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JUDICIAL DISSENT IS AN APPEAL TO THE FUTURE

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In the higher courts, disagreements over the law are inescapable and quite common. The words in the Constitution are contentious. The language of Acts of Parliament is frequently ambiguous. Especially in rapidly changing times, there may be no exact precedent of common law for a new problem of society or technology. So judges have a creative role to solve such uncertainties, however much some might prefer to deny or hide it.

The demand for unanimity amongst judges is often 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 now deceive relatively few. This is why the appointment of judges, especially to final courts, is such an important right, prized by governments.

Studies of judicial opinions demonstrate beyond argument a high consistency in patterns of decisions which different judges show in their decision-making. Expressing the law is inescapably a process shaped by values. Judges, like most mortals, have values. As judges, they have a vision of the Constitution and society, its fairness and justice. Some are more concerned than others about human rights and protecting fundamental freedoms. Governments of all persuasions know this. It influences their judicial appointments. Rarely are they as candid as Tim Fischer was, after the *Wik* decision

on native title in 1996, when he declared that the government would appoint "capital C conservative[s]" to the High Court. But whether they say it or not, governments of all political persuasions usually try to appoint judges who will be competent but also in general harmony with their values.

A recent analysis by Professor George Williams and Andrew Lynch has shown divisions in the voting patterns of the current Justices of the High Court. Except for a honeymoon period of four 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 the future. In the old days, when the judges served for life, they often lived long enough to see their dissents accepted. Isaac Isaacs in 1907 insisted on a different way of interpreting our Constitution that was not accepted until 1921. It has survived ever since. Owen Dixon patiently laid down his approach to law which was gradually embraced during his thirty-five year service. Today, because the judges must retire at 70, the appeal of dissent must generally be addressed to the judge's successors, to the legal profession and to the young.

Williams and Lynch, by reference to last year's decisions in the High Court, showed the strong concurrence in the voting of individual cases of four of the current judges who generally share

each other's viewpoint. They disagree amongst themselves in very few cases. On the other hand, Justice McHugh dissented in 14% of cases, Justice Callinan in 22% and I in 38% of all cases. My disagreement last year in constitutional cases, stood at 52% - the highest in the history of the High Court.

Statistics tell little. To understand dissent it is necessary to look at the cases to see what the disagreement has been about. Thus, in the year past, my dissents have concerned:

- The power to hold indefinitely in detention a stateless person who could not be deported to his own country;
- The power of federal authorities potentially to expel half a million British subjects from Australia as "aliens";
- The power of State parliaments to superimpose indefinite detention of prisoners who have completed serving their prison sentence; and
- The expansion of the powers of military tribunals over civilian-type offences.

In these and other decisions, important values and notions of our constitution and Australian society were at stake. Only by disclosing conflicts of judicial opinion do Parliament and the people get the opportunity to evaluate the justice and direction of the laws in the nation's highest court.

Recently, an important book was published in the United States by Cass Sunstein, Law Professor at the University of Chicago. That University is often referred to as the 'think tank of capitalism'. In the book, *Why Societies Need Dissent*, Sunstein explains why honesty, transparency and dissent are vital to the good health of institutions. He instances President Johnson's gradual involvement in Vietnam, the Ford Motor Company's debacle with the *Edsell* motor car and judicial failings in Nazi Germany and Vichy, France as the products of institutional silence where contrary voices should have been raised. He warns about a judicial tendency to conform to majority opinions, describing a so-called "cascading effect" of going along with the majority. It is usually easier to do so. Concurring in someone else's opinion involves less work than expressing one's own disagreement.

Sunstein instances many cases in the United States Supreme Court where ringing dissents have later been vindicated. They include the dissents in *Dred Scott v Sandford* in 1857 to the ruling upholding slave owner's rights and the dissents in *Dennis v The United States* in 1951 which upheld the laws against communists similar to those struck down in the Australian High Court a few months later. In big cases, especially constitutional 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 inclination.

My dissent rate is higher than that of any High Court judge in the past. But this is the product of the changing composition of the Court and the types of legislation, federal and State, that have come under scrutiny. I agree with the assessment of Williams and Lynch that, had I been sitting in the High Court when Chief Justice Mason presided in the 1990s my dissent level would have been closer to that of the current majority in the Court. Timing is important in the law, as in life. If the *Mabo* case on Aboriginal land rights, the *Capital Television* case on constitutionally protected speech and the *Dietrich* case on rights to representation in criminal trials had come to the High Court in its present composition, the outcomes would probably have been very different. In the business of judging, much depends on the time of one's appointment and the values of one's colleagues.

To check this theory, I went back to my decisions in the last year that I served as President of the New South Wales Court of Appeal (1995). In that year, leaving aside formal decisions, there were 234 cases in which I participated and gave reasons. In 198 of these (84.6%) I was in the majority. In only 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 reputation as "the great dissenter" depends, for a judge, on whom one is dissenting from: on their approach to the law, their values and their vision of the Constitution.

During the Mason Court, Justice Daryl Dawson was often in lone dissent against the important constitutional and other decisions of that time. I often disagreed with his reasons and conclusions. But I admired his expression of them and the tradition of our courts that challenged us, as citizens, with the choices being made. Just as Justice Dawson's values have returned to primacy, so, in due course, will those of Justices Deane, Mason, Brennan, Gaudron and Toohey. In such ways, but at a distance, our highest courts tend to track the philosophical changes occurring in the nation, reflected, in turn, in 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. In the Court of Appeal, we had institutional procedures to reduce needless dissent for sometimes it is highly desirable to strive for a single, unanimous opinion. 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. One day, perhaps, they will come; but not in my lifetime.

There are many 'control freaks' in society who hate disagreement, demand unanimity and insist on more consensus, including amongst appeal judges. They speak endlessly of the need

for clarity and certainty in the law. Truly, that is a goal to be attained if at all possible. But not at a sacrifice of truth, independence and conscience. There are many failings in the judicial system of Australia for it is a human institution. But amongst its greatest strengths is the role it gives to judges to state their honest opinions. As citizens, we can agree or disagree. 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. However, the true vindication arises at the moment of decision. The right and duty to dissent signals that every judge, whatever his or her values, honestly states the law and its application 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 works in Tammany Hall. It has no place in an Australian courtroom.