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JUDICIAL DISSENT - COMMON LAW AND CIVIL LAW TRADITIONS

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IRRELEVANT DISTRACTION OR INSTITUTIONAL NECESSITY?

Judicial dissent and public disagreement 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 operating in the world. To the 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 Netherlands and other European 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 those of Germany, more congenial. 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 essentially derived from France. It seemed more modern, rational and economical. In some ways, 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 the criminal trial is repeatedly insisted upon[1], the economies that

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

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]. Conversely, 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 competing advantages of other legal systems which they sometimes copy.

My purpose is not, as such, to examine the coalescence of the 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

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

[3] For example, until 2005 special leave applications in the High Court of Australia involved a right to an oral hearing lasting up to 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 for initial consideration of applications for special leave on the papers by two Justices who may dispose of the application without an oral hearing or direct that an oral hearing take place, as if then before two or three Justices: High Court Rules 2004, Rule 41.11. In 2002, the Court of Cassation of France likewise introduced a procedure for "non admission" of appeals. See G Canivet, "The Court of Cassation: Looking Into the Future" (below [ms p 7, fn.18]).

their decisions. Judges in such courts[4] explain the reasons for their decisions, rulings and orders to the litigants, the legal profession, other judges, the academic community and citizens more generally. In most countries, giving reasons is now an incident of the judicial process[5]. In the course of examining the reasoning process, 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 explain, 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 in common law countries is the facility for offering individual opinions, including opinions which dissent either from the outcome and orders favoured by the majority or, at least, disagree with the reasoning of the majority explanation for such outcomes and orders.

Questions immediately present. How did this divergence in judicial opinions emerge? In particular, how did the entitlement to

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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. These remarks are not confined to final appellate or constitutional courts.

[5] In Australia it is obligatory for judicial officers: see *Public Service Board of New South Wales v Osmond* (1986) 159 C.L.R. 656 at 666 approving *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 388 (CA).

express a differing, and even dissenting, opinion come about in common law countries? Why has it not generally emerged in civil law countries, even though 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 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 which judicial reasons serve in a modern community. Are dissenting opinions irrelevant to the function of courts? Do they, as their critics sometimes suggest, weaken the role of the courts in expressing clearly and finally the governing law[6]? Do they amount to a self-indulgence on the part of their writers - the ultimate submission to a temptation from which a judge should be immune?[7] Or are they, instead, the most precious indication of the integrity, transparency and accountability of the work of the judicial branch of government, the presence of which constitutes a peculiar badge of honour typical of common law courts but missing from the more autocratic governmental tradition of Napoleon's post-revolutionary centralised officialdom?

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[6] 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").

[7] Justice Butler cited in Post, n. 6, 1340 (fn. 217).

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 describes the way in which judicial reasoning differs within Europe[8]:

> "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 resembles [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) 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 styles 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

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[8] 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.

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 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. Article 93ix of the Constitution of Brazil states[9]:

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

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[9] Brazil, Senado Federal, *Constitution of the Federative Republic of Brazil*, (1988) (revised ed 2002) (trans. I Vajda *et al*), Brasilia, 2002, 74. The Constitutional Court Regulation (No 06/PMK/2005) of the Constitutional Court of the Republic of Indonesia likewise provides (Ch. VII, art. 32(6) that "All dissenting opinions shall be attached to the majority decision". However, reflecting the civil law tradition, provision is made for adjournment of decision-making so as to uphold "the principle of deliberation leading to consensus" (art. 32(2)). Further, a dissenting opinion may not be attached to the majority decision "where the justice in question requests otherwise" (art. 32(6)). In fact, dissenting opinions have been published in Indonesia in highly controversial cases.

As a consequence of the foregoing provision, judicial opinion-writing in Brazil has become longer, more elaborate, less formal and more discursive. Once this happens, and the right of individual judges 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 by Belgium, the Netherlands, Italy and most other civil law countries, dissents are prohibited. No doubt there are historical and institutional reasons that help to explain this tradition[10]. Yet whilst this rule is maintained in such countries, it has been abandoned as an obligatory practice 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, or experiences of, the law was probably considered a necessary ingredient in the post-War constitutional cultures of those societies[11]. In Spain and in Brazil, votes in the dispositions of proceedings are

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[10] See Canivet, above n. 3, p …. (ms 7 fn. 19).

[11] In the German Constitutional Court, dissenting opinions are regulated by the Law on the Constitutional Court (B Verf GG, art. 30(2) which was introduced in 1970. See D P Kommers, *The Constitutional Jurisprudence of the Federal Republic* (1989) 24. Dissenting opinions have been comparatively rare in that court. According to a study conducted a decade after provision was made for them only 6% of decisions contained dissenting opinions.

published and dissenting opinions are now allowed. Professor Sweet goes on[12]:

> "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* whose current tradition, 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 moved to permit the publication of minority opinions, it would be likely that a more literary, discursive model of opinion-writing would gradually emerge, such as that found in common law countries.

The existence of the contemporary debates in Europe and in countries of the civil law outside Europe, and the strong defence of the

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12 Sweet, n. 8, *loc cit*.

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 why and how 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[13]; countries (like Australia and the United States) where dissent is an inescapable feature of judicial independence from one's colleagues; and countries, instanced 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, the High Court of Australia

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[13] 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. It is still comparatively rare.

and the proposed new Supreme Court in the United Kingdom? Do judges of the common law tradition have anything to learn from the deeply held convictions of judges of the civil law tradition who, to this day, generally resist the facility of individual opinions, discursive reasoning and above all dissent?

To justify our adherence to the availability of judicial dissent do common lawyers need more than hunch, habit and inclination? Do they, for example, need an empirical examination of the use made of earlier dissenting opinions in later cases[14]. 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 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, hearing arguments and making rulings there. Such a judge is continuously under scrutiny and obliged,

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[14] J Alder, above n. 8, 246.

by the provision of *ex tempore* reasons, to justify publicly all important steps taken in disposing of legal proceedings[15].

At the trial level, the orality of the common law was reinforced by the common necessities presented by the role of the jury. 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[16]. It is a creature 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 that 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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15 *Scott v Scott* [1913] A.C. 417; *McPherson v McPherson* [1936] A.C. 177; 1 DLR 321 (PC); *Russell v Russell* (1976) 134 C.L.R. 495 at 520; *Raybos Australia Pty Ltd v Jones* (1985) 2 N.S.W.L.R. 47 (C.A.).

16 *Attorney-General v Sillem* (1864) 10 H.L.C. 704 at 720-721 [11 ER 1200 at 1207-1208]; *South Australian Land Mortgage and Agency Co Ltd v The King* (1922) 30 C.L.R. 523 at 553; *SRA (NSW) v Earthline Constructions Pty Ltd* (1999) 73 A.L.J.R. 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[17]. Both of these bodies have coexisted in England, in various forms, up to the present day. Initially, 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 monarch[18].

In the struggle over the respective functions of Parliament and the Council in England, ultimately it was the House of Lords that succeeded in establishing its right to hear appeals (in the sense of correction of errors), from the courts of the Kingdom, including from the Court of Chancery[19]. Such appeals came before, and were heard by, the House of Lords[20] which is, to this day, the final appellate court of the United Kingdom, although not, it seems, for much longer . In exercising the appellate jurisdiction, as in any other committee of Parliament, the

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

18 *Ibid,* 214.

19 *Ibid*, 316.

20 The evolution of the appellate jurisdiction of the House of Lords is discussed in R Stephens, *Law and Politics - The House of Lords as a Judicial Body, 1800-1976*, (Weidenfeld and Nicolson, London, 1979). See especially at 28-34, 84, 340.

participating Lords enjoyed the right to express their own opinions in their own ways. Where they disagreed, they would express the disagreement. This would be recorded in the parliamentary record[21].

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 the British colonies, settlements and dependencies throughout the world.

However, 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[22]. Because formally, the judgments of the Judicial Committee of the Privy Council were made in the form of advice to the Monarch, 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 the differing legal regimes, that flowed to Westminster from the many overseas dominions and colonies. It was considered that the monarch should not be

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21 cf Alder, above n. 8, 233.

22 The rule was modified by Judicial Committee (Dissenting Opinions) Order 1966 (S.I. 1966 No. 1100). See Alder, above n. 8, 235.

embarrassed by conflicting advice emanating from 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 relevant committee of the House of Lords, he would simply have expressed the opinion he held in one of the *seriatim* opinions and speeches within the committee for the disposal of the proceedings.

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 at least by 1798 when *Grindley v Barker*[23] was decided. Indeed, in that decision, the judges were quite explicit in saying 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 right of

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[23] (1798) 1 Bos. & Pul 229 at 238 per Eyre CJ; 126 E.R. 875 at 880.

appeal was established in Chancery by statute[24], 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[25].

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 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* individual 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 his 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 usually expressing the conclusions of the Court with a single voice. Only later in his long service as Chief Justice did

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[24] 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) v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 323 [73].

[25] 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 Q.B. 696 at 723.

dissenting opinions 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 appointment in 1906 of Justices Isaacs and Higgins, the unanimity of the Court's early 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[26]. In the manner of the House of Lords, the contests were thereafter spelt out in differing opinions. This permitted all who were interested to witness intellectual debate conducted in public and not kept behind the Court's closed doors. Readers could then make their own evaluation of 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 typically observed there.

Whereas, in civil law countries, most judges are recruited for the ordinary courts soon after university graduation 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 *cadre* of

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[26] See e.g. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 C.L.R. 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 U.S. 159 at 213 (1819).

advocates or barristers. So recruited, the newly minted judge does not easily throw off the highly independent habits of a lifetime. He (and now she) will be inclined to regard the judicial vocation as in some ways an extension of a life as a senior and independent lawyer. Few such appointees ever 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 comprising strong-minded, experienced senior-advocates-turned-judges, not accustomed 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 or ingrained respect are not features 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 lives. Others might describe a proneness to dissent as vanity[27]. 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 common law system of

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[27] Justice Brandeis referring to Justice Butler in a letter to F Frankfurter. See Post, above n. 6, 1340, fn. 216.

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 repeatedly to look to government 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 also 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. In short, the judge's role is to "quell the controversy"[28], 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 the judges too can quite easily differ.

Adversarial 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

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[28] *Fencott v Muller* (1983) 152 C.L.R. 570 at 608; *Abebe v The Commonwealth* (1999) 197 C.L.R. 510 at 570 [164].

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, produce strong reasons favouring one side or the other.

When such a clash occurs, the highly skilled and experienced judges who have witnessed the contest in an appellate court, recruited from the senior ranks of the independent legal profession can readily appreciate (from their own professional backgrounds) the conflicting arguments urged upon them from the Bar table. Occasionally they might 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[29]. 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

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

a matter of law, would leave judges, trained in the manner described, thoroughly unsatisfied. Like the advocates they once were, they feel obliged to state 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. This will 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 to 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. This identifies the European model of the Kelsenian Constitutional Court (adapted to the more modest judicial functions of Europe) and the more powerful American model (that emerged from the principle of judicial review asserted by Chief Justice Marshall in the influential decision of the Supreme Court of the United States in *Marbury v Madison*[30]).

In its modern manifestation, the 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 like his own would not accept the establishment of judicial review of the kind practised by the Supreme

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[30] *Marbury v Madison* (1803) 1 Cranch (5 U.S.) 137.

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 useful function.

The solution, according to Kelsen, was to show that a system of review could provide the benefits of constitutional review without turning decisions over to a government of judges - which is the criticism that civil lawyers often direct at the constitutional courts of the common law world[31]. 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 acceptability of the law in question. This model of review has proved popular throughout the civil law world. It did so because, unlike the judicial review embraced by John Marshall, it could easily be attached to the parliamentary-based architecture of the ordinary European State.

The recent debates in the United Kingdom, and the terms of the *Human Rights Act* 1998 (UK) which hold back from invalidation of enacted laws, reflect the continuing British adherence to notions of parliamentary "sovereignty". In this respect they reveal that the United Kingdom remains, constitutionally speaking, anchored in a European tradition of deference to Parliament whereas, by embracing the

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[31] Sweet, above n. 8, ch 2.

Marshallian tradition of invalidation, Australia and most countries of the Commonwealth of Nations have followed the American model asserted successfully in *Marbury v Madison*.

It is not coincidental that, once such a strong system of judicial review was established in the United States, it addressed, quite directly, the deepest issues of constitutionalism. The power, at every level of the judicial hierarchy, to declare the invalidity of laws, or other official acts, is a very large one. It requires prudence in its exercise. Yet it is one that fits comfortably in the judiciary created after the common law model and in the confidence in the personnel typically appointed to the senior ranks in that judiciary. To exercise such large powers, the provision of convincing reasons, founded in law, was essential. A mere judicial *fiat* would not be satisfying or acceptable.

Amongst judges deploying such powers, 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 because of personal amity of their colleagues or

institutional harmony[32], 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 most appellate and constitutional 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 tradition have generally been. I do not doubt that this is a product of history. But it is also affected by the different personnel, traditions and training typically 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 will undermine the authority of a court seem to most common law lawyers 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 if the common law or its jurisprudence are obscure, is it not preferable to acknowledge this? Judges will do so amongst each other behind closed doors. Do they not owe it to their community to reveal the controversies

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[32] As occurred from time to time in the United States. See letter of Justice Butler to Justice Holmes in Post, above n. 6, 1341, fn. 219.

and any deeply held differences so that, if need be, court decisions can be re-visited and the law reformed? Once it is acknowledged, as it must be, that a superior judge to some extent creates the law[33], transparency and disclosure of the legitimate parameters of judicial choice become important, whether the judge is operating in common law or civil law jurisdiction.

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 the judges humbly tendered to him, today that justification will not attract general acceptance. Even if "the people" or “the nation” are substituted for the monarch, the mere assertion by a court that it is propounding the law in the name of that authority 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 the law, is one that has fewer supporters in common law countries today than was formerly the

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33 cf Canivet, above n. 3, (ms p 18).

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, in English-speaking countries, to the growth 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[34].

In this context, the provision of dissenting, or different concurring, 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 of the reasoning of common law courts. A judicial *order* on its own will allow no disagreement. It indeed states the law's outcome. 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 litigants and the people?

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[34] *Public Service Board of NSW v Osmond* (1986) 159 C.L.R. 656 at 666; *Siemens Engineering and Manufacturing Co of India Ltd v Union of India* A.I.R. 1976 SC 1785 at 1789; cf *Sharp v Wakefield* [1891] A.C. 173 at 183; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] A.C. 997 at 1032-1033, 1049, 1050-1054, 1061-1062; *Minister of National Revenue v Wrights' Canadian Ropes Ltd* [1947] A.C. 109 at 123.

Even in common law courts, however, there are variations on this theme. For example, in the English Divisional Court, dissenting opinions are not usually given in criminal appeals against conviction or sentence. The reasons 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 (and possibly an order of acquittal) by the opinion of a judge who disagreed and thought the prisoner should remain locked up.

This English tradition of restraint, confined in what may appear 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, typically because of the sheer burden and number of such dispositions. But the English rule of special restraint in criminal and sentencing appeals is not observed, as a matter of practice, in the Australian courts in which I have participated. The provision of dissenting reasons in such appeals is quite common. It is unrestrained by any belief that providing them will upset prisoners, 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 alike 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 constitutional Bill of Rights.

Whereas some measure of credence might perhaps 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 "due process" requires 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 now be seen that the dissents of Justices Curtis and McLean in *Scott v Samford*[35]; of the first Justice Harlan in *Plessy v Ferguson*[36]; of Justices Roberts, Murphy and Jackson in *Korematsu v United States*[37]; and of Justices Black and

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[35] 19 How (60 U.S.) 393 (1857).

[36] 163 U.S. 537, 552 (1896). See Brennan, 37 *Hastings Law Journal* 427 at 431 (1986).

[37] 323 U.S. 214 (1944).

Douglas in *Dennis v United States*[38] 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 acknowledged and corrected.

In England[39], Australia[40] and elsewhere, there have been significant dissents. Sometimes, even 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. It will encourage the judges who come later to perceive the errors that the majority have expressed. Sometimes too the dissent will provoke legislative amendments designed to give effect to the minority opinion.

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

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38 341 U.S. 494 (1951).

39 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] A.C. 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. 8, 231.

40 *Federated Engine Drivers' and Firemen's Association v Broken Hill Pty Co* (1913) 16 C.L.R. 245 at 273-275; *Federated Municipal etc Employees v Melbourne Corporation* (1919) 26 C.L.R. 508 at 526 per Isaacs J; *Chester v Waverley Corporation* (1939) 62 C.L.R. 1 at 14 per Evatt J.

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

Upon constitutional questions, courts are often 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[41]. In this respect, 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, may address directly the good opinion and rational consideration of interested members of the community affected. It may promote public discussion in a more vigorous way than would occur if the dissent were suppressed.

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[41] *Melbourne Corporation v The Commonwealth* (1947) 74 C.L.R. 31 at 84 per Dixon J.

Dissent is not, or should not be, a crude appeal to popular majorities, in the manner of partisan politics[42]. An appeal of such a kind would attract the criticism which the opponents of judicial 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?"[43]. The answer to that question is that today, rightly, infallibility is denied to any human institution.

Sometimes disagreement may not extend to the outcome or order favoured by the majority. It may relate to a difference of view about the mode of reasoning, the applicable legal rule, the state of the court's doctrine, the view of the facts or just the way the explanation for the decision should be expressed. Such nuances of reasoning reflect a measure of disagreement amongst judges that is even more common in appellate courts of the Commonwealth of Nations, than outright dissent. They surface in separate concurring opinions delivered at the time of disposition[44]. Such opinions may be provided so as to keep alternative views in play whilst awaiting a different case, or more propitious time, when they can be expressed more decisively.

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[42] Post, above n. 6, 1357.

[43] "Evils of dissenting opinions", 57 *Albany Law Journal* 74 at 75 (1898). See Post, above n. 6, 1356-1357.

[44] P McCormick, "The Choral Court: Separate Concurrence and the McLachlin Court, 2000-2004" (2005) 37 *Ottawa Law Review* 3 at 25-33.

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 or disagreement falling short of dissent in the outcome diminishes 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 and disagreements 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[45]. Dissent is not permitted in its opinions. A reason advanced to support this arrangement is the need to build up a united front on behalf of the Court against the temptation towards any 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 or to punish them for having failed to do so. 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. Similarly, within the nation itself the provision of a single court opinion is said to reduce the dangers of retaliation and revenge for unwanted or divided decisions.

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[45] 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. 8, 234.

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 personal consequences 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 nationally appointed *ad hoc* judges rarely dissent from the interests of the nation that has appointed them[46], in the European Court of Human Rights, the judges repeatedly demonstrate their independence and integrity in their reasons and dispositions. Quite often they take stands, as judges, contrary to the interests and submissions of their country 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[47]. Such a postulate should therefore be rejected out of

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[46] H Charlesworth, "Judges *Ad Hoc* of the International Court of Justice" in T McCormack and C Saunders, *Sir Ninian Stephen - A Tribute* (Miegunyah Press, 2007), 176 at 187-188.

[47] *International Covenant on Civil and Political Rights* (1976), art. 14.1; *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) art. 6(1).

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 statement of judicial opinions. Where disagreement in reasons or about the result must somehow be accommodated in the opacity of language of a single opinion, the result will often be ambivalence in expression, with resulting uncertainty and lack of clarity in the 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 intellectual integrity*: In those countries that 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[48]. 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 seems to most of those of the common law tradition. It

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[48] 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. 8, 235-236 fn. 67.

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 may be added a particular institutional 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[49]. Even in the final court itself, dissent may help to 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 entire process by improving the reasons of the majority.

10. *Internalising error prevention*: The last of the reasons which common law lawyers advance for the facility of dissent and for rejecting civil law formalism which denies that facility is a structural one. Dissent provides an institutional safety mechanism in the transparent disclosure of the differing opinions that can exist in the law over the content and

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49 cf Alder, above n. 8, 241.

effect of particular laws and the development of the law in particular directions.

Professor Cass Sunstein of the University of Chicago in a recent work[50], has argued 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. He does this by reference to the errors of the decision making in the Ford Motor Company in the development of the *Edsel* motor vehicle; the errors of President Kennedy in the Bay of Pigs; of President Lyndon Johnson in Vietnam; of President Nixon after Watergate; and the errors of courts in adhering to legal doctrine when it ought to have been overthrown or abandoned.

In a sense, judicial dissent is an inbuilt safety mechanism of the courts which accept this facility to prevent the unquestioned pursuit of majoritarian opinions that may 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, administration, political parties and other institutions of society.

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

To deny to judicial institutions 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 wholly 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 presented by the issue of judicial dissent and disagreement. It is an issue that transcends particular cases. It certainly transcends the inclinations of particular judges. Dissent has varied over time in the Supreme Court of the United States[51]; in the highest courts of England[52]; and in courts such as the High Court of Australia[53]. There is no possibility that such courts will

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[51] Post, above n. 6.

[52] 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 sitting in the House of Lords, delivered dissents in 19% of the cases in which he participated. See Alder, above n. 8, 226 (fn. 29), 243 (fn. 124).

[53] 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

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change their long held tradition which goes back to the earliest colonial times in America, Canada and Australia and to long before in the ancient customs of the judiciary of England. To us, it seems more in harmony with the transparency of modern government which should be increased, and not diminished, in the current age. We are now obliged to consider this issue by reason of the global and regional forces that bring the courts and tribunals of all countries into new relationships. I do not believe that these forces require the abandonment or curtailment of the facility of dissent and disagreement or the formal constitutional amendments that would be necessary in most cases to achieve such an end[54].

Doubtless courts of the common law tradition can learn from the civil law tradition of judicial reasoning a greater precision and succinctness in the expression of the facts, issues, analysis and conclusions of cases. Perhaps we could learn the importance of trying harder, at least in final courts, to put in place arrangements that encourage single opinions given that such judicial dispositions state, and sometimes change, the expression of the law. We are certainly learning the economies that derive from performing more judicial functions on the

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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.

[54] A Lynch, "Is Judicial Dissent Constitutionally Protected?" (2004) 14 *Macquarie Law Journal* 81 at 103-104.

basis of written argument, as the civil law systems have long done. But, it is in the detail of facts and issues[55], and in the exploration of the arguments of parties that the true solutions to many legal problems emerge. Such solutions will often deny 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 and disagreement. They should not be needlessly expressed; nor ventured simply for the reason of voicing a different or contrary point of view or making a noise. 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 goodwill can often disagree. In the judicial process, procedures and not just outcomes, are important. Whereas the political branches of government quite properly can, and do, strike bargains and negotiate compromises, the abiding features of the judicial branch are honesty and conformity with principle. Going along with the numbers or with sheer power or because disagreement is not immediately effective, is uncongenial or personally burdensome, may be understandable in other governmental activities. But honesty and transparency encourage and

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[55] Judge Cardozo cited in L P Stryker, *The Art of Advocacy - A Plea for the Renaissance of the Trial Lawyer*, (Simon and Schuster, NY, 1954) at 11: "Let the facts be known as they are, and the law will sprout from the seed and turn its branches towards the light".

reinforce the proper discharge of the judicial function[56]. Where necessary this requires the provision of separate reasons and dissents.

Out of transparent reasons, even 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 lawyers in increasing numbers in civil law countries tend to support the expression of the true reasons of the judges and the privilege, where it is considered necessary, to express judicial dissent or differing views. The citizens of the country, and others affected, may not like, or agree with, the opinions of the judges. But at least they then know, in every case, that those reasons almost certainly represent a sincere and honest attempt by the judge to explain the deployment of public power within the judiciary.

It is important that every day, and in every case, the conscientious deployment of judicial power should be publicly, rationally and persuasively demonstrated by those who temporarily enjoy the privilege of exercising that power on behalf of the community. There can be no clearer demonstration of a judicial deontology deserving of public respect, nor greater proof that judges are not fighting for their own power but to uphold the law as they see it, than if judges disclose serious

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56 M D Kirby, "Appellate Courts and Dissent" (2004) 16 *Judicial Officers' Bulletin* (NSW), 25; M D Kirby, "Judicial Dissent" (2005) 12 *James Cook University Law Review* 4 at 10; *Forsyth v Deputy Commissioner of Taxation* [2007] H.C.A. 8 at [49]-[55].

differences when they arise in the disposition of cases. To disguise such differences in the name of "uniform interpretation of the law" or achievement of "coherence and consistency" in the law or effective performance of the "unifying mission entrusted to the court" is not a course attractive to most lawyers of the common law tradition. In the struggle of ideas in a free society, transparency is usually the best policy. Moreover, it is the way most consistent with modern constitutionalism and the fundamental human rights of the governed ultimately to choose for themselves and to secure the laws that are best for them[57].

Michael Kirby[*]

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[57] It is recognised that a full understanding of the traditions of each system of law and of its institutions and procedures requires detailed empirical study and cultural awareness. Such studies are now beginning. See eg J Hodgson, *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France* (Oxford, Hart Publishing, 2005).

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LAW QUARTERLY REVIEW

JUDICIAL DISSENT - COMMON LAW AND CIVIL LAW TRADITIONS

The Hon Justice Michael Kirby AC CMG