Some thoughts on judicial reasoning across jurisdictions[1]

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1. In many ways, judgments (in England, Wales and Northern Ireland) and opinions (in Scotland) bear the same relationship to the judiciary as statutes bear to the legislature. They are the formal means by which judges determine and declare the law just as statutes are the formal means by which Parliaments lay down the law, with the legal arguments by the lawyers being the equivalent of the debates in Parliament. But it must be admitted that there is a powerful argument for saying that it is the court order (in England, Wales, and Northern Ireland) or (in Scotland) the interlocutor which is closer to the formal statute, with the judgment (or opinion) being the judicial equivalent of the parliamentary debate. After all, at least in the courts of the UK, the unsuccessful party appeals against an order (or marks a reclaiming motion against an interlocutor) not against a judgment (or an opinion).

2. As with almost any analogy, there are imperfections in both arguments, but I think that the former comparison is better than the latter, although the latter has an attractively purist and technical quality. The judgment contains the legal reasoning of the judge who makes the order, and it is the judgment, not the order, which is normally published and reported and it is the judgment, not the order, which is subsequently referred to in legal arguments, judgments and articles. In other words, judges communicate and lay down the law publicly through their judgments, in the same sort of way as Parliament lays down the law in statutes, albeit with far more reasoning.

3. It is largely for this reason that judges are rightly reluctant to discuss, let alone to amplify or question, the points made in their judgments. It is embarrassing if they do so, because any such subsequent remarks would inevitably serve to confuse and undermine the authority of the reasoning, and even of the conclusion, in the judgment concerned. If, in a subsequent public discussion, a judge adds something to or subtracts something from a point made in a judgment, that would not merely undermine the judgment, but it also leaves it as a matter of considerable uncertainty whether a lawyer, an academic commentator or another judge should take into

[1] I am very grateful to my Judicial Assistant, Charlotte Gilmartin for all the work she has carried out to assist with this talk, and to my colleague Robert Reed for some illuminating discussions and information.

account the subsequent modification as part of the judgment. To do so would clearly be contrary to basic principle, but not to do so might seem contrary to common sense. So judges should let their judgments speak for themselves. Of course, this sometimes means that judges finds that their judgments are being misinterpreted in the sense that it is taken to mean something different from what had been intended. Some might say that that would be a case of the biters being bit, as judges sometimes interpret statutes and contracts in a way in which those drafting them did not intend.

4. My purpose this evening is to examine how judges communicate and reason in their judgments, and to do so by looking at decisions of senior courts in the United Kingdom, in mainland Europe, in the United States and in Australia.

5. Before the 19th century, in most European countries, courts employed the so-called rotal style of judgment, which involved the judge considering the issues in some detail including reference to previous decisions[2]. This style of judgment has continued to this day in the courts of the various parts of the British Isles is maintained in the courts of common law countries. Over the 15 years following the 1789 Revolution, the great majority of superior French courts changed their practice to adopt a much shorter, relatively oracular style of judgment. And this approach then became standard in the courts of many other European countries, including most of the Italian states[3]. As a result, there is today a very marked distinction between decisions of the senior common law courts (namely the UK, the US and Australia) and the decisions of the senior civilian law courts – at least on mainland Europe. While the differences between the common law traditions and the civilian law traditions are quite marked, there are also significant differences within the common law group and within the civilian law group.

6. The most obvious difference between the common law jurisdictions and the civilian law jurisdictions arises when it comes to the issue of one judgment or several judgments in appellate and similar courts with more than one judge. In that connection, the biggest difference is between the traditional common law senior court decisions, which, at least in the past, tended almost always to have multiple judgments and the traditional decisions of the French *Cour de cassation* and its Italian equivalent, which often hardly contain anything which a common lawyer would call a judgment.

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[2] G Gorla and L Moccia *A 'Revisiting' of the Comparison between 'Continental Law' and 'English Law' (16th-19th Century)* [1981] 2 Journal of Legal History, p 143

[3] See eg Article 265 of the Italian General Judicial Regulations for the Execution of the Italian Codes of Civil Procedure etc

7. If one goes back to decisions fifty years or so ago, members of the panel sitting on an appeal in the UK House of Lords, and, even more I think, judges of the High Court of Australia, would normally write their own judgments, giving very fully argued reasons for their conclusions, even when those conclusions were identical and the reasons identical or very similar to those of some or all of the other judges. Indeed, more than one, and sometimes all, of the seven Australian High Court judges would often each set out the relevant facts, so that such a judgment could be treated as entirely self-contained[4]. Reading a law report of a case in the Australian High Court thirty years ago one ends up with the impression that, rather than a single court of seven judges having heard the appeal together, the situation was one where seven different judges separately happened to have heard the same appeal.

8. The traditional common law approach has the advantage that judges can express themselves precisely as they want. They are free to dissent as they see fit, or to concur for different reasons of their own. Even when a judge agrees with another colleague for the same sort of reasons, there is no question of either of them having to make amendments in order to ensure that the other signs up to the judgment. There is complete freedom for judges to write in their own personal style, and even indulge in humour. As Justice Cardozo wrote, perhaps somewhat ironically, "for quotable good things, for pregnant aphorisms, for touchstones of ready application, the opinions of the English [and I would unhesitatingly add in the country of Alan Rodger, Scottish] judges are a mine of instruction and a treasury of joy"[5].

9. Let me give three well-known examples of personal style this side of the Atlantic, in decreasing order of prolixity. First, there is Lord Atkin's solo dissent in *Liversidge v Anderson*[6], which echoes down the corridors of the rule of law and is the most famous dissent in any UK decision. He said:

> "In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. …. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I. I protest, even if I do it alone, against a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister. … I know of only one authority which might justify the suggested method of

[4] For example, *Kioa v West* (1985) 159 CLR 550; *A v Hayden* (1984) 156 CLR 532; *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521.
[5] B Cardozo, *Law and Literature* 14 The Yale Law Review 699 (1925)
[6] [1942] AC 206

construction: "'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.'"'

10. Secondly, there is Lord Denning's well-known opening paragraph in a judgment refusing an appeal against an award of damages for nervous shock to a widower following his wife's death in a car accident[7]:

> "It happened on April 19, 1964. It was bluebell time in Kent. Mr. and Mrs. Hinz had been married some 10 years, and they had four children, all aged nine and under. The youngest was one. Mrs. Hinz was a remarkable woman. In addition to her own four, she was foster-mother to four other children. To add to it, she was two months pregnant with her fifth child."

11. The late lamented Lord Rodger did not approve of the Denning judgment openings such as the one I have just quoted, saying that although they were "great fun", they "do not, in my view really work", not least because they are "*faux naïf*".[8] Lord Rodger himself, a great supporter of individualistic judgments, provides my third, characteristically pithy and erudite example of individual style. The ratio of his judgment in one case was the simple statement: *Argentoratum locutum, iudicium finitum*[9] (Strasbourg has spoken; the case is closed).

12. Lord Atkin's speech in *Liversidge* was unusual, though not unique, for a judgment of a UK judge, in that he criticised (indirectly, but nonetheless strongly) his colleagues' contrary view. Indeed, the story goes that this was so unusual and seen to be so offensive that the other Law Lords refused to lunch with Lord Atkin thereafter[10]. The Justices of the Supreme Court on the other side of the Atlantic Ocean are, of course, far more prepared to insult each other and far less sensitive about receiving insults. At any rate in recent times, the late Justice Scalia was easily the most renowned judicial (if not always judicious) proponent of the well-turned insult.

13. Thus, in one 2015 judgment[11], he described the reasoning of the majority as "bit of interpretive jiggery-pokery", "suffer[ing] from no shortage of flaws", "[p]ure applesauce", and "largely self-defeating", and ended with the statement that the majority judgment would "publish forever the discouraging truth that the Supreme Court of the United States favors some laws over others,

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[7] *Hinz v Berry* [1970] 2 QB 40
[8] Lord Rodger of Earlsferry, *The Form and Language of Judicial Opinions* (2002) 118 LQR 226
[9] *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269, para 98
[10] Allan C. Hutchinson, *Laughing at the Gods: Great Judges and How They Made the Common Law* (2012), p 128
[11] *King v Burwell* 576 U.S. ____ (2015)

and is prepared to do whatever it takes to uphold and assist its favorites". And in another case earlier this year[12], in his dissenting judgment, he said of the majority judgment "What silliness", describing it as "devious", and saying that "in Godfather fashion, the majority makes state legislatures an offer they can't refuse". Great fun for him and for many readers, but such evidence as there is suggests that this acerbic wit alienated his colleagues in the sense that they were less likely to go along with him as a result[13]. Nonetheless, he, the most conservative Justice on the Court, was very close friends with Justice Ginsburg, perhaps the most liberal Justice on the Court, such that there was even an opera *Scalia/Ginsburg*[14].

14. Scalia was such a larger than life character that when he died earlier this year, his death was the lead item on the BBC World News website for several hours. As I said to my colleagues, I doubt that there would be any coverage anywhere on the BBC UK News website when a member of the UK Supreme Court dies, although, come to think of it, there might be a little bit of coverage if all of us died on the same day.

15. Reverting to my main theme, the advantages of a judgment given by a common law judge are that it can be engaging to read, and, because there is no need to get any colleague to sign up to the judgment, the judgment can (and therefore should) be clearly expressed, and can propound firm views. But there are two significant disadvantages of a system which permits multiple judgments. First, one decision with a number of judgments can mean that there is an awful lot to read; this is primarily because there is more, often many more, than one judgment, but it is also because single judgments end to be shorter anyway as the need for unanimity often results in the deletion of all but the essential. Secondly, as even the Judges who agree about the outcome of a case will inevitably express themselves differently, it is often difficult to work out what precisely is the ratio of the court on a particular decision, or the view of the court on a particular point. For example, in a case where the UK Supreme Court sat nine Justices considering whether the criminalisation of assisting a suicide infringed article 8 of the Convention[15], the resultant decision ran to over 360 paragraphs and three different groups of conclusions (four saying no infringement, two saying infringement and three saying give parliament another chance), and on top of that there were variations within the three groups of Justices.

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[12] *Montgomery v Louisiana* 577 U. S. ____ (2016)
[13]Bruce Allen Murphy *Scalia: A Court of One* (2014), pp187-190
[14] See eg https://www.washingtonpost.com/posteverything/wp/2016/02/13/what-made-scalia-and-ginsburgs-friendship-work/, reflecting their frequent visits to the opera together
[15] *R (Nicklinson & Anor) v Ministry of Justice* [2015] 1 AC 657

16. By contrast, at the other end of the spectrum, the *Cour de cassation* decisions never contain multiple judgments: indeed, it is not entirely unfair to say that they contain no judgments at all. They set out the essential facts and then express a conclusion, and contain no, or next to no, reasoning at all. The formula is *Attendu que* …, *Attendu que* …, *Attendu que* …, *Rejet*, if the appeal fails; and *Attendu que* …, *Attendu que* …, *Vu que* …, *Casse*, if the appeal succeeds. I understand that, when the lawyers for the parties attend the reading out of the judgment, they disappear after the word *Vu* is read out: once they hear the word *Vu*, they know that the appeal has succeeded.

17. It would not, I think, be an exaggeration to say that many a *Cour de cassation* decision would be automatically overturned if it had been given by a Judge in a court in the United Kingdom. As the Court of Appeal explained in the 2002 *Emery Reimbold* case[16] "justice will not be done if it is not apparent to the parties why one has won and the other has lost". But it is fair to the *Cour de cassation* to say that its approach does derive significant support from maybe the greatest ever Lord Chief Justice of England, Lord Mansfield (who was, of course, a Scot, and indeed, according to some, a Jacobite). When asked by a recently appointed Colonial Governor how to apply the law, he answered: "Tut, man, decide promptly, but never give any reasons for your decisions. Your decisions may be right, but your reasons are sure to be wrong"[17].

18. It is also right to add that in every case in the *Cour de cassation* there is an *avocat général*, a member of the *ministère public*, who presents his or her views (or *conclusions*) to the Court after the parties have made their submissions. In addition, there is a reporting judge in each case, and he or she is a member of the court[18]. The views of the *avocat général* are occasionally, but rarely, publicly available[19], but they are not treated as part of the reasoning of the *Cour*. Indeed, the reasoning is to be found in the academic *Dalloz* commentary. The same is generally true of decisions of the *Conseil d'État* (which has *commissaires du gouvernement* whose function is similar to that of *avocats généralsl*). For instance, one of the *Conseil*'s most important decision, *Arrêt Nicolo*[20] on the status of foreign treaties in French domestic law runs to less than a page, whereas the academic commentary in *Dalloz*[21] takes up eleven closely typed pages, which include a large number of references.
19. The contrast between the full common law decision and terse civilian law decision is well demonstrated by contrasting the decisions of the *Cour de cassation* and the House of Lords on

[16] *English v Emery Reimbold & Strick Ltd.* [2002] 1 WLR 2409, para 16
[17] John Cordy Jeaffreson, *A Book About Lawyers* (1867), Volume 1.
[18] Lasser, *The French Bifurcation in Judicial Deliberations – A comparative analysis of judicial transparency and legitimacy*, (2004)
[19] Steiner, *French Law: A Comparative Approach* (2010), p 186
[20] Conseil d'État ass., 20 Octobre 1989, *Nicolo*
[21] *Les grands arrêts de la jurisprudence administrative* (20e édition), pp 606-617

the issue whether a gay man was entitled to succeed to the tenancy of his deceased partner. The *Cour de cassation* decision[22] runs to thirty lines, whereas the House of Lords decision[23] extends to over forty pages.

20. However, nothing is simple. While the senior French courts I have so far referred to, the *Cour de cassation* and the *Conseil d'État*, do not give what common lawyers would regard as reasons for their decisions, the *Cour d'appel* does so. Thus, no doubt just to show that whatever the Anglo-Saxon judges can do the French judges can do better, the *Cour d'appel* judgment relating to criminal and civil liability following the sinking of a tanker off the coast of France runs to 487 pages[24]. And, although the *Corte di Cassazione* in Italy follows the French practice, its decisions tend to have a bit more reasoning.

21. German court decisions show that there is no firm rule in relation to the reasoning in civilian court judgments. I think it is not unfair to say that German judicial decisions lie somewhere on the spectrum between common law and *Cour de cassation* decisions. Compared with the French decisions, German decisions contain far more legal analysis and argument, including references to legal academic works and previous court decisions[25]. However, compared with the common law approach, German court decisions are more impersonal and more formally structured. There are no concurring judgments and (save in the case of the *Bundesverfassungsgericht*, the Federal Constitutional Court) no dissenting judgments. Thus, as in the *Cour de cassation* and the *Corte di Cassazione* it is the reasoning of the court that is recorded, not the reasoning of individual judges. However, the approach to reasoning in decisions of senior German courts is not that different from that in UK courts. This is demonstrated by the fact that the reasoning of German *Bundesgerichtshof*, the Federal Court of Justice, in patent case decisions is sufficiently full for UK courts to take their approach onto account – and the *Bundesgerichtshof* return the compliment[26].

22. And then, of course, there are the European courts in Strasbourg and Luxembourg. The Luxembourg Court of Justice of the European Union has a firm tradition of always giving a reasoned judgment, but an equally firm tradition that that judgment is a single judgment of the court. This has the advantage of meaning that every decision simply consists of one judgment which cuts down reading time and avoids differences between different judges. It also is aimed

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[22] *Vilela v Weil* (1997) D. 1998, 111
[23] *Fitzpatrick v Sterling Housing Association Ltd* [1999] WLR 1115
[24] *Cour d'appel de Paris* nr RG 08/02278, 30 March 2010.
[25] Markesinis *Judicial style and judicial reasoning in England and Germany* (2000) 59(2) CLJ 294
[26] See the discussion in *Human Genome Sciences Inc v Eli Lilly & Co* [2012] 1 All ER 1154, paras 84-87, and Case Xa ZR 130/07

at ensuring that the judges of the court work together to arrive at a mutually acceptable result which has been well argued out. However, a single judgment of the court inevitably means that the reasoning is often very constrained as sometimes as many as 17 judges have to sign up to it. Judges in the UK have not infrequently had cause to complain about the fact that judgments of the CJEU are unclear, are internally inconsistent, or even fail to answer the question which has been referred. Occasionally, it has even been necessary to re-refer an issue because the decision on the initial reference was so opaque that it did not deal, or at least did not deal comprehensively or even comprehensibly, with the issue which had been referred. Sometimes, I suspect when the judges cannot agree, the Luxembourg court reformulates the question referred, simply because it does not appear to want to answer it.

23. The single unanimous judgment of the Luxembourg court with its rather wooden style is perhaps most reminiscent of the German courts, but the Luxembourg court also has the benefit of an Opinion of an Advocate General (which is normally published), which owes its origin to the French tradition. Those Opinions often demonstrate the freedom of expression if one is able to express one's own opinion without having to accommodate the views of others, coupled with the freedom of knowing that one is not having the responsibility of deciding the case. Accordingly, the relatively confined and laconic nature of many of the CJEU judgments can fairly be said to be leavened, often very substantially, by the accompanying Opinion of the Advocate General.

24. It is, of course, over-simple to suggest that one can find no trace of a mandatory single judgment system, or even unreasoned decisions, in the common law courts. And it is even more than over-simple, but positively wrong to suggest that there are no single judgments in common law Supreme Courts. So far as unreasoned decisions are concerned, the UK Supreme Court does not normally give any more than pretty formulaic reasons for refusing permission to appeal to it. As to single judgments, in 2012 over half the decisions given in the UK Supreme Court were in the form of single judgments, although the year before it was only 20%, and over the period between 1981 and 2013 the proportion varied rather widely between 12% and 70%[27]. And, unlike its Scottish equivalent, the (normally three but sometimes five)-Judge Criminal Appeal Court of England and Wales conventionally only permits one judgment, which inevitably that sometimes involves a degree of compromise.

[27] Alan Paterson *Final Judgment* (2013), p 106

25. And in the US Supreme Court, as a recent biography of Justice Brennan reveals[28], it is by no means unknown for a Justice to amend his judgment in such a way as renders it unclear or internally inconsistent so as to get a majority to agree with his judgment. In the UK Supreme Court, it is not uncommon for a Justice to agree to amend his judgment in a certain way in order to get another Justice's concurrence, but, at least in my experience, never, or at any rate hardly ever, at the expense of clarity or consistency. Even if that is putting it too high (and I do not think that it is), there is no doubt that Luxembourg court judgments contrast unfavourably with most common law court judgments in being somewhat formulaic and rather uninspiring stylistically, and minimalist and sometimes rather confusing in terms of contents; but, on the other hand, there are the advantages of a guarantee of judicial unanimity and there is normally significantly less to read.

26. The single judgment rule in the CJEU is partly attributable to the civilian law origin of the Court which carries all the advantages and disadvantages which I have already mentioned. But it is also attributable to political factors. Each member state appoints one CJEU judge, and given that many judges hope to be reappointed, and that some CJEU decisions will be politically sensitive in some or all member states, there are obvious advantages in a member state's government not knowing how its appointed judge voted on a particular case[29].

27. The fact that the judges appointed by Council member states to Strasbourg serve for a single non-renewable nine-year term may therefore help to explain why it is that, although the European Court of Human Rights publishes a judgment of the court, it will often be a majority judgment with those judges who have signed up to it being identified, and why it is that not only dissenting judgments but also concurring judgments are permitted. The Strasbourg court's majority or unanimous judgment will often be somewhat turgid and lengthy with rather a lot of "boiler-plate paragraphs", and partly for the same sort of reasons as the CJEU judgments, they tend to be rather unengaging, but they are in a standard, if rather pedantic, form and therefore are relatively easily navigated at least by the initiated. The fact that Strasbourg court judgments are initially drafted by members of the Legal Secretariat of the Court's Registry no doubt does not help to detract from their lack of *élan*. The concurring and dissenting judgments in Strasbourg tend to be brief and punchy – at least in part because they are written by the relevant judges themselves.

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[28] S Stern and S Wermiel *Justice Brennan, a Liberal Champion* (2010)
[29] Lord Mance *The common law and Europe* Holdsworth Club Presidential Address, 2006

28. So far, I have been largely talking about the procedural question of reasons or no reasons and one judgment or multiple judgments. However, it is also worth considering variations in the substantive approach of judges in their decisions.

29. The contrasting approach of the civilian courts and the common law courts to resolving issues of law has been interestingly expressed in the following terms by Eva Steiner:

> "[T]he French Cartesian propensity for conceptual thinking, whereby particulars are subsumed under universals by an act of categorisation, explains why the deductive method, when applied in a legal context, is considered in France to be best able to settle legal issues conclusively. Emphasis on deduction in judicial decisions is also common in other civil law systems, such as Germany and Italy, where the prevailing tendency in judicial opinions, as in France, is to present the final ruling as the necessary outcome of a logical set of arguments structured in a syllogistic form."[30].

As the author goes on to say, in France, Italy and Germany, "syllogistic logic is particularly suited to the philosophical cast of mind of civil lawyers who, for centuries, have been exposed to the abstract process of reasoning prevalent in Continental law schools". By contrast, she suggests, "[c]ommon law, … organised and developed mainly as a by-product of litigation, seems more concerned with securing decisions that make good practical sense, rather than exhibiting the virtues of logic". Lord Cooper put the same point very pithily nearly 70 years ago, when he said that "the civilian [lawyer] naturally reasons from principles to instances, the common lawyer from instances to principles. The civilian puts his faith in syllogisms, the common lawyer in precedents"[31].

30. The judicial function is seen rather differently in France and the UK. As it was put by professor Zweigert and Kötz:

> "Continental judges, in Italy and France rather more than in Germany, are still imbued with the old positivistic idea that deciding a case involves nothing more than applying a particular given rule of law to the facts in issue by means of an act of categorisation; indeed, they often entertain the further supposition that ideally the rules of law to be applied are statutory tests…"[32].

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[30] E Steiner, *French Law: A Comparative Approach* (2010), p 139, quoting from *Samuel* (1998: 172)
[31] Lord Cooper, *Address to Edinburgh University* (1950)
[32] K Zweigert and H Kötz *An Introduction to Comparative Law*, (English edition translated by Tony Weir) (1998), p 264

By contrast, fifty years ago, a Law Lord, Viscount Radcliffe said "[t]here was never a more sterile controversy than upon the question whether a judge makes law. Of course he does. How can he help it?"[33]. And, as he also pointed out, "[a] Constitution can live only by judicial reinterpretation"[34]. Around the same time another Law Lord, Lord Reid, said "We do not believe in fairy tales any more, so we must accept the fact that for better or worse judges do make law"[35].

31. As I have observed before[36], the difference of approach between the common lawyers, with their respect for case-law, and the civilian lawyers, with their respect for codes, is encapsulated by a distinction in relation to different types of philosophers drawn by the great philosopher Francis Bacon some 400 years ago. Bacon drew a distinction between what he characterised as "men of experiment [and] men of dogmas". He said that "men of experiment", whom I would equate to the common lawyers, "are like the ant, they only collect and use", whereas "the men of dogma", ie the civilian lawyers, "resemble spiders, who make cobwebs out of their own substance"[37].

32. I discussed earlier the benefits and disadvantages of a single, sparse judgment as against multiple fully reasoned judgments, and the question of giving reasons. As I said the common law view is that, of course, must be done. But *Perdriaux*, the classic authority on the *Cour de cassation* goes so far as suggesting that "it is necessary to abstain from giving reasons for the conclusions of law in the sense that …. the explanation for the conclusions of law [brings] in considerations which are more or less subjective and contingent"[38]. In addition to the notion that what the common law would regard as appropriately reasoned judgments involve too much subjectivity, some writers consider that judicial reasoning may often be based on insufficient judicial research, especially where it involves foreign law [39], and that the reasoning is better left to be discussed behind the scenes between judges[40] (as happens in the Luxembourg court).

33. No doubt heavily influenced by my own common law background and experience, I do not find these arguments convincing. It is true that the more a judge says in a judgment, the more he is likely to make a mistake, but the notion that judges should be totally reticent about their

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[33] Lord Radcliffe *The Lawyer and his Times'*, *Not* in *Feather Beds* (1968) (published 1978), p 271
[34] *Ibid*, p 272
[35] Lord Reid *The judge as lawmaker* (1972) The Journal of Public Teachers of Law, p 22.
[36] Eg https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/mr-speech-chancery-bar-assoc-lecture-jan12.pdf
[37] F. Bacon, *Novum Organum* (1620) Book One at XCV
[38] A Perdriaux, *La pratique des arrêts de la Cour de cassation* (1993) para 1299 (my attempt at translation)
[39] A view supported by M Bobek, *Comparative reasoning in European Courts* (2013), p 235
[40] Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (2009), pp 45ff

reasons strikes me as unattractively self-protective. And there is no better way than testing your own conclusion by being forced to explain them in writing knowing that what you say will be put into the public domain. In any event, it is important for the loser to know why he has lost and for the winner and any subsequent appellate court to know why she has won. Transparency appears to me to demand a fully reasoned judgment. There is an additional reason for a reasoned judgment, namely the role of the courts in keeping the law up-to-date.

34. Closely connected to achieving transparency and currency is the question of the way in which a judge's reasoning is structured. An interesting, and I think valuable approach to common law judgments is to be found in an article by Professor Rudden[41] cited by Markesinis and Fedtke[42]. Rudden suggested that common law decisions traditionally involve four dialogues, namely, (i) between the bench and the bar, (ii) between members of the Bench (and Markesinis and Fedtke added that this dialogue was "conducted in a calmer tone in England than in the United States"); (iii) the dialogue with the past (by which Rudden meant the consideration and refinement of precedent); and (iv) the dialogue with the future. He also made the point that, unlike the US courts, and even more unlike the German courts, the UK courts do not have dialogue with academics: he was writing in 1974, and since then there has been a marked and welcome change in the approach of UK judges to academic articles and books.

35. As to his third and fourth "dialogues" with the past and the future, it is of course the case that one of the fundamental principles on which the courts in the UK proceed is that of *stare decisis*. In a judgment earlier this year[43], the UK Supreme Court said this:

> "In a common law system, where the law is in some areas made, and the law is in virtually all areas developed, by judges, the doctrine of precedent, or as it is sometimes known *stare decisis*, is fundamental. Decisions on points of law by more senior courts have to be accepted by more junior courts. Otherwise, the law becomes anarchic, and it loses coherence clarity and predictability. *Cross and Harris*[44] … rightly refer to the "highly centralised nature of the hierarchy" of the courts of England and Wales, and the doctrine of precedent is a natural and necessary ingredient, or consequence, of that hierarchy."

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[41] Rudden, *Courts and Codes in England, France and Soviet Russia* (1974) 48 Tulane L. Rev. p 1010
[42] Markesinis & Fedtke, *Judicial Recourse to Foreign Law: A New source of Inspiration?* (2006), p 4
[43] *Willers v Joyce* (*Re: Gubay (deceased) No 2)* [2016] 3 WLR 534
[44] Cross and Harris, *Precedent in English Law* 4th ed (1991), p 11

In almost every judgment given by an appellate court in the UK there will be at least one reference to an earlier decision on the basis that the reasoning in the earlier decision either needs to be distinguished, or is of assistance on, or is even decisive of, the point at issue.

36. In France and, to a lesser extent, in Italy the position is very different. The doctrine of precedent has practically no part to play in the *Cour de cassation* or the *Conseil d'Etat*. Indeed, subject to two exceptions, "judicial decisions, even when pronounced by superior courts, are not binding precedents that must be followed by judges. Courts are only bound by legislation or *principes généraux de droit*", to quote again from Steiner[45]. The two exceptions are first, decisions and reasoning[46] of the *Conseil Constitutionnel*; and, secondly, decisions of the *Cour de cassation* to the very limited extent that when it sends a case back for rehearing the rehearing court must follow its reasoning[47]. The exclusion of *stare decisis* in France appears to apply to such an extent that a superior court cannot even refer to its own previous decisions to support its conclusions[48].

37. In the light of this analysis of the relative benefits and disadvantages of both the form and the substance of judicial reasoning, what should the Justices of the UK Supreme Court be striving to achieve? First, whatever anyone (including the President of the Court) seeks to do, it cannot and should not be by diktat. Supreme Court Justices are and should be free to agree on a single judgment or to write individual concurring or dissenting judgments as they see fit. Indeed, a judge in the UK takes an oath to administer justice "without fear or favour, affection or ill-will". So it is not only a matter of established convention, but it is also correct in principle, that a judge on a multi-judge court is free to write or not to write a judgment on any case (although at least one must do so). Appeal court judges have both a collegiate and an individual judicial responsibility, and they are free agents to proceed, within certain limits, as they see fit. And, as I have said, the ability to write individual judgments avoids stylistically anodyne judgments whose content is self-evidently the product of messy compromise, while the ability to join in writing or agreeing a single judgment ensures that, when possible, the opinion of the court can be given simply and clearly.

38. Further, quite apart from this, it is a matter of horses for courses: some appeals are more apt for concurring judgments than others. For instance, a decision which seeks to give guidance to

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[45] Steiner, *French Law: A Comparative Approach* (2010), p 90
[46] Decision 62-18 L, 16 January 1962, *Loi d'orientation agricole* Rec. 31
[47] *Code de l'Organisation judiciaire* art L 431-6
[48] See eg *Thirion v Motte* (1958), Bull., crim., no. 466, and *Caisse mutuelle de reassurance agricole de l'Ile-De-France et autres v Casimiro* (1967) JCP1968, II, 15339

trial judges as to how they should deal with a procedural issue should ideally consist of one judgment[49]; and it is questionable whether a decision concerned with a point of statutory or contractual construction need normally extend to more than one judgment. But a decision seeking to take forward the law relating to duty of care or unjust enrichment may very usefully include more than one full judgment. In such types of case, the judgments, even if they agree, can involve different approaches or emphases, and can therefore lead to a useful discussion with academics, and indeed other judges, as to how the law on the topic should be taken forward.

39. In general, I have been keen to reduce the number of concurring judgments. As I say, they are sometimes valuable, but often they are what I have called vanity judgments. A vanity judgment is one which is intended to agree with the lead judgment, but not to add anything other than saying "I have understood this case" or "I think I can express it better" or "I am interested in this point" or simply "I am here too". Such judgments, of which virtually every appellate judge, not least myself, has been guilty, are at best a waste of time and space, and, at worst, confusion and uncertainty – although they are popular with academics. Partly with a view to discouraging vanity judgments, partly with a view to encouraging collegiality and partly in the hope that it may sometimes improve the eventual judgment in the UK Supreme Court, I have sought to increase the number of cases where two, or even three, Justices join together in writing a joint judgment.

40. Dissenting judgments are rather different. The very fact that they are minority judgments mean that they do not normally confuse, as, by definition, they are not part of the *ratio* of the decision. The dissenting opinion can sometimes be particularly valuable in a case where the law is developing or may in due course develop. Sometimes a dissenting judgment may eventually turn out to be right (as happened to Lord Atkin's famous dissent in *Liversidge).* And, even when that does not happen, the dissent may provide a helpful insight. While some judges may take the rather purist view that it conflicts with their judicial oath, I think that there is much to be said for the view that, in some cases where a judge does not feel strongly and where a dissent would add nothing useful, he should go along with the majority opinion. Lord Ackner, a former Law Lord, observed that one dissents only where one's sense of outrage at the majority decision overcomes one's natural indolence[50]. Chief Justice Roberts of the US Supreme Court has said that, because the Court should be "acting as a court and functioning as a court, [Justices] should

[49] As in *Manchester City Council v Pinnock* [2011] 2 AC 104
[50] A Paterson *Final Judgment* (2011) p 189

be worried when they are writing separately, about the effect on the court as an institution"[51]. I think that there is force in that, but, at least in my view, its main thrust is towards how and what a dissenting Justice writes, as opposed to whether he writes.

41. As to the question of substance, as I have said already, despite the potential pit falls, there is a fundamental importance in providing as fully a reasoned judgment as is consistent with clarity, coherence and concision. Naturally, the extent to which this is appropriate in any given jurisdiction will be influenced by the historical, political and constitutional context; however, my sense is that the common law approach, subject to largely functional rather than political constraints, has the advantage of revealing the thought processes of judges in coming to their conclusions, and of ensuring that any decision coheres with the existing body of law. The decision may therefore lack the stylistic tightness and conceptual and logical rigour of the civilian judgment, but what it lacks in neatness it makes up for in reality and depth. It enables full and probing debate, and criticism where appropriate, ensuring that the judge strives to write a rigorous and careful judgment, which is just as important as reaching the 'right' decision. It protects the values of certainty and predictability, cornerstones of the rule of law, and, I hope, provides a force and legitimacy to the common law judgment which justifies its designation as a formal pronouncement of the law.

David Neuberger Edinburgh, 11 November 2016

[51] Interview with Jeffrey Rosen in *The Atlantic*, 13 July 2012