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MONASH UNIVERSITY
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JUDICIAL DISSENT - COMMON LAW AND CIVIL LAW TRADITIONS

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IRRELEVANT DISTRACTION OR INSTITUTIONAL NECESSITY?

Judicial dissent in multi-member courts and tribunals is a regular feature of such institutions in common law countries. It is not so normal in countries of the civil law tradition. Why should this be so? Does it matter? Will it change with the growing interaction of legal cultures and the globalisation of legal ideas and procedures?

It comes as a surprise to many lawyers of the common law tradition to discover that their system of courts and judging is not the predominant one in operation throughout the world. To the

* This paper grew out of discussion of the subject of judicial dissent at the Annual Global Constitutionalism Seminar conducted at the Yale Law School in September 2006. The author acknowledges the insights of colleagues at that seminar and especially of Professor Robert Post whose seminal article on dissent in the United States Supreme Court is referred to extensively.

** Justice of the High Court of Australia. See also M D Kirby, "Appellate Courts and Dissent" (2004) 16 *Judicial Officers' Bulletin* (NSW), 25.

contrary, the civil law tradition predominates. It is not confined to France and the countries of its former Empire. Because of the conquests in Europe that followed Napoleon's successful armies, the work of his codifiers spread throughout the length and breadth of Europe. Thence those ideas were exported throughout the Iberian Empires and, later, through the Russian and Soviet Empires. When China and Japan embraced modern ways, they may have copied naval arts from England and manufacturing from the United States. But when it came to modernising their legal systems, they found the legal traditions and procedures of France, and its derivatives in Germany, more attractive. Thus, whilst the common law techniques of adversarial litigation spread to a quarter of humanity in most of the British Empire, the rest of the world preferred the model derived from France. It seemed more modern, rational and economical. In some respects, it was also more respectful of government and thus, better adapted to the perceived needs of modern governance as viewed from the seat of power.

To divide the world, as by a modern-day Pope's line, between common and civil law countries, over-simplifies the great diversity that exists between the judicial procedures of common law countries and the rest and within the two main systems. It is neither appropriate, nor fully accurate, to separate the multitude of judicial systems of the world into common law and civil law jurisdictions any more than to divide them between countries that observe adversarial and accusatorial traditions, on the one hand, and those that are

organised according to the inquisitorial model, on the other. The lesson of recent decades is that such a binary division of the world is gradually adapting to borrowings that have a tendency to render the two main models on offer gradually more similar to each other. Thus, in a country like Australia, whilst the essential accusatorial form of criminal trial is repeatedly insisted upon[1], the economies that can be offered by a more inquisitorial procedure have proved irresistible to legislators designing new high volume tribunals[2]. The economies of dealing with problems on the papers, without an oral hearing or of shifting advocacy towards written submissions have increasingly influenced the way modern courts and tribunals operate[3]. Similarly, developments in criminal procedures in a civil law country such as Italy, have led to the embrace of rights of cross-examination that are a feature of the common law adversary trial. In this way, hybrid forms of legal procedure are emerging as countries, and their judges and lawyers, become more familiar with the

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1 See e.g. *RPS v The Queen* (2000) 199 CLR 620 at 630 [22].

2 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 576 [187]; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 115 [76], 152 [208].

3 For example, until 2005 special leave applications in the High Court of Australia were heard under a right to an oral hearing lasting 20 minutes - one of the last such final courts to preserve that facility. In 2005 the High Court Rules were changed under the pressure of the case-load, to provide initial consideration of applications for special leave on the papers by two Justices who could dispose of the application without an oral hearing or direct that an oral hearing take place: High Court Rules 2004, Rule 41.11.

competing advantages of other legal systems which they sometimes copy.

My purpose is not, as such, to examine the coalescence of institutional arrangements and procedures in courts in many countries. Instead, it is the more modest task of examining the way in which the higher courts in common law and other countries explain the reasons for their decisions. The different ways in which judges in such courts[4] express the reasons for their decisions, rulings and orders to the litigants, the legal profession, other judges, the academic community and citizens more generally. In the course of examining this question, I will expose a significant difference that persists between common law and most other jurisdictions in the provision of dissenting and concurrent opinions, alongside the expression of the reasons by the majority that explains, as a matter of law, why a particular result has been reached and why particular orders have been made.

At the risk of over-simplification, an emerging feature of the opinions of judges in multi-member courts (and some tribunals) in common law countries is the facility for offering individual opinions, including opinions which dissent either from the outcome and orders

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[4] By "courts" I include tribunals not designated as "courts" as such but performing court-like functions, such as the Conseil constitutionel of France.

favoured by the majority or, at least, from the reasoning of the majority explaining such outcomes and orders.

The question immediately presented is how did this divergence in judicial opinions emerge? In particular, how did the entitlement to express a differing, and even dissenting, opinion come about in common law countries? Why has it not generally emerged in civil law countries, albeit that more recent trends appear to favour the right to dissent in such countries and to permit the more elaborate and transparent style of reasoning that such dissent often reflects and stimulates?

Beyond the different features of those legal systems that permit, and those that forbid, individual opinions and rights to dissent, lie deeper questions that concern the purpose that judicial reasons serve within a modern community. Are dissenting opinions irrelevant to the function of the courts? Do they, as their critics sometimes suggest, weaken the role of courts to express clearly and finally the governing law[5]? Do they amount to a self-indulgence on the part of their writers - the ultimate submission to a temptation

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[5] See eg letter from William Howard Taft to John H Clarke (February 10, 1922) cited D D Danelski, *The Chief Justice and the Supreme Court*, (1961) at 184 and in R Post, "The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decision-making in the Taft Court", 85 *Minnesota Law Review* 1267 at 1311 (2001) (hereafter "Post").

from which the judge should be immune?[6] Or are they, instead, the most precious indication of the transparency, accountability and integrity of the work of the judicial branch of government, the presence of which constitutes a peculiar badge of honour typical of common law courts missing from the more autocratic tradition of Napoleon's post-revolutionary centralised officialdom?

The way judicial reasons are written reflects the legal culture in which the judge operates. In his book *Governing with Judges: Constitutional Politics in Europe*, Professor Alec Stone Sweet described the way in which judicial reasoning differs within Europe[7]:

> "Two models of opinion-writing styles co-exist in Europe. The first represented by France and Italy, is the more traditional. The French and Italian constitutional courts follow conventions established by the high administrative and civil courts. Decisions are relatively short and declaratory of the law; they invoke precedential authority of prior case law through use of linguistic formulas that are pointedly repeated. The second model, developed first in Germany but quickly adopted in Spain, more resemble [common law] practice. Constitutional decisions are longer, more wide-ranging, even literary. Each important point of law raised by each litigant may be argued through to its conclusion, in the light of existing case law and alternative (but ultimately rejected)

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6 Justice Butler cited in Post, n 5, 1340 (fn 217).

7 A S Sweet, *Governing with Judges: Constitutional Politics in Europe*, (2000), extracts from Chs 2 and 5. Dissents are published in at least Switzerland, Norway, Sweden, Finland, Portugal and Greece as well as in Germany in the Constitutional Court. See J Alder, "Dissents in Courts of Last Resort: Tragic Choices?", (2000) 20 *Oxford Journal of Legal Studies* 221 at 237.

> lines of argument. The German and Spanish courts commonly cite the work of legal scholars and even other courts, like the US Supreme Court. Although a decision written in the style given by the first model could never be confused for one written in the style of the second, French and Italian constitutional rulings have, over time, become much longer, more openly argumentative, and less terse and syllogistic".

Professor Sweet interprets the gradual change that he detects in opinion writing style within the European civil law tradition as "a predictable response to the increased politicisation of constitutional justice" in which the purported dogmatic syllogisms are no longer convincing to the wider range of persons who examine judicial writings nowadays and compare them to well-known examples in other countries and in other fields of intellectual endeavour in their own country. Professor Sweet ascribes the change to the increased politicisation especially of constitutional justice. He says that constitutional judges know that the politicisation of their offices by litigants can only be effectively countered "with more and better normative arguments".

The debates in the several European countries mentioned by Professor Sweet are parallelled by similar debates in non-European countries of the civil law tradition. Thus, in the 1988 Constitution of Brazil, the lawmakers were obviously determined to effect a change from the style of civil law reasoning towards the more transparent

style of common law courts. Thus Article 93ix of the Constitution of Brazil states[8]:

> "All judgments of the bodies of the Judicial Power shall be public, and all decisions shall be justified, under penalty of nullity ...".

As a consequence of the foregoing article, judicial opinion-writing in Brazil has become longer, more elaborate, less formal and more discursive. Once this happens, and the right of individual Justices to express their different opinions in support of a court's orders is acknowledged, the critical question is reached. Should judicial dissent be permitted? In the formal tradition of France, copied in Italy and most other civil law countries, dissents are prohibited. Yet whilst this rule is maintained in most such countries, it has been abandoned in the highest constitutional courts of Germany and Japan, possibly because of the influence of the post-War Allied occupation and the institutions they left. The freedom inherent in dissent, and the right to criticise developments in the law was probably considered a necessary ingredient in the post-War constitutional arrangements of those societies. In Spain and in Brazil, votes in the dispositions of proceedings are published and dissenting opinions are now allowed. Professor Sweet goes on[9]:

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[8] Brazil, Senado Federal, *Constitution of the Federative Republic of Brazil*, (1988) (revised ed 2002) (trans. I Vajda *et al*), Brasilia, 2002, 74.

[9] Sweet, n 7, *loc cit*.

> "Those who favour the practice argue that dissents enhance the court's legitimacy by showing 'that the arguments of the losing side were taken seriously by the court.' Opponents invoke the legitimising power of public unanimity. A small handful of studies on voting patterns in the German and Spanish courts exits, which show that groups of judges do tend to vote together, and that judges appointed by the same parties tend to belong to the same groups. These tendencies, which are quite weak, are often overwhelmed by disagreements about the law and constitutional doctrine".

The features just described are presently in a state of flux in several countries. In Italy, although not yet in France, a vigorous debate exists over whether to allow dissenting opinions. In the Netherlands, a similar debate has arisen in academic circles concerning the practice of the Hoge Raad der Nederlanden whose current practice, like that of the courts of France, forbids dissent. The opinion-writing styles of the final courts in Germany and Spain more easily accommodate themselves to dissent. As Sweet points out, if France or Italy did move to permit the publication of minority opinions, it would be likely that a more literary, discursive model of opinion-writing, such as that found in common law countries, would gradually emerge.

The existence of the contemporary debates in Europe and in countries of the civil law outside Europe, and the strong defence of the prohibition on dissent by opponents of any change in many of those countries (especially France) requires of contemporary common law judges an examination of their own assumptions about judicial reasoning and an explanation of the way in which common law courts first adopted, and then maintained, the individualistic

tradition and discursive style of reasoning in judicial opinions. How did this disparity in the approach to judicial reasoning arise? Does it betoken some deep difference between the notions of courts and their role in society as between countries where dissent is permitted but discouraged[10]; countries (like Australia and the United States) where dissent is an inescapable feature of judicial independence from one's colleagues; and countries, led by France, where dissent is regarded as functionally incompatible with the performance by the courts of their essential role in deciding important matters of dispute, including over legal doctrine.

What do such differences tell us about the judicial method and the role of the courts in societies observing these different traditions? How did the disparity arise in the first place? Which of the systems on offer contributes most to the proper functions of the courts in a modern society, and especially of a final constitutional and appellate court, such as the Supreme Court of the United States and the High Court of Australia? Do judges of the common law tradition have anything to learn from the deeply held convictions of those judges of the civil law tradition who, to this day, resist the facility of individual opinions, discursive reasoning and above all

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[10] As in the United States Supreme Court during the early service of Chief Justice John Marshall. See W J Brennan, "In Defense of Dissents", 37 *Hastings Law Journal* 427 at 433-434 (1986). The practice in the German Constitutional Court after dissent was permitted in 1970 is similar. Although permitted, it is still comparatively rare.

dissent? To justify our adherence to the facility of judicial dissent do common lawyers need more than hunch and inclination? Do they, for example, need an empirical examination of the use made of earlier dissenting opinions in later cases[11]. Or does the utility of dissent lie in deeper values - such as the daily manifestation of the honesty and integrity of the judiciary and its commitment to honesty and transparency as an integral part of the process of wielding the judicial power of the state?

TEN FEATURES OF COMMON LAW DISSENT

1. *The oral tradition*: For centuries, procedural and institutional features of common law courts have been greatly affected by the strong tradition of orality. Whereas, in courts of the civil law tradition much of the work of judges has long been performed away from the courtroom, even at home, the common law judge has conventionally sat continuously in a public courtroom, heard arguments and made rulings there. Such a judge was continuously under scrutiny and obliged, by the provision of *ex tempore* reasons, to justify publicly the steps taken in disposing of legal questions[12].

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[11] J Alder, above n 7, 246.

[12] *Scott v Scott* [1913] AC 417; *McPherson v McPherson* [1936] AC 177; 1 DLR 321 (PC); *Russell v Russell* (1976) 134 CLR 495 at 520; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 (CA).

At the trial level, the orality of the common law was reinforced by the common necessities of jury trial. In early centuries, jurors would ordinarily have been illiterate. It was therefore necessary for evidence to be given orally in the jury's presence and for argument and judicial rulings to be made in terms that the jury could understand. The presence of the jury profoundly shaped the adversarial and accusatorial features of the trial at common law, the rules of evidence and the procedures to be observed. It was natural that the oral tradition, in which common lawyers were trained from the first, should spill over to the conduct of appeals.

As such, an appeal, in the modern sense, is not a creature of the common law[13]. It is an invention of statute. However, in England, from at least the reign of Edward I, provision was made for a form of challenge to the outcome of trials which constituted a kind of appeal to the supervisory powers of the King. Such procedures were addressed both to the King in Parliament and to the King in Council.

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[13] *Attorney-General v Sillem* (1864) 10 HLC 704 at 720-721 [11 ER 1200 at 1207-1208]; *South Australian Land Mortgage and Agency Co Ltd v The King* (1922) 30 CLR 523 at 553; *SRA (NSW) v Earthline Constructions Pty Ltd* (1999) 73 ALJR 306 at 322 [72].

In the last resort, the errors of inferior courts might be brought for correction before the King in either of these manifestations[14]. Both of these bodies have coexisted in England, in various forms, up to the present day. There was great jealousy on the part of the House of Commons concerning the claimed jurisdiction of the King in Council to interfere in the decisions of the ordinary courts. It is by the jurisdiction of the King in Parliament, as a court of error, that royal justice was conventionally reserved, in its ultimate manifestation, to the sovereign[15].

In the struggle over the respective functions of the Parliament and the Council in England, ultimately it was the House of Lords that succeeded in establishing its rights to hear appeals (in the sense of correction of errors), from the courts of the Kingdom, including from the Court of Chancery[16]. Such appeals came before, and were heard by, a committee of the House of Lords which is, to this day, the final appellate court of the United Kingdom. In that committee, as any other committee of the Parliament, the individual participating Lords enjoyed the right to express their own opinions in their own ways.

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[14] F W Maitland, *The Constitutional History of England*, (Cambridge, 1950), 136.

[15] *Ibid*, 214.

[16] *Ibid*, 316.

Where they disagreed, they would express the disagreement. These would be recorded in the parliamentary record[17].

Despite the eventual ascendency of the House of Lords in this respect, the Council remained the final court for some parts of the realm not formally part of the Kingdom of England, such as the Isle of Man. With the expansion of the British Empire beyond the seas, the King's Privy Council acquired an extraordinary jurisdiction to hear and determine appeals from courts in British settlements and colonies throughout the world. But with the council, unlike the parliamentary committee of the Lords, a different rule obtained. It was a rule that survived in the dispositions of the Privy Council until 1966[18]. Because formally, the judgments of the Judicial Committee of the Privy Council were made in the form of advice to the sovereign, dissent was not permitted. Although still discursive, the opinions of the Privy Council were ordinarily briefer and more dogmatic. They simply resolved the case at the Bar and did so upon the vast range of legal questions, under a multitude of differing legal regimes, which flowed to Westminster from the many colonies and settlements beyond the seas. It was considered that the sovereign should not be embarrassed by conflicting advice emanating from the

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[17] cf Alder, above n 7, 233.

[18] The rule was altered, or at least, modified, by Judicial Committee (Dissenting Opinions) Order 1966 (S.I. 1966 No. 1100). See Alder, above n 7, 235.

Committee of the Council. A single form of advice was given. In this way, the Privy Council, until quite recent times, observed many of the features of the civil law tradition.

To the question: Who was the first judge of the common law tradition who provided dissenting reasons? The answer is unclear. But it took no special courage. In the Committee of the House of Lords, he would simply have expressed the opinion he held in the provision of one of the *seriatim* opinions and speeches within the Committee for the disposal of the proceedings by way of error.

Below the Parliament and Council, for example in the Court of Common Pleas in Banc, the acceptance of dissenting views and of the fact that the opinion of the majority would prevail, was certainly established by 1798 when *Grindley v Barker*[19] was decided. Indeed, in that decision, the judges were quite explicit that "it is impossible that bodies of men should always be brought to think alike". So also in judicial dispositions in multi-member courts.

Dissent, in English appellate practice, was thus an application of the oral tradition displayed in the proceedings in error in the relevant committee of the House of Lords. When later a more expansive statutory right of appeal was established in the

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[19] (1798) 1 Bos. & Pul 229 at 238 per Eyre CJ; 126 ER 875 at 880.

Chancery[20], and later still in the English Court of Appeal after that court was established, it was natural that the proceedings, from the start, should reflect the traditions of individuality that were already well established in the House of Lords[21].

Moreover, by the time the regular English appellate courts had been created by legislation in the nineteenth century, the Supreme Court of the United States had begun its own separate existence. As the Constitution of the United States envisaged, it was a court in the tradition of the English courts. At first it too followed the procedure of *seriatim* oral opinions, sometimes delivered *ex tempore* at the conclusion of argument. Each Justice would give his own reasons orally, delivering the same according to the order of seniority of appointment.

The tradition of publishing a Court opinion was introduced to the United States Supreme Court by Chief Justice John Marshall. His legal skill, logical prose style and quick mind won him the support of his colleagues in expressing the conclusions of the Court with a single voice. Only later in his long service as Chief Justice

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[20] The Court of Appeal in Chancery was created in 1851 by 14 & 15 Vict c 83. It was subsequently absorbed in the Court of Appeal established by the *Judicature Act* 1873 (UK). See *SRA (NSW)* (1999) 73 ALJR 306 at 323 [73].

[21] A good example of *seriatim* reasons where the judges in rank were unsure as to the resulting orders, can be seen in *Attorney-General v Butterworth* [1962] 1 QB 696 at 723.

did dissenting opinions begin to re-emerge. In Australia, the first Chief Justice of the High Court, Sir Samuel Griffith, had a similarly powerful effect on the original Justices. However, with the advent in 1906 of Justices Isaacs and Higgins, the unanimity of the Court's opinions broke down. Doctrinal issues soon emerged in sharp focus. Many of them were important to the future shape of constitutional and general law in Australia[22]. In the manner of the House of Lords Committee, the contests were thereafter spelt out in differing opinions so that all who were interested could witness the intellectual debate conducted in public and not behind the Court's closed doors. All readers could then make their own judgment on the Court's dispositions.

2. *Background of the judges*: A second feature that helps to explain the comparative frequency of dissent in common law courts is the tradition of judicial appointment observed in many common law jurisdictions. Whereas, in civil law countries, most judges are recruited soon after university and specifically trained for a judicial life, the common law tradition has generally been different. Typically, a judge is recruited in middle age from the senior ranks of the practising legal profession: in many countries from a specialised

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22 See e.g. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 where a new majority reversed the early doctrine of implied reserved powers of the States and their instrumentalities borrowed from earlier United States cases, also later reversed. See *McCulloch v Maryland* 4 Wheat 316 at 436; 17 US 159 at 213 (1819).

cadre of advocates and barristers. So recruited, the newly minted judge does not easily throw off the independent habits of a lifetime. He (and now she) will be inclined to regard the judicial vocation as an extension of a life as a senior and independent lawyer. Few such appointees regard themselves as public servants or members of the official bureaucracy.

The manner of appointment of judges of the higher courts in the common law world is one that is virtually certain to result in a judiciary with strong-minded, highly experienced senior-advocates-turned-judges, not used to thinking of themselves as members of an institutional unit or government service. Nor would they necessarily suppress their own opinions because others more senior in rank, or more numerous, hold different opinions. Insipid timidity is not a feature of the life of such senior legal practitioners in common law jurisdictions.

When people trained in this way are elevated to judicial office, they often bring with them the vigorous intellectual independence that marked their previous professional activities. Others might describe a proneness to dissent as vanity[23]. But to the holders of different opinions, trained and experienced in such a way, it is no more than honesty and personal integrity. To this extent, the

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[23] Justice Brandeis referring to Justice Butler in a letter to F Frankfurter. See Post, above n 5, 1340, fn 216.

common law system of appointments tends to protect individuality of opinion against the institutional forces that, in civil law countries, are reinforced both by the initial methods of training and by the necessity to look to government repeatedly for promotion in the course of a judicial career.

3. *Notions of the courts' role*: It is out of the common law tradition, so described, that different notions emerged early in the life of the United States Supreme Court concerning the role of that court. It is a conception that has influenced the courts of many Commonwealth countries established later by their independence constitutions.

According to this tradition, the judge is a person whose functions are primarily to resolve the dispute brought to the court by the parties. As such, the judge is only incidentally a defender of the constitutional order. Because parties in dispute will often have substantial arguments for and against their respective interests, they will frequently disclose, by their arguments, the closely divided issues upon which judges too can quite easily differ. Adversary litigation, in the hands of highly skilled and professional advocates, facilitates the sharpening of the points of difference and the revelation of the best that can be said for the respective cases of the parties. The need to demonstrate the existence of a "case or controversy" (within the United States Constitution) or a "matter" (within the Australian Constitution) heightens the constitutional

necessity for a clash of arguments which it is the business of the court to quell. In so far as that clash is exposed, it will often, of its very character, present strong arguments favouring one side or the other.

When such a clash occurs, the highly skilled and experienced judges, recruited from the senior ranks of the independent legal profession, who have witnessed the contest in the appellate court can readily appreciate (from their own professional backgrounds) the conflicting arguments urged upon them from the Bar table. Sometimes they might even feel that they can improve on the arguments advanced by the advocates themselves. Their training, therefore, makes them sensitive to the arguability of causes. Their duty, especially in a final appellate court, is to settle authoritatively the matter in issue because, in the common law tradition, their ruling will become a precedent for later cases[24]. A past life as an advocate will promote an appreciation of the nuances of argument, the complexity of decision-making and the highly controversial character of some decisions.

In such circumstances, a semi-dogmatic statement of facts and an assertion of a conclusion said to follow inexorably from those facts as a matter of law would leave judges trained in the manner

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[24] For the Australian rules on *stare decisis* see *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 417 [56].

described thoroughly unsatisfied. Like the advocates they once were, they feel committed to express their conclusions in the cases before them, in the most persuasive way: addressing the several arguments that have been advanced; expressing a conclusion and pronouncing orders after dealing with the arguments which may sometimes show that the decision is by no means clear cut.

4. *The model of constitutional courts*: As the American model of judicial review spread its influence in the newly created constitutions of Commonwealth countries, two types of constitutional review emerged. Broadly speaking, they follow the fault line that I have already described. They represent the European model of the Kelsenian Constitutional Court (adapted to the more modest judicial functions of Europe) and the American model (that emerged from the principle of judicial review asserted by Chief Justice Marshall in the famous opinion of the Supreme Court of the United States in *Marbury v Madison*[25]).

The typical European model was the brainchild of Hans Kelsen, a legal scholar and philosopher who drafted the 1920 Constitution of the Second Republic of Austria. It was Kelsen's view that the political élites in countries of the civil law tradition would not accept the establishment of judicial review of the kind expounded by the

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25 *Marbury v Madison* (1803) 1 Cranch (5 US) 137.

Supreme Court of the United States. Nevertheless, he believed that a constitutional court, if granted limited powers, would not arouse the hostility of such élites and could play a very useful function.

The trick, according to Kelsen, was to show that a system of review could provide the benefits of constitutional review without turning the over to a government of judges - which is the criticism that civil lawyers often cast at the constitutional courts of the common law world[26]. According to the Kelsenian approach, the preferred role of such courts is as assistants, almost advisors, to the legislature, preferably before enacted legislation has actually begun to operate: affording, or withdrawing, recognition of the constitutional lawfulness of the law in question. This model of review has proved popular throughout the civil law world. This was so because, unlike the judicial review devised by John Marshall, it could be easily attached to the Parliamentary-based architecture of the ordinary European State.

It is not coincidental that John Marshall established strong judicial review, now so dominant in most countries of the common law. Once such a strong system of judicial review was established, it necessarily addressed, quite directly, the deepest issues of constitutionalism. The power, at every level of the judicial hierarchy,

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[26] Sweet, above n 7, ch 2.

to disallow the validity of laws, or other official acts, is a very large one. It requires prudence in its exercise. Yet it is one inherent in the strength of the judiciary after the common law model and in the confidence in the personnel typically appointed to senior rank in that judiciary, who enjoy that power.

Amongst such judges, the candid exposure of the issues to be addressed is more likely to happen when the common law model of judicial reasoning is followed than amongst judges of the Kelsenian type of constitutional courts of Europe. Once the deep and fundamental questions of constitutionalism are addressed candidly, the emergence of differing opinions calling for expression, explanation and justification becomes virtually inevitable. Unless judges suppress their own opinions for reasons of personal amity or harmony[27], the true logic of discharging the judicial function honestly, particularly in courts empowered with functions of constitutional review, will necessitate exposition of opinions that sometimes differ and occasionally clash.

In this sense, it is a feature of courts of the common law constitutional tradition that they tend to be stronger and less deferential in the wielding of power than the courts of the European

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27 As occurred from time to time in the United States. See letter of Justice Butler to Justice Holmes in Post, above n 5, 1341, fn 219.

tradition have been. I do not doubt that this is a product of history. But it is also affected by the different personnel, traditions and training found in the higher courts of most common law countries. These, in turn, affect the degree of transparency that is considered normal in disclosing divisions and acknowledging candidly the distinct arguability of opposite conclusions. The institutional assertion that "the law is the law" and that conflicting views would undermine the authority of a court seem to a common law lawyer hopelessly old-fashioned and disrespectful to the people whom the courts serve. If, in truth, law is often unclear, if words in the Constitution or in parliamentary law are ambiguous and the common law or jurisprudence are obscure, is it not better to acknowledge this? Judges will do so to each other behind closed doors. Do they not owe it to their community to reveal controversies and deeply held differences so that, if need be, court decisions can be re-visited and the law reformed?

5. *Notions of governance*: In both common law and civil law countries today, the Kelsenian *Grundnorm*, or foundational principle of legal authority, is usually the notion of popular sovereignty. Whereas once (as in British Privy Council decisions), the orders of a court were made in the name of the King, accepting the advice of judges, humbly tendered to him, today that justification will not generally do. Even if "the people" are substituted for the King, the mere assertion by the court that it is propounding the law in the name of the people will not mask the reality that the propounding is

actually done by human judges, with the human propensity to error, mistake, illogicality and inconsistency with past understandings of the law.

The notion of law as a rule handed down by people in authority to be obeyed simply because it is propounded as such, is one that has fewer supporters in common law countries today than was formerly the case. Whether the law is made by Parliament, in the Executive Government or in the courts, the necessity that it be transparently made and openly expressed, explained and justified is now commonly accepted. It is this feature of law in contemporary society that has led to the growth in English-speaking countries of an enlarged administrative law; the proliferation of judicial and constitutional review; the enactment of freedom of information, ombudsman and administrative tribunal legislation; and the increased insistence on the necessity of providing reasons for judicial and administrative decisions[28].

In this context, the provision of dissenting opinions is simply one more step in the process of governmental transparency. The assertive, seemingly dogmatic, style of judicial reasoning in the traditional civil law countries is rather unsatisfying, even dismaying, to those brought up in the more transparent and discursive approach

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[28] *Pettitt v Dunkley* [1971] 1 NSWLR 376 (CA); *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 666.

of the reasoning of common law courts. A judicial *order* will permit no evidence of disagreement. It indeed states the outcome of the law. But the *reasons* that support the order will in fact often be diverse. So what is the justification for keeping the diversity a secret from the people?

Even in common law courts, however, there are variations. For example, in the English Divisional Court, it is not usual for dissenting opinions to be given in criminal appeals against conviction or sentence. The reasons offered for this tradition are obscure. Presumably it is justified by the feeling that an unsuccessful prisoner should not be upset by knowing that one judge saw merit in the appeal. Likewise, a successful prisoner should not be upset by any doubt cast on his or her success by the opinion of a judge who disagreed and thought the prisoner should remain locked up.

This English tradition of restraint, confined in a somewhat classist way to the disposition of the appellate affairs of prisoners, has not enjoyed a ready export to other parts of the common law world. It is true that needless dissent will sometimes be suppressed in criminal appeals, possibly because of the sheer burden and number of such dispositions. But the English rule of special restraint in such appeals is not observed, as a matter of practice, in the Australian courts in which I have participated. As a mark of the integrity of judicial opinions, the provision of dissenting reasons in such appeals is quite common. It is unrestrained by any belief that

providing them will upset prisoner, governmental authorities or anyone else. To the contrary, the presence of a dissenting opinion, where a prisoner loses an appeal, is affirmative proof to the prisoner and the public that the court has taken the process seriously and treated the prisoner as an equal litigant, along with all the others.

6. *Bills of Rights*: A further feature that, from the early days of the United States Supreme Court, encouraged the provision of separate, and dissenting, opinions, was the existence of the open-textured provisions of the Bill of Rights.

Whereas some measure of credence might be given to the provision of a single decision about a purely technical provision of statute law applied to uncontested or determined facts, the broad language of human rights laws virtually assures the existence of strongly held, and differing, opinions over such matters. These can arise, for example, over what is "due process" or what constitutes "cruel and unusual punishment". In such matters, courts of high minded judges will quite easily exhibit disagreement.

Sometimes such disagreements can play an important part in the development of the law. In the United States, it can be said that the dissents of Justices Curtis and McLean in *Scott v Samford*[29]; of

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[29] 19 How (60 US) 393 (1857).

the first Justice Harlan in *Plessy v Ferguson*[30]; and of Justices Roberts, Murphy and Jackson in *Korematsu v United States*[31]; and of Justices Black and Douglas in *Dennis v United States*[32] redeemed the serious errors of constitutional doctrine exhibited in the majority opinions in those decisions. The dissentients offered a beacon to a later, more enlightened time when the errors of the majority would be corrected and acknowledged.

Within England[33], Australia and elsewhere, there have been similar occasions of significant dissent. Sometimes, in important matters, dissents will sink like a stone, overtaken by later or more important events. But on other occasions, the dissenting voice will herald fresh opinions and approaches and encourage the judges, who come later, to perceive the errors that the majority have expressed.

7. *The pedagogical function*: As befits the democratic character of their constitutional arrangements, in common law countries,

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[30] 163 US 537, 552 (1896). See Brennan, 37 *Hastings Law Journal* 427 at 431 (1986).

[31] 323 US 214 (1944).

[32] 341 US 494 (1951).

[33] An illustration is the well-known dissent of Lord Atkin in the war-time decision of the House of Lords in *Liversidge v Anderson* [1942] AC 206 at 244 (HL). See G Carney, "Lord Atkin: His Queensland Origins and Legacy" in Queensland, *Supreme Court History Program Yearbook 2005*, 33 at 54. Other important dissents in the United Kingdom are collected in Alder, above n 7, 231.

courts generally, and final courts in particular, perform pedagogical functions. They express reasons and values that can be examined by citizens and non-citizens alike; by lawyers but also non-lawyers. Through the internet, such opinions are now much more readily, and instantaneously, available.

Upon constitutional questions, the courts are inevitably faced with political issues - not in the partisan sense but in the sense of issues relevant to the structures of government, the accountability of governmental leadership to the people and the values that inform the ways in which individuals are controlled by and under law. In this sense, courts, and especially final courts, contribute to the formation of popular opinion concerning matters relevant to their community's social values. They are thereby engaged in a dialogue with the community they serve.

Reasoned dissents may not predominate in such dialogue in the way that clear majority opinions do. However, reasoned dissent, appealing over the weight of binding orders of the court, will address directly the good opinion and rational consideration of interested members of the community affected. It may amount to an attempt to promote public discussion in a more vigorous way than would occur if the dissent were suppressed.

Dissent is not a crude appeal to popular majorities, in the way of partisan politics[34]. An appeal of such a kind would attract the criticism which the opponents of dissent advance in countries such as France and the Netherlands. They ask why members of an institution should be permitted to "shake the faith of the people in the wisdom and infallibility of the judiciary?"[35]. The answer to that question is that today, rightly, infallibility is denied to any human institution. The activities of institutions, particularly those of government in a democratic polity must be accountable to the people whom the institution serves. The suppression of dissent discourages this accountability. It thereby weakens, rather than strengthens, the institution of the courts.

8. *A fear of retaliation*: Some of those who oppose the provision of dissents point to the risk of governmental retaliation against judges who provide dissenting opinions. Thus, the European Court of Justice at Luxembourg follows the French tradition[36]. Dissent is not permitted in its opinions. A reason advanced to support this procedure is the need to build up a united front on behalf of the

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[34] Post, above n 5, 1357.

[35] "Evils of dissenting opinions", 57 *Albany Law Journal* 74 at 75 (1898). See Post, above n 5, 1356-1357.

[36] Each judge of the European Court of Justice must sign the reasons and orders of the Court in accordance with the Statute of the European Court of Justice, arts 32 and 33. See Alder, above n 7, 234.

Court against political pressure on its judges. If a right to dissent were granted, governments might be more prone to try to "get at" national judges in order to persuade them to support national interests. The provision of a single opinion, signed for the entire court in which disparities are accommodated as far as possible and residual differences are suppressed, frustrates any such retaliation. Within the nation itself, likewise, the provision of a single court opinion is said to suppress the dangers of retaliation and revenge for unwanted or minority decisions.

Unlike its sister institution at Luxembourg, the European Court of Human Rights at Strasbourg, permits dissents. In fact, dissents are not at all uncommon. They reflect the highly contestable issues that typically come before that court. Whilst, on at least one occasion, a judge of that court was said to have suffered by reason of a judicial opinion adverse to his appointing country, for the most part the nation states have had to accommodate themselves to the integrity and honesty of the judges involved - just as they usually need to do to municipal judges. Unlike the International Court of Justice, where *ad hoc* nationally appointed judges rarely if ever dissent from the interests of the nation that has appointed them[37], in the European Court of Human Rights, the judges repeatedly

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[37] H Charlesworth, "Ad hoc judges of the International Court of Justice" in T McCormack and C Saunders, *A Remarkable Public Life, Festschrift for Sir Ninian Stephen* (forthcoming).

demonstrate their independence and integrity. Quite often they take stands, as judges, contrary to the interests and submissions of their nation of nationality.

The suggestion of retaliation for dissenting or separate opinions is unpersuasive. Indeed, it appears outrageous and inadmissible - a departure from the fundamental right of litigants to an independent and impartial court. Such a postulate should be rejected out of hand. Institutional protection against such pressure must be built and the risk of it rebuffed. It should not be accepted as a basis for denying the honest explanation of judicial opinions. Where disagreement in reasons or result must be somehow accommodated in the opacity of language of a single opinion, the result will often be ambivalence, uncertainty and a lack of clarity in the resulting law. Moreover, the contribution of dissenting opinions to the development of the law, and especially in matters of controversy and legal evolution, is then lost for little apparent gain.

9. *The obligation of academic integrity*: In those countries which deny the facility of judicial dissent, it is not unknown for the nuances of differing opinions to be disclosed by participating judges in later academic commentary. Sometimes, even the judge of the court in question may contribute an article to a legal journal which discloses

that a different opinion was held[38]. The notion that a common law judge should suppress his or her opinion from the one place in which that opinion matters most (the court disposition in a case in which the judge has participated) but reveal it in subsequent private or public communications of a different kind seems totally unacceptable. It denies not only the proper functional analysis of the judicial decision-making process, as it appears to those of the common law tradition. It also denies the proper fulfilment of the judicial role, with integrity, candour and honesty to those immediately affected by the judge's orders.

To these reasons can be added a particular functional one - stated from the viewpoint of the work of a final court. The expression of minority legal views at the trial, or in an intermediate appellate court, are immensely useful to final courts of appeal. They identify and sharpen issues of legal doctrine that may require attention higher in the judicial hierarchy. Indeed, they can assist in opening the door to further consideration, which the suppression of dissent and of heterodox views serves to mask and keep from further attention[39]. Even in the final court itself, dissent may help to

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[38] Before the facility of dissent was allowed in 1966, one law lord who had participated in a Privy Council decision published a kind of dissent in the form of a law review article: Lord Wright (1955) 33 *Canadian Bar Review* 1123. See Alder, above n 7, 235-236 fn 67.

[39] cf Alder, above n 7, 241.

explain to the reader what the case was all about and why it was, or was not, important. It may also ensure that the majority reasons grapple with the point of difference. Hence dissent can sometimes enhance the process by sharpening the reasons of the majority.

10. *Institutional error prevention*: This brings me to the last of the reasons which common law lawyers embrace for the facility of dissent and for rejecting civil law formalism which denies that facility. I refer to the institutional safety mechanism which dissent provides in the transparent disclosure of the differing opinions that can exist in the law over the content and effect of particular laws and the development of the law in particular directions.

Professor Cass Sunstein of the University of Chicago in his important recent work[40], has demonstrated convincingly the need for all major institutions, public and private, to have inbuilt institutional mechanisms to question error; to expose it when it is thought to exist; and to afford pathways for the discovery of truth and reason.

Professor Sunstein does this by reference to the errors of the Ford Motor Company in the development of the Edsell vehicle; the errors of President Kennedy in the Bay of Pigs; of President Lyndon Johnson in Vietnam; President Nixon after Watergate; and the errors

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40 C Sunstein, *Why Societies Need Dissent*, Harvard, 2003, 168, 184-186.

of courts in pursuing doctrine when it ought to have been overthrown or abandoned.

In a sense, judicial dissent is an inbuilt safety mechanism of the courts that accept this facility to prevent the unquestioned pursuit of majoritarian opinions that may sometimes turn out to be wrong-headed, inappropriate or out of date. By reference to his research, Cass Sunstein illustrates the inbuilt tendency of institutions, including courts, to go along with majority opinions. This is, as he describes it, a "cascading effect" which can be seen not only in courts but in business, political parties and other institutions of society.

To deny the judicial institution the benefit of internal questioning that is candidly exposed for expert, professional and public analysis, opinion, and commentary is to deny it an important self-protecting mechanism. This will not be afforded if the dissent is entirely internalised and kept secret from outside scrutiny. It may be afforded if the dissent is exposed and responds to the sunlight of critical professional and public debate.

THE RATIONAL DEPLOYMENT OF JUDICIAL POWER

These, therefore, are the arguments that circle around the issue of dissent. It is an issue that transcends particular cases. It certainly transcends particular judges. Dissent has varied over time

in the Supreme Court of the United States[41]; in the highest courts of England[42]; and in courts such as the High Court of Australia[43]. There is no possibility that we will change our long held tradition which goes back to the earliest colonial times in Australia and long before to the ancient customs of the judiciary of England. To us, it seems a tradition more in harmony with the transparency of modern government which should be increased, and not diminished, in the current age. We are obliged to consider this issue by reason of the global and regional forces that now bring together the courts and tribunals of all countries. But I do not believe that these forces require the abandonment or curtailment of the facility of dissent or the constitutional amendments that would be necessary in most cases to achieve that end.

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41 Post, above n 5.

42 Alder provides some figures on dissent rates in the English Court of Appeal and House of Lords between 1965 and 1999. In that interval in the Court of Appeal dissents appeared in 11% of cases and in 9.9% in the House of Lords. Lord Denning, whilst in the Lords, had 19% dissents. See Alder, above n 7, 226 (fn 29), 243 (fn 124).

43 A Lynch, "Dissent: The Rewards and Risks of Judicial Agreement in the High Court of Australia", (2003) 27 *Melbourne University Law Review* 724 at 744-748; M Groves and R Smyth, "A Century of Judicial Style - Changing Patterns of Judgment Writing on the High Court of Australia 1903-2001", (2004) 32 *Federal Law Review* 255 at 269 (figure 5); A Lynch, "Taking Delight in Being Contrary: Worried About Being a Loner or Simply Indifferent: How do Judges Really Feel about Dissent?", (2004) 32 *Federal Law Review* 311; M Bagaric and J McConville, "Illusions of Disunity", (2004) 78 *Law Institute of Victoria Journal* (9), 37; A Lynch, "Dissent - Towards a Methodology for Measuring Judicial Agreement in the High Court of Australia", (2004) 24 *Sydney Law Review* 470.

Doubtless we can learn from the European tradition of judicial reasoning a greater precision and succinctness in the expression of the facts, issues, reasons and conclusions of cases. We are learning the economies that derive from performing more judicial functions on the basis of written argument. But, as we would generally believe, it is in the detail of facts and issues, and in the exploration of the arguments of parties that the true solutions to many legal problems will emerge. Such solutions will often elude dogmatic expression. All too commonly they will reflect, and invite, differing opinions.

The ties of history and of rational modern government seem to be on the side of the facility of judicial dissent. Such dissent should not be needlessly expressed; nor ventured simply for the reason of voicing a different or contrary point of view. The disposition of judicial work is too serious and arduous for such games. But such work is also concerned with fundamental values and upon them men and women of good will can often disagree.

Out of disagreement, and not from narrow, formal, syllogistic reasoning or enforced concurrence, wisdom and justice are more likely to emerge. That is why, lawyers of the common law tradition and increasing numbers in civil law countries cherish the expression of the true reasons of the judges and the privilege, where it is considered necessary, of judicial dissent. The citizens of the country, and others affected, may not like, or agree with, the opinions of the judges. But at least they know, in every case, that

those reasons almost certainly represent a sincere and honest attempt to explain the deployment of public power in the judiciary. It is not enough that it should be declared to be deployed in the name of the people. It is important that every day, and in every case, that element should be publicly, rationally and logically demonstrated by those who temporarily hold the privilege to exercise judicial power on behalf of the people.