

BOOK REVIEW

Kim Stevenson¹

***Final Judgement: the Last Law Lords and the Supreme Court*, Alan Paterson, Oxford, Hart Publishing, 2013, 335pp. £25.00 Hardback. ISBN 978-1-84946-383-6**

This book follows on from the author's earlier ground-breaking work, *The Law Lords*, published in 1982,² which focussed on judicial decision making in the House of Lords. Through it Paterson earned the unprecedented trust of the senior judiciary enabling him to research and produce this absorbing text. It is both a fascinating survey and real life 'behind the scenes' review of the work of the Law Lords (now Justices of the Supreme Court) and their role in the highest court in the land. The work is unique in providing intimate portraits revealing the characters and idiosyncrasies of the individuals who determine and apply the law at the ultimate level, because Paterson understands something that the Victorians also knew: that to comprehend the reasons why judgments are reached, one has to look beyond the mere 'letter of the law'. Paterson is the first to be granted access to their judicial notebooks (at least the ones that have survived), markedly those of Lord Reid and Lord Bingham, which offer an amazingly rich source of detail and information. He also secured permission to conduct a number of elite interviews with all the current and recent holders of this esteemed office.

While this new book also focusses on the social processes of judicial activism, its main emphasis is primarily on the judicial dialogue and inter-actions of the judges with each other, the legal profession and the body politic. Paterson examines and analyses the nature and content of such channels of communications and how they are, and have been, influenced by the leading players within the judicial and wider public context. Thus as Paterson confirms, the book is partly an oral history of the judges as social actors, but also an historical narrative detailing and tracking the increased accessibility, transparency and willingness of the contemporary Justices of the Supreme Court to enhance their public image and understandings of their role. Paterson interviewed 27 Law Lords plus six members of the Court of Appeal, as well as Leading Counsel, Judicial Assistants, Principal Clerks and a Registrar from the current Supreme Court. The result is a highly ambitious text that is intriguing and rich in genuine factual detail. The author also seamlessly and with consummate skill weaves in references to a number of examples of appellate cases heard

¹ Kim Stevenson is Professor of SocioLegal History at Plymouth University, Kim.stevenson@plymouth.ac.uk

² Alan Paterson, *The Law Lords*, (London: Macmillan, 1982).

during the last 50 years in a way that is truly awesome. It demonstrates phenomenal scholarship and a humbling level of intellectual insight to the reader. And as if this were not enough, he then incorporates comparisons with other Supreme Courts – the United States, Australia and Canada – into his analysis, illustrated through a range of informative tables and charts. The book is therefore a must-read for anyone who teaches or studies the English and/or Scottish Legal Systems, Legal History and Legal Method, something that I will return to shortly.

As far as readers of this journal are concerned, there is also plenty of interest – not least in terms of the shifts and changes in approaches and attitudes to the judicial ‘law-making’ process and delivery of opinion and decisions during the last half century. More fascinating though are the references from oral history and testimony that add colour and dimension to the personalities of those names we so regularly cite and read but know so little of (or presume) about their individual characters, reputation, inter-bench rivalries and dynamics. Surprising and interesting anecdotes and snippets often confirm what those of us who regularly read judicial opinions secretly thought, harking back to similar nineteenth century depictions and sketches from those ‘insiders in the know’. Thus we learn that Lord Templeman was known as ‘Sid Vicious’; Lord Fraser was so courteous as to allow one oral argument over the meaning of ‘ordinary resident’ to go on for nine days and that ‘counsel found Lord Diplock “ever more problematic than his colleagues”’, and a bully who made up his mind beforehand which is of course exactly the sneaking suspicion that I and no doubt many criminal lawyers thought about *Caldwell* (see p.36). These modern epithets are very similar in style and substance to the kind of acerbic wit and soubriquets to be found in nineteenth century tomes such as *Anecdotes of Bench and Bar*.³ For example, Lord Bramwell ‘could be very ironic in his judgments’ and ‘when at the bar constantly came into collision with Lord Campbell’, having ‘an antipathy to all the unctuous platitudes of the bench.’ The Lord Chief Justice, Lord Ellenborough ‘was a great bon vivant’ but also ‘possessed great power of sarcasm,’⁴ or Lord Justice Knight-Bruce who ‘will be remembered for the sparkling cleverness and power of his judgment, and the irrepressible humour even in his gravest judgments.’⁵ What Paterson understands is that such short anecdotes can often speak volumes.

³ Arthur H. Engelbach, *More Anecdotes of Bench and Bar*, (London: Grant Richards Ltd, 1915) see passim pp.16, 166, 242.

⁴ *Ibid*, passim pp.127, 199.

⁵ *Ibid*, p.274.

Another interesting historical issue, especially in light of the current referendum on Scottish independence, is the proportion of cases appealed from north of the border and the sometimes 'fraught' relationship between the two jurisdictions (pp.233-45). The ambiguity in the Treaty of Union 1707 regarding which cases could be referred to London and which would be subject to final resolution in Edinburgh, was resolved by the Scottish judges swamping the House of Lords between 1794 and 1807 with 84% of all appeals. This reduced to 53% in the mid-nineteenth century and the acceptance of civil cases falling under the jurisdiction of the Lords and criminal cases remaining under that of the Scottish Court of Criminal Appeal. From a fall of 10% of all cases in the 2000s, Scottish appeals now appear to be on the increase comprising 17% of the current Supreme Court workload.

For academics generally, Paterson reviews the recent development of judicial dialogue with the academy and attention to academic literature, singling out the *Law Quarterly Review*, *Cambridge Law Journal* and *Journal of Public Law* as particularly attracting their Lordships' interest. It is also reassuring to note that the previous rule that the work of a living author was not regarded as a good authority has been dispensed with, and that more credence is paid to the academy than in the United States Supreme Court where law review articles are considered to be of little value to the bench (p.217). For criminal law academics in particular, the controversies regarding *Caldwell* and *G*, and *Anderton v Ryan* and *Shivpuri* are finally laid to rest. In exercising the Practice Statement, Paterson confirms that both panels were influenced by the critical comments of JC Smith and Glanville Williams, and as regards the latter:

Astonishingly, not only did Lord Bridge in *Shivpuri* read the article, he acted on it and used it to justify overruling *Anderton* rather than distinguishing it, and persuaded his colleagues to follow him in this regard, despite the 'lack of moderation' in the article's language (p.214).

With reference to the Practice Statement, the book might disappoint those law students set the standard 'chestnut' of an essay on the subject: it does not even appear in the index, just three pages deal specifically with the rule basically confirming its cautious use: eight rulings in the first 14 years, and less than 25 in the first 43 (p.266). Instead, Paterson offers so much more for the conscientious student to consider and critique. For example, how lead judgments are allocated and whether there should be one single lead opinion – apparently Diplock was strongly in favour of the latter, Lord Bingham less so except in relation to the criminal law to ensure certainty. Where in the judgment the summary of facts should appear, for example, Lord Bingham thought they should be incorporated into the first opinion to help the reader. The developing convention against the use of concurrences requiring each Justice to articulate their reasoning is discussed as are tabulated comparative dissension

rates and types of opinion according to individual judges. Embracing the art of persuasion, until relatively recently it was rare for judges to engage with each other's published judgments. And not to mention the copious range of direct quotes that can be used as supporting evidence, or for tutors to exploit for essay tasks. Students, and indeed lawyers, should also take heed of the Justices' views on the performance of leading counsel, what constitutes good advocacy, and their identification of the most effective QCs – unsurprisingly Pannick, Pollock, Pritt, Rose and Sumption are all singled out in this regard. Here Paterson sets himself yet another significant challenge, analysing the extent to which advocacy makes a difference, but he is also reassuringly equivocal that oral arguments should not be replaced by written ones.

There is so much in this book that a review like this can only highlight some of the immediate and obvious points of interest, likewise it is difficult to offer any critical comment. There is a wealth of contextual information, examples and details that others will easily find engrossing and of significant relevance. The last chapter focuses more on the constitutional position of the judiciary, its relationship with the executive and Parliament and the sweeping reforms culminating in the establishment of the Supreme Court tempered by the dilemma that independence has also brought less political influence. Paterson humanises the judiciary and it is to their credit that their 'access all areas' approach allows more than a glimpse into this particular judicial and legal world, but presents a genuinely wide-angled 'behind the scenes' view.