

Simply a Matter of Style? Comparing Judicial Decisions

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Abstract

The style and format of court judgments have been subject to developments worldwide as courts adapt to the increasingly important issue of visibility and accessibility of judicial decisions. This article considers the evolving nature of the form of judgments within the common law focussing upon the UK Supreme Court, and analysing recent changes within a historical and comparative law perspective. It is argued that the Supreme Court should now be ready to leave the experimental stage and establish one main form of judgment, a change which will require changes to working methods, particularly in terms of deliberations and drafting.

Introduction

Traditionally overlooked in academic discourse,¹ the style or form of judgments is nonetheless subject to developments worldwide.² Courts are responding to the increasingly important international and European courts, exchanges and cross-citation over national boundaries, and the further opening up of legal systems, traditionally perceived as closed within well-defined hierarchies. Within this process, it is important for judges, practitioners and scholars to understand the different formats of judgments from other jurisdictions. Lord Rodger of Earlsferry spoke some time ago of an international market in judgments,³ and courts are clearly aiming to make their own judgments available outside their own jurisdictions.⁴ At a national level, certain courts are engaged in a critical scrutiny of traditional approaches.⁵ In domestic English circles, there have

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¹ See for instance, M Arden, *Judgment Writing as Literature?* 128 LQR 516 (2012), making this point.

² See for two instances of an emerging academic interest in the topic, Mitchel Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford: Oxford University Press 2004), and N Huls, M Adams and J Bomhoff (eds), *The Legitimacy of Highest Courts' Rulings: 'Judicial Deliberations' and Beyond* (The Hague: Asser Press, 2008).

³ Lord Rodger of Earlsferry, *The Form and Language of Judicial Opinion* 118 LQR 226, 247 (2002).

⁴ See for instance the translations into other languages of judgments on the web sites of the French and German constitutional courts, and the German Supreme Court.

⁵ For instance, the French *Conseil d'Etat* has recently reflected on a reform of their style of judgment, based upon a detailed comparative law study: *Groupe de Travail sur la Rédaction des Décisions de la Jurisdiction Administrative* (Paris, Conseil d'Etat, April 2012).

been indications of an evolution in style. Roderick Munday's pioneering work on the form of judgments has shown that the practice of the Court of Appeal has "diversified" or "mutated" to a greater use of composite judgments, which he now calculates as one in three appellate judgments adopting this mode of composition.⁶

The advent of the new United Kingdom Supreme Court prompted Lord Neuberger of Abbotsbury MR, in 2009 to consider how matters might evolve. The Supreme Court delivers judgments in court rather than speeches in the chamber of the House of Lords,⁷ and he proposed that it should also adopt a different approach to judgments, offering greater clarity and coherence in the law. Lord Neuberger pointed to two possible approaches: (i) the single judgment approach, adopted by the European Court of Justice and the Privy Council, or alternatively (ii) the approach, "beloved of the US Supreme Court, and quite often adopted by the Australian High Court, of a single majority judgment with dissenting and/or concurring judgments."⁸

How then has the Supreme Court responded since its first judgment in 2010? A review of the practice of the Supreme Court shows, as we shall see below, that whilst it has departed from the traditional speeches in the House of Lords in different ways, it has not yet adopted a settled approach but instead applied a range of different forms.

Seeking recourse to comparative law, Lord Mance at an Oxford seminar in 2010 presented the outcome of his own comparative law studies, including a typology of the forms of judgment, providing a comparative law reflection on the theme.⁹ This article continues the exploration of comparative law sources, legal history and doctrinal discussion. Comparative law provides different vantage points on similar phenomena, as well as an indication of possible routes for reform. The common law style of judgments is not monochrome of course: other common law jurisdictions than that of England and Wales, and different experiences and experiments in the United Kingdom courts, current or in the past, provide further models. In this perspective, the future form of judgment in the UK Supreme Court is discussed, as are the implications for the working methods of the court.

The structure of this article will be as follows. We will first consider the evolving nature of the style and form of judgments within the common law. In doing this, we will examine the traditional approach in the English common law and endeavour to identify some of the reasons for its salient features. Whilst our focus at this stage is predominantly upon the English common law, we will at various points make comparative law references where appropriate to models in other jurisdictions. The tradi-

⁶ See R Munday, *Configuring Reason* in M Andenas and S Vogenauer (eds), *The Form of Judgment* (Oxford: Hart, forthcoming).

⁷ The seriatim 'speeches' were delivered in order of precedence and with varying degrees of cross-referencing (often with none at all and wholly self-contained).

⁸ Lord Neuberger of Abbotsbury, MR, 'Insolvency, internationalism & Supreme Court judgments', speech 16/11/2009.

⁹ Seminar in honour of Lord Bingham of Cornhill, 20–21 June 2008, Institute of European and Comparative Law, Oxford. See also M Arden, n. 1 above.

tional approach will then be contrasted with the historical variations away from this model towards a collective approach to judgments.

In a second section, we then go on to consider the recent practice of the United Kingdom Supreme Court, and examine whether there has been a significant departure from traditional models of judgments. We identify some significant developments, and analyse critically the current position, advocating that greater changes are now required. The Supreme Court should now be ready, we argue, to leave the experimental stage and establish one main form of judgment, a change which in turn requires changes to working methods, particularly in terms of deliberations and drafting.

I. Form of Judgment in the Common Law: an Evolutionary Process

(i) *Traditional Forms and Style*

The common law judgment is traditionally viewed as an open-textured, discursive and individual document, as contrasted with the pithy, authoritative statement of the law found in continental judicial prose.¹⁰ In spite of considerable variation, these characteristics remain valid even when one looks across the different courts in the variety of common law jurisdictions. The judicial form allows the individual judge to develop and use his or her personal style, with examples, allusions and imagery.¹¹ Style is thus considered to be an important feature of the common law. Whilst Stendhal may have been inspired by the Napoleonic Civil Code in his writing style for *La Chartreuse de Parme*,¹² the common law's style is found not in its singularly inelegant statutory drafting style, but in the decisions of its judges.¹³ Certain judicial figures have even been admired for the literary qualities of their judgments! Justice Cardozo wrote admiringly – perhaps with a slight tinge of irony – of English judgments in his famous 1925 article: “for quotable good things, for pregnant aphorisms, for touchstones of ready application, the opinions of the English judges are a mine of instruction and a treasury of joy.”¹⁴

¹⁰ As John Bell has argued: “The style of French judgments... claims authority and aims to present an outcome, but without deeper explanations”: J Bell, *Judiciaries within Europe: A Comparative Review* 73 (Cambridge: CUP, 2006).

¹¹ Including the use of literature, which has on occasion been contentious. The Lord Chancellor, Lord Simon, objected to Lord Atkin's citation from Lewis Carroll's *Through the Looking Glass* in the famous dissent in *Liversidge v. Anderson* [1942] AC 206, see Louis Blom-Cooper, *Style of Judgments* in Louis Blom-Cooper et al (eds) *The Judicial House of Lords 1876–2009*, 145 at p 152 (Oxford: OUP 2009).

¹² Letter from Stendhal to Honoré de Balzac dated 30 October 1840..

¹³ See e.g. Sir Arthur Quiller-Couch, *Oxford Book of English Prose*, 1028 (1925 edn), including three extracts from the law courts. Louis Blom-Cooper, *Style of Judgments* in Louis Blom-Cooper et al (eds), *ibid*, regards this as ‘meagre trawl from the ocean that is so much bigger 80 years on’ (at p 146).

¹⁴ See B Cardozo, *Law and Literature* 14 *The Yale Review* 699 (1925).

This has no counterpart in courts in civil law jurisdictions where the facts are set out in a collegiate judgment,¹⁵ and the ideal would be a sober and precise style, to the exclusion of individual variation. It is in the discussion of the law where common law judges can make full use of the freedom left by the judicial form to develop their personal style, particularly in the higher courts. The common law judgment will typically have an extended discussion of the legal issues, setting out the authorities, and arguing, often vigorously and robustly, for the outcome. This process leading up to the legal conclusion is given much space and attention, again in contrast with continental methodology in which the codified notion of ‘concision’ is the leitmotif. The French Code of Civil Procedure refers to the required “succinctness” of judgments,¹⁶ so that any form of ambiguity must be ironed out.¹⁷

Certain judicial styles in the common law are immediately recognisable. Lord Denning’s opening words in different Court of Appeal judgments provide much loved and striking examples of the use of a personal style: “It happened on April 19, 1964. It was bluebell time in Kent”¹⁸; or, “Old Peter Beswick was a coal merchant in Eccles, Lancashire. He had no business premises. All he had was a lorry, scales, and weights. He used to take the lorry to the yard of the National Coal Board, where he bagged coal and took it round to his customers in the neighbourhood”.¹⁹

Lord Rodger held a critical view of Lord Denning’s famous openings: ‘which though great fun, do not, in my view, really work. They strike me as faux naïf.’²⁰ He did on another occasion²¹ compare Lord Hoffmann’s mastery of the dramatic, scene-setting opening to Lord Denning’s, using Lord Hoffmann’s speech in *Tomlinson v. Congleton Borough Council*²² also to demonstrate how other judges could have set out the facts of the case in a different manner, to support a particular argument and conclusion.²³ Lord Rodger explained that Lord Hoffmann’s speech was ‘clearly intended to bring

¹⁵ Even in the few jurisdictions allowing dissenting judgments, as in the Scandinavian countries and in the German Constitutional Court which is the only German Court allowing dissenting judgments.

¹⁶ Art. 455, *Code de procédure civile*. See also the reception of similar wording in the Italian codice di procedura civile Art. 132(1) introduced in 2006, requiring “la concisa esposizione delle ragioni”; in this context to achieve brevity and increase the capacity of the court to deal with its massive backlog., see M Acierno, *La motivazione della sentenza tra esigenze di celerità e giusto processo* Riv. trim. dir. proc. civ. 437 (2012).

¹⁷ P Mimin, *Le Style des Jugements*, para. 122bis (Paris, 4th edn, 1978).

¹⁸ *Hinz v. Berry* [1970] 2 QB 40 at 42. The case concerned tort liability for nervous shock, and this emphasis on the pastoral idyll supported Lord Denning’s argument.

¹⁹ *Beswick v. Beswick* [1968] Ch. 538, 557. Here the facts were set out to support the common sense of Lord Denning’s view that Mrs Beswick was entitled as a third party to benefit from the contract as intended, unencumbered by the doctrine of privity of contract.

²⁰ See Lord Rodger of Earlsferry, *The Form and Language of Judicial Opinions* 118 *Law Quarterly Review* 226, 244–245 (2002).

²¹ See Lord Rodger of Earlsferry, *British Judges: Not Such Fungible Persons* in M Andenas and S Vogenauer (eds), *The Form of Judgment* (Oxford: Hart 2013).

²² *Tomlinson v. Congleton Borough Council* [2003] UKHL 47 [2004] 1 AC 46, 71–72 [2].

²³ Lord Hoffmann was against holding a local authority liable for injuries a young man sustained diving into a shallow man-made lake and hitting his head on the bottom.

about a major shift in the climate of the law of negligence',²⁴ and the setting out of the facts may not be the appropriate part of the judgment to argue for this outcome.

Lord Bingham was also known for a distinctive style and was a model of clarity, particularly in terms of the legal issue at stake. An example can be found in the opening paragraph of Lord Bingham's (partially dissenting) judgment in the complex and difficult case of *Smith v. Chief Constable of Sussex Police*, concerning the liability of the police:

“In these two appeals, heard together, there is a common underlying problem: if the police are alerted to a threat that D may kill or inflict violence on V, and the police take no action to prevent that occurrence, and D does kill or inflict violence on V, may V or his relatives obtain civil redress against the police, and if so, how and in what circumstances?”²⁵

Lord Bingham subjected his support of separate judgments to the condition that “however many separate judgments are given and whether or not some members of the court dissent, the principle of law laid down by the court (or the majority of it) should be clear.”²⁶ He was himself known for the clarity of the legal reasoning. In his judgments, the relevant provisions and sources were carefully assembled and analysed. In his memorable piece, cited above, Lord Rodger compared the styles of two leading Law Lords; Lord Bingham and Lord Nicholls using architectural metaphors:

“I have sometimes likened a speech of Lord Bingham to the Pompidou Centre in Paris – the pipework and essential services are on the surface, open for all to see. In other words, Lord Bingham sets out all the relevant provisions and refers to all the relevant decisions which lead him to the position which he ultimately adopts. By contrast, with Lord Nicholls, all the plumbing, electrical and other services are concealed beneath the surface, sunk in ducts and concreted over so that all we see is the smooth plastered finish. In other words, Lord Nicholls digests the relevant provisions and authorities and, unless it is essential for the resolution of some point at issue, he does not narrate them, but distils their effect in the clearest and most straightforward prose”²⁷

As Lord Rodger points out, if presented with an anonymised speech from the House of Lords, one would be unlikely to confuse speeches of these judges for one another. As we have already noted, the style of continental judgments aims just to do that – render the judgments impersonal. Civil law jurisdictions will typically set out facts in a collegiate judgment, drafted in a uniform style, to the exclusion of individual varia-

²⁴ *Ibid.*

²⁵ *Smith v. Chief Constable of Sussex Police* [2008] UKHL 50, Para. 1.

²⁶ T Bingham, *The Rule of Law*, 45 (Allen Lane, 2010).

²⁷ See Lord Rodger of Earlsferry, *British Judges: Not Such Fungible Persons* in M Andenas and S Vogenauer (eds), *The Form of Judgment* (Oxford: Hart 2013).

tion. Indulging in personal forms of expression would run contrary to the aims of the court. The restatement of the law in the brief form of the French Cour de cassation, as *la bouche de la loi*,²⁸ exemplifies this, thereby avoiding any discussion or identifying reasons for doubt or disagreement.²⁹ When we examine further the comparative law perspectives below, we will also turn to developments in Australia's High Court, Canada's Supreme Court and New Zealand's Supreme Court where new forms of judgments and working methods limit indulgence in individualised form.

We will now turn to see however that this 'traditional approach' to judgments in the common law has, on occasion, been departed from. We will see that there are examples of historical variations away from this model towards a collective approach to judgments.

(ii) *Breaking with Tradition: Single and Composite Judgments in the House of Lords*

In the House of Lords, the judgments were 'speeches' in Her Majesty's Court of Parliament; the convention remained that each Law Lord had the right to give a separate assenting or dissenting opinion. This built on the seriatim judgment in other collegiate courts, but also on the parliamentary procedures, with the Law Lords constituting at times the Appellate Committee of the House and at others, the House of Lords itself.³⁰

A collective approach to judgments was not without precedent in the House of Lords. Alan Paterson singled this out as one of the main themes in his 1982 book *The Law Lords*,³¹ and revisited it in his 2011 Hamlyn Lectures, *Lawyers and the Public Good*.³² His books provide detailed background and analysis for understanding the interplay between, on the one hand, the form of judgment and on the other, the standing of the House of Lords, its law making role, and the influence of individual law lords, in particular strong and reforming senior law lords. His conclusions in both books support a move away from the seriatim judgments and towards the unitary judgment of the court.

Already in 1972 Louis Blom-Cooper and Gavin Drewry had stated that assenting judgments were "insidious to ... clarity and certainty in the law."³³ More recently, Blom-Cooper has identified three series of attempts to move towards a collective approach. The first attempt, in the 1960s, the case in favour of which was stated by Lord

²⁸ Montesquieu, *L'Esprit des Lois* (1748).

²⁹ See G Canivet *The Court of Cassation: Looking into the Future* 123 LQR 401 (2007), and *The Judgment in the Cour the Cassation* in M Andenas and S Vogenauer (eds), *The Form of Judgment* (Oxford: Hart, forthcoming).

³⁰ The firm convention since the 19th century being that no other peers would appear or vote in the chamber of the Lords.

³¹ A Paterson, *The Law Lords*, 96–100; 183 ff (London: Macmillan, 1982).

³² A Paterson, *Lawyers and the Public Good* (Cambridge: Cambridge University Press, 2012).

³³ L Blom-Cooper and G Drewry, *Final Appeal. A Study of the House of Lords in its Judicial Capacity*, 93 (Oxford: Clarendon Press, 1972).

Radcliffe³⁴ was “abandoned after the poorly-received trilogy of cases in *Smith v. DPP*,³⁵ *Sykes v. DPP*³⁶ and *Shaw v. DPP*³⁷”. Lord Reid was strongly in favour of multiple judgments, even in criminal cases. Judicial law-making was different from acts of Parliament, and best done by slow and incremental development.³⁸ The words of a single speech should not be treated as a definition: “The true ratio of a decision generally appears more clearly from a comparison of two or more statements in different words which are intended to supplement each other.”³⁹ The 1966 Practice Statement on departure from precedent⁴⁰ was still recent and increased the focus on the legitimacy of judicial law making.

The second was a revival by Lord Diplock as Senior Law Lord in the 1970s, and a third was in “the years of the Bingham court.”⁴¹ In this respect, Blom-Cooper cites one instance of a composite judgment, *Norris v. Government v. United States of America*,⁴² as a “unique” break with tradition. There are a number of single judgments from the House of Lords, introduced as ‘the considered opinion of the Committee’. Lord Bingham has explained that there are some cases in which the need is for a single statement carrying the authority of the whole House. *R v. Forbes*, which turned on the obligation of the police to hold identification parades, was considered to need such a single statement:

“The case seemed to cry out for a judgment of the court. But this, I was told, was precluded by the parliamentary procedure which calls for a vote by each member of the committee on the floor of the House. Thus the best one could do was produce a single opinion reinforced by four unqualified concurrences. By a happy chance, however, I had appeared as counsel in a case 30 years earlier in which a single judgment of the House had been given, the report of the case beginning ‘Lord Wilberforce delivered the joint opinion of their Lordships’. What could be done once, I suggested, could be done again. So the single judgment in *R v. Forbes* was introduced as ‘the considered opinion of the Committee’, a formula which has been used in a number of later cases which have been felt to call for the same treatment.”⁴³

³⁴ Lord Radcliffe, *Law and Order* 61 Law Society Gazette 820, 823 (1964); see N Duxbury, *Lord Radcliffe Out of Time* CLJ 41, 60 n 132 [2010].

³⁵ [1961] AC 290.

³⁶ [1962] AC 220.

³⁷ *Ibid.*

³⁸ A Paterson, *The Law Lords*, 183–4 (London: Macmillan, 1982).

³⁹ *Saunders v. Anglia Building Society* [1971] AC 1004, 1015.

⁴⁰ [1966] 1 WLR 1234; [1966] 2 Lloyd’s Rep. 151; (1986) 83 Cr. App. R. 191 (Note); (1966) 110 S.J. 584 [1966] 3 All ER 77.

⁴¹ L Blom-Cooper, *Style of Judgments* in Louis Blom-Cooper et al (eds), *The Judicial House of Lords 1876–2009*, 145, at 153 (Oxford: OUP 2009).

⁴² [2008] 1 AC 920.

⁴³ Lord Bingham of Cornhill, *A Personal Perspective*, in M Andenas and S Vogenauer (eds), *The Form of Judgment* (Oxford: Hart, forthcoming).

The case in which Lord Bingham had appeared 30 years earlier was *Heaton's Transport (St Helens) Ltd v. Transport and General Workers' Union*.⁴⁴ He later asked Lord Wilberforce informally how he had achieved this procedural outcome, on which the official minute threw no light, and Lord Wilberforce's response was: "Oh, dear. How very irregular". Lord Bingham adds that this expedient may perhaps have owed something to the urgency of the case, heard by the National Industrial Relations Court in May, by the Court of Appeal over nine days in May-June, and by the House over seven days in July. The joint opinion was delivered on 26 July.⁴⁵

Lord Bingham has stated that "where the members of the House are unanimous, both as to the result and the reasons, I am generally in favour of a single judgment in cases ruling on matters of practice and criminal law".⁴⁶ All but five of the single judgments pertained to crime or the conduct of inquests. *Huang v. Secretary of State for the Home Department*,⁴⁷ on the proportionality test, is the sixth which did not, and which Lord Bingham singled out for special comment: "A single opinion was given in that case because it was felt that there had been a tendency, both in the arguments addressed to the courts and in the judgment of the courts, to complicate and mystify what was not thought to be, in principle, a hard task to describe, however difficult it might be in practice to perform. It was hoped, no doubt optimistically, that a single opinion might induce a rather more straightforward approach to the problem."⁴⁸

Blom-Cooper, however, is correct in mentioning only one instance of a composite judgment, *Norris v. Government United States of America*.⁴⁹ The single judgments listed above, although representing the collegiate view of the committee and reflecting

⁴⁴ [1973] AC 15 (HL) 94.

⁴⁵ Lord Bingham of Cornhill, *A Personal Perspective*, in M Andenas and S Vogenauer (eds), *The Form of Judgment* (Oxford: Hart, forthcoming).

⁴⁶ *Ibid.* The single judgments from the Bingham Court, reflecting this view, included *Lawal v. Northern Spirit Ltd* [2003] UKHL 35 [2003] ICR 856, about apparent bias; *R. v. Drew* [2003] UKHL 25 [2003] 1 WLR 1213, about criminal culpability; *Scottish Provident Institution v. Inland Revenue Commissioners* [2004] UKHL 52 [2004] 1 WLR 3172 about tax; *Barclays Mercantile Business Finance Ltd v. Mawson* [2004] UKHL 51 [2005] 1 AC 684, also about tax; *R. v. Montila* [2004] UKHL 50 [2004] 1 WLR 3141, about the proceeds of crime; *R. (Middleton) v. Coroner for West Somerset* [2004] UKHL 10 [2004] 2 AC 182, and *R. (Sacker) v. West Yorkshire Coroner* [2004] UKHL 11 [2004] 1 WLR 796, both about verdicts at coroners' inquests; *R. v. H* [2004] UKHL 3 [2004] 2 AC 134, about the prosecution duty of disclosure to the defence; *R. v. Wang* [2005] UKHL 9 [2005] 1 WLR 661, about directions to a criminal jury to convict; *Henderson v. 3052775 Nova Scotia Ltd* [2006] UKHL 21 [2006] SC 85, about summary judgment in Scotland; *Ward v. Police Service of Northern Ireland* [2007] UKHL 50 [2007] 1 WLR 3013, about questioning of suspects by the police; *R. v. Kennedy (No 2)* [2007] UKHL 38 [2008] 1 AC 269, about the offence of administering noxious drugs; *R. (Jones) v. Ceredigion County Council* [2007] UKHL 24 [2007] 1 WLR 1400, about appellate procedure; *R. v. GG* [2008] UKHL 17, 1 WLR 458, about dishonest price-fixing; and *R. v. May* [2008] UKHL 28 [2008] 2 WLR 1131, *Jennings v. Crown Prosecution Service* [2008] UKHL 29 [2008] 2 WLR 1148, and *R. v. Green* [2008] UKHL 30 [2008] 2 WLR 1154, all three dealing with criminal confiscation orders.

⁴⁷ *Huang v. Secretary of State for the Home Department* [2007] UKHL 11 [2007] 2 AC 167.

⁴⁸ Lord Bingham of Cornhill, *A Personal Perspective*, in M Andenas and S Vogenauer (eds), *The Form of Judgment* (Oxford: Hart, forthcoming).

⁴⁹ [2008] 1 AC 920.

the contribution of individual members, were all, with one possible exception,⁵⁰ the work of a single hand.⁵¹ In *Norris v. Government v. United States of America* different sections of the joint opinion were drafted by different members. This departure from tradition was signalled by describing it as ‘the composite opinion of the committee’.⁵²

A final and important point that should be noted is that differences within the common law are not only historical but also apply within the current set-up. Economy and brevity has long been a feature of the Judicial Committee of the Privy Council. Indeed, the Privy Council until relatively recently did not allow dissenting or concurring opinions,⁵³ and while the former is not any longer barred, economy still prevails. The restrictions on dissent in the Court of Appeal’s Criminal Division remain so strong that dissents have no practical importance.⁵⁴

In other common law countries, a ‘judgment of the court’ from which dissents are allowed is the prevailing model, for instance in the United States, Canada and India. This is also so with some variations in Australia’s High Court, Canada’s Supreme Court and New Zealand’s Supreme Court. Australia’s High Court has moved away from the *seriatim* judgments by placing the majority’s judgment before dissents, and without indication of individual contributions to the drafting.⁵⁵ With the Australian High Court’s working methods of circulating draft judgments, an individualised form may make other judges less likely to join and leave the drafter of such a text with the options of dropping the draft or making a concurring judgment.⁵⁶ Canada’s Supreme Court and New Zealand’s Supreme Court also make use of judgments of the court and joint judgments of more than one judge. In the Supreme Court of India the judgment of the court is delivered by a judge who will make use of the plural “we”.

In civilian traditions, there are similarly examples of great variation in the standard format between courts in one national jurisdiction. This is illustrated by the difference between the French *Cour d’appel* and *Cour de cassation*. The latter, as the court of last instance in civil and criminal matters, generally produces very short judgments

⁵⁰ In *Scottish Provident Institution* (n 46 above), Lord Nicholls said that all members had contributed, a formula familiar in the Court of Appeal.

⁵¹ Lord Bingham, n 48 above.

⁵² See *Norris* [1].

⁵³ Lord Bingham, n 48 above.

⁵⁴ T Bingham, *The Rule of Law*, 44 (London: Allen Lane, 2010). Note also the practice from the Court of Appeal and Divisional Court that Roderick Munday has analysed. See R Munday, *Configuring Reason* in M Andenas and S Vogenauer (eds), *The Form of Judgment* (Oxford:Hart, forthcoming).

⁵⁵ Lord Neuberger discusses the influence of the US model on the Australian High Court, which he argues in favour of, see Lord Neuberger of Abbotsbury, MR, ‘Insolvency, internationalism & Supreme Court judgments’, speech 16/11/2009. See the Australian literature addressing the form of judgment, M Groves and R Smyth, *A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903–2001* 32 *Federal Law Review* 255 (2004), JL Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Durham, North Carolina: Carolina Academic Press, 2006), A Lynch, *Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia* 26 *U.N.S.W.L.J.* 32 (2003) and A Lynch, *Dissent: Towards a Methodology for Measuring Judicial Disagreement in the High Court of Australia* 34 *U.N.S.W.L.J.* 1006 (2011).

⁵⁶ See the strong defence of individual dissent and style in M Kirby, *Judicial Dissent – Common Law and Civil Law Traditions* 123 *LQR* 379 (2007).

with limited detail as to facts, whereas the former invariably sets out a detailed and careful presentation of facts in cases where this is particularly relevant. The limited competence of a cassation court, and the way it sees its role in harmonising the approach of the appellate courts and authoritatively restating the law, may help explain this.⁵⁷

Over and above these historical differences and common and civil law comparators which we have identified in this section, the practice of a series of separate, individual judgments has however been subject to particularly sharp criticism in recent times. The case of *Doherty v. Birmingham City Council*,⁵⁸ turned largely upon the correct interpretation of an earlier decision, *Lambeth LBC v. Kay*, by a panel of seven in the House of Lords, with four in the majority, and two, including Lord Bingham of Cornhill, dissenting.⁵⁹ The Court of Appeal in *Doherty* was thus required ‘to distil the essence from the six fully reasoned speeches [in *Kay*]... (running to some 60 pages of the Law Reports) to extract from the four majority speeches a single, coherent test by which to determine the instant case.’⁶⁰ The majority in the House of Lords had attempted to impose a degree of unanimity by each adopting as part of their judgment a particular passage from the judgment of Lord Hope. However, the Court of Appeal in *Doherty* found that this was of limited help, because of the need to relate the same passage to the different observations made in each case. In his judgment in the Court of Appeal, Lord Justice Carnwath (as he then was) delivered, with the agreement of his two colleagues, a heart-felt plea for legal certainty:

“Was it necessary for the opinions of the House to have come to us in the form of six substantive speeches, which we have had to subject to laborious comparative analysis to arrive at a conclusion? Could not a single majority speech have provided clear and straightforward guidance, which we could then have applied directly to the case before us?”

Lord Justice Carnwath went on to suggest this priority: “In my view, the main challenge for the UK Supreme Court is not so much to develop the law, but to consolidate, clarify and make accessible what is already there.” We must thus turn to a critical examination of the practice of the UK Supreme Court.

II. Reforming Supreme Court Practice

Having analysed the evolution of the traditional approach to common law judgments, and how foreign examples show that other models do exist, even on familiar common

⁵⁷ The *Cour de cassation* (re)states the rule that the lower courts are to use.

⁵⁸ *Doherty v. Birmingham CC* [2006] EWCA Civ 1739 [2007] HLR 32.

⁵⁹ *Lambeth LBC v. Kay; Leeds CC v. Price* [2006] UKHL 10 [2006] 2 AC 465.

⁶⁰ *Doherty v. Birmingham City Council* [4].

law shores, we turn to the development in the current Supreme Court practice.⁶¹ Whilst there have been some important changes, there is not a radical departure from the practices of the House of Lords. We consider whether greater changes are required, providing some comparative law perspectives.

(i) *Supreme Court Practice*

In order to understand the current position, we have undertaken an analysis of practice since the first judgment of the Supreme Court in 2009.

A first point to make concerns the stylistic changes of the Supreme Court judgments. First, the judgments are accompanied by a Press Release,⁶² which includes information on the background to the appeal, the decision of the court, and a brief summary of reasons for the judgment(s), with cross-references to the actual judgment(s). Whilst the full judgment of the Court is the only authoritative document, and the summary does not form part of the reasons for the decision, the Press Release is designed to “assist in understanding the Court’s decision.”⁶³ Second, another stylistic feature of judgments of the Supreme Court is that concurrence of Justices with the judgment of another Justice may now be expressly noted in the headline as follows: for instance, “Lord Hope, with whom Lady Hale, Lord Brown, Lord Mance and Lord Kerr agree.”⁶⁴

Second, there have been developments in the pattern and form of the judgments in the Supreme Court. Although separate judgments remain the rule, there have been a significant number of cases where one judgment is delivered by one judge, who is explicitly said to be “delivering the judgment of the court.” Lord Neuberger’s judgment in *Manchester City Council v. Pinnock*,⁶⁵ is an example of this phenomenon.⁶⁶ In some rarer cases, such a judgment of the court may be delivered by two or more judges,⁶⁷ and we will examine this further below. The practice of a sole judgment of the court represents a relatively limited phenomenon statistically with, on our estimates, only 29 cases out of 166 during the period reviewed⁶⁸ adopting such an approach.

⁶¹ See also the statistical analysis of judgments in Part 6 of UCL Judicial Institute, *An Initial Empirical View of Decision-Making by the United Kingdom Supreme Court in Its First Two Years (2009–11)*, available at: http://www.ucl.ac.uk/laws/judicial-institute/docs/UCL_SC_Project%20_Report_June2012.pdf. See earlier analysis of impact of HRA on style of judgments: T Poole and S Shah, *The Law Lords and Human Rights* 74 MLR 105 (2011).

⁶² On rare occasions, Press Releases are not provided e.g. *Anderson v. Shetland Islands Council* [2012] UKSC 7 (which was an application on security for costs by way of written submissions so as to minimise costs and because the appellant, who was a litigant in person, was elderly).

⁶³ Phrase included at base of Press Release.

⁶⁴ *Ravat v. Halliburton Manufacturing and Services Ltd (Scotland)* [2012] UKSC 1.

⁶⁵ [2010] UKSC 45.

⁶⁶ *Manchester City Council (Respondent) v. Pinnock (Appellant)* [2010] UKSC 45 “LORD NEUBERGER 1. This is the judgment of the Court, to which all members have contributed.”

⁶⁷ *Principal Reporter (Respondent) v. K (Scotland)* [2010] UKSC 56: “LORD HOPE AND LADY HALE. »; *In the matter of E (Children)* [2011] UKSC 27: “LADY HALE AND LORD WILSON, DELIVERING THE JUDGMENT OF THE COURT.”

⁶⁸ Namely the period from 29 October 2009 – 11 July 2012.

However, this does represent 17% of cases over the period and represents a significant departure from previous practice.

Another linked development in Supreme Court Practice is a move towards the central place for a lead judgment. For a time there seemed to be a move toward a judgment of the court, with the lead or majority judgment coming first even when delivered by a judge who was not the most senior. For instance, in *R v. The Governors of X School*,⁶⁹ Lord Dyson, the most junior, delivered the first judgment, and it was stated in brackets after his name at the top of the judgment: ‘(with whom Lord Walker agrees)’. Then followed the most senior and presiding judge, Lord Hope, and the other judge in the majority, Lord Brown. The one dissenting judge, Lord Kerr, gave his judgment last. The decision on an issue of patent law in *Human Genome Sciences Inc (Appellant) v. Eli Lilly*⁷⁰ is another example of a case in which the rule of the order of seniority was set aside, with Lord Neuberger’s judgment being delivered first as a leading judgment. Similarly, in the case of *R (on the application of KM) v. Cambridgeshire CC*⁷¹, Lord Wilson’s lead judgment (with which 5 of the other Justices of the seven judge court agreed),⁷² was placed before the concurring judgment of Lady Hale. A more recent example can be found in the case of *Walton v. The Scottish Ministers*,⁷³ and there are other examples of this phenomenon,⁷⁴ in which case the Press Releases accompanying judgments have taken now to referring to the fact that “The lead judgment is given by ...”⁷⁵

Another linked development has been to group together majority and dissenting judgments. This was the case in the *Nuclear Test Veterans Case* in which the Supreme Court, by a 4–3 majority dismissed the veteran claimants’ appeal against the decision of the Court of Appeal, which had held that all nine Lead Claims in the Group Action were statute-barred. In the judgment, the majority decisions of Lord Wilson, Lord Walker, Lord Brown and Lord Mance came first followed by, in a section entitled “Dissenting Judgments”, the minority judgments of Lord Phillips, Lady Hale and Lord

⁶⁹ *R (on the application of G) (Respondent) v. The Governors of X School (Appellant)* [2011] UKSC 30.

⁷⁰ [2011] UKSC 51.

⁷¹ [2012] UKSC 23.

⁷² Recorded in this way in the judgment: “Lord Wilson (with whom Lord Phillips, Lord Walker, Lord Brown, Lord Kerr and Lord Dyson agree).”

⁷³ *Walton (Appellant) v. The Scottish Ministers (Respondent) (Scotland)* [2012] UKSC 44.

⁷⁴ See for instance *ANS v. ML (Scotland)* [2012] UKSC 30; *Tesco Stores Limited v. Dundee CC (Scotland)* [2012] UKSC 13 (lead judgment of Lord Reed); *In the matter of Peacock* [2012] UKSC 5 (lead judgment of Lord Brown); *R (on the application of KM) v. Cambridgeshire CC* [2012] UKSC 23 (lead judgment of Lord Wilson); *R (on the application of A) v. B* [2009] UKSC 12 (lead judgment of Lord Brown); *Grays Timber Products Limited (Appellants) v. Her Majesty’s Revenue and Customs (Respondents) (Scotland)* [2010] UKSC 4 (lead judgment of Lord Walker); *R (on the application of JS) (Sri Lanka) v. Secretary of State for the Home Department* [2010] UKSC 15 (lead judgment of Lord Brown).

⁷⁵ See for instance *ANS v. ML (Scotland)* [2012] UKSC 30, and the accompanying press release (dated 11 July 2012). Or, more rarely, “leading” judgment: see e.g. *Lukaszewski v. The District Court in Torun, Poland* [2012] UKSC 20, and the accompanying press release (dated 23 May 2012).

Kerr. In the *Assange* case,⁷⁶ a similar pattern was followed with a separate section entitled “Dissenting Judgments”, followed by the judgments of Lady Hale and Lord Mance.

However, this methodology is not always followed. An example of a different approach is found in the *Argentine Vulture Funds* case,⁷⁷ in which the judgment of Lord Phillips of Worth Matravers came first even though his was not the majority judgment on the reasons.⁷⁸ The Court was unanimous in favour of overturning the Court of Appeal but not on the reasons why, and none of the judges in the majority here wrote what was to become the lead judgment. One explanation might be the working methods of the UK Supreme Court, which does not follow the patterns of its US counterpart in circulating memos and holding judges conferences to examine the allocation or re-allocation of the judgment-writing, or for that matter, the lead dissent if there are more than one. In the *Argentine Vulture Funds* case, the order of the judgments was such that after Lord Phillips, came Lord Mance who agreed in the outcome but had a different view on one of the reasons given by Lord Phillips. Lord Collins⁷⁹ agreed with Lord Mance but made one independent point of what he regarded to be a hypothetical nature. Lord Clarke agreed with Lord Phillips but with Lord Collins on the latter point they agreed to be of a hypothetical nature in the case before them.

The case of *F-K v. Polish Judicial Authority*,⁸⁰ also illustrates a different model. This case concerned the extradition of the parents of young children and the rights of the child and to family life. Lady Hale, alone in the minority, delivered the first judgment. She summarised the preceding proceedings and all the legal issues leading up to her conclusion. Lord Judge delivered another full judgment in which the other judges joined. Lord Wilson did so in yet another full judgment.

A further development in Supreme Court practice is a tendency for the Justices to set out more extensive cross-referencing between judgments.⁸¹ It is therefore more frequent to find agreement and disagreement between the Justices addressed explicitly in the main judgment, than it was previously in the House of Lords. An example of this is to be found in the *Franked Investment Income (“FII”) Group Litigation*,⁸² in which the presiding judge Lord Hope outlines the various issues in play, and then cross-refers to the main judgments of Lord Walker and Lord Sumption.⁸³ Another

⁷⁶ *Assange v. Swedish Prosecution Authority* [2012] UKSC 22.

⁷⁷ *NML Capital Limited v. Republic of Argentina* [2011] UKSC 31.

⁷⁸ Alan Paterson discusses how Lord Neuberger in *Stack and Dowden* started out writing for more colleagues ‘only to find that when the dust had settled and the vote switching was over, they were on their own ...’, see, A Paterson, *Lawyers and the Public Good*, 174–5 (Cambridge: CUP, 2012).

⁷⁹ With whom the second senior judge, Lord Walker agreed, as indicated in brackets at the top of Lord Collins’s judgment.

⁸⁰ *F-K v. Polish Judicial Authority and R (HH and PH) v. Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25.

⁸¹ But note the limited success of this in *Doherty v. Birmingham City Council* [2006] EWCA Civ 1739 [2007] HLR 32, as discussed above.

⁸² [2012] UKSC 19.

⁸³ Prior to engaging in a separate consideration of an EU Law point.

example is the case of *Jones v. Kernott*,⁸⁴ Lord Kerr lays out in his judgment the areas in which there is a consensus among the members of the court,⁸⁵ before setting out the remaining areas of disagreement.⁸⁶ There are other examples of such an approach.⁸⁷

Finally, in some cases there have been jointly authored or composite judgments by two or more Justices. Although this has occurred only in limited cases so far, there are a number of interesting examples. In *the matter of E (Children)*,⁸⁸ Lady Hale and Lord Wilson jointly delivered the judgment of the court. In another case, *Principal Reporter v. K (Scotland)*,⁸⁹ Lord Hope and Lord Hale delivered a joint judgment, expressed also as “a judgment of the court with which all members agree”, but with an explanation of which parts of the judgment / issues in play Lord Hope and Lady Hale had respectively taken “primary responsibility.”⁹⁰ In *Manchester City Council v. Pinnock*,⁹¹ as discussed above, a single judgment of the court was delivered by Lord Neuberger but it was explicitly noted that all members of the court had contributed to it. In other cases, *Lucasfilm Limited v. Ainsworth*, Lord Walker and Lord Collins gave a joint judgment (with which two other Justices agreed);⁹² and in *Jones v. Kernott*,⁹³ Lord Walker and Lady Hale gave a lead joint judgment.⁹⁴

Practice continues to develop, and the most recent judgments at the conclusion of the new Supreme Court’s first three years have not reflected any limitation of the rich variety of forms.⁹⁵ As already noted, the shift from the methodology in the House of Lords has not been fundamental, or without precursors in the Bingham Court and before, and the instinctive penchant for separate judgments, dissenting opinions and concurring and partly concurring judgments seems to linger. It remains noteworthy

⁸⁴ [2011] UKSC 53.

⁸⁵ *Ibid.*, at [67] – [68].

⁸⁶ *Ibid.*, at [69].

⁸⁷ See e.g. *R. (on the application of Alvi) v. Secretary of State for the Home Department* [2012] UKSC 33 : Lord Clarke at [104] and Lord Wilson at [129]; and the case of *Assange v. Swedish Prosecution Authority* [2012] UKSC 22, Lady Hale at [186 et seq].

⁸⁸ [2011] UKSC 27.

⁸⁹ [2010] UKSC 56.

⁹⁰ *Ibid.*, Para. 1.

⁹¹ [2010] UKSC 45.

⁹² [2011] UKSC 39. The other Justice, Lord Mance, also agreed with the joint opinion but preferred to “express no view” about a further issue, namely the application or scope of the doctrine of act of state in relation to issues of validity of foreign intellectual property rights (at [115]).

⁹³ [2011] UKSC 53.

⁹⁴ Lord Collins agreed with Lord Walker and Lady Hale and adds some reflections of his own. Lord Kerr and Lord Wilson agree in the result but reach it by a different route.

⁹⁵ Judgments delivered in July, August and October 2012. Albeit in all of these cases, the first judgment would be that of the majority or a unanimous court. The first judgment would be delivered by one judge but in all cases one or more of the other judges would join or concur by an express note in brackets in the headline that they “agree”. See e.g. in *Solihull Metropolitan Borough Council v. Hickin* [2012] UKSC 39 the Supreme Court dismissed the appeal by a 3–2 majority, and what the press release refers to as the “leading judgment” was delivered by one judge (“Lord Sumption with whom Lord Walker agrees”), and with Lord Hope, the Deputy President, giving a short concurring judgment.

the extent to which the Supreme Court is now endeavouring to ensure that the *ratio* of a case is clearly expressed and accessible, and to avoid needless repetition.

But have the changes gone far enough? We will now consider whether greater reforms are required, and also consider how historical experience and comparative law can give some guidance to this process.

(ii) *Reforming Supreme Court Practice*

As we have seen, the Supreme Court has begun to experiment with the form of judgment. Our review of the case law above has shown that the Supreme Court has applied a range of different forms without having, as yet, adopted a single model.

We argue in this section that these incremental changes should be developed further. There is a new generation of Justices with an interest in taking the courts into the next stage, trained in the new forms of judgment in the Court of Appeal, and in the application of EU and human rights law. Many of the new generation of Supreme Court Justices have sat as judges in Strasbourg, and they are not only familiar with other common law courts but also with French or German courts and their law and working methods. This provides a good opportunity to ensure that the form of judgments of the apex court of English and Wales are developed further and thus to continue to be influential within the global market for judgments.⁹⁶

Matters of style are subject to discussion, evolution and reform in most jurisdictions and have not been totally absent from comparative law discourse. Indeed, Montesquieu devoted long sections of Book 6 of *Esprit des Lois*, which was partially entitled “the Form of Judgments”, to the theme “Of the Manner of Passing Judgment.” A limited literature has recently developed, predominantly devoted to challenging the orthodox view which has traditionally perceived the style and form of judicial decision-making in England and France as sitting on, or somewhere near, opposite ends of the judicial scale.⁹⁷ Sir Basil Markesinis has in his extensive scholarship found effective ways of making these available to the common lawyer,⁹⁸ and making meaningful contributions to law reform discussions. Mitch Lasser has also been prominent in questioning the traditional dichotomy between the common law and civil law systems in this sphere.⁹⁹ Lasser notably analyses the practice of the French *Cour de cassation*, thereby challenging the archetype external analysis of the French system of adjudication as a pas-

⁹⁶ Lord Rodger of Earlsferry, *The Form and Language of Judicial Opinion* 118 LQR 226, 247 (2002).

⁹⁷ It should be underlined that the French judicial style is by no means representative of the heterogeneous continental approach: see e.g. G Cuniberti, *Grands Systèmes de Droit Contemporains*, Para. 111 (Paris: LGDJ, 2007).

⁹⁸ See in particular BS Markesinis, Hannes Unberath, *The German Law of Torts: A Comparative Treatise* (5th ed, Oxford: Hart Publishing 2002); BS Markesinis, H Unberath, A Johnston, *The German Law of Contract: A Comparative Treatise* (2nd ed, Oxford: Hart Publishing 2006).

⁹⁹ See e.g. M De S.-O.-L'E Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System* 104 Yale L J 1325–410 (1995);

sive and mechanical system of a “syllogism machine”,¹⁰⁰ by contrasting the official portrait of French adjudication with the hidden, unofficial portrait.¹⁰¹

How can comparative perspectives provide insights into reform issues? Lord Bingham and Dame Mary Arden have both argued that comparative law may prompt a re-examination of domestic approaches,¹⁰² and the latter has also recognized the importance of comparative law in her recent article on judgments:

“Different legal systems approach judgment writing in different ways and we should of course seek to enrich our own judgment-writing ideas by looking to see how judgments are written in other systems. As in other areas comparative law is likely to give us a wider perspective on the issues and their solution.”¹⁰³

Elsewhere, in continental jurisdictions, the style of judgments has always been an important concern. Whilst on an initial view, the short judgments in French Supreme Courts might not be thought to raise significant stylistic concerns,¹⁰⁴ on closer investigation they transpire to be highly-stylised documents, in respect of which one finds a number of books dedicated to their study.¹⁰⁵ This approach is not however set in stone. The French *Conseil d’Etat* has recently engaged in a reflection on the reform of the style of administrative court judgments. The resultant report includes proposals to develop the reasoning underpinning the court’s decision and adopt a more accessible judicial style, including a proposed move away from the hallowed one-sentence approach.¹⁰⁶ In making the various conclusions, the report drew upon a detailed comparative law study.¹⁰⁷

In the European context, there are the fair trial requirements of Article 6 of the European Convention on Human Rights. The Court of Appeal in *English v. Emery Reimbold & Strick Ltd* summarised the case law of the European Court of Human Rights thus:

¹⁰⁰ Citing J Carbonnier, *Ibid.*, at 696.

¹⁰¹ Lasser thus refers to two protagonists of this hidden, discursive sphere, the reporting judge and the advocate general, who via their respective *rapports* and *conclusions* “demonstrate that the French judicial system possesses all of the attributes that traditional American comparative analyses have claimed that it lacks”: See M De S.-O.-L’E Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford, 2004).

¹⁰² *Fairchild v. Glenhaven Funeral Services Ltd* [2002] UKHL 22 at [32] (Lord Bingham); *An Informer case v. A Chief Constable* [2012] EWCA Civ 197 at [109] (Lady Justice Arden).

¹⁰³ M Arden, *Judgment Writing as Literature?* 128 LQR 516 (2012).

¹⁰⁴ G Cuniberti, *Grands Systèmes de Droit Contemporains*, Para. 111 (Paris: LGDJ, 2007).

¹⁰⁵ See e.g. A Perdriau, *La Pratique des Arrêts Civils de la Cour de Cassation: principes et méthodes de rédaction* (Paris, 1993); P Estoup, *Les Jugements civils: Principes et méthodes de rédaction* (Paris, 1988); P Mimin, *Le Style des Jugements* (4th edn, Paris, 1978).

¹⁰⁶ *Groupe de Travail sur la Rédaction des Décisions de la Jurisdiction Administrative* (Paris, Conseil d’Etat, April 2012).

¹⁰⁷ See Annexe 3, covering a dozen or different countries.

‘[it] requires that a judgment contains reasons that are sufficient to demonstrate that the essential issues that have been raised by the parties have been addressed by the domestic court and how those issues have been resolved. It does not seem... that the Strasbourg jurisprudence goes further and requires a judgment to explain why one contention, or piece of evidence, has been preferred to another.’¹⁰⁸

More importantly both the European Court of Human Rights and the European Union Court of Justice review UK court judgments. The Strasbourg Court compares national supreme courts and the way in which they give reasons for their decisions which may determine approval or censure. The majority of the judges in any European court will come from other traditions than English law. Comparative law can assist in the analysis of how to write judgments that satisfies the requirements of the European courts (or convince them).

Finally, comparative law shows that the style or form of judgments in the common law is far from uniform, and that not only in the United States but in Australia’s High Court, Canada’s Supreme Court and New Zealand’s Supreme Court, there have been considerable developments in this sphere. In the experimentation phase underway in the UK, there is a need for a comparator for assessing different aspects of the domestic system. Comparative law provides assistance in the assessment of particular features and their efficiency and compliance with more general aims and principles.

We will now turn to examine the specific reforms in the United Kingdom. We will cover a number of pressing issues and advocate that in modernising the style of the Supreme Court decisions, an effort must be made to make judgments shorter, and that single majority judgments should, where possible, be prioritised, with restraint exercised in the use of concurring judgments. We will note that this will have an impact on issues such as the internal workings of the court, control of admissibility of cases and judicial training.

(iii) *Making Judgments Shorter*

There has been a marked inflation in the length of judgments handed down in England and Wales, a phenomenon which has been noted by influential judicial figures. Lady Justice Arden has argued that “ever-growing length can be seen by comparing judgments in the 1890s with those for any year since the start of the new millennium. Without a shadow of a doubt, they have become much longer. Many judgments are wholly admirable, but some are longer than they need to be.”¹⁰⁹

As we have already seen, Lord Bingham was also an advocate of clarity and succinctness in the art of judging. He considered that, as accessibility of the law is a key constituent element of the rule of law, judges must also bear such considerations in mind when drafting judgments. In his book on the rule of law, Lord Bingham thus

¹⁰⁸ [2002] 1 WLR 2409, CA, at [12].

¹⁰⁹ M Arden, *Judgment Writing as Literature?* 128 LQR 516 (2012).

noted that “[t]he length, elaboration and prolixity of some common law judgments... can in themselves have the effect of making the law to some extent inaccessible.”¹¹⁰

In a recent extra-judicial speech, Lord Neuberger has also addressed the issue of the length of judgments.¹¹¹ He balances the arguments as follows:

“Short or long? On the face of it, the answer is obvious: judgments should be as short as possible. But if a judgment is too abbreviated, the judge will risk not considering the issues and previous authorities properly. And one of the main points of a judgment is to explain the decision to the parties, especially the loser, to their lawyers and to any appellate court, and more generally to future potential litigants, to their lawyers, as well as to academics. And particularly in our common law precedent-based system, judges often should refer to and consider past decisions. So the shorter the better, but, as with anything, you can have too much of a good thing.”¹¹²

Civil lawyers may agree with the first part of Lord Neuberger’s concluding sentence, but perhaps not so easily with the latter.¹¹³ We have already noted that in the pithy continental equivalent, brevity is considered as an essential characteristic. One leading commentator on French judicial drafting has argued that concision is the primary virtue of French judgments,¹¹⁴ and in accordance with the strictures of the French Code of Civil Procedure, judgments are to be “succinct.” Although judgments in the courts of final appeal often consist of only a few hundred words,¹¹⁵ the picture is again nuanced. We have already pointed out the general differences in form between the French Cour de cassation and Cour d’appel. An example of an atypically long judgment from a French Cour d’appel is in the case from 2010 on criminal and civil liability after the ‘Erika’ oil tanker sank off the coast of France in 1999, causing a major environmental disaster. The Court of Appeal judgment amounted to 487 pages.¹¹⁶ Unusually, the 2012 judgment of the Cour de cassation in that case was also very long, reaching some 319 pages, and even includes a table of contents at the end.¹¹⁷ The Italian Corte di cassazione and the German Bundesgerichtshof in general deliver longer judgments than the French Cour de cassation, and often include a more extensive review of case law. The Bundesgerichtshof also makes references to legal literature. In the Scandinavian

¹¹⁰ T Bingham, *The Rule of Law*, 42 – 43 (London: Allen Lane, 2010).

¹¹¹ Lord Neuberger of Abbotsbury, Master of the Rolls, ‘Open Justice Unbound?’, Judicial Studies Board Annual Lecture 2011.

¹¹² *Ibid.*, at [10].

¹¹³ But see the changes proposed in Conseil d’Etat, *Groupe de Travail sur la Rédaction des Décisions de la Jurisdiction Administrative* (Paris, Conseil d’Etat, April 2012).

¹¹⁴ P Mimin, *Le Style des Jugements*, Para. 1 (4th edn, Paris, 1978). For an account in English, see E Steiner, *French Legal Method*, Chapter 8 (Oxford, 2002).

¹¹⁵ See e.g. A Touffait and A Tunc, *Pour une motivation plus explicite des décisions de justice*, *Revue trimestrielle de droit civil* 487 at 505 (1974).

¹¹⁶ Cour d’Appel de Paris, n° RG 08/02278, 30 March 2010.

¹¹⁷ Cass crim 25 Sep 2012, N° 3439.

courts the Danish Supreme Court are shorter than the Swedish and Norwegian supreme courts, and in spite of publishing dissenting judgments, and internal variations between them, in terms of length they resemble the German models.¹¹⁸

As for courts at the European supranational level, they have developed from a starting point of brief judgments (striking a balance between the approaches of courts in the original members states and owing much to French influences),¹¹⁹ to a position where the length in judgments has gradually increased. In the courts of the European Union, the General Court (normally a first instance court) has much longer judgments than the Court of Justice, in particular to deal with facts of cases.¹²⁰

This tendency towards longer judgments in national and international courts may be explained by a variety of factors. Clearly, the growing complexity of sources and legal issues has played a role,¹²¹ assisted also by recourse to technology with efficient databases of authorities. Other factors are of relevance as well, including the increasing scrutiny of administrative action, with the development of nuanced and subtle tests such as the principle proportionality, which requires the setting out of criteria, the factors that are considered, and how they are balanced against one another. At a European level, the special position of a supranational court, and the need to demonstrate and explain the aforementioned doctrines for application by the courts in a diverse range of Members States across Europe should also be taken into account. Similar considerations may also be felt in national systems, where the apex court plays a role in harmonising the law. These are problems which have some commonality whatever the level of the courts in the various hierarchies.

We concur with the viewpoint of Lady Justice Arden about the need for more effective ways of limiting prolixity and achieving concision in the common law. Accessibility of the law is important within the context of ever more complicated sources of law. Comparative law can perhaps serve to place the evolutions within a broader focus. The review of English judgments may benefit from a more systematic study of, and comparison with, this aspect of judgments in other European countries.

¹¹⁸ LP Kristensen, P Magid, T Melchior, J Stokholm and D Tamm, *Højesteret – 350 år*, 172–175 (Copenhagen: Gyldendal 2011).

¹¹⁹ In *De Becker v. Belgium* (1962), Series A No. 4, and the *Belgian Linguistic Case* (No.1) (1967), Series A, No.5 (1979–80) the European Court of Human Rights discusses the law in the judgment's final section before the order over two pages, with every paragraph beginning "Considérant que" or "que" or "whereas" in the English version. René Cassin, who had served 16 years as the head of the French Conseil d'Etat, was the president in both. The average judgment in the Court of Justice of the European Union was between 10 and fifteen pages for the first twenty years. The landmark cases of C-26/62 *Van Gend en Loos v. Administratie der Belastingen* [1963] ECR 1 and C-6/64 *Costa v. E.N.E.L.* 1964 [ECR] 585 ran to 16 and 13 pages.

¹²⁰ For instance, the General Court judgment in Case T-201/04, *Microsoft Corp. v. Commission* [2007] E.C.R. II-3601, reached 433 pages. The House of Lords European Union Committee has supported that the General Court's judgments are "unnecessarily long" and that it should "be more economical in judgment writing", see *An EU Competition Court: Report with Evidence*, 15th report of session 2006–07, House of Lords papers 75 2006–07.

¹²¹ As well as, in the English context, of the move from an oral process of trial to a predominantly paper-based approach.

(iv) In Favour of Single Majority Judgments

The position of single majority judgments has become, as we have already seen, an important issue in recent times in the United Kingdom, and particularly during the transition to the Supreme Court. We have shown in our analysis above, however, that this is not an entirely original concern. From a historical perspective, practice has evolved over time in different parts of the English court structure, and also in the House of Lords.

Comparative law perspectives are of relevance here. There has been an identifiable trend towards majority judgments in a number of jurisdictions. The Supreme Court in the United States adopts, as is well-known, a format of majority judgments of the court, albeit that there has been continuing discussion within the Court about the place of concurring and minority judgments.¹²² Another important common law court, the Australian High Court, has—as seen above—graduated from the seriatim format, adopting its own version of a judgment of the court, without indication of individual contributions to the drafting.¹²³ The position of European courts has already been discussed in earlier sections. In many European courts, there is a preference for a judgment of the court, and in many jurisdictions this means that judges do not deliver concurring or dissenting judgments. The position of the International Court of Justice should also be mentioned here. The Court and its predecessor, the Permanent Court of International Justice, have from their inception adopted a judgment of the court, allowing different forms of recording of dissents and concurrences.¹²⁴

There are strong arguments in favour of moving towards a majority judgment as the norm in the UK. Lady Justice Arden has argued that a single majority judgment is preferable in appellate courts, where possible, rather than a succession of individual judgments.¹²⁵ This is in line with Lord Bingham's statement as cited above that "where the members of the House are unanimous, both as to the result and the reasons, I am generally in favour of a single judgment in cases ruling on matters of practice and criminal law".¹²⁶ Whilst single majority judgments can, where appropriate, be supplemented by concurring judgments or of course, separate dissenting judgments, Arden LJ makes the point that it is no longer axiomatic that "the value of separate judgments from each member of the appellate court was that it would enable the reader to obtain a rounder and richer picture of the law."¹²⁷

¹²² See e.g. the discussion in Ruth Bader Ginsberg, *The Role of Dissenting Opinions* 95 *Minnesota Law Review* 1 (2010), at 1 and 2

¹²³ See the Australian literature addressing the form of judgment, cited in note 55 above.

¹²⁴ This is expressly stated in the ICJ statute, see the discussion in R.Hofmann and T.Laubner, *Art. 57* in A Zimmermann, K Oellers-Frahm, C Tomuschat, and CJ Tams (eds.), *The Statute of the International Court of Justice. A Commentary* (2nd edn, Oxford: OUP, 2012).

¹²⁵ M Arden, *Judgment Writing as Literature?* 128 *LQR* 516 (2012).

¹²⁶ Lord Bingham of Cornhill, *A Personal Perspective*, in M Andenas and S Vogenauer (eds), *The Form of Judgment* (Oxford: Hart, 2013).

¹²⁷ M Arden, *Judgment Writing as Literature?* 128 *LQR* 516 (2012).

Additional arguments have been made by judges. We have already noted above the plea of Carnwath LJ in his judgment in the Court of Appeal in *Doherty*¹²⁸ that the primary role of the UK Supreme Court should be to “consolidate, clarify and make accessible” the law. Referring to Lord Reid’s 1971 comments in *Saunders v. Anglia Building Society*, Lord Justice Carnwath said:

“It may be that the balance of priorities has changed since 1971, when Lord Reid was speaking. To take the most obvious point, in those days the domestic statutes for a single year fitted comfortably into a single volume, and there was no European legislation or case-law to muddy the waters. We live in a very different legal world today. The overriding problems are the sheer volume of new legal material, legislation and case-law (domestic and European), and the pace of change.”

In one of his first speeches after his elevation to the Supreme Court, Lord Carnwath referred to his own experience in the Court of Appeal, leading him “to the clear view that the greater risk is from too many judgments, rather than too few.”¹²⁹

Lord Neuberger¹³⁰ has explained that in some types of case, it is important to have a single judgment giving clear guidance, avoiding any possibility of arguments as to whether two slightly differently expressed judgments meant the same thing. Lord Neuberger expanded upon this referring to the series of Supreme Court judgments which gave rise to the comment of Lord Justice Carnwath in *Doherty*:

“The desire to write your own judgment, particularly in an interesting and important case, can be quite considerable. The wish is reinforced where, as often happens, you think you can write an even better judgment than the one your colleague has produced. ... I was recently involved in a case in the Supreme Court, where we were anxious to ensure that judges in the County Courts had clear guidance as to how to apply Article 8 of the European Convention to residential possession actions. Lord Phillips PSC was anxious that there was only one judgment, given the importance of clear guidance in such a case. Although it went out in my name, the contributions to the judgment of the other eight members of the court were substantial, in some case very substantial. It was hard work, involving a number of meetings and a great deal of email communication, but the result was much better than my original draft. Whether it achieved its aim only other people and time can tell.”¹³¹

¹²⁸ *Doherty v. Birmingham CC* [2006] EWCA Civ 1739 [2007] HLR 32.

¹²⁹ Lord Carnwath of Notting Hill JSC, ‘Judicial Precedent – Taming the Common Law’, NMLR Annual Lecture Series – 7th June 2012, available at http://www.supremecourt.gov.uk/docs/speech_120607.pdf.

¹³⁰ Lord Neuberger of Abbotsbury, Master of the Rolls, ‘Open Justice Unbound?’, Judicial Studies Board Annual Lecture 2011, at [25]. See also Lord Neuberger, ‘No Judgment, No Justice’, The First BAILII Lecture, 20 Nov 2012.

¹³¹ *Ibid.*

From a doctrinal perspective, a single judgment has support in academic writing. In this respect, we have already noted the scholarship of Alan Paterson and Louis Blom-Cooper.¹³² Most recently, Professor Neil Andrews has formulated his support in precise terms: he is in favour of composite decisions, ending the concurring judgment but retaining the option to dissent.¹³³ He points out that it remains controversial whether panels of appellate judges should continue to compose individual concurring judgments, and his own conclusion is that “on balance, composite decisions should be adopted, with sensible word-limits”, ending the concurring judgment but retaining the option to dissent.¹³⁴ The approach suggested by Professor Andrews presents many advantages.

It is our view that English courts should strive towards delivering a majority judgment, where at all possible. Concurring judgments should be delivered only in restricted circumstances where the judge in question concurs as to result, but disagrees as to the grounds and reasoning, and that this cannot be accommodated in a sensibly worded variation in the single majority view.¹³⁵

In those cases where concurring, partially concurring judgments or, separate dissenting judgments are delivered, then greater co-ordination needs to be made within the court so as to clarify the ratio of the decision. There have been steps towards this process already. We have seen that there have been perceptible efforts on the part of the Supreme Court to ensure that the ratio of cases is clearly expressed and accessible. Where there are several judgments, then the development of extensive cross-referencing between judgments, as has already occurred in some cases,¹³⁶ would be very useful. Even the re-ordering of judgments, with a lead judgment delivered first, as well as the grouping together of majority and minority judgments, where both majorities and minorities may agree on joint judgments may assist the understanding of the decision. However, greater efforts do need to be made to strive towards clarity. Other ideas should be canvassed. Lord Neuberger recently suggested that the leading judgment should, at the outset, include a short summary, which “should be sufficient to enable a non-lawyer to know the facts, the issues, and how and why they were resolved.”¹³⁷ Such a summary, incorporated into the opening paragraph of a judgment, would be available to all in a way that headnotes are not (as they are found only in professionally published law reports), compiled by the judge(s) in the case and would be incorporated in the corpus of the judgment (which the Supreme Court press re-

¹³² In subsection (ii) *Breaking with Tradition: single and composite judgments in the House of Lords*, above.

¹³³ N Andrews, *Duty to Give Reasons* in M Andenas and S Vogenauer (eds), *The Form of Judgment* (Oxford: Hart, 2013) and the further discussion in N. Andrews, *Andrews on Civil Processes Vol 1 Court Proceedings and Principles* (Cambridge: Intersentia 2013).

¹³⁴ *Ibid.*

¹³⁵ An additional possibility is where the judgment in question is only partially concurring, and thus where the separate judgment focusses solely on the elements of dissent.

¹³⁶ See discussion above. A striking example of this is *Franked Investment Income (“FII”) Group Litigation* [2012] UKSC 19.

¹³⁷ Neuberger, ‘No Judgment, No Justice’, The First BAILII Lecture, 20 Nov 2012, at [17].

leases are not). We will discuss below the consequences that this will have on internal workings of the court and training. We will first say a word about dissenting judgments.

(v) *Dissenting Opinions*

The attraction of the dissent in the English common law has always been strong.¹³⁸ The right to disagree publicly is thus jealously guarded by many in the judiciary. Indeed, on a number of occasions, the dissent has ultimately prevailed, as the minority ultimately becomes the majority view.¹³⁹

As first glance, the contrast offered by the civil law tradition is striking. Perdriau has explained that judgments must not be undermined by doubt or incertitude, but rather should be powerful (even perhaps, “brutal”),¹⁴⁰ and lay down the legal position by means of a pithy assertion. The desire for authority of the judgment may in part, explain the lack of dissenting opinions in the French system.¹⁴¹ As one author has opined, the publication of individual judgments “would entail the serious disadvantage of reducing the weight of the decision by revealing to the public the diversity of opinions that went to make up that decision.”¹⁴² In such a context, internal disagreement can be reflected only in the form of words, by longer or shorter reasoning. The European Union Court of Justice belongs to this tradition, and here the argument that this strengthens the court’s independence may have some merit in a system with fixed and renewable terms of appointment with national government controlling appointments.

On closer scrutiny, however, the picture appears somewhat different in a civil law context. The European Court of Human Rights and the International Court of Justice allow dissent; in Germany, dissents are allowed in the Constitutional Court. In the Scandinavian countries, all courts have allowed dissent since the 19th century. In practically all jurisdictions there is an on-going discussion about the form of judgment,

¹³⁸ J Laffranque, *Judge Versus Judge: Is There Room for Judicial Dissent as Opposed to Artificially Created Harmony in the Context of Preserving the Authority of the ECJ Judgments?* in M Andenas and S Vogenauer (eds), *The Form of Judgment* (Oxford: Hart, forthcoming) argues that the Court of Justice of the European Union now has matured and should graduate to accepting dissenting judgments.

¹³⁹ A Paterson *The Law Lords*, 100–104 (London: Macmillan, 1982) discussed how views on and the frequency of dissent had changed over time in the House of Lords. Lord Nicholls of Birkenhead, in his foreword by in N Geach and C Monaghan *Dissenting Judgments in the Law*, v. (London: Wildy, Simmonds & Hill Publishers 2012) says that “at best, a dissenting judgment may be so obviously right that the courts or Parliament soon steer the law along a better path”, and for a similar US perspective, V Baird and T Jacobi, *How the Dissent Becomes the Majority* 59 *Duke Law Journal* 183 (2009).

¹⁴⁰ A Perdriau, *La Pratique des Arrêts Civils de la Cour de Cassation: principes et méthodes de rédaction*, para. 1292 (Paris, 1993).

¹⁴¹ The anonymity of judgments and collegial decision-making are seen as guarantors of judicial independence and impartiality: J Bell, *Principles and Methods of Judicial Selection in France* 61 *S Cal L Rev* 1757, 1776.

¹⁴² O Barrot, *de l’organisation judiciaire en France*, 69, cited by B Rudden, *Courts and Codes in England, France and Soviet Russia* 48 *Tul L Rev* 1010, 1016 (1973–74).

including aspects such as length, dissent,¹⁴³ as well as consequences for the style and form of judgments of the application of European, international and comparative law.¹⁴⁴ Even in those countries where for deep-seated constitutional reasons dissents are not allowed, such as France, the reality may be more nuanced. One only needs to think of the conclusions pronounced by the *rapporteur public* before the Conseil d'Etat which may not ultimately be followed.

Even in the common law, there are more critical views on the frequency of dissenting judgments. In England, Lord Diplock favoured single judgments which arose to nearly 70% in his term as Senior Law Lord. Chief Justice Roberts of the US Supreme Court has repeated his view from his confirmation hearings that less dissent is an aim, with references to Chief Justice Marshall who during his term in the first third of the 19th century, generally delivered the judgment for the US Supreme Court, departing from the English model of seriatim judgments by the judges.¹⁴⁵ In a recent interview, Roberts declared he would make it his priority, as Marshall did, to discourage his colleagues from issuing separate opinions: "I think that every justice should be worried about the Court acting as a Court and functioning as a Court, and they should all be worried, when they're writing separately, about the effect on the Court as an institution."¹⁴⁶

The dissenting opinion is an important feature of the common law, and a move towards single majority judgments, as described above, still allows for the co-existence of separate dissenting judgments. However, as part of the broader reflection on the accessibility of the law, and succinctness of case law, it may well be useful to undertake a reflection on the frequency and occurrence of dissents. A development of working methods with more time set aside for conferences and circulation of drafts between judges, as we discuss below, may facilitate this.

(vi) *Internal Workings of the Court*

So what are the consequences of the foregoing for the internal working methods in the courts? The Woolf reforms and Civil Procedure Rules on case management include the aim of focusing on key issues rather than every possible issue and limiting the amount of work that has to be done on the case. This is given effect through procedures

¹⁴³ In German discussion the article by Konrad Zweigert is a classic: 'Empfiehl es sich, die Bekanntgabe der abweichenden Meinung des ueberstimmten Richters (Dissenting Opinion) in den deutschen Verfahrensordnungen zuzulassen' *Gutachten für den 47. Deutschen Juristentag* (Nürnberg : Beck, 1968).

¹⁴⁴ E.g., Conseil d'Etat, *Groupe de Travail sur la Rédaction des Décisions de la Jurisdiction Administrative* (Paris, Conseil d'Etat, April 2012).

¹⁴⁵ See Hope Yen, 'Roberts Seeks Greater Consensus on Court', *Washington Post*, 21 May 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/21/AR2006052100678.html>; see also, Chief Justice John Roberts, 'Address to Georgetown University Class of 2006' (21 May 2006) available at <http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=144>. See also the discussion in Ruth Bader Ginsberg, *The Role of Dissenting Opinions* 95 *Minnesota Law Review* 1, at 1 and 2 (2010).

¹⁴⁶ See 'Roberts's Rules', interview with Jeffrey Rosen in *The Atlantic*, 13 July 2012. The number of dissents fell in Chief Justice Roberts's first term but has later risen.

leading up to hearings. At the appellate stage too, meetings prior to hearing can contribute to narrowing issues, reducing time scales, focusing arguments, and for judges to understand the position of colleagues on preliminary issues. It requires reading of papers and management of pre-hearing discussions. Much has been done across the UK court system in improving the utility of the parties' submissions in the requirements to the written case.

There are different models for a more structured preparation. One is the assignment of the writing of the judgment of the court in common law jurisdictions such as the United States and as this practice has developed in the Supreme Court of Canada. Others can be found in jurisdictions making use of a report before the hearing (*rapport préalable*) by a *juge rapporteur* who will later draft the judgment. Some continental courts receive an opinion with an outline of a decision by an Advocate General or *Rapporteur Public*. The work of *juges rapporteur* and Advocates General vary considerably, between national jurisdictions, within national jurisdictions (as in administrative, general and constitutional courts) and even between court instances (such as Cour d'appel and Cour de cassation in France or the EU General Court and Court of Justice). In the French supreme courts one refers to *travaux préparatoires* for judgments, and these may include, in addition to the reports mentioned, notes on comparative law and mechanisms for securing unity in law and form, for instance by a skilled *lecture d'arrets*, revising the texts of the judgments.

The House of Lords and the Supreme Court has developed its working methods, and in recent times, there has been an increase in assigning tasks and subsequent circulation of drafts in the Supreme Court.¹⁴⁷ This raises the issue of conferences where drafts are discussed. Alan Paterson has analysed the limited opportunity to discuss cases in conferences between the justices, and points out that only in exceptional instances will a case be discussed at more than one conference.¹⁴⁸ There is thus clearly scope for the internal workings of the courts to be developed, particularly in terms of co-ordination between judges on the writing of judgments. If changes are to be effected in style and format, then collaboration and co-ordination will need to be increased. The nature of this would depend upon the ultimate objective, but could range from simply a greater frequency of meetings, to the more formal developments of a reporting judge for each matter. The more ambitious solutions would entail significant changes. If the current trend in favour of composite judgments continues, then this will require that time schedules allow for exchanges of drafts and conferences on a different scale from today. Many civil law courts spend more time on conferences than on the hearings, and this applies to certain common law courts too, such as the United States Supreme Court.

¹⁴⁷ A Paterson, *The Law Lords* (London: Macmillan, 1982), A Paterson, *Lawyers and the Public Good* (Cambridge: Cambridge University Press, 2012).

¹⁴⁸ *Ibid.*

(vii) Training

The final point may be an obvious one. The form of judgment, as we have explained above, is a highly developed form in all jurisdictions. In civil law jurisdictions, much attention is thus given to the skill of judgment drafting, which is considered to be a topic worthy of study. In France, for instance, one finds a number of books dedicated to their study, some in the form of manuals or text books for the training that takes place in the different judicial academies.¹⁴⁹ For civil lawyers, drafting judgments is, as something different from other forms of legal writing, a skill that features prominently in the training of judges at all levels. In many continental universities, this is part of the syllabus for law degrees, and a form of examination question: given a set of facts and submissions, the candidate is required to ‘draft a judgment’. In England and Wales, on the other hand, judgment writing has not traditionally been taught. One is assumed to pick up this skill intuitively as a common lawyer reared on a diet of case law, and secondarily perhaps as a stint as a recorder. Some voices have however been raised in favour of reform—albeit incremental reform! Lord Neuberger has recently referred to that it might seem that judgment writing is a very individualistic exercise “governed by the style and approach of the judge and the issues and character of the case ... Some might go so far as to say that anyone who needs to be taught how to write a judgment is unfit to be a judge.” Lord Neuberger did not agree with that conclusion. He pointed to advocacy, which is taught, and every bit as much a personal, case-based art. Even an experienced judge can learn about judgment-writing, as so often in the daily work of the Court of Appeal: “When I receive a colleague’s draft judgment, I often not only consider the reasoning and conclusion of the draft, but also realise that the approach, style or structure is different from that which I would have adopted, and, at least sometimes, I really think I learn from it.” Training thus may also assist in accompanying and assisting an evolution in the format and style of judgments.¹⁵⁰

III. Outlook

What can we expect in the Supreme Court emerging from the current phase of experimentation and respect for the unrestricted freedom of Justices to compose individual judgments? Dame Mary Arden¹⁵¹ and Lord Neuberger¹⁵² advocated, before the

¹⁴⁹ See n 105 above.

¹⁵⁰ The Judicial Studies Board has arranged seminars for High Court judges on judgment writing. Lord Hope of Craighead laments the lack of training in judgment writing when he explains that it was ‘after seven years and still without training, I was moved to the comparative calm of the appellate and judicial committees at Westminster and in Downing Street’, Lord Hope of Craighead, ‘Writing Judgments’, Judicial Studies Board Annual Lecture 2005.

¹⁵¹ M Arden, *A Matter of Style? The Form of Judgments in Common Law Jurisdictions: A Comparison* in M Andenas and S Vogenauer (eds), *The Form of Judgment* (Oxford: Hart, forthcoming).

¹⁵² Lord Neuberger of Abbotsbury, MR, ‘Insolvency, Internationalism & Supreme Court Judgments’, speech 16/11/2009, with reference to a version of Lady Justice Arden’s paper just cited, available on the web at (http://www.judiciary.gov.uk/docs/speeches/amatter_of_style_bingham_conference.pdf).

new Supreme Court began to sit, that it should adopt a majority judgment of the court. It remains to be seen whether that is ultimately adopted.

New emphasis on brevity and clarity will require efforts and leadership. Developing new working methods will be time-consuming. Other issues are also in play. As we have already seen above, the desire for judges to write their own judgments, particularly in an interesting and important case, can be quite considerable. Lord Neuberger has said that “[v]irtually every appellate judge has been guilty of what might be called a vanity judgment: I certainly have.”¹⁵³

Will the loss of ‘vanity judgments’ and disappearance of idiosyncratic summaries of fact or legal argument for which certain judges were recognised, have any negative impact on common law? Even if the opportunity is lost to receive judgments similar to those given by Lord Denning or Lord Hoffmann, perhaps this is a price worth paying for a Supreme Court that effectively fulfils its role at the summit of the United Kingdom legal system. It will not lose influence in international and European courts, and will continue to be cited as persuasive authority in other common law courts and beyond. Replacing the ‘faux-naif’ with authority, brevity and clarity may not do anything but good to the standing of English courts in the world.

¹⁵³ Lord Neuberger of Abbotsbury, MR, ‘Open Justice Unbound?’, Judicial Studies Board Annual Lecture 2011 at [24].