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JUDGMENT WRITING IN THE SUPREME COURT

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In July 2010, I was interviewed for the UKSC Blog (www.UKSCblog.com). They wanted to know about the high points and the low points in our first year. So I asked that year's Judicial Assistants for their opinions. Ironically, the JFS case (*R (E) v Governing Body of JFS* [2009] UKSC 15, [2010] 2 WLR 153) featured in both:

> (a) the high point – interesting subject matter, a large and committed audience, nine fully engaged justices, excellent advocacy, and (in their view) the right result; but
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> (b) an example of the low point - they thought that we really should have got our judgment-writing act together, yet here were nine judgments: the majority five (holding there was direct discrimination) delivered five full judgments reasoning through the law to exactly the same approach, although entering into the facts with varying emphases and degrees of detail; one minority two (holding there was indirect discrimination) delivered one full judgment and one short concurrence; the other minority two (holding the difference in treatment was not on grounds of ethnic origin at all) delivered two fully reasoned, though quite short, judgments.

The move from the House of Lords to the Supreme Court allows us to experiment in ways which Parliamentary procedure made difficult. In the House of Lords, we could have a considered opinion of the whole appellate committee, individual opinions with which the others simply agreed, or a series of individual opinions; but jointly authored or plurality opinions were difficult and rarely tried. There were ways round this. One recent example was *R (Aweys) v Birmingham City Council* [2009] UKHL 36, [2009] 1 WLR 1506, where the lead judgment was a genuinely joint effort between Lord Neuberger and me. A previous example of a rather different collaboration was *R (Ahmad) v Newham LBC* [2009] UKHL 14, [2009] 3 All ER 755, where Lord

Neuberger and I parcelled up the issues and co-operated in answering them but delivered separate opinions.

One obvious change in the Supreme Court is that we can print the judgments in whatever order we choose, so the lead (what I call the "donkey-work") judgment can come first regardless of seniority (although that may not always happen). This makes the decision much easier to understand before the law reports come out (as do our press summaries). But what about having more plurality judgments or fewer lengthy concurrences?

Richard Reynolds, one of this year's Judicial Assistants (to whom I am greatly indebted for his researches on this subject), has surveyed our first 57 decided cases. He found that in 20, there was a "judgment of the court"; and in a further 11, there was either a single judgment (with which all the other Justices agreed), or a single majority judgment (with which all the Justices in the majority agreed), or an "effectively" single or single majority judgment (because separate judgments were simply footnotes or observations). So 31, or more than half, came out as plurality or effectively plurality judgments.

This came as something of a surprise to him and also to me. I think it a welcome trend but have some reservations. We need to balance two principles:

(a) that each Justice must take full responsibility for his or her own decision and not simply slip-stream the others, especially if the matter is difficult, as it almost always is in the Supreme Court; and once one has done that, one should perhaps be expected to explain oneself to the world; but

(b) that the Court should be sensitive to the needs of its consumers; it is possible that higher court advocates welcome separate opinions because they give them something to argue about in the next case, and that academics welcome them because they give them something to write about; but lower courts mostly want clear guidance, as do most potential litigants (unless the wriggle room gives them an argument in their favour when the stakes are high).

So I suggest that we should have a flexible approach in which each Justice is free to write but a climate of collegiality and co-operation in plurality judgments is encouraged. At the very least, however many judgments are, there should never be any doubt about what has been decided and why: see Lord Bingham in "The Rule of Law" (2007) 66 CLJ 67, at pp 70-71) and in this collection; or me in *OBG Ltd v Allen* [2007] UKHL 21, at paras 303 and. 304. This may not always be achieved even when we think that we have: see *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465, leading to Carnwath LJ's protest in *Doherty v Birmingham CC* [2006] EWCA Civ 1739 [2007] LGR 165, at para 62, and expanded in this collection; and I am afraid that it would take an astute reader of *A v Essex County Council* [2010] UKSC 33, [2010] 3 WLR 509 to realise that a majority (Lord Phillips, Lord Kerr and I) thought that providing a severely handicapped child with little or no education for more than 18 months raised a triable issue that his rights under article 2 of the First Protocol to the European Convention on Human Rights had been violated, because the focus of the argument had been on a different point. What we would have done had we been split three, three, three on the result in *JFS*, who knows, but we would have had to do something.

I recognise that there is high level support for developing the common law through the principles to be deduced from different judgments: see Lord Reid in *Broome v Cassell* [1972] AC 1027, at p 1084:

> ". . . it is not the function of noble and learned Lords or indeed of any judges to frame definitions or to lay down hard and fast rules. It is their function to enunciate principles and much of what they say is intended to be illustrative or explanatory and not definitive. When there are two or more speeches they must be read together and then it is generally much easier to see what are the principles involved and what are merely illustrations of it."

Of course that may be why some (but not all) academics and top silks like it. Lord Reid also referred to the risk that if there is only one judgment, its words will be construed as if they were provisions in an Act of Parliament. (In fact, I think that that is a risk however many judgments there are and is exacerbated by our style of oral

advocacy, with each advocate picking out the passages which suit him or her best and treating them like statutes.)

Lord Reid and Lord Bingham have also referred to the inferior quality of single Privy Council opinions – at least from point of view of developing the law. But I wonder whether that is because of a lack of any real tradition of collaboration in how those opinions are reasoned and expressed, rather than because of single opinions as such. No doubt traditions of collaboration wax and wane over time according to the personalities and preferences of the Justices involved, but I was not alone in finding when I first arrived that colleagues did not really expect one to comment on the draft in depth and in detail in the way in which, for example, Law Commissioners were expected to comment on draft consultation papers and reports. But we are certainly doing more of that now.

A preference for plurality judgments would not rule out certain sorts of concurring judgment, which can enhance rather than detract from the power of the lead judgment. James Lee, in his article "A defence of concurring speeches" [2009] Public Law 305 – 331, gives some examples:

- giving an "executive summary", as I did in the Belmarsh case, *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68;

- adding a "dramatic touch", as Lord Rodger did in *R v Bentham* [2005] UKHL 18, [2005] 1 WLR 1057, para 14, quoting from Ulpian: "*dominus membrorum suorum nemo videtur*";

- dissociating oneself from certain passages (though hopefully only *obiter dicta* rather than the *ratio decidendi*) in the lead judgment, as did Viscount Dilhorne, Lord MacDermott and Lord Hodson in *Dingle v Turner* [1972] AC 601 (as to the relevance of fiscal considerations in deciding whether a gift or trust is charitable); technically a simple concurrence is only agreeing with the outcome and the *ratio*, and not with everything said

along the way, but this may not be generally known and in any case there is no harm in spelling it out;

- explaining common ground, as Lord Walker, Lord Brown and I tried to do in *OBG*;

- adding a distinctive perspective; this is certainly what I have tried to do in several cases – most notably perhaps in *R (Gentle) v Prime Minister* [2008] UKHL 20, [2008] AC 1356, but in several others where I have tried to tell the story from the point of view of the people involved or concentrated upon a different aspect of the case – eg in *N v Secretary of State for the Home Department* [2005] UKHL 31, [2005] 2 AC 296 (the AIDS/article 3 case); or *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246 (the Christians for corporal punishment case); or *Fornah v Secretary of State for the Home Department* [2006] UKHL 46, [2007] 1 AC 412 (the female genital mutilation case – where I think that Arden LJ felt the same); or *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, [2009] 1 AC 1198 (where I concentrated on the child's rather than the mother's right to respect for family life).

I think, therefore, that there are good reasons for short, separate concurrences in appropriate cases. This is not to justify grandstanding or self-indulgence. Most of this could perhaps be achieved by a more collegiate approach to judgment writing, which is common elsewhere in world where plurality judgments are the norm – for example in the US and Canadian Supreme Courts or the European Court of Human Rights. But they too allow short additional concurrences, without which something distinctive would be lost. And I doubt whether some different perspectives could always or even often be accommodated in the plurality view.

This is not the same as prohibiting dissent, as they do in the European Court of Justice and in many civilian courts (as well as our own Court of Appeal (Criminal Division) unless the Presider permits it on a point of law). It does promote much more

collegiality (and reduce the political pressures on international judges) but it can sometimes lead to obscure or even incomprehensible answers to apparently simple questions – the lowest common denominator rather than the highest common factor. On occasions, it must place the dissenting judge in an intolerable position if he or she is to remain true to the judicial oath. I cannot foresee dissent ever being prohibited in the Supreme Court. We do not seem to have become more dissenting since we moved. Chris Hanratty, in his piece on "Dissenting opinions in the UKSC" (posted in the UKSC Blog on 19 August 2010) found dissent in just under one fifth of our 57 cases, almost exactly the same percentage as in the House of Lords, and less than in Canada, Australia or the US, although more than in South Africa. It would be fascinating to speculate on the reasons why . . .

As another great jurist, Megarry J, famously put it in *Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch 9, at pp 16-17, translating from Hankford J in 1409, ". . . le ley per bon disputacion serra bien conus": "Today, as of old, by good disputing shall the law be well known". Perhaps this is as true of judges at it is of counsel.