Tweaking the Curial Veil
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Lord Neuberger
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1. In the heady days of the South Sea Bubble in 1720, many highly dubious company prospectuses were being hawked around the City of London to induce foolish folk to part with their money. They included a prospectus for a company which proposed to reclaim sunshine from vegetables, one for a company which allegedly intended to build mansions floating in the sea, and another for a company which allegedly was aimed at constructing a wheel for perpetual motion. But none of these proposals was, I think, quite as blatant as the prospectus which sought subscriptions for "an undertaking of great advantage, but nobody to know what it is"[1].

2. Well, I fear that, in one sense at least, I am the lecturing equivalent of that last fraudulent, if ingenious, promoter, who, having remarkably managed to raise a substantial sum on the back of his prospectus, decamped with the money to France. And, by the same token, you are the audience equivalent of the equally optimistic, if credulous, members of the public who came up with that money. Why, you may wonder, do I start by insulting my audience in this way? Well, actually, I am criticising myself for indecision and thanking you for your confidence in me. This subject of this lecture was advertised until a short time ago as "A topic of legal importance" – about as informative as the fraudulent prospectus. And yet you all have set aside an otherwise leisurely Saturday morning to come and hear the lecturer who could not even make up his mind as to the title of his lecture. Thank you very much.

[1] Charles Mackay, *Extraordinary Popular Delusions and the Madness of Crowds* (1841)

3. Well, not before time, I did come up with a title – "Tweaking the curial veil". Perhaps it is something of a teasing title. The corporate veil is a well-known legal expression, and its lifting or piercing has been the subject of two fairly recent Supreme Court decisions[2]. The curial veil is not such a common expression, and nor is tweaking, but the title is meant to refer to what goes on behind the scenes in appellate courts.

4. Open justice is an important, indeed a fundamental, feature of the administration of justice, as has been emphasised in a number of significant cases over the past century from *Scott v Scott*[3] in the House of Lords in 1913 to the *Bank Mellat (No 1)* case[4] in the Supreme Court in 2013. Indeed its importance is reflected in article 6 of the European Convention on Human Rights, and the central vitality of open justice was very recently emphasised by the Lord Chief Justice in his annual press conference earlier this week, when he said "if justice is not open it's not justice"[5].

5. Open justice requires that, save insofar as it would be inconsistent with the administration of justice, all aspects of litigation between the parties, whether documentary or oral, whether before after or during the trial, are subject to public scrutiny. The public has a right to see the administration of justice in the courts, the rule of law at its sharpest end, in action. And it is vital that lawyers and judges can be seen and can be held to account when carrying out their functions in the court and tribunal system, which are so vital to a modern democratic society. Any direction as to secrecy can only be made when there is no reasonable alternative way to achieve justice, and, in

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[2] *VTB Capital plc v Nutritek International Corpn* [2013] UKSC 5; [2013] 2 AC 337 and *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415
[3] *Scott v Scott* [1913] AC 417
[4] *Bank Mellat v Her Majesty's Treasury (No. 1)* [2013] UKSC 38, [2014] 1 AC 700
[5] http://www.theguardian.com/law/2014/nov/12/defendants-never-anonymous-lord-chief-justice

such a case, the extent of any secrecy must be kept to an absolute minimum[6].

6. While we have long been accustomed to enjoying open justice in this country, another familiar, if less discussed, aspect of our justice system is the fact that, while the paperwork provided by the parties, the hearing of the appeal, and the judgments, are generally open to the public, the business of appellate courts is otherwise conducted in private. The selection of cases to hear and of the judges to hear them, and the course of the discussions between the judges, or "deliberations", are all carried out in the absence of the public. And only occasionally is there any official public indication of what has gone on behind the scenes. A judge may indicate that his mind has fluctuated while writing a judgment or even that he has changed his mind or withdrawn a judgment as a result of reading another judge's judgment. This, in one case in the House of Lords[7], Lord Walker said that he had "set aside as redundant most of the opinion which I had prepared" because he could "not usefully add to, still less improve upon" Baroness Hale's judgment. The case is engraved on my heart as it was the first case I sat on in the House of Lords, and I found myself strongly dissenting in a minority of one. And, adding insult to injury, that was after thinking that I was part of a majority of three who was expecting to write a two word judgment, "I agree".

7. Normally, of course, very little if anything is known about what goes on behind the scenes in appellate courts once the hearing is over, apart from the judgment and any consequential decision on costs and the terms of the court's order. If one views an appellate court as a single bench which happens to consist of more than one judge, that can be said to be entirely appropriate: on that view, it is no more rational to expect to

[6] See eg *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42, [2011] WLR 1645, para 29
[7] *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432, para 14

know what passes between the various constituent members of an appellate bench when they discuss the case than it is to expect to know the thought processes in the mind of a trial judge when he is thinking about the case. The appellate judges can thus be regarded as having a single collective brain.

8. This analogy appears to me to be arguably valid in the case of a court which only speaks with one voice, such as the Court of Justice of the European Union. The CJEU always has a single anonymised judgment, which represents the collective opinion of the court, based sometimes on agreement, sometimes on compromise, and sometimes on majority vote. There is no room for dissenting judgments or for nuanced differences in concurring judgments. Accordingly, it can be cogently argued that the judicial crania should be seen as working jointly rather than severally, or, to use an electrical analogy, in series rather than in parallel.

9. However, in our common law world, the position is very different. It is true that the majority of modern decisions of the Court of Appeal and of the Supreme Court are based on a single judgment with which the other members of the court agree. However, with the exception of criminal appeals in the Court of Appeal where the convention is that there is a single judgment, each judge is free to write a concurring or dissenting judgment in every case he sits on as he sees fit. And, of course, it is a very common occurrence for an appellate judge to do just that. I suppose that it may be said that our appellate courts consist of a number of judges who happen to be sitting on the same bench, whereas courts such as the CJEU consist of a single bench which happens to comprise more than one judge.

10. Casting one's eyes globally, only one Supreme Court, to my knowledge, broadcasts its judicial deliberations as to the disposal of appeals, and that is the Brazilian Supreme Court. There is, as far as I am aware, no suggestion in this jurisdiction or in most of the common law world, that judicial deliberations should take place in public, although there is a small amount of literature on the topic. According to one apparently reliable article written by an American law professor, the filming of judicial deliberations been proposed in Wisconsin for its state Supreme Court by the Chief Justice. Her suggestion was apparently prompted by an alleged "lack of collegiality among the justices on the … Court, including most prominently an alleged assault of one justice by another".[8] However, true to their alleged lack of collegiality, the Justices of the Wisconsin Supreme Court apparently rejected the proposal unanimously[9].

11. Interestingly, the article refers to the fact that appeals are disposed of by the Wisconsin Supreme Court normally without any hearing, and if there is a hearing it is only very brief, whereas, and I quote:

> "English courts have long operated according to a tradition of orality in which every step of the adjudicative process takes place in public. The underlying idea … is that … [the] faithful observance of the tradition … guarantees the accountability of English justice and maintains public confidence in it."

I have no quarrel with that analysis.

12. Two grounds have been put forward to support the argument that appellate judges should deliberate in public. First, such a development has been said to be in line with the direction of travel in the modern world. The trend in this era of the worldwide web is for

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[8] Chad Oldfather, *The Prospect of Open Deliberations in the Wisconsin Supreme Court,* Marquette Law Scholarly Commons, 1 September 2011. According to one report, "a [male]member of [the] court … was accused of choking one of his female colleagues during a closed-door meeting in June. [The male judge], a conservative who had come within about 7,300 votes of being recalled in April, admitted putting his hands on [the female judge's] neck, but he said he was acting defensively", according to a report which can be found at http://ideas.time.com/2011/09/12/justice-on-display-should-judges-deliberate-in-public/.

[9] *ibid*

opinion-formers to be prodigal about publishing their thought processes and opinions through blogging, tweeting and texting and the like. Secondly, and more specifically, if, in the course of their deliberations after a hearing, judges influence each other and, even more, if they develop new points or perceptions, it can be said to be inconsistent with open justice if the deliberations are not in public. After all, the purpose of open justice is to ensure that the arguments are properly ventilated and rebutted in public. Thus, the formidable Dyson Heydon, who retired a couple of years ago from the Australian High Court, has suggested that "The secret debate among the bench can move – and after all advocacy turns on public not secret debate – further and further from the parameters of the public debate between bench and bar."[10]

13. Despite these two arguments, I would reject any suggestion that UK appellate court judges should deliberate in public. The fact that so much material is publicly available electronically is at best neutral: it is not a reason for making yet more material public. Furthermore, because UK courts continue to value the oral tradition so greatly, in contrast not merely with civilian law systems, but also with US appeal courts, we do already have serious debates with counsel and, to some extent, with each other, about the issues in the case during the oral hearing of an appeal. In other words, we already have a great deal of public argument, as is acknowledged in the Wisconsin article which I have just mentioned.

14. As for the point so well articulated by Dyson Heydon, it is simply answered, at least in the United Kingdom, by the fact that we have two mechanisms to avoid the sort of secret justice he fears. First, if deliberations result in the judges considering that there is a

[10] Dyson Heydon, *Threats to Judicial Independence – The Enemy Within*, Inner Temple Lecture 23 January 2012

new point which may affect the outcome of the case on which the parties have not had the opportunity to put their arguments, the court will almost always inform the parties and give them an opportunity to address the point. Secondly, for the past twenty years or more, the Court of Appeal and the Supreme Court have almost always made judgments available to the parties in draft, on a strictly confidential basis, mainly for the purpose of making small grammatical, syntactical and factual corrections. However, where a party considers that the draft judgment is based on a ground which has not been properly raised, they can say so, and the court will then consider whether it would be right to give the parties the opportunity of addressing the ground.

15. These two mechanisms are by no means merely of academic interest. They have each been operated successfully in a number of cases in which I have been directly involved since I joined the Supreme Court two years ago. And the operation of both mechanisms, especially the second, represent a tribute to UK advocates and litigation lawyers. When I mention the fact that we circulate draft judgments to the lawyers for comments, judges from other jurisdictions express surprise. They say that they cannot trust their lawyers either because they would take improper advantage of the mechanism to re-argue the case, or because they would not honour their obligation to keep the contents of the draft judgment confidential.

16. So I am not very impressed with the reasons advanced in favour of the idea of public judicial deliberation. In addition, there are drawbacks with the idea. I believe that it would hamper the effectiveness of the discussions between the judges. One of the attractions of post-hearing deliberations is that judges should feel completely free to say what they think, possibly to shoot a line and see how it goes down with colleagues. Knowing the world was watching would represent a significant and damaging constraint

on the valuably free-ranging discussion. An aspect of this is that, maybe wrongly, but understandably, many judges would be afraid of being thought to be weak or stupid by the public or of losing face with the public; this would either result in their holding back in expressing their views or being reluctant to depart from their expressed views, during the deliberations. Further, deliberations often take place informally – eg between two judges who are thinking along roughly the same lines: if they have to be public, I suspect such discussions would not take place, or would take place illicitly, often unintentionally. This is, I suppose, a real world example of the so-called observer effect in physics (which is sometimes confused with Heisenberg's uncertainty principle).

17. I believe that intra-judicial discussion in appellate courts is not merely legitimate but valuable – perhaps particularly in the Supreme Court. The function of the Supreme Court is to ensure, as far as possible, that the law is principled, clear and sensible, so we tend to take cases on topics on which we think that the law needs to be clarified, modernised, or sorted out. There is no doubt that focussed argument and discussion between opposing advocates gives a judge an advantage which academics do not have (although, not merely because I am speaking in Oxford, I hasten to add that academics have advantages which judges do not have). The judicial advantage was famously described in *Cordell v Second Clanfield Properties Ltd*[11], where Sir Robert Megarry V-C accepted an argument which was inconsistent with a view he had expressed in his excellent book on land law[12], saying this:

> "The process of authorship is entirely different from that of judicial decision. The author . . . lacks the advantage of that impact and sharpening of focus which the detailed facts of a particular case bring to the judge. Above all, he has to form his ideas without the purifying ordeal of skilled argument on the specific facts of a contested case. Argued law is tough law."

[11] [1969] 2 Ch. 9, 16 – 17.
[12] Megarry & Wade, *The Law of Real Property*

18. So, too, it seems to me that if appellate judges argue about, or even just discuss, a case after they have heard it, they are more likely to tease out a clearer and better answer than if they do not. The disadvantages of thinking about a case without having one's views challenged by, and openly discussed with, lawyers who are equally interested and involved, is, I believe, self-evident. My point is not, I hope, blunted by the fact that Sir Robert Megarry's decision in *Cordell* was subsequently overruled by the Court of Appeal, who thought (albeit reluctantly) that he had got the answer right in his book.[13]

19. The prolific judicial writer, Judge Richard Posner, has written[14]:

> "The difficulty outsiders have in understanding judicial behavior is due partly to the fact that judges deliberate in secret, though it would be more accurate to say that the fact that they do not deliberate (by which I mean deliberate collectively) very much is the real secret. Judicial deliberation is overrated."

Although I accept that the value of judicial deliberation can only be taken so far, I do not agree with the view that its value or contribution is overrated - at least so far as the UK Supreme Court, or indeed the Court of Appeal of England and Wales, is concerned.

20. I think that there is a balance to be found between the civilian notion that there is a single curial decision to which all judges are deemed to subscribe and the Dyson Heydon notion that each judge should give an entirely independent judgment. The former approach involves intense negotiations between the judges to produce an agreed single judgment, like the Treaty of Versailles; the latter approach renders an appellate court more like a the famous monastery in Soligny-la-Trappe in Normandy – with the judges not communicating with each other at all. Neither approach is satisfactory. The Versailles

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[13] *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2) [1975] 1 WLR 468, 479*
[14] Richard Posner, *How Judges Think* (1990), p. 2

approach can result in compromise judgments, with an unattractively anodyne and impersonal style whose contents are often obscure, internally inconsistent, or minimalist, sometimes do not even answer the question raised by the proceedings, as is evidenced by some of the CJEU decisions. The Trappist approach produces an unnecessarily long series of full judgments, which often either repeat each other's reasoning, or, even worse and more commonly, almost repeat each other's reasoning with unintended subtle distinctions which is a gift to the legal profession and a disaster for legal certainty.

21. To my mind at least, the ideal approach, as usual, lies somewhere between the two extremes. An approach somewhere between Versailles and Soligny-la-Trappe suggests what might be termed, at least geographically, a Chartres approach[15]. Appellate court judges should be free to agree on a single judgment or to write individual concurring or dissenting judgments. It is correct in principle, because 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 it is correct in practice, because 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.

22. Further, quite apart from what a judge feels he wants to do in a particular case, some appeals are more apt for concurring judgments than others. For instance, a decision which seeks to give guidance to trial judges as to how they should deal with a procedural issue should ideally consist of one judgment; and it is questionable whether a decision

[15] On a straight line, it would be Dreux, but it sounds less good and is far less well known

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 usefully include more than one full judgment, as 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.

23. So, how does the Supreme Court deal with appeals behind the scenes?

24. When I moved to the House of Lords from the Court of Appeal in 2007, one of the changes which struck me was the absence of any pre-hearing inter-judicial discussions. In the Court of Appeal, the presiding judge allocated the judgment-writing in advance, so one knew well before the hearing which of the three Lords Justices would be writing the leading judgment. And there would invariably be a pre-hearing meeting, normally 15 minutes before the hearing was to start, at which the judges discussed the appeal. By the time we went into court each of us knew what the other two judges thought, or thought they thought, about the case, although there were, as there should be, changes of mind as a result of the oral argument, which would be mentioned to colleagues at a convenient time. At the end of the hearing, there was normally not much discussion, and the next stage was the sending out of the leading draft judgment, to which the other two judges replied either by agreeing (sometimes with proposed amendments) or by sending out another draft judgment. On difficult or important cases, there were sometimes discussions, quite frequently between two of the three judges, but there were very rarely any further formal meetings between all three judges to discuss the case.

25. In the House of Lords in 2007 there were no pre-hearing meetings. Indeed, at least in theory, there were no discussions between the Law Lords about the case until after the hearing. So, normally, the only inkling one had of one's colleagues' views arose from inferences from their questions during the hearing. It was only at the end of the hearing that the Law Lords discussed the case, each giving an oral "mini-judgment" for the benefit of his colleagues with the most junior always going first. The contrast in styles was marked; some were brief and impressionistic, others were long and detailed; some were fluent and prepared, others were halting and off-the-cuff; some were very certain, others pretty tentative. After the presider had spoken, there was sometimes a brief further discussion, but often the presider simply allocated the writing of the leading judgment - and off we all went. After the leading draft judgment was circulated, the position was pretty similar to that in the Court of Appeal – the odd informal discussion between two Law Lords, but very rarely any meeting of all five.

26. When I returned to the Court of Appeal as Master of the Rolls in 2009, things had not changed much, although there was probably a bit more discussion, and they remained much the same for the next three years. When I moved on to my present job in 2012, I found that things had changed following the move from the House of Lords to the Supreme Court. The Supreme Court now adopts the approach of the Court of Appeal in always having a pre-hearing meeting 15 minutes before the hearing. Our discussions tend to be more tentative in terms of expressing views than in the Court of Appeal. Indeed, in more sensitive and difficult cases, I have noticed that we sometimes do not express even tentative opinions, and not infrequently we avoid discussing the merits at all.

27. However, as the arguments of the parties develop, we often are more prepared to discuss the case, for instance during lunch. After the case is over, we still adopt the Law Lords'

approach of each giving a mini-judgment and the presider allocating the leading judgment, which is circulated among the judges after it is written. However, the discussions can be much longer. This week, we spent about an hour discussing the case we had just heard, and that was after we had spent thirty minutes giving our mini-judgments.

28. The choice of leading judgment writer is governed in part by the fact that it should normally be a Justice who is aligned with the majority view on the answer and the reasoning (although it is not always easy to identify a view which is supported by a majority, as some views are very tentative). I also try and ensure that the judgment-writing is distributed between the Justices reasonably fairly in terms of quantity of judgments and judgments in interesting cases. We also may discuss who else is likely to want to write and whether the case is one where we should try and have a single (or single majority) judgment or whether it is the sort of case where more than one judgment would be a good idea.

29. After the leading draft judgment is circulated, the Supreme Court Justices are far more likely than were the Law Lords to discuss the draft pretty fully either through email exchanges or at a meeting. In a number of cases we have had two or three post-hearing meetings, some of which have lasted an hour or two. These meetings can sometimes be unhelpful in that the judges who have come to opposing conclusions use them as an opportunity to try and convert their so-far-uncommitted colleagues – ie the judges with firm views get into advocacy mode – and nothing productive is achieved. But that is the exception rather than the rule. Normally the meetings at least serve to identify the areas of disagreement and agreement. But they often serve to bridge gaps, to refine ideas, and to get rid of confusing material, or even to achieve compromises which is excellent,

provided that they are principled and clarifying, rather than messy. On a number of occasions, the discussions have led to changes of mind. I am glad to be able to report that these meetings have always been good-humoured and courteous even when they have not had any concrete results.[16]

30. I find it very valuable, and sometimes chastening, to be able to discuss a difficult and important case in depth, after I have thought and written about it, with my fellow judges after they have thought about it. The fact that they are judging the same case makes all the difference. When a first instance judge, I discovered that discussing a judgment with a colleague who was not involved with the case was normally of only very limited value, and could sometimes be positively misleading, as his principal desire was either to get me out of his room so that he could get on with his work, or to turn the conversation to the case which he was trying.

31. It is very different when the discussions are between judges who are on the same case. And, *pace* Dyson Heydon, provided each judge maintains his mental toughness and independence, it is of considerable benefit to the public if Supreme Court Justices thoroughly discuss between themselves their thoughts on important and difficult cases. It helps to refine and clarify both our thoughts and the way we express our thoughts. Further, although, as my colleague Jonathan Mance points out, such an approach to judgments means more work for the Judges, it not only results in a better product, but it makes for a better judicial working environment, which is valuable in itself.

[16] I am particularly pleased to report that, at least as far as I am aware, no such meeting has ever resulted in one judge putting his hands on another judge's neck, whether defensively or otherwise.

32. As I have mentioned, such an approach is less common in the Court of Appeal. This is unsurprising. The sheer pressure, in terms of number of appeals and applications for permission to appeal, on members of the Court of Appeal is much greater than it is on members of the Supreme Court. If one relies on the neutral citation references, the 38 or so Judges who sit in the Court of Appeal decided around 1800 appeals in 2013, whereas the twelve Supreme Court Justices decided some eighty appeals.

33. It is not safe to take these figures too mathematically. Thus, the Court of Appeal always sits three, whereas the Supreme Court sits at least five and sometimes seven; the Court of Appeal figure takes into account a fair number of relatively easy cases and quite a few renewed oral permissions to appeal; on the other hand, the Court of Appeal figure does not take into account criminal appeals, but, equally, the Supreme Court figure does not take into account the cases in the Judicial Committee of the Privy Council which the Justices hear in addition to their Supreme Court diet. Having made these points, none of them should mask the fact, which is often overlooked by many commentators, that for a multitude of reasons, a number of publicly very important cases stop at the Court of Appeal and do not get to the Supreme Court.

34. Reverting to the Supreme Court, another development which is apparent is an increasing number of joint judgments. This is, I think, attributable to two factors. The first is increasing collegiality. The more closely a group of judges work together the more likely it is that two (or sometimes three[17]) judges will gravitate towards the idea of working together on a judgment. The second reason is the fact that we are moving away from concurring judgments unless they really add something, which means that the average

[17] As in *Shergill v Khaira* [2014] UKSC 33 and [2014] 3 WLR 1 and *R v Ahmad* [2014] UKSC 36, [2014] 3 WLR 23

Justice will write fewer judgments each year, and joint judgments are a way of compensating for this.

35. Joint judgments have a presentational advantage over single judgments: where there is a single judgment, some people, especially no doubt the losing party, may suspect that only one judge has really thought about the case. It is true that sometimes a judge will not give a great deal of time to considering another judge's draft judgment, once he is satisfied that he agrees with its conclusion and basic reasoning. But that is often fair enough: the answer may be tolerably clear and the first judge will have thought about the case carefully immediately before and after, as well as during, the hearing. And, anyway, in the great majority of cases, almost all the other Justices will come back with some suggestions, often quite important suggestions. Most single judgments of the Supreme Court have significant input from other Justices.

36. I am emphatically not suggesting that the Supreme Court should be working towards a single judgment in every case or should even be increasing the proportion of single judgments. Professor Alan Paterson, our perceptive and faithful chronicler[18] warned against the risks of single majority judgments in the second BAILII annual lecture[19]. While I do not accept all his reasons, I entirely agree with his point that it would be wholly undesirable and probably unconstitutional for judges to be precluded from writing concurring judgments (although it is an unbroken convention in the Criminal Division of the English and Welsh Court of Appeal). Further, as he mentioned, Lord Rodger was correct in pointing out that[20], "not only humour, but any form of distinctive good writing, is even harder to bring off in a composite judgment than in an individual

[18] See *Final Judgment, The Last Law Lords and the Supreme Court* (2013)
[19] http://www.bailii.org/bailii/lecture/02.html
[20] Lord Rodger, *Humour and the Law* 2009 SLT (News) 202

judgment". However, most of the Court's jointly authored judgments involve individual judges writing a particular sections, rather than both judges collaborating on all sections. Nonetheless, I accept that Lord Rodger's point has validity, although in the end, I would (perhaps with some regret) suggest that clear and brief judgments are more important than judgments which have distinctive style and humour.

37. I have discussed what goes on behind the scenes after, and just before, an appeal is heard in the Supreme Court. There are two anterior aspects of appeals which deserve to be mentioned, namely (i) the consideration of applications for permission to appeal ("PTA") and (ii) the selection of the panel of judges to hear the appeal.

38. So far as applications for PTA are concerned, the Supreme Court is only meant to take cases which raise points of general public importance. Whether a case satisfies this test is sometimes difficult to assess, but normally one can tell pretty quickly, although perhaps inevitably, opinions can differ. The most difficult applications are ones where the Court of Appeal seems to have gone wrong, but the point is a one-off and so not of general importance. Most judges (including me – I hope) have a natural sense of justice and it is somewhat counter-intuitive to such judges to refuse permission to appeal against a decision one thinks is wrong, but that is what must sometimes be done.

39. We receive about 250 applications for PTA each year. About nine times a year, the Registrar, a lawyer experienced in the ways of appellate courts and who is employed by the Supreme Court, gets around 28 applications together and divides them into four batches, and each batch of about seven is given to a panel of three Justices. Each PTA panel is chaired by one of the four most senior Justices (currently Lady Hale, Lord Mance, Lord Kerr and myself), and the Registrar ensures that the other eight Justices are

moved round so that the constitution of the panels varies from one batch of PTAs to another. The batches of PTA applications are allocated between the four groups by the Registrar and her allocation is submitted to the President and Deputy President for approval. I can only remember one occasion in two years when a PTA allocation was changed from the Registrar's proposals and, sorry, but I can't remember why it was changed.

40. The PTA panels meet when all the members have read the applications, and they discuss and come to a view on the seven applications before them. Consistently with the approach adopted for discussions immediately after hearings, the junior Justice gives his view first on a PTA, and the senior Justice goes last. If they all agree, that is usually the end of the discussion about the application. But if they don't, there is normally further discussion. Although it is not written in stone, the convention is that, if one Justice thinks permission should be given, even after his colleagues have tried to persuade him otherwise, permission is given, but normally a dissenter will not insist.

41. If we give permission, we do not give reasons, but we give provisional directions as to the likely length of the hearing and the number of Justices who should hear the appeal. If we refuse permission we normally are pretty anodyne about the reasons. I used to be keen on the idea of giving much fuller reasons, but no longer. If we say that the Court of Appeal was right, we could be said to be inappropriately deciding the point without proper argument. And, if we say that there is a powerful case for saying that the appeal court was wrong but the point is not of sufficient importance, the applicant will feel a strong and understandable sense of grievance. Unlike in the Court of Appeal, where only one judge decides whether to grant or refuse PTA on the papers, we do not give an

unsuccessful applicant for PTA the opportunity to renew his application at an oral hearing.

42. I turn finally to the constitution of the panels which hear the appeals themselves. There are twelve Justices in the Supreme Court and most appeals are heard by five of us, although we not infrequently sit seven (on important cases or often where we are being asked to overrule a previous decision). Occasionally, we even sit nine for particularly contentious or important cases – for instance the recent *Nicklinson* case[21] on assisted suicide. Whatever the size of a particular panel, its members are selected from the Justices. The selection is made initially by the Registrar, who compiles the list of panel constitutions for each term's cases and then submits the list to the President and Deputy President, and any other Justice who ought to be consulted, for approval.

43. Occasionally the panel includes the Lord Chief Justice or Master of the Rolls or their Scottish or Northern Ireland equivalents. It is important, in my view at any rate, that the Supreme Court keeps in touch with its roots in England and in Wales, in Scotland and in Northern Ireland, in terms of the law, the courts and the judges. We have a delicate line to tread: being the top UK court means that we have a responsibility to ensure consistency and unity. However, we value and must respect the high degree of autonomy which is and always has been accorded to jurisdictions of England and Wales, Scotland and Northern Ireland, and the fact that the senior Judge and head of those jurisdictions is the Lord Chief Justice of England and Wales, the Lord President in the case of Scotland, and the Lord Chief justice of Northern Ireland respectively.

[21] R *(on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2014] 3 WLR 200

44. The UK Supreme Court is rather unusual in the common law world. In almost all common law countries, the Supreme Court sits in banc – ie all members of the court sit at least on most appeals unless they are conflicted. That is true, for instance of the Australian, New Zealand, Canadian and US Supreme Courts, with their five, seven or nine judges. In many European jurisdictions, the closest analogy is the Constitutional Court (or Conseil d'Etat or its equivalent) rather than the Supreme Court (or Cour de Cassation or its equivalent) as most civilian law Supreme Courts are much larger, and take many more cases, than a common law Supreme Court. Most constitutional courts either sit in banc, or (as in Germany) distribute the work between two groups of judges on a random basis. Further, in the German Supreme Court, for example, the bench is divided into groups of judges with particular types of expertise and cases are allocated to a particular group by reference to the issue involved. Further, whenever it is necessary to select a panel from a group of judges, they are either selected by rota or at random the judges from the group.

45. As both the supreme UK civil, criminal, family court and the UK quasi-constitutional court, with 12 judges, each of whom has specialised knowledge and experience (often in more than one field), it is not sensible for the Supreme Court to constitute its panels on a random basis or on a rota basis. For instance, with two or three experts on family law, it would be unwise not to ensure that at least two of them sit on divorce and children cases; with two experts on criminal law, it would be absurd if at least one of them was not on a criminal appeal. And, unlike most European countries, which can remember a period when the judiciary was politicised or suborned by the executive, the United Kingdom seems to be relaxed about judicial appeal panels being selected by the presiding judge or judges. We are used to the notion that judges can be selected from a pool to hear an appeal by a person who is not seeking to undermine judicial independence or to

skew the result. Although I have heard the occasional comment that a particular decision of the Court of Appeal or the House of Lords might have been different if the panel hearing the appeal had been differently constituted, I have never encountered the suggestion that the choice of panel was intentional loaded towards a particular result.

46. The judicial input into the constitution of panels to hear appeals is slight, as the Registrar knows what each appeal is about and ensures that the panel includes a mixture of experts and non-experts. The Registrar also seeks to ensure that all Justices get a fair share of the more interesting, difficult and important cases. Sometimes Lady Hale and I have changed a constitution, but it is normally because a Justice is unexpectedly away, because we feel that a Justice has not had a fair share of a certain type of case, or because we consider that the panel should be seven not five.

47. The problem with permitting five or seven judges from twelve to hear a particular case is that, as I have mentioned, there can be a perception on the part of some observers, that, if the panel had consisted of different Justices, the result would have been different. Such observers would normally include the loser and other people who disagree with the majority view, particularly where the court turns out to be split 3-2 or 4-3. This has been a feature of the Supreme Court and the Law Lords for many decades (and, indeed, it is the position in the Court of Appeal). However, with the growth of judicial review, the advent of human rights and the creation of the more visible Supreme Court, it is likely that people will take more interest in this aspect of our decision-making.

48. It is, of course, inevitable that there are differences in outlook and variations in temperament between the Justices, and it is, I believe, inevitable that a judge's particular outlook and temperament will sometimes play a part in his or her decision-making. Of

course, there is a limit to how far it is proper for judges to be influenced by their views, and all good judges have learnt to keep their prejudices and hobby-horses under control when sitting on the bench. But even on a relatively technical legal point such as the interpretation of a commercial contract, where everyone agrees that both the language of the contract and the commercial realities have to be taken into account, there are judges who are temperamentally inclined to give greater relative weight to commercial reality than other judges. Or when it comes to the never ending tussle between certainty and fairness, there are judges who lean more towards fairness than others, although the differences may change depending on the area of law involved.

49. This is not merely the position in the UK Supreme Court: it applies equally to all judges everywhere, and of course it applies to the Court of Appeal and (in Scotland) to the Inner House, and to trial judges throughout the UK. Indeed, in the Supreme Court, with at least five judges, you can hope, indeed you can expect, to have a smoothing, or averaging, out of different types of temperament, which is not quite so easily achieved with three judges, or, of course, with one, as is the position at trial. However, the Supreme Court, with its relatively few judges and its relatively high profile, is easier to monitor and analyse than the Court of Appeal or first instance judges.

50. Under the common law system, where the law develops by decisions of judges, differences in judicial temperament or outlook has always been one of the enriching, if sometimes potentially confusing, features of the courts in general and of judge-made law in particular. Within limits, the more multifarious the judicial outlooks in a court the more reliable and the more generally relevant the law as developed by the court should be. More reliable because the broader the variety of judicial views, the more likely it is that the law will reflect the totality of different outlooks. More generally relevant because

if all views are represented in law-making it is likely that the law will seem relevant to most people.

51. While diversity of outlook or approach among the judges is desirable, like all beneficial features, it has its price, and the price of diversity of outlook is a possible reduction in consistency. This has nothing to do with diversity in the sense in which it is more often discussed, namely increased representation of women and ethnic minorities. As I have said on other occasions, the judiciary, particularly the senior judiciary, undoubtedly needs to get more diverse in this more familiar sense, but whether or not this would necessarily improve diversity of outlook or approach is a matter of opinion. More to the point, it is not really relevant for present purposes. The essential point is that diversity of approach is beneficial, but, like most benefits, it has a price.

52. Having said that, the diversity of approach between the Justices of the Supreme Court should not be exaggerated. Although I have got to know them all well, I do not have much idea as to how most of my colleagues vote or have voted in elections, and the few who have volunteered the information in discussions have often surprised me. Further, if you look at cases where there have been two dissenting judgments, there is not much consistency in the identity of the Justices who dissent together. I have no doubt but that the Justices in the Supreme Court are well aware of the fact that absence of consistency can be a serious downside when it comes to law-making, as one of the most vital features of the rule of law is that the law is clear. In the same way as Supreme Court Justices should steer a middle course between being in a court which happens to have several judges and being several judges who happen to be in the same court, so should we steer a middle course between asserting and submerging our own individuality.

53. Quite apart from this, I think that there are advantages in having an appeal court where the same judges do not sit together on every case. Such is human nature that I suspect that a judge's outlook may become more entrenched if he or she is always sitting with the same colleagues than if his or her fellow judges are subject to a degree of variation.

54. When it comes to selecting panels, the concern that different judges have different outlooks can be said to support a case for having more panels with seven or even nine Justices. However, some cases simply do not merit more than five Justices, enlarged panels can lead to more delay before judgment, and they make it difficult for more than one panel to sit - and even with enlarged panels one would run the risk of 4-3 or 5-4 decisions.

55. When it comes to split decisions, I don't think people should complain: every judge is appointed to exercise his or her judgment, and, particularly when a case gets all the way to the Supreme Court, it is very likely to be difficult and will therefore often result more than one possible answer.

56. I have been talking today about judging and one important feature of good judgment is knowing when to stop, and if I go on much longer, you will think I am no good at judging. Despite referring at the beginning of this talk to company prospectuses and despite the vogue over the past thirty-five years for privatisation, I doubt that the Supreme Court is about to be sold off. However, if there were to be a market in UK Supreme Court shares, I hope that this rather inward-looking talk has not made you feel that you would be a seller rather than a buyer. Thank you.

David Neuberger Oxford, 15 November 2014