

NEW SOUTH WALES JUDICIAL OFFICERS' BULLETIN

APPELLATE COURTS, AND DISSENT*

The Hon Justice Michael Kirby**

Diversity as the protectress of freedom

For an appellate court to reach the highest standards of achievement, there must be diversity amongst its members. If every judge has the same judicial philosophy, background and experience, a court is seriously weakened. Chief Justice John Bray of the Supreme Court of South Australia once said that "diversity is the protectress of freedom". He was right.

In collegiate courts, diversity is also a protector of intellectual rigour, as each judge measures his or her opinions against those of colleagues who may approach the law and judging in a slightly different way and sometimes come to different conclusions about the law's requirements and how to express them. To my mind, manifest diversity of judicial opinions is yet another of the great

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gifts of the English judiciary to the world. In Australia, we are beneficiaries of that gift.

Diversity in Australian courts

Most of the world's legal systems do not permit dissenting judicial opinions. Most courts of the civil law tradition do not allow discursive reasoning that reveals the variety of factors that illuminate the judge on the path to decision. Most legal systems are intolerant of heterodox views. They are frozen in a pretence that law is always clear, that words of contracts and statutes - even of the Constitution - are unambiguous and that judges merely *apply*, and never *make*, the law. This simplistic view is shared by politicians, media pundits and even some lawyers in Australia. But it is not our legal tradition. Nor should it be so. My years in the Court of Appeal of New South Wales taught me how important diversity of judicial philosophy, professional service and life's experience can be in building a great court - great by the world's standards.

In the Court of Appeal in the mid-1980s I sat with, and observed Chief Justice Sir Laurence Street and Justices Robert Hope, Harold Glass, Gordon Samuels and Dennis Mahoney, great judges, as they gave countless *ex tempore* judgments. I tried to copy their skills. In time, and with experience and confidence, it became easier: as it does for all of us.

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I agree wholeheartedly with something that Justice Dyson Heydon said on his departure from the Court of Appeal to take up his appointment to the High Court. The time when I arrived in the Court of Appeal represented golden days. I was very lucky to be appointed to the Court at such a time.

When we were joined in the Court of Appeal a few months after my arrival by Michael McHugh I would sometimes sit in the Court with him and Bill Priestley. R P Meagher QC was often heard to lament, on his way to court, that he was going to appear before "those three communists". Yet the strength of the Court of Appeal, as I found it, lay in the mixture of the judicial philosophies of its judges.

I suppose one could put Justices Hope, Priestley and myself, and occasionally Justice McHugh, on the liberal side. Justices Glass, Samuels and Mahoney were often more conservative in matters of judicial technique. The mixture has continued in the New South Wales Court of Appeal. It exists throughout the Supreme Court of New South Wales, and to varying degrees in every Australian court. The diversity of judicial philosophies, combined with the differing professional and judicial experience, created in the New South Wales Court of Appeal an appellate court that set the gold standard throughout the English-speaking world.

Why societies need dissent

Recently I was in Chicago at the famous law school that helped found the law and economics movement. I spent some time with Richard Posner, a lively intellectual and a formidable federal judge who wrote *Economic Analysis of Law* (5th ed, 1998) and many other stimulating works. One of the professors, Cass Sunstein, gave me copy of his new book *Why Societies Need Dissent*. It is not specifically a book about law. It is a book about the importance of hearing different voices, with different information, in politics, business and society.

Professor Sunstein's book tells the story of John Kennedy's error at the Bay of Pigs. Of Lyndon Johnson's nightmare in Vietnam. Of Richard Nixon's debacle at the Watergate. Of the Ford Motor Company's mistake with the *Edsel* and many other big and small mistakes. These errors came about chiefly because dissenting voices were ignored or suppressed. In a sense, Sunstein's book is a prolonged *coda* that explores the reasons that lie behind Chief Justice Brandeis's Australian defence of diversity, including in the law.

Professor Sunstein justifies some of the inefficiencies inherent in the American constitutional system (many of which we have followed in Australia) with a homely story from history¹:

"[O]n his return from France, Thomas Jefferson called on George Washington to account at the breakfast table for having agreed to a second Chamber. 'Why', asked Washington, 'did you pour that coffee into your saucer?' 'To cool it', quoth Jefferson. 'Even so' said Washington, 'we pour legislation into the Senatorial saucer to cool it'."

In courts too we allow for a second look at decisions. None of us is so proud that we are certain that we have the whole truth. By diversity, we seek to ensure that we "*cool* it" and, when required, that we *heat* it a little. Sunstein devotes a chapter of his book to judicial dissent. He asks: Are judges subject to conformity effects? Are such effects likely to cascade? Do like-minded judges, sitting together, tend to move to extremes? What is the effect of anticipated or actual dissents in a collegiate court?

By an analysis of the record of judicial decisions in the United States Circuit Courts, Professor Sunstein concludes that the appointees of Republican Presidents are generally likely to vote more conservatively than the appointees of Democrats. That a judge's ideological tendency is likely to be dampened if he or she is

¹ C Sunstein, *Why Societies Need Dissent* (Harvard, 2003), 153.

sitting with two judges appointed by a President from a different political party. Personal inclinations will tend to be amplified if sitting with two judges appointed by a President from the same political party. The survey was conducted over an extended period and with a large judicial sample. It allows for personal exceptions and variations over particular issues. It acknowledges departures where the law is completely clear. But, overall, the results are consistent, indeed marked. Judges have coherent attitudes. They tend to have a world-view, just as Julius Stone taught us so long ago. Sunstein asks - does this come as a surprise?²

Accepting that judicial decisions in Australia are somewhat different because of the absence of a Bill of Rights, different modes of appointment and professional traditions, it still seems likely that some, at least, of Sunstein's conclusions may have relevance for the Australian judiciary. As if to respond to Australian self-assurance that we are different, Sunstein concludes³:

"Many people think that in the United States, there is no fundamental difference between judges appointed by Presidents of different political parties. Such people emphasise that once on the Bench, judges frequently surprise those who nominate them. This view is misleading and fundamentally wrong. To be sure, some

² *Ibid*, 168.

³ *Ibid*, 184-186. A thought somewhat similar to the conclusion in this passage appears in M Beazley, "Women on the Bench" *Reform* (ALRC). Issue 33, 2003, 20 at 23.

judicial appointees do disappoint the Presidents who nominated them. ... But we should not be fooled into thinking that these examples are typical. Judges appointed by Republican Presidents are quite different from judges appointed by Democratic Presidents. ... The existence of diversity on a ... panel is likely to bring that fact to light and to move the panel's decision in the direction of what the law actually requires. The existence of potentially diverse judges, and of potential dissenter ... increases the chance that the law will be followed ... A decision is more likely to be right, and less likely to be political in a prerogative sense, if it is supported by judges with different predilections".

Diversity in judicial appointments

Contrary to received wisdom, the capacity of politicians, elected by the people, to influence over time the composition of important courts in Australia, is not a weakness of our constitutional and judicial system. It is a strength. It is precisely how the Constitution is expected to work. I do not agree with the idea of judicial appointment commissions made up mainly of judges, lawyers and other worthies from the elite. Such bodies, almost certainly would, clone-like, reproduce judges just like themselves. We do not need this. I witnessed the strength of diversity in the judiciary in the Court of Appeal of New South Wales. I discovered, truly, that diversity of judicial outlook was a most precious intellectual commodity. The conception of invariable certainty about the law, or incontestable judicial outcomes, is an infantile belief. Contemporary judges owe it to the people whom they serve to explain why this is so.

The happiest time of my judicial years were spent on the Supreme Court of New South Wales. There are many reasons why that was so. But the chief of them lay not in the court's traditions and history, still less in matters of status, salary, colourful ceremonies or nostalgia about the "good old days". It lay in the comradeship of colleagues, arrayed in all their robust diversity. May it always be so in our courts. Diversity is the protectress of freedom.

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