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EQUALITY & DIVERSITY IN OUR COMMUNITY

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DISSENT AND THE IMPORTANCE OF JUDICIAL DIVERSITY*

The Hon Justice Michael Kirby AC CMG**

Dissent in judicial opinions is a special feature of legal systems, like those of Australia and New Zealand, that trace their origins to England. In the European legal tradition, judges generally have no right to dissent. This practice is commonly justified on the basis that expressing disagreement over decisions will undermine public confidence in the certainty and clarity of the law. When I visited the Conseil Constitutionnel of France in Paris recently, only one of the members I spoke with favoured a right to dissent. We are all the products of the legal tradition in which we were raised.

* This text draws on an address to the dinner of the judges of the Supreme Court of New South Wales on 12 February 2004 now published in *Judicial Review* (March, 2004) and an address delivered to Inter Alia, the Law Students' Society of James Cook University in Cairns, 26 February 2005.

** Justice of the High Court of Australia.

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 of law are intolerant of heterodox views. They are frozen in a pretence that law is always clear, that words are unambiguous and that judges merely *apply*, and never *make*, the law. However, this 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. I believe that the same has been true in New Zealand. However, it may not have been so noticeable to the public and the legal profession, because of the absence of a written national Constitution, difficult to assert.

The different judicial tradition in Australia and New Zealand is different, probably the result of the more libertarian history of England which we inherited. Possibly it is because our leading judges are chosen in middle age from the most experienced advocates in the private sector. They are not promoted by government in a career judiciary. Our judges are therefore more resistant to pressures from government and also from their colleagues. Judicial independence includes independence from each other. Most judges are subject to correction on appeal or review. But the only masters of the judges are conscience and the judge's understanding of the law and the facts of the case.

For an appellate court to reach great strengths there is a need for diversity amongst its members. If everyone has the same judicial philosophy, background and experience, a court is seriously weakened. Chief Justice John Bray of the Supreme Court of South Australia was correct to say that "diversity is the protectress of freedom". In courts, diversity is also a protector of intellectual rigour, as each judge measures his or her opinions against those of colleagues who may approach judging in a slightly different way and sometimes come to different conclusions about the law's requirements and how they should be expressed. To my mind, this is yet another of the great gifts of the English judiciary to the world, including to the courts of New Zealand and Australia.

In the higher courts, disagreements over the law are inescapable and quite common¹. The words in the Constitution or Bill of Rights provisions are inescapably contentious². The language of Acts of Parliament is frequently ambiguous³. Especially in rapidly changing times, there may be no exact precedent in the common

¹ M D Kirby, *Judicial Activism* (Hamlyn Lectures, 2003), (2004), 78-83.

² M D Kirby, "Are We all Nominalists Now?" (2004) 9 *Deakin Law Review* 523, referring to recent decisions of the High Court of Australia on the word "alien" in s 51(xix) of the Constitution and "jury" in s 80.

³ *Newcastle City Council v GIO General Ltd* (1998) 191 CLR 85 at 109; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [70]-[71].

law for a new problem of society or technology⁴. So judges have a creative role to solve such uncertainties, however much some might suggest otherwise⁵.

The demand by observers for unanimity amongst judges is infantile. If it is an insistence that judges hide their disagreements from the public they serve, it denies the ultimate sovereign, the people, the right to evaluate, and criticise, judicial choices. Pretending that everything is certain in the law, and that judges simply operate on automatic pilot, will deceive relatively few who are informed. This is why the appointment of judges, especially to final courts, is such an important entitlement, correctly prized by governments.

Studies of judicial opinions demonstrate beyond argument a high consistency in the patterns of the decisions that different judges make⁶. Expressing the law is a process shaped by values. Judges, like most mortals, have values. As judges, they have a vision of the Constitution, of Bill of rights provisions and of society,

⁴ See eg *Cattanach v Melchior* (2003) 215 CLR 1.

⁵ Contrast J D Heydon, "Judicial Activism and the death of the Rule of Law (2004) *Otago Law Review* 493 and M D Kirby, "Judicial Activism? A Riposte to the Counter-Reformation?" (2005) 11 *Otago Law Review* 1.

⁶ A R Blackshield, "Quantative Analysis: The High Court of Australia 1964-1969" (1972) 3 *Lawasia* 1; G Schubert, "Political Ideology and the High Court" (1968) 3 *Politics*, 21.

its fairness and justice. Some tend to be more concerned than others about protecting human rights and fundamental freedoms. Governments of all persuasions know this. It influences their judicial appointments. Rarely are they as candid as the then Australian Acting Prime Minister, Tim Fischer was, after the *Wik* decision of the High Court of Australia on native title in 1996⁷. He declared that the government would appoint "capital C conservative[s]" to the High Court. Yet whether they say it or not, in my experience, governments of all political persuasions usually try to appoint judges who will be competent but also who, they hope, will be in general harmony with their values.

A recent analysis by Mr Andrew Lynch and Professor George Williams has shown divisions in the voting patterns of the current Justices of the High Court of Australia⁸. Except for a honeymoon period of three years when the Court was first established in 1903, there have always been divisions, reflecting the different philosophies and perspectives of the office-holders. A dissent, expressing disagreement over the outcome of a case, is an appeal to

⁷ N Savva, "Fischer seeks a more conservative court" *The Age* (Melbourne), 5 March 1997, at pp 1-2.

⁸ A Lynch and G Williams, "The High Court on Constitutional Law: The 2004 Statistics", unpublished paper delivered to a conference, Sydney, 18 February 2005 reported *Sydney Morning Herald* 18 February 2005, p 9 (hereafter "Lynch and Williams").

the future⁹. Before 1977, when the Justices of the High Court of Australia served for life, they often lived long enough to see their dissents accepted. For example, Isaac Isaacs from 1907 insisted on a different way of interpreting the Australia Constitution¹⁰. It was not fully accepted until 1921¹¹. It has generally survived ever since. Sir Owen Dixon patiently laid down his approach to the law which was gradually embraced during his thirty-five year service¹². Today, because High Court judges in Australia must retire at 70¹³, the appeal of dissent must generally be addressed to the judge's successors, to the legal profession, to the academy and to the young.

Lynch and Williams, by reference to the decisions in the High Court of Australia in 2004, showed the strong concurrence in the

⁹ Chief Justice Charles E Hughes, *The Supreme Court of the United States* (1936), p 68; cf A Lynch, "Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia" (2003) 27 *Melbourne University Law Review* 724 at pp 744-748.

¹⁰ eg *Federated Engine-Drivers and Firemen's Association of Australia v The BHP Company Ltd [No 2]* (1913) 16 CLR 245 at 278; *Federated Municipal & Shire Council Employees' Union of Australia v Melbourne Corporation* (1919) 26 CLR 508 at 526.

¹¹ *Amalgamated Society of Engineers v Adelaide steamship Co Ltd* (1920) 28 CLR 129 at 144; (1921) 29 CLR 406 at 413.

¹² K M Hayne, "Owen Dixon" in T Blackshield, M Coper and G Williams (eds) *The Oxford Companion to the High Court of Australia* (2001) 218 at 220.

¹³ Constitution, s 72, following the *Constitution Alteration (Retirement of Judges)* 1977.

voting in individual cases of four of the current judges who generally share each other's viewpoint¹⁴. They disagree amongst themselves in very few instances. On the other hand, Justice McHugh dissented in 14% of cases, Justice Callinan in 22% and I in 38% of all cases¹⁵. My disagreement in constitutional cases last year, stood at 52% - the highest in the history of the High Court of Australia¹⁶.

On their own, statistics tell little. To understand dissent it is necessary to look at the cases themselves to see what the disagreement has been about. Thus, in 2004, my dissents concerned:

- The power of federal authorities to hold indefinitely in detention a stateless person who could not be deported to his own country¹⁷;
- The power of federal officials potentially to expel more than half a million British subjects from Australia as "aliens"¹⁸;

¹⁴ Lynch and Williams, above n 8, p 6.

¹⁵ *Ibid*, Table D(I), p 6. For dissent rates over the history of the High Court of Australia, see M Groves and R Smyth, "A Century of Judicial Style - Changing Patterns in Judgment Writing on the High Court of Australia 1903-2001" (2004) 32 *Federal Law Review* 255 at 269 (Figure 5).

¹⁶ Lynch and Williams, above n 8, p 7, Table D(II).

¹⁷ *Al-Kateb v Godwin* (2004) 78 ALJR 1099; 208 ALR 124.

¹⁸ *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 78 ALJR 203; 203 ALR 143.

- The power of State parliaments to engage judges in the indefinite detention of prisoners who have completed serving their prison sentences¹⁹; and
- The expansion of the powers of military tribunals over civilian-type offences²⁰.

In these and other decisions, important values and notions of the Australian Constitution and of society were at stake. They are, of course, questions upon which informed people can have different opinions. Only by disclosing conflicts of judicial opinion do Parliament and the people secure the opportunity to evaluate the justice and direction of the laws in the nation's courts.

Recently, an important book was published in the United States by Cass Sunstein, Law Professor at the University of Chicago. In the book, *Why Societies Need Dissent*²¹, Sunstein explains why honesty, transparency and dissent are vital to the good health of all institutions, not just the courts. He instances how

¹⁹ *Baker v The Queen* (2004) 78 ALJR 1483; 210 ALR 1; *Fardon v Attorney-General (Qld)* (2004) 78 ALJR 1519; 210 ALR 50.

²⁰ *Re Colonel Aird; Ex parte Alpert* (2004) 78 ALJR 1451; 209 ALR 311.

²¹ (2003). See review essay: 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; cf M D Kirby, "Tradition and Diversity - Twin Strengths of the Judiciary" (2004) 42 *Law Society Journal* (NSW) 76 at 78.

President Johnson's was gradually mired in Vietnam, the Ford Motor Company's debacle with the *Edsell* motor car and judicial failings in Nazi Germany and Vichy France²² as products of institutional silence where contrary voices should have been raised.

Professor Sunstein justifies the inefficiencies inherent in the American constitutional system (many of which we have followed in Australia) with a homely story from history²³:

"[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 judicial diversity of approach and opinion, 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

²² M Curtis, *Verdict on Vichy: Power and Prejudice in the Vichy France Regime* (2004) 105, 305, 347.

²³ C R Sunstein, *Why Societies Need Dissent* (Harvard, 2003), 153.

extremes? What is the effect of anticipated or actual dissents in a collegiate court?

Sunstein warns specifically about the psychological tendency for judges in appellate courts to conform to majority opinions, describing a so-called "cascading effect" in group psychology that involves going along with the majority²⁴. It is usually easier to agree. Concurring in someone else's opinion may be more congenial to colleagues. It certainly involves less work than expressing one's own contrary opinion.

By an analysis of the record of judges' decisions in the United States Circuit Courts, 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 sitting with two judges appointed by a President from a different political party. Conversely, it will 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 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 tend to

²⁴ Sunstein, above n 23. See Lynch (2004) 32 *Federal Law Review* 311 at 320-322 ("Dampening - The Pull of Conformity).

have coherent attitudes. They tend to have a world-view, just as Julius Stone taught in Auckland and Sydney so long ago. Sunstein asks - does this come as a surprise?²⁵

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 to me that some, at least, of Sunstein's conclusions may have relevance for the Australian judiciary. Perhaps they are relevant to the New Zealand scene with your Bill of Rights legislation and the new Supreme Court. As if to respond to Australian self-assurance that we are different, Sunstein concludes²⁶:

"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 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 a potential dissenter ... increases the chance that the law will be

²⁵ *Ibid*, 168.

²⁶ *Ibid*, 184-186. A thought somewhat similar to the conclusion in this passage appears in M Beazley, "Women on the Bench" (2003) 83 *Reform* (ALRC). Issue 33, 2003, 20 at 23.

followed ... A decision is more likely to be right, and less likely to be political in a pejorative sense, if it is supported by judges with different predilections".

Sunstein instances many cases in the United States Supreme Court where dissents have later been vindicated. They include the dissents in *Dred Scott v Sandford*²⁷ to the ruling upholding slave owners' rights and the dissents in *Dennis v The United States*²⁸ which upheld the laws against communists, similar to those struck down in the High Court of Australia a few months later²⁹. In big cases, especially constitutional and public law ones, it is vital that judges get it right. They are more likely to do so if they listen to, and hear, views different from their own first inclinations.

My dissent rate is higher than that of any judge of the High Court of Australia in the past³⁰. However, this is probably a product of the changing composition of the court, the types of legislation, federal and State, that have come under scrutiny and the

²⁷ 60 US (19 Howard) 393 (1857).

²⁸ 341 US 494 (1951).

²⁹ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

³⁰ cf A Lynch, "The Gleeson Court on Constitutional Law: An Empirical Analysis of Its First Five Years" (2003) 26 *University of New South Wales Law Journal* 32; M Bagaric and J McConnill, "Illusions of disunity" (2004) 78 *Law Institute Journal* (Vic), (9), p 37; A Lynch, "Dissent"- Towards a Methodology for Measuring Judicial Disagreement in the High Court of Australia" (2002) 24 *Sydney Law Review* 470.

introduction of the universal system of special leave that has influenced the types of case that now come before the court. There are now no easy appeals. I agree with the assessment of Lynch and Williams that, had I been sitting in the High Court of Australia when Chief Justice Mason presided in the 1990s, my dissent level would have been closer to that of the current majority in the Court³¹. Timing is important in the law, as in life. If the *Mabo* case³² on Aboriginal land rights, the *Capital Television* case³³ on constitutionally protected speech and the *Dietrich* case³⁴ on entitlements to representation in criminal trials had come to the High Court in its present composition, the outcomes might have been very different. In the business of judging, especially in final national courts, much depends on the time of one's appointment and the values of one's colleagues.

To check these propositions, I went back to my decisions in 1995 - the last year that I served as President of the New South Wales Court of Appeal. In that year, leaving aside formal

³¹ Quoted in Lynch (2004) 32 *Federal Law Review* 311 at 326.

³² *Mabo v Queensland [No 2]* (1992) 175 CLR 1. See Heydon, above n 5, at p 510.

³³ *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106. See Heydon, above n 5 at p 506.

³⁴ *Dietrich v The Queen* (1992) 177 CLR 292; contrast *McInnes v The Queen* (1979) 143 CLR 575. See Heydon above n 5, at p 510.

decisions³⁵, there were 234 cases in which I participated and gave reasons. In 198 of these (84.6%) I was in the majority. In 36 (15.4%) was I in dissent. In 64 cases (27%) my reasons were given for a unanimous Court. In a further 27 (11.5%) at least one other judge agreed in my reasons, without adding any of his own. These figures tend to demonstrate that a judge's reputation as "the great dissenter" depends on whom he or she is dissenting from: on their approach to the law, their values, where relevant, their vision of the Constitution and their view of Australian society, and, perhaps, where the judge in question sits in the judicial hierarchy.

During the time in the High Court of Australia when Sir Anthony Mason was Chief Justice, Justice Daryl Dawson was often in dissent against the important constitutional and other decisions of that time³⁶. I frequently disagreed with his reasons and conclusions at that time. However, I admired unreservedly his expression of them and the tradition of our courts that constantly challenges us,

³⁵ The figures do not include many cases, especially in the motions list, where orders were pronounced, with unanimity and reasons of no more than a sentence or two. They also omit the residue of appeals in which orders were made and reasons published between 1 January 1996 and 5 February 1996 before the author's commission in the High Court of Australia took effect on 6 February 1996.

³⁶ For example, Dawson J alone dissented in *Mabo* (1992) 175 CLR 1 at 120; he dissented in *Australian Capital Television* (1992) 177 CLR 106 at 177; and in *Dietrich* (1992) 177 CLR 292 at 338. However, see the comment of C Saunders, "Darryl Dawson" in Blackshield, Coper and Williams, *Oxford Companion*, above n 12, 190 at 192.

as lawyers and citizens, with the choices being made. Just as Justice Dawson's values have now returned to the ascendancy in Australia, so, in due course, will the values of Justices Mason, Brennan, Deane, Toohey and Gaudron. In such ways, but at a distance, our highest courts tend to track the philosophical changes occurring in the nation, reflected, in turn, in periodic electoral changes. Those who deny such things are hopelessly naïve or self-deceptive. It is just the way our institutions work.

Being in dissent can be uncongenial and burdensome. Accordingly, in the New South Wales Court of Appeal, we had institutional procedures to reduce needless dissent for sometimes it is highly desirable to strive for a single, unanimous opinion³⁷. Our techniques included the fair assignment to all judges of the writing of the primary draft and a culture of mutual respect, reinforced by happy social intercourse. These methods have never been features of the High Court of Australia. Perhaps they are observed in New Zealand. One day, perhaps, they will come in Australia; but not in my judicial lifetime.

There are many in society who hate disagreement, demand unanimity and insist on more consensus, including amongst appellate

³⁷ cf C Moisisdis, "Dispelling misconceptions about appellate judgments" (2004) 78 *Law Institute Journal* (Vic) (12), pp 70-73.

judges. They speak endlessly of the need for clarity and certainty in the law. Truly, these are goals to be attained if at all possible. But judges must not achieve them at the sacrifice of truth, independence and conscience. There are many failings in the judicial system of our two countries for the judiciary is a human institution. Yet amongst its greatest strengths is the role it gives to judges to state their honest opinions. As citizens, we can agree or disagree with those opinions. But we must vigilantly protect, and cherish, these open procedures. And that includes the expression of disagreement, where it exists.

The dissenting judge may, or may not, be vindicated by history. The true vindication for the dissenting judge arises at the moment of the decision when truth, as it is seen, is spoken and conscience is clear. The right and duty to dissent signals that every judge, whatever his or her values, honestly states the law and its application to the case as conscience dictates. If we think about it, we would not have it any other way. Going along with the numbers and with sheer power may work in Tammany Hall. It has no place in our courtrooms.

Contrary to received but recent wisdom, the capacity of politicians, elected by the people, to influence over their time the composition of important courts in Australia, is not a weakness of our constitutional and judicial system. In my view, it is a strength. Indeed, it is precisely how the Constitution is expected to work. I

witnessed that strength in the Court of Appeal. I discovered, truly, that diversity of judicial outlook was a most precious commodity. That conceptions of invariable certainty about the law, or of judicial outcomes, is an infantile belief. And that judges owe it to the people they serve to explain why this is so.

There are, of course, very strong arguments for greater diversity in the appointment of the Justices of the High Court of Australia in terms of geography, gender, ethnicity, judicial outlook, legal and other experience. Yet the appointments arise but rarely. Correctly, they are greatly prized by each government that makes them, never so much as today.

The result is that, in Australia at least, governments of all political persuasions, try to know the track record of those whom they appoint. They want this as a hoped-for predictor for future judicial performance. Inevitably, this means a search amongst the entrails of earlier legal writing. Appointed, the judges are completely independent of the government that selected them just as they are in New Zealand. Some do indeed disappoint their appointers; and all do so from time to time. Judges of liberal repute and expectation turn out to be died-in-the-wood conservatives and vice-verse. Sir William Deane in Australia was one of the vice-versas. So the world view of most judges is part of the reality of our democratic

constitutional arrangements. It is naïve to deny it. I do not see our system of judicial appointment changing in Australia in my lifetime.³⁸ I am not convinced that it should. Yet a realisation of the importance of diversity is an obligation of those who temporarily enjoy the privilege of selection.

There are other things to do with a brief and precious life. To climb the Matterhorn. To study ancient Khmer. To enter a Trappist monastery. To master quantum physics. To improve a golfing handicap. Or just to lie on a beach and read the tragic poems of Euripides. We have chosen a different path. We, the judges, are lucky to share a precious life's experience in the courts. For me, the happiest time of my judicial years were spent on the Court of Appeal. There are many reasons why that was so. But the chief of them lay not in traditions and history, still less in status, salary, colourful ceremonies or the fading little flower carpet on the corridor floor behind the old Banco Court in Sydney. It lay in the comradeship of colleagues, arrayed in all their robust diversity. And the diversity of values and opinions of the judges - not hidden but openly displayed for the citizen, the judiciary and the legal profession

³⁸ Cf, R Smith, "Judicial Concerns" (2003) October *Counsel – Bar News* (UK), October 2003, 22; contrast R Davis and G Williams, "Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia" (2003) 27 *Melbourne University Law Review* 819, 827.

to observe and evaluate. May it always be so in our courts.
Diversity is the protectress of freedom.