what he or she provisionally thinks should be the result.

Normally 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 normally 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. 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.

When David Cameron discovered this he 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 punch-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 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 blow to all of us.

The previous year we had been deprived of the services of Lawrence 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. Justices are, however, permitted to be invited back to sit ad hoc until they reach the age of 75 as, in effect, a non-permanent Justice of the Court.

Let me end by saying a few words about Human Rights. 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 *Ullah* that it was the duty of the English Court to define human rights in a way that was “no more and certainly no less” than their considered interpretation by the Strasbourg Court 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 *Horncastle*, 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 Supreme Court and the Strasbourg Court. Ultimately, however, where the Strasbourg Court makes it plain that it is not going to change its mind, the Supreme Court regards itself as bound to follow Strasbourg, even though at least one member of the Court, Lord Sumption, has extra-judicially criticised the Strasbourg Court for exceeding its remit.

[P.S. This speech was based on a talk Lord Phillips NPJ had given in other jurisdictions. His Lordship was sharing with his audience an explanation of the material events that he had given to other audiences.]