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Oñati International Institute for the Sociology of Law
Avenida Universidad, 8 – Apdo. 28
20560 Oñati – Gipuzkoa – Spain
Tel. (+34) 943 783064 / opo@iisj.net / https://opo.iisj.net

When you cannot ask the judge: Using cases to explore judicial culture in the UK Supreme Court

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RACHEL CAHILL-O'CALLAGHAN*

Abstract

Much of our understanding of the judicial role and culture is grounded in data gathered through interviews, surveys, and observations of judges. However, in the UK access to the judiciary and the nature and form of questions you can ask of them is strictly controlled. This paper argues that cases are important artefacts of the culture of the judicial institute. The analysis of judicial decisions, approached through the lens of dissent, provides an insight into the factors that shape the decision-making culture and the influence of culture on individual decision makers. The analysis of cases, enriched with data from judicial speeches, raises important questions about the decision-making culture in the highest court.

Key words

Judicial culture; decided cases; data; artefacts

Resumen

Gran parte de nuestra comprensión de la función y la cultura judiciales se basa en datos recogidos en entrevistas, encuestas y observaciones de los jueces. Sin embargo, en el Reino Unido, el acceso a la judicatura y la naturaleza y forma de las preguntas que se les pueden formular están estrictamente controlados. Este artículo sostiene que los casos son artefactos importantes de la cultura judicial. El análisis de las decisiones judiciales, enfocado a través de la lente de la disidencia, proporciona una visión de los

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* Rachel Cahill-O'Callaghan, Cardiff School of Law and Politics, Cardiff University. Email: Cahill-OCallaghanR@cardiff.ac.uk.

factores que conforman la cultura de la toma de decisiones y la influencia de la cultura en los responsables individuales de la toma de decisiones. El análisis de los casos, enriquecido con datos procedentes de los discursos judiciales, plantea importantes cuestiones sobre la cultura decisoria en el más alto tribunal.

Palabras clave

Cultura judicial; casos resueltos; datos; artefactos

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> Our case material is a gold mine for scientific work. It has not been scientifically exploited.
> (Oliphant 1928, 161)

1. Introduction

The quotation highlights the potential of decided cases as data and this paper uses a dataset of cases decided by the UK Supreme Court to explore the decision-making culture of the court. In contrast to many civil law systems, in which there is a strong insistence on the "embodiment of the law in a code that the courts theoretically apply", in most common law systems there is more overt recognition of the importance of the exercise of judicial discretion in shaping the law (Baudenbacher 1999, p 336).[1] In this context, it is important to explore the institutional culture that shapes decision making and enables and constrains the exercise of judicial discretion.

Legal culture has long been the focus of comparative lawyers and legal sociologists. The focus of much of this work is the macro context, the profession, institutions, and the perception of law in society (For example, Friedman 1969, 1994, Cotterrell 2006, Nelken 2006, Merry 2010, Engel 2010). This paper turns from the macro culture to the micro and internal culture of judicial decision making the UK Supreme Court. In this context, culture is defined as the overt and less overt factors and influences which shape judicial decision making.

Much of the research which centers on judicial culture is grounded in direct engagement with the courts, judicial officers, and other legal actors (For example Darbyshire 2011, Paterson 2013). This form of research, in particular surveys and interviews, requires that we analyse information articulated by the judge. It provides a wealth of information about individual judges, institutional processes, and the court culture. But what about the unarticulated, that which is either unknown or unsaid? We are all aware of the limitations imposed on the information judges may provide, but increasingly work by Kahneman, Tversky and others (1982) demonstrate that many factors that influence our behaviour, and decision making, lurk beneath the conscious and these important influences remain hidden even from the respondent (Kahneman *et al.* 1982, Kahneman 2003).

This paper draws on speeches delivered by Supreme Court Justices and the cases decided in the UK Supreme Court. The Court is the final court of appeal for all UK civil matters and for criminal matters from England, Wales and Northern Ireland.[2] It hears approximately a quarter of the cases that make an application for permission to appeal, and selects those cases deemed to have arguable points of law of the greatest public and constitutional importance.[3] This paper draws on the cases decided by the court from it's opening in October 2009 to June 2020 to demonstrate that publication of the decision and the reasoning behind it can provide a lens through which we can view the judges,

[1] Thank you to the reviewer who highlighted the importance of this point and identified the quotation. For an opinion on the development of judge-made law by a UK Supreme Court Justice see Lord Hodge "The scope of judicial law-making in the common law tradition" Max Planck Institute of Comparative and International Private Law Hamburg, 28 October 2019.

[2] The final court of appeal from criminal matters in Scotland is High Court of Justiciary.

[3] See the UK Supreme Court website.

judicial culture, and the court.[4] The exploration of data derived from judicial decisions casts light on the unexplored and unspoken facets of the court culture and the impact on the individuals within it. It raises new questions and provides new lines of enquiry.

Whilst it is recognized that asking the judge provides rich and detailed insights into the decision-making process, this paper starts with a discussion of the limitations of this approach including the institutional, procedural and individual constraints on who can speak to a judge and what a judge can or wishes to say. In contrast, judicial speeches and published judgments are a public resource and, albeit constrained by legal and institutional principles and norms, they contain traces of the individual and the culture in which they were created.

The paper then examines the many facets of culture and the importance of the analysis of artefacts to gain an insight into the more hidden elements of judicial culture. Drawing on judicial speeches, the paper explores the evidence from policy and procedural artefacts that presents a picture of a changing culture from individual decision making towards a more collective decision-making culture. Little is known about how this changing decision-making culture influences individual decision makers.

Drawing on the decided case as an artefact, this paper examines how longitudinal analysis of the decisions reached by the UK Supreme Court can cast a light on the role of the individual in a culture of collective decision making. Using the publication of dissenting judgments as a barometer of change, this paper highlights the gradual disappearance of the sole voice of dissent and the differential impact of culture on two key decision makers.

Finally, the paper draws on a brief content analysis to highlight the potential of the dissenting judgment as a porthole through which we can view the individual decision maker and the factors that motivate their decision making. In doing so, this paper highlights the central importance of the case as an artefact of judicial culture and the potential of this form of analysis to raise novel and important questions about the decision-making culture in the highest courts and the individuals making the decisions.

2. Socio-legal study of judicial decision making: The case as data

Despite decades of study, we know very little about judicial decision-making culture and the influences on individual decision makers in the UK Supreme Court. The insights we do have tend to be filtered through the lens of autobiography (Lady Hale), diaries (Lord Hope) or a few academics with privileged access (See for example Paterson 1983, 2013). Whilst each provide a glimpse into the decision maker and that which the Justices wish to say about their own or colleagues' decision making, each source of data is subject to conscious and less conscious limitations.

As Epstein and King (2002) noted:

> [A]sking someone to identify his or her motive is one of the worst methods of measuring motive. People often do not know, or cannot articulate, why they act as they

[4] The UK Supreme Court was established in October 2009, to replace the Appellate Committee of House of Lords, to achieve overt separation of powers by removing the judiciary from the UK legislature. The Supreme Court was established by Part 3 of the Constitutional Reform Act 2005 and structures (including the appointments process) was modified by the Crime and Courts Act 2013.

> do. In other situations, they refuse to tell, and in still others, they are strategic both in acting and in answering the scholar's question. This is obvious from the example of asking justices about how they reach decisions.

This quotation highlights two fundamental issues with asking the judge; the first is judicial editing or parsimony, the second is that some things are simply not known. Judges are constrained by the norms, structures, principles, and rules of their office. Whether conscious or less conscious, these facets of the judicial office serve to limit what judges say about themselves and others. Indeed, scholars who work closely with judges, or seek to influence judicial policy, may also exercise some self-restraint – in what they say and publish – to retain the privileged access they have acquired. Scholars who do engage in judicial interviews are conscious of these limitations and the knowledge claims that can be made.[5] Indeed, within these constraints, much can be discerned about the culture of the court particularly when these interviews are part of a rich ethnography (see for example Bergman Blix and Wettergen 2018).

Yet, some knowledge simply evades articulation (Guthrie *et al.* 2000). There is increasing recognition that the processes, particularly of decision making, can happen at a less than conscious level (Guthrie *et al.* 2007).[6] Indeed, extensive research in psychology has identified a dual systems process of decision making (Kahneman 2011). System one processes are quick, instinctive and function as the lens through which we make our decisions. These instinctive responses, although important to judicial decision making, often remain hidden from the decision maker (Sale 2001, Peer and Gamliel 2013). The responses may be moderated by the culture in which the decision-making process occurs, this is particularly true in panel decision making (Chatman and O'Reilly 2016).[7] Cases in the UK Supreme Court are decided by panels of five, seven, or nine Justices. Every Justice on the panel is potentially exposed to the influence of the decision-making culture and, although these influences are often hidden from view, they are manifest both in the outcome of the decision and the reasoning behind it. As such, the examination of decisions and judgments may provide an insight into the unarticulated influences on judicial decision making.

The study of published judgments does not overcome the limitation of judicial editing, but rather accepts it. Every judgment is subject to the constraints of the judicial office and the "law conditioned" judicial role, as such judicial editing is embedded in the analysis of the outcome and reasoning of the case (Llewellyn 1931). The analysis of published judgments also overcomes the issues surrounding access and the restraint access may impose. As with other publicly available data sources, the use of data generated from published judgments ensures that the analysis, interpretation, and understandings generated from the case data can be reproduced and the validity of the analysis challenged (Braun *et al.* 2018).

[5] An excellent example of the detailed methodological consideration of interviewing judges can be found in the paper discussing judicial understanding of difference which highlights the importance of subject matter (van Oorschot 2020).

[6] The focus of this article is not on emotion, but emotion has also been demonstrated to play a role see for example (Wistrich *et al*. 2015, Maroney 2015).

[7] In this context, culture is defined in terms of its underlying psychological mechanism, social norms that operate through informational and normative social influence. The focus is on the norms and behaviours that shape decision making not the structures and processes (organisational climate).

As such, the case is a valuable communal source of data. Despite the long history of this resource harnessed for doctrinal scholarship, it is less commonly the object of study in socio-legal scholarship (examples include Riles 2005, Valverde 2009, Cowan and Wincott 2016). In part, this may be because the final decision and the published reasons are the remnants of the judicial process, often containing only traces of the social context from which it emerged. But the outcome and reasoning are shaped by the decision maker, and despite the neutral language traces of the decision maker remain and the culture within which it was created persists.

3. Considering culture: The importance of the artefact

Raymond Williams (1995) argued that culture is one of the most complicated words in the English language and despite extensive debates in the fields of sociology and anthropology, a shared definition of culture has yet to emerge (Soysa 2009). This is mirrored in discussions of legal culture, which Sally Engle Merry suggests is a "very complex concept, subject to considerable debate" which encompasses features such as structures and practices to the ideas and value of law (Merry 2010, Nelken 2010). What does emerge is a sense of culture as a multi-faceted overarching system of meaning, "a repertoire of actions, practices and beliefs" which sustains a community or institution (Parsons 1972, Hall *et al.* 2003, Merry 2010). But culture can also change an institution, indeed, Merry highlights that "[c]ultures are not bounded entities but porous, with ideas and practices that are constantly shifting. Changes are not random, however, but take place in terms of existing cultural ideas and practices" (Merry 2010, p. 42). As such, changes in the practices of legal institutions may reflect the many facets of the internal and external culture.

Much of the focus on legal culture centres on the wider legal system and the place of law in society (Friedman 1994, Merry 2010).[8] This paper adopts a narrower frame of focus and explores culture within a single institution. In an institutional context, culture is a sense-making mechanism that guides and shapes, and may even control, the behaviours and attitudes of an institution's members (Weick 1995, Chen *et al.* 1997, Mears *et al.* 2017).

The culture of an institution is shaped and maintained by a multitude of tangible and intangible elements from building structures and images, policies and procedures, to ideas, knowledge, values (Schein 2016). These elements influence behaviour and decision making at different levels from overt conscious influences, to less conscious influences.[9] Indeed, Schein (2016) highlights the central importance of the less conscious influences on institutional culture, defining institutional culture as

> ... the accumulated learning of a pattern or system of beliefs, values and behavioral norms that come to be taken for granted as basic assumptions and eventually drop out of awareness. (Schein 2016, p. 6)

[8] This wider context is reflected in Merry's four dimensions of legal culture. The "internal focus on practices and ideologies within the legal system" centres on the wider legal system. The other dimensions explore legal culture in wider society (public attitudes to law, legal mobilization and legal consciousness).

[9] For a brief example of the breath of the factors that have been viewed as a facet of culture see Schein and Schein (2016) where the authors set out ten different categories of facets of culture (observed behaviour, climate, formal rituals and celebrations, espoused values, philosophy, norms, rules, identity, images, skills, habits of thinking, shared meanings, metaphors and symbols).

It is these less overt influences that have been the focus of much of the research in the decision-making field (Weber and Morris 2010, Yates and De Oliveira 2016). The study of institutional culture has long been divided on the best framework to understand the role of culture in shaping individual decision making. This division is in part grounded in the nuanced interplay between overt and covert facets of culture and the many research fields and traditions that explore and seek to understand it. Schein provides a framework for investigation that divides institutional culture into three levels, the first focuses on the visible structures, processes and observed behaviours (artefacts). The second moves the focus from objective observation to the espoused beliefs, values and rationalisations, the stories that are told about the culture. The final layer is the more hidden, unconscious beliefs and values which have fallen out of focus but play a role in determining behaviour. These levels are not discrete, rather each level shapes and relate to the other; the artefacts are manifestations of values and espoused values are manifestations of assumptions. As such, artefacts and espoused values provide an insight into the more hidden values and assumptions of culture.

Artefacts are tangible and often visible aspects of culture. Examples include those aspects of judicial decision making that are overt and public, the procedures, policies, documents and observed behaviours. The artefacts reflect the espoused beliefs and values of the organisation. These conscious and explicitly articulated beliefs and values serve as a normative framework to guide actions and decisions. Leaders often play a significant role in developing and embedding these shared values and beliefs. Artefacts and espoused values alone cannot provide a complete portrait of the culture of any institution or organisation, but both offer glimpses into the culture of the court which provides an opportunity to question hidden assumptions and values.[10] This paper is grounded in those artefacts of the UK Supreme Court that are publicly available and reflect both the institution and the individual; judicial speeches and decisions. Both artefacts albeit constrained by the conventions, processes and procedures of the judicial role provide glimpses into the institutional structures and culture that shapes judicial decision making in the UK Supreme Court.

4. The Supreme Court decision making culture

What little is known about the procedures and structures that shape the decision making in the UK Supreme Court is to be found in judicial speeches and insights from those with privileged access to the Court. The speeches of the Justices of the UK Supreme Court are published on the Supreme Court website, and whilst closely governed by convention, a few speeches cast a light on how the decision-making procedures have evolved since the Court opened in October 2009.[11]

Some elements, albeit changed by COVID-19, were retained from the processes of the previous judicial committee of the House of Lords, including the pre-hearing meeting, which was an opportunity "to discuss the hearing and express preliminary views as to the outcome" (Lord Hodge 2020). This is followed by a post-hearing discussion or "first conference" when the panel come together to discuss the disposition of the case. These

[10] Artefacts of culture require interpretation and this is subject to all the observer biases and assumptions that limit any interpretive method.

[11] https://www.supremecourt.uk/news/speeches.html

discussions are the foundation for "team-working" practices that were established with the new court, a significant step away from the individualist practices of the previous judicial committee of the House of Lords where each member of the panel was required to deliver a judgment even if it was a simple "I agree" (Paterson 2013). This team working is the basis of the collaborative working culture that has developed in the Supreme Court as Lord Reed recognised in his speech to mark the ten-year anniversary of the Court:

> The Supreme Court building itself assists in this collaborative process. The Justices' offices are next to one another. We each have a spacious room with several chairs, 11 where colleagues can drop in to discuss matters. Most of us work with our doors open, encouraging that to happen. We normally have lunch together every day we are sitting, encouraging collegiality. We have conference rooms where we meet to discuss cases after the hearing. We usually have a brief discussion of the case in the presiding Justice's room 15 minutes before the hearing, focusing particularly upon how the hearing should be conducted. Any views expressed at that stage are usually tentative. Further discussions take place after each adjournment, and a longer discussion is usually held immediately after the hearing has finished. Sometimes, if we require time to consider the case further before expressing a view, we agree to meet a week or two after the hearing. We also sometimes have further meetings if agreeing a judgment is proving difficult. The discussion can be lengthy – sometimes an hour or two – and quite robust. (Lord Reed 2019)

The practices established in the new Supreme Court overtly encouraged collective and group-orientated rather than individualistic decision making (Paterson 2021).[12] This change towards collective decision making is amplified in the 2019 call for a new Deputy President of the Supreme Court, which noted that one of the criteria for appointment was an "ability and determination to play an active leadership role in a collegiate court made up of 12 independent and strong-minded individuals."[13] As such, the first level of the Schein (2016) model of institutional cultures suggests that the visible structures and processes encourage a culture of collective decision making.

If we follow Schein's (2016) conception of institutional culture, the second level recognises the importance of the individual in the institution and centres on individuals espoused positions and the overt recognition of the culture by those in the institution. It is typically speeches and interviews that offer an opportunity to explore individual understandings of institutional culture. It is perhaps unsurprising that those in the most senior positions, also espouse the collegiate nature of decision making. Indeed, Lord Neuberger suggests that this is associated with a reduction in number of individual judgments:

> 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

[12] These practices and the group-orientated decision-making processes are attributed to the second President of the Supreme Court Lord Neuberger (Paterson 2021).

[13] Information Pack – Vacancy for appointment as Deputy President of the Supreme Court. Available on https://www.supremecourt.uk/docs/appointment-process-for-the-deputy-president-of-the-supreme-court.pdf

> more likely it is that two (or sometimes three) judges will gravitate towards the idea of working together on a judgment. (Lord Neuberger 2014)

Lord Neuberger suggests that a culture of collective decision making is associated with a move away from the individual judgment whether in agreement or dissent, to agreed judgments and the available evidence from the UK Supreme Court viewed though the policies and procedures highlight this cultural change away from an individualistic approach towards collective decision making. Lord Neuberger suggests that this cultural change would have a significant impact on the form of decision making of the court. But policy, procedures and espoused values provide little insight into whether this aspirational culture is embedded in the court and how the culture influences the individual decision maker.

A detailed ethnography of the court would offer these insights, but it is unlikely in the UK Supreme Court where the decision making is hidden behind closely guarded closed doors. The work of Penny Darbyshire most closely aligns with this form of research (Darbyshire 2011). But the four days she spent with the Supreme Court, offer few glimpses into the judicial culture of the Supreme Court beyond the structural process, collegiate nature and speed of the decision making (Darbyshire 2011). Indeed, whilst the policies suggest a dynamic and evolving decision-making culture, interviews, observations and speeches only offer an insight into a moment in time and rarely provide an opportunity to consider the court over extended periods or changing personnel. The longitudinal study of observed behaviours, another artefact of culture, offers these opportunities.

In the context of the UK Supreme Court, a longitudinal study of decisions can offer an opportunity to study the evolution of the decision-making culture. It also provides valuable insights into the institutional culture that shapes decision making in the court and the opportunity to observe the influence of culture on individuals and individuals on culture.

5. Mapping dissent: A tool to explore decision making culture

Every judicial decision on the disposition of a case, and the judgment written about it, is a reflection of the case details, legal principles, and law, and the individual and the culture within which the decision was reached. The judgment is thus an artefact of the decision-making culture. To explore the influence of the culture of collective decision making the following is a study of the cases decided in the Supreme Court approached through the lens of dissent. The arguments for and against judicial dissent have been the topic of much debate, justifications typically centre on judicial independence, integrity, and transparency, whilst arguments against dissent focus on legal uncertainty and the potential detriment to judicial authority. These debates on the normative value of dissent are not the focus of this paper. Rather, this paper uses the behaviour of publishing a dissenting opinion to highlight the potential of empirical studies of cases to provide insights into the culture of the court and the impact of that culture on individuals. As Lord Neuberger, noted above, in a culture of collective decision making, judges are less likely to disagree. This is not to suggest that disagreement is not possible or that the dissenting voice is silenced, rather that a cultural change that moves away from the individual decision maker to a collective approach is more likely to result in agreement.

It must be noted a decision to dissent is not simply a reflection of the culture of decision making, indeed numerous factors have been implicated in the decision to dissent, thus it is not suggested that culture alone results in a reduction or increase in dissent, but rather that a culture of collective decision making may play a role.

This paper presents a longitudinal study of patterns of dissent in the first eleven years of the court from the opening of the Supreme Court in October 2009 until the end of October 2020.[14] During this time, the court decided delivered 756 judgments of which 21% of cases divided judicial opinion.[15]

The quantitative statistical analysis of judicial decisions, jurimetrics, has a long history in the US where political scientists have harnessed the decisions of the US Supreme Court and Court of Appeals to understand the influence of judicial ideology, attitudes, context, and character on decisions reached (See for example Ulmer 1963, Segal and Cover 1989, Clark 2009, Danziger *et al.* 2011, Epstein *et al.* 2012). Although, rare there are examples of this in the UK, most notably the work of Chris Hanretty (2013, 2020). Traditionally, quantitative studies of judicial decision making tend to focus on facets of the judicial identity (strategy, ideology, race, gender) or the plaintiff identity which appear to influence the final outcome (Grossman 1966, Steffensmeier and Britt 2001, Peresie 2004, Collins *et al.* 2010). This paper moves away from the traditional approach adopted in quantitative empirical legal studies which requires hypothesis testing and statistical analysis of large datasets (Ulmer 1963, Segal and Cover 1989, Clark 2009, Hanretty 2013, 2020). The low number of judgments per year and the relatively low rate of dissent would require the data to be aggregated to facilitate analysis. To do so, would mask the small but perhaps important changes in patterns of decision making over time. As such, this paper simply maps dissent as a process of exploration and looks for regularity and irregularity in the patterns of decision making that may indicate change. It shifts the focus from statistically significance to more subtle changes which may be worthy of further exploration. In doing so, the approach moves away from the traditional positivist approach associated with numerical data and quantitative studies to the interpretative approach most often associated with qualitative studies. The data is presented in graphic form, asking the reader to observe the patterns, the regularities and irregularities. It does not provide answers, rather it asks the reader to explore the data and ask further questions about the institutional culture of the court and the influence of that culture on the individuals within it.

6. Dissent in the Supreme Court

The dataset was the cases which were decided by the UK Supreme Court between 1st of October 2009 – 1st of October 2020. During this time the court delivered judgments on 756 cases of which 158 cases divided judicial opinion. Figure 1 presents the pattern of dissent over that time. Those cases which divided judicial can be sub-divided into two classes, lone dissents (black line) and minority decisions (blue line). The lone dissent series are those cases where a single Justice disagreed with the majority position and

[14] Unlike the US Supreme Court, the UK Supreme Court Justices have a retirement age of 70 or 75 depending on the time of appointment. As such, the court is subject to regular change. To date 33 Supreme Court Justices have sat full time on the bench, with regular additions from a supplementary panel.
[15] This data does not include judgments from the Judicial Committee of the Privy Council.

delivered a dissenting judgment. The minority decision was where two or more Justice disagree with the majority position on the disposition of the case.

FIGURE 1

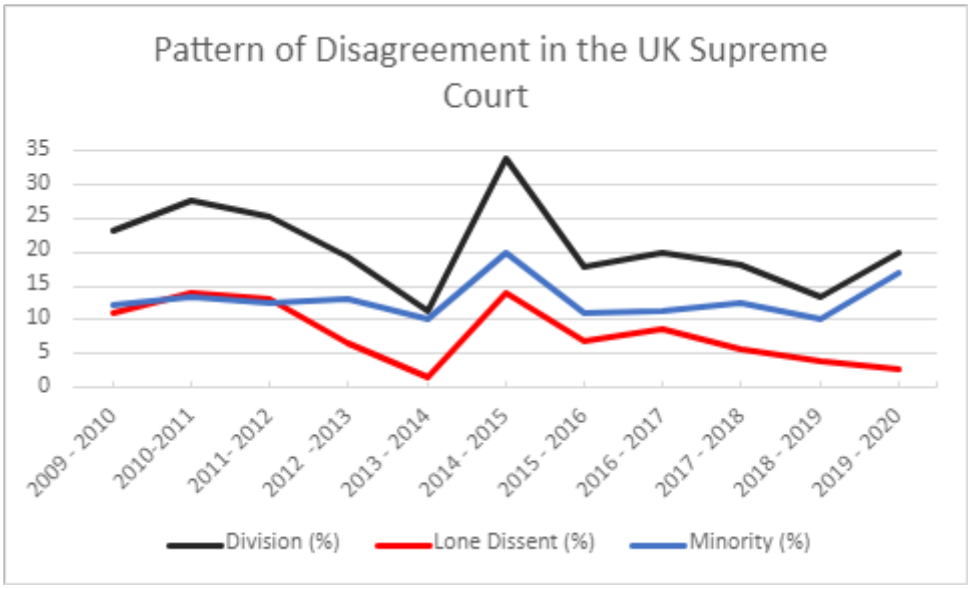

Figure 1. Pattern of Disagreement in the UK Supreme Court.
(The Y-axis (0 - 35%) is the percentage of decisions which divided the court. On average the court divided in 21% of cases decided in the first 11 years. A low of 11% was seen in 2013–2014, this was followed by a high of 34% in 2014–2015.)

The graph of dissent over time provides a picture of declining dissent. It is notable that the decrease in dissent is most profound in those cases where a Justice dissented alone (red line). The decrease seen in the lone dissent may reflect the individuals who populate the court, and the culture of the court, and perhaps a pressure to conform whether overt or less so.

Writing a minority or dissenting judgment imposes significant personal costs on the judge writing the judgment. These costs are in time and effort but also in potential loss of collegiality, which is particularly true of a strongly worded judgment. Thus, in deciding to disagree, the Supreme Court Justice must manage the conflicting pressures of unity against judicial individualism and judicial independence. But a judge delivering a dissenting judgment alone also incurs significant psychological costs. The seminal work of Solomon Asch (1956) on conformity identified that 37% of male college students facing a unanimous majority buckled under pressure and gave conforming incorrect answers. When he added a second dissenter, the rate of conformity reduced significantly to 5%, demonstrating that it is psychologically less difficult to dissent with others than alone. Whilst, Asch (1956) was not talking about judges, in an institutional culture that prioritises or even simply values consensus it may be significantly more difficult for a single judge to overcome the external and internal pressures to deliver a dissent alone. The collective decision-making forums introduced to enhance teamwork may further encourage consensus and limit lone dissent. In the UK Supreme Court, it is this form of dissent, where a single Justice opposes the minority, that is disappearing. The high level of analysis of the full dataset presents a superficial overview of the pattern of division and a phenomenon but little else. Dividing the dataset and narrowing the frame, allows

us the opportunity to further explore the culture of decision making that reduces dissent and the influence of the Supreme Court President on shaping that culture.

6.1. Collective decision-making culture and the President

During these years (2009 – 2020), the courts has had four Presidents, Lord Phillips (1st of October 2009–30 September 2012); Lord Neuberger (1st October 2012–4th September 2017), Lady Hale (1st October 2017–10th January 2020). Lord Reed is the current President and upon his retirement will be the longest standing President of the UK Supreme Court. We have some insight into the Justice's perceptions of dissent from interviews and public speeches, but it is notable perhaps that it is only Lord Neuberger who has publicly expressed a position on dissent in the court:

> As with dissents, I consider that there is something to be said for an appellate judge in such a case considering whether his [sic] disagreement is sufficiently great or important to justify adding a judgment. And while I agree with Dyson Heydon's view that an appellate judge's primary duty is, as any other judge, to be independent, I also consider that he [sic] has a collegiate function. I do not regard it as my function to dissuade colleagues from writing a concurring or dissenting judgment, but I do regard it as my duty to point out to a colleague any difficulties for the future which I foresee if his [sic] proposed judgment proceeds in its presently proposed form. (Lord Neuberger 2015)[16]

In this quotation, Lord Neuberger conflates collegiality with consensus. The Supreme Court has been characterised as a collegiate court (Paterson 2013). Indeed, the artifacts suggest that the structures in place in the Supreme Court encourage teamwork, supported with conferences and regular discussions throughout the deliberation process. In contrast to the seriatim opinions (individual judgments) when the court sat as part of the House of Lords, the Supreme Court also introduced plurality opinions (where two or more Justices write together) and single majority judgments (the court panel agree a single judgment). A step which was seen as to encourage collaboration by Lord Reed:

> The single judgment is the product of a highly collaborative process, in which all the members of the panel are active participants. I would hope that bringing at least five intelligences to bear will tend to result in better judgments that most of us would prepare if we were working in isolation. (Lord Reed 2019)

Indeed, the encouragement and overt recognition of the importance collaboration and collegiality in the UK Supreme Court, may underpin the narrative that dissent negatively impacts collegiality. But dissent and collegiality are not uneasy bedfellows, in contrast, the publication of dissent could be viewed as evidence of effective collegiate working, if a more nuanced understanding of collegiality is considered.

Justice Edwards (2003) extended the definition of collegiality beyond teamwork to a process where members of the court are prepared to engage with different views to achieve the best decision.[17] Collegiality, he argues, is a process that helps to create the

[16] It should be noted that Lord Neuberger used the male judge as his reference point. It is notable that male Justices have been in significant majority on the UK Supreme Court bench. At the time of writing, only four female Justices have sat on the Court.

[17] Chief Justice HT Edwards was the chief judge of United States Court of Appeals for the District of Columbia Circuit.

conditions of principled agreement by allowing all points of views to be aired and considered (Edwards 2003). Whilst Justice Edwards continues the narrative of collegiality and agreement, at the heart of this understanding of collegiality is a respect for difference and the value of diversity of opinion. Indeed, psychological studies of panel decision making suggest that a range of perspectives improve both decision making and decision quality (Schulz-Hardt *et al*. 2006). In this context, a minority view challenges the other members of the panel to think more carefully and consider alternatives (Nemeth 1995). This challenge can serve to refine the majority position and limit consensus and the bias that consensus perpetuates (Tacha 1995). This important effect of dissent was noted by Lord Phillips (as President) in his judgment in *Edwards*:

> When initially I saw in draft the judgment of Lord Dyson, my reaction was that it was so plainly right in the result that my inclination was simply to add my agreement to it. The [dissenting] judgments of Lady Hale and Lord Kerr have, however, caused me to give further consideration to this difficult area of the law. While I have not changed my mind as to the result, the route by which I have reached it is not on all fours with that of Lord Dyson. (Lord Phillips in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58, [2012] 2 AC 22, [70]. Dissenting added by the author)

A published disagreement therefore suggests that behind closed doors those who are making the decisions in the highest courts are challenged. In contrast, to Lord Neuberger's position dissent is not evidence of a less collegiate court, but external evidence of a collegiate court that values difference and different perspectives, but also judicial independence. It is thus perhaps of concern when we look at the data on dissent under the tenure of each President and see a pattern of dissent, which starts to remove the sole voice of disagreement (Table 1).

TABLE 1

President	Number of cases (n =756)	Consensus %	Minority %	Dissent %
Lord Phillips	180	74	14	12
Lord Neuberger	368	80	12	7
Lady Hale	116	84	12	4
Lord Reed	92	88	11	1

Table 1. Pattern of disagreement of disagreement in the court under the tenure of four Presidents.

By narrowing the frame of quantitative analysis, the data raises different questions. Questions that start to explore the power of the President to shape the decision-making culture of the court and the impact the culture that emerges, whether consciously or less so, on individuals. By changing the frame, the consistent pattern is more obvious and casts a light on the individual Presidents. This reduction in dissent is a reflection of the overt ambition of Lord Neuberger, but a surprise perhaps for Lady Hale who had a reputation for robust dissent (See for example Lady Hale's dissenting judgment in *Radmacher v Granatino* [2010] UKSC 42). A reputation that Lord Hope (Deputy President to Lord Phillips), noted in a diary entry, that may have prevented her obtaining a position of President at that time:

> Nicholas [Lord Phillips, President] came to see me during the week with a suggestion as to how to handle the succession of him as President. As mentioned above, he thinks that I should succeed him, or at least put my hat in the ring, to give David Neuberger, his obvious successor, a bit more time to serve as Master of the Rolls (…). There is another factor Brenda Hale. It seems that she would stand for the position of President if I do not and might do so if I did that anyway. But there would be quite a lot of opposition to her as President just now, which would not be there if she were to succeed me as Deputy President. (Lord Hope 2019)[18]

This brief, and frank, excerpt from Lord Hope's diaries draws our attention to the power of the President in the decision of the successor. Lord Neuberger was the next President, Lady Hale served as Deputy President during his tenure and went on to be President six years later. It highlights Lady Hale's propensity to disagreement at the time of writing, but that was to change.

6.2. The impact of culture on the individual

It is at this level, perhaps, that provides some glimpses of the third level of Schein's framework of culture. This level of analysis starts to ask questions about the influence of less overt or covert influences that shape the decision-making culture and the impact this may have on the individual decision maker. On average, a Supreme Court Justice will oppose the majority in 6% of cases they hear and will dissent alone in 2% of cases. Lord Phillips, the first President, supported the minority position in 8% of the cases he heard and dissented alone in one case. Lord Neuberger was brought into the court to lead. He never dissented alone in his six-year tenure (n = 244 cases), and only supported the minority position in 4% of cases. Lady Hale's pattern of disagreement is more interesting. During Lord Phillips tenure, her early years on the Supreme Court – those years that Lord Hope noted in his diary– Lady Hale disagreed with the majority in 14% of cases, but more notably delivered a lone dissent in 6% of cases. Three times the average rate of dissent for a Justice on the bench.

[18] Lord Hope was not opposed to Lady Hale as President indeed he supported her but others were resistant.

FIGURE 2

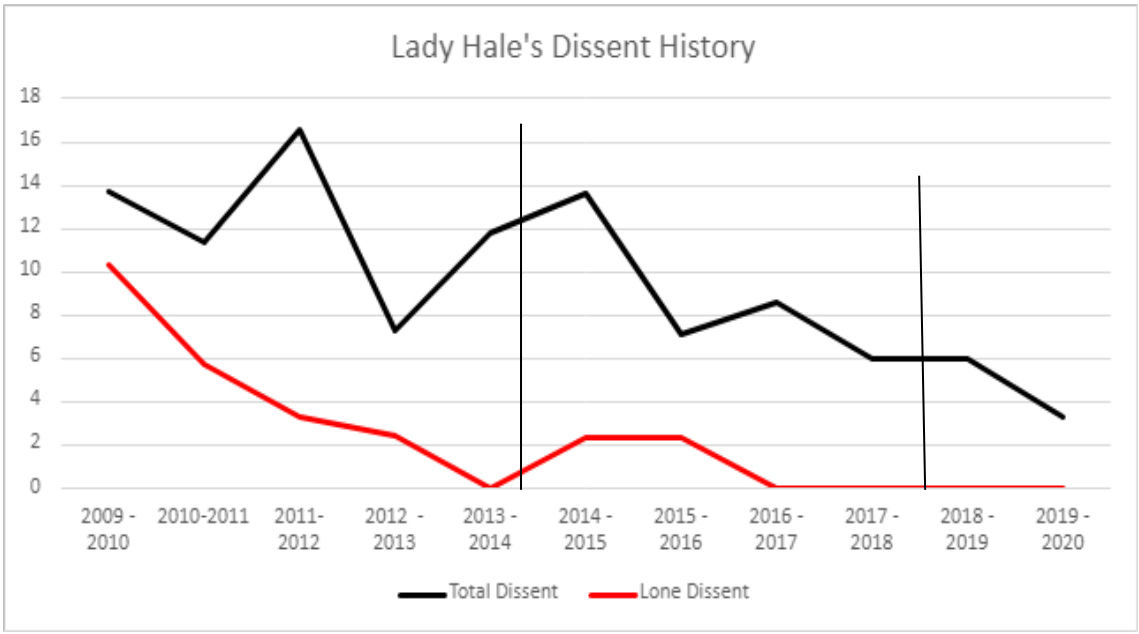

Figure 2. Lady Hale's Dissent History.
(Y axis (0 – 18%) there are two key points in the timeline. The first time point (line) is her appointment to Deputy President, the second line her appointment to President. The peak between these two time points represents two cases in which she dissented alone.)

Indeed, Lady Hale, in 2010, on the first anniversary of the court, highlighted the relationship between collegiality and agreement but noted in the context of a court where dissent was prohibited, the negative impact of collegiality and consensus and limiting of dissent on the final outcome:

> [Prohibiting dissent] does promote much more collegiality (and reduce the political pressures on international judges) but it can lead sometimes to obscure or even incomprehensible answers to apparently simple questions – the lowest common denominator rather than the highest common factor. (Lady Hale 2010)

Whilst her overt position may not have changed, her pattern of decision making did (Figure 2). Changing the frame to explore Lady Hale's pattern of dissent demonstrates an overall reduction in her rate of dissent and the disappearance of her sole dissents during her time on the court. It is notable perhaps that the reduction in sole dissents occurred prior to her appointment as Deputy President. There is no indication that the reduction in dissent was associated with a difference in the nature of the cases heard, yet a pattern starts to emerge of disappearing dissent. Lady Hale has never suggested that there was any pressure to achieve consensus or any overt pressure to change her pattern of decision making, yet the changing culture of the court, with a significant reduction in sole dissent and the acquisition of significant leadership roles within that culture may underpin the change. The data analysis shows the power of longitudinal case analysis to present an unnoticed and unexpected feature of decision making. It is even more interesting perhaps when this case analysis compared with others who were resistant to change.

6.3. Comparison of the influence of culture on individuals

In stark contrast to Lady Hale, Lord Kerr who was as "difficult" and dissenting during the tenure of Lord Phillips remained consistent in his opposition. During his time on the Court, he decided 289 cases, he opposed the majority in 12% of cases and in 4% he delivered a single lone dissent. Although he was not immune to the cultural changes and the rate at which he dissented alone also decreased with each successive President, Lord Kerr was consistently the most likely of all the Justices to dissent alone.

But Lord Kerr was not immune to the culture that emerged at the start of Lord Neuberger's tenure, indeed in the first two years of Lord Neuberger's tenure as President, Lord Kerr only dissented alone once. This radically changed in 2014–2015 when he disagreed in six cases, three alone. More notable is that year, and the one that followed, Lord Kerr was only on the panel for half the number of cases he typically heard. On average Lord Kerr heard 38 cases per year, but he only decided 32 cases over that two-year period, fewer than he decided in the first year of Lord Neuberger's tenure. It is the President who decides who is on the panel and how many cases a Justice will hear during any given year. To date, this allocation was the lowest of any Justice per year. There are many reasons why a Justice may not hear many cases, including ill health, and whilst there is no suggestion that there was any attempt to silence a dissenter, the data highlights the importance of asking questions about case allocation. It also highlights the potential of the role of the President to shape the culture of decision-making of the court and the influence (whether conscious or less so) on culture on the decision making of the individual Justice.

FIGURE 3

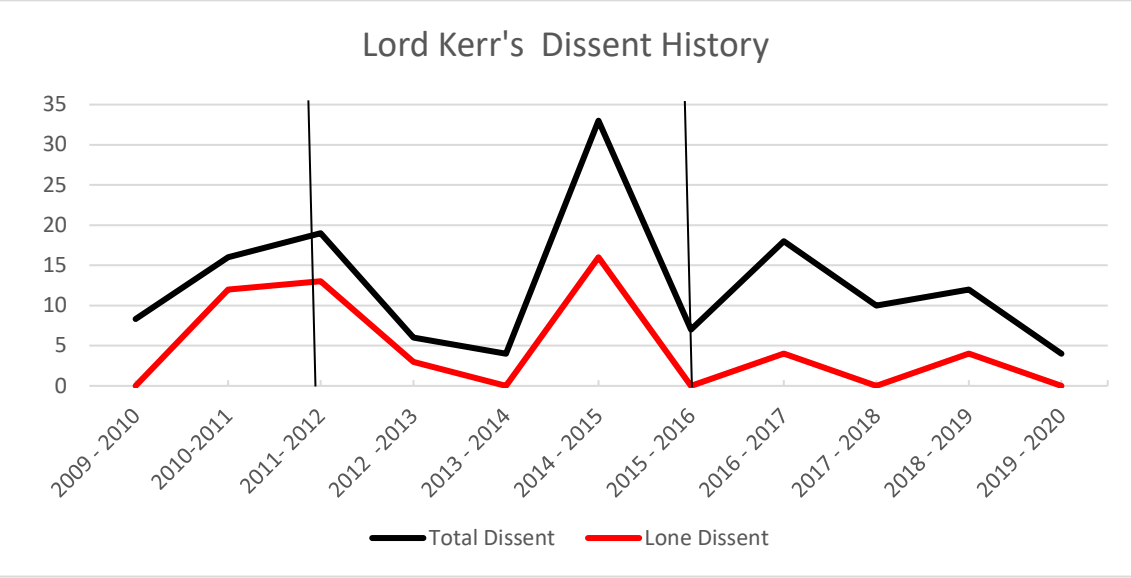

Figure 3. Lord Kerr's Dissent History.
(The lines inserted represented the tenure of Lord Neuberger. During which time Lord Kerr achieved his maximum and minium dissent rate.)

The question then perhaps is why did Lord Kerr consistently choose to bear the burdens of disagreement?

It is here that quantitative analysis of judgments only takes us so far. The focus on the decision and the outcome of cases and shifting the frame provides real insights into the

culture and opportunities ask questions about the culture but the analysis remains superficial and speculative. It raises questions, highlights anomalies, and shows patterns of behaviour but it does not do more. A shift from quantitative analysis to content analysis of judgments takes us further.

7. The richness of the reasoning[19]

> It would be waste to study only the skin of cases and throw away the fruit.
>
> (Hall and Wright 2008, p. 90)

The reasoning within judgments, which is at the core of doctrinal scholarship, is so often overlooked by socio-legal scholars. A judgment is a judicial communication which provides a valuable insight into the judge and the principles, legal and otherwise, the Justice upholds and promotes. Even within the constraints of judgment writing, traces of the judge remain in the published judgment. This is particularly true in dissenting opinions. Central to the decision to dissent is the concept of disagreement and the motivation to highlight that the majority are wrong and requires a sufficient commitment by the judge to the position he or she adopts to publicly acknowledge the difference. The decision to dissent, particularly alone requires what Justice Brennan refers to as "passion" (Brennan 1988). It is in a published dissent, that we gain the clearest insight into these passions and those facets of the law that the judge values most highly. These traces of the humanity of the decision maker remain in the reasoning of the dissenting judgment and exploration of the reasoning offers an opportunity to further understand the motivations of the judge. A pattern, that is not obvious in a single judgment emerges when a series of judgments are analysed.

Lord Kerr delivered twenty-two dissenting judgments with others and thirteen alone. In all of his dissenting judgments, whether alone or with others, two themes dominated. Lord Kerr consistently sought to advocate for the most vulnerable in society and ensure that the rights enshrined within the European Court of Human Rights were not encroached upon by the State. In particular, he sought to protect the rights of those who had been in the criminal justice system championing rehabilitation:

> Rehabilitation is our criminal justice system's way of acknowledging and encouraging the potential for personal growth and change. If we continue to define ex-offenders throughout their lives on the basis of their offending we deprive them of reintegration into society on equal terms with their fellow citizens. (*Gaughran v Chief Constable of the Police Service of Northern Ireland* [2015] UKSC29, 95)

And non-disclosure of minor offences to potential employers when the convictions or cautions were spent:

> Thus, this young woman, with so much to offer and who has overcome grievous difficulties, may forever be shut out from achieving her potential or from making the valuable contribution to society that her talents and education so clearly equip her for. A disclosure scheme which has that effect faces significant questions as to its efficacy

[19] The data presented in this element is presented in more detail with a fuller explanation of the factors that underpinned Lord Kerr's dissent in a chapter by the author in the festschrift for Lord Kerr edited by Dickson and McCormick (2021).

> and proportionality. (*In the Matter of an application by Lorraine Gallagher for Judicial Review* [2019] UKSC3, 89)

And legal representation during questioning:

> … where a person becomes a suspect, questions thereafter put to him or her that are capable of producing inculpatory evidence constitute interrogation. Before such interrogation may be lawfully undertaken, the suspect must be informed of his or her right to legal representation and if he or she wishes to have a lawyer present, questions must be asked of the suspect, whether or not he or she is in custody, in the presence of a lawyer. (*Ambrose v Harris* [2011] UKSC 43, 146)

In his dissenting judgments, he sought to protect the rights of the disadvantaged and placed the individual's lived experience at the heart of his judgments. This was evident when he opposed the cap on State support for the unemployed:

> Justification of a discriminatory measure must directly address the impact that it will have on the children of lone mothers because that impact is inextricably bound up with the womens capacity to fulfil their role as mothers. If you take money away from children which mothers would receive on their behalf, money which they use to realise their role as mothers, the discrimination that you perpetrate involves withholding resources necessary to fully discharge their maternal role. Because, therefore, one cannot segregate the interests of the deprived children from those of their mothers, the discrimination against mothers and their children is of the same stripe. No hermetically sealed compartmentalisation of their interests is possible. (*R (on the application of SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16, 265)

Or in an appeal which concerned the lawfulness of a bus company's policy in relation to the space provided for wheelchair users on its buses, joined by Lady Hale and Lord Clarke, Lord Kerr opposed the majority noting:

> Wheelchair users face formidable difficulties in making use of facilities that the able-bodied can take for granted. If inconvenience to the travelling public because of delay is the price which has to be paid to allow those who depend on a wheelchair to make maximum use of the transport system which is made available to all, I do not consider that this is, in any sense, unreasonable. *(FirstGroup Plc (Respondent) v Paulley* [2017] UKSC 4, 135)

The Supreme Court heard a series of cases which were centred on the lack of provision of abortion services in Northern Ireland. Lord Kerr dissented in each case he heard advocating for the women seeking the services. For example:

> In fact, of course, a woman who travels to England to obtain an abortion has, in the clear majority of cases, no true choice. She must travel away from her home and the support of her family and friends to obtain treatment of the most traumatic type in unfamiliar surroundings. If she wishes to obtain an abortion, she must travel to England. (*R on the application of A and B) v Secretary of State for Health* [2017] UKSC 41, 55)

The analysis of the reasoning of cases creates a rich body of work exploring the factors that influence the final decision. Analysis of the content of the dissenting judgments of Lord Kerr, presents a consistent picture of the judicial motivation to dissent. Indeed, it was perhaps the strength of this motivation and the values that underpin it that served as the foundation of his resistance to the changing culture of the Court (Cahill-O'Callaghan 2021). Lord Kerr consistently disrupted the culture of collective decision making and the agreement associated with it. His presence on a judicial panel

encouraged disagreement, indeed in almost a quarter of the panels which included Lord Kerr, disagreed on the disposition of the case. It may be that the strength of his conviction and his argument or perhaps his resistance to the culture of agreement provided the impetus to others to disagree. The analysis of the reasoning, perhaps, provides some insight into the foundation of the division and the strength of will required to disrupt a culture of collegiality and team work, and agreement.

8. The importance of the case as an artefact of culture

This paper draws on artefacts of the UK Supreme Court to explore the changing institutional culture and the effect on decision making in the court. The speeches provide an insight into the ambition to foster a culture of teamwork and collective decision making in the UK Supreme Court. The multi-layered longitudinal analysis of dissenting opinions highlights the changing culture and influence of that culture on decision making. The explorative analysis highlights the disappearance of individual dissent and the power of the President to shape a culture that supports that change. But there is a differential impact on individuals in the court, whilst the changing culture towards collective decision making resulted in a significant reduction in dissent, one Justice, Lord Kerr continued to consistently deliver dissenting judgments alone. The reasoning of these dissenting judgments provided some insight into the values that motivated him sufficiently to resist the changing culture and deliver a dissent.

The paper demonstrates what can be discerned from publicly available artefacts. Judicial speeches and judgments provide an insight into the institution and the culture that shapes the decision making. The longitudinal analysis of decision making provides an insight into the pattern of decision making over time and the changes that may not be evident at a single point. The analysis also identifies key points of change and perhaps the less conscious influence of the changing culture on the decision maker. Indeed, the systematic longitudinal analysis of decisions has considerable power to direct our gaze to previously unnoticed and unexpected features of judicial culture and judges within it. To maximise the potential of this form of research it should serve as a gateway to probe new areas, and challenge the findings, through other qualitative methods (Hall and Wright 2008). But in situations where the judges will not say, the challenge is to build on case analysis by developing new and innovative techniques to capture the unspoken. In the meantime, case analysis provides us with the first glimpse of the stories we could tell and the questions we should ask.

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