

## THE SEARCH FOR UNITY: THE IMPACT OF CONSENSUS SEEKING PROCEDURES IN APPELLATE COURTS

### 1. INTRODUCTION

Appellate courts can adopt various post hearing procedures. At one end of the spectrum the judges strive mightily with conferences, discussions, negotiations and the like to achieve a consensus of opinion, to be expressed in a judgment of the court. Unanimity is the primary goal though dissents and concurrences are permissible. At the other end each judge retires to 'the loneliness of the mind...[and] the quiet of his own study'<sup>1</sup> to write a judgment. Between them are those courts that have various procedures for exchange of views but are not completely committed to a search for consensus.

In 1982 the House of Lords appeared to abandon the intermediate position in favour of the unity seeking approach.<sup>2</sup> The trend of higher appellate courts appears also to be in this direction.<sup>3</sup> The decision to seek unity requires significant changes in the methodologies of these courts and in the roles played by their judges. Moreover, when such a change is adopted, not only are the form and tone of judgments altered, but also the reasoning that they employ. This article looks at this impact on legal thought, together with the benefits and losses produced by a process that seeks for unity.

### 2. PRACTICE OF THE SUPREME COURT OF THE UNITED STATES

The United States Supreme Court's post hearing practices can be taken as a paradigm of a unity seeking approach. The first formal stage of the post hearing procedure of the Court is the conference. Only the Justices attend the conference, the Chief Justice acting as conference chairman and secretary - the most junior Justice plays doorman.<sup>4</sup> Earl Warren described the conference procedure of his court as follows:

'On Saturday morning, we held a conference on the cases

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1 Barwick, 'The State of the Australian Judicature' (1977) 51 ALJ 480, 493.

2 *P v Baker* (1983) 99 LQR 371. The Law Lords had previously conferred during and after hearings and there was an informal arrangement whereby one of their number might write the major opinion. There was nothing in the system encouraging unanimity or discouraging separate concurring opinions or dissents. Consultation during the opinion writing stage varied from intense to none at all. Thus sometimes the Lords wrote seriatim opinions, in other cases, particularly criminal matters, one opinion of the House would be delivered. See Paterson, *The Law Lords* (1982) Ch 5. See further Cross, 'The Ratio Decidendi and a Plurality of Speeches in the House of Lords' (1977) 93 LQR 378.

3 The final appellate courts of India (see 70 All India Rep (1983)), Canada (see 24 DLR (4th) (1986)), New Zealand (see [1985] 1 NZLR), and South Africa (see [1986] 1 SALR) show a marked tendency to deliver majority judgments. Australia, Ireland, Hong Kong, West Indies and Papua New Guinea adopt the mixed position of majority judgments, individual judgments with concurrences and seriatim opinions. See (1985) 159 CLR; [1983] IR; [1985] HKLR; 29 WIR; [1984] PNGLR. For the position in 1953 see McWhinney, 'Comparative View of Opinion-writing in Final Appellate Tribunals' (1953) 31 Can BR 595, 601-609.

4 Warren, *The Memoirs of Earl Warren* (1977) 283.

heard during the week. The procedure was very simple. In each case, the Chief Justice would, in a few sentences, state how the case appeared to him, and how he was inclined to decide it. Then beginning with Justice Black, the senior Justice, each would speak his mind in a similar manner...Then we proceeded down the line until everyone had spoken briefly in this formal manner. During all of this, nobody was interrupted and there was no debate. If we were all of one mind and no one desired to say anything more, the case was ready for assignment for the writing of the opinion. The Chief Justice always assigned the opinion to be written if he were with the majority. If he were not, the senior Justice who was with the majority made the assignment. If, after the first canvassing of the court...there was a difference of opinion, the case was open for debate...The discussion proceeded in an orderly manner until all had spoken as much as they desired. If they were ready to vote, we did so at that time. In voting we reversed the process and first called on the junior member...with the Chief Justice voting last.<sup>5</sup>

The discussion in conference does not always proceed in the orderly fashion described by Chief Justice Warren.<sup>6</sup> Also the voting procedure is not as simple as it seems. If the case is complex the Chief Justice might have difficulty determining where the majority lies.<sup>7</sup> This will depend on his ability to accurately synthesize the views expressed.<sup>8</sup> If unanimity is considered essential the Chief Justice can ask that no votes be taken in order that positions might not solidify.<sup>9</sup>

The selection of the majority opinion writer is critical. It is also open to manipulation. The Chief Justice might, where the views expressed by the other justices are uncertain or tentative, indicate that he forms part

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5 Ibid 282-283. Other general works on the court are: Bickel, *The Unpublished Opinions of Mr Justice Brandeis* (1957); Douglas, *Go East Young Man* (1974); Kluger, *Simple Justice* (1975); Mason, *Harlan Fiske Stone: Pillar of the Law* (1956); Murphy, *Elements of Judicial Strategy* (1964); Murphy and Pritchett, *Courts, Judges and Politics* (2nd edn 1974); White, *The American Judicial Tradition* (1976). Woodward and Armstrong's *The Brethren* (1979) is the most detailed description of the workings of the Burger court. The book received some criticism, primarily because of its journalistic style, its reliance on hearsay and the ethics of those connected with the publication of confidential information. However, the book has been viewed as a generally accurate account of the court's workings. See for example the following reviews of the book: (1981) 44 MLR 739, 742; (1980) 55 NYULR 149, 154-155; (1980) 128 U Penn LR 716, 725; (1979) 47 U Chicago LR 185, 192; (1980) Wis LR 429, 433-437. *The Brethren* is useful for the purposes of this paper in that it indicates what might happen under the majority seeking approach. For criticism of the book's accuracy in individual items see Lewis, 'Supreme Court Confidential' NY Rev of Books, 7 Feb 1980, 3; Murphy, 'Spilling the Secrets of the Supreme Court' Wash Post Book World, 16 Dec 1979, 1.

6 Danelski, 'The Influence of the Chief Justice in the Decisional Process' in Murphy and Pritchett, supra n 5 at 528; Woodward and Armstrong, supra n 5 at 45.

7 Ibid 113.

8 Danelski, supra n 6 at 527.

9 Ulmer, 'Earl Warren and the Brown Decision' in Murphy and Pritchett, supra n 5 at 508; Grossman, 'The Brethren: Inside the Supreme Court', 434 points out that under Warren Burger's Chief Justiceship the court had adopted a more fluid notion of preliminary votes rather than fixed formal votes - the former being indicated merely by the statements of the justices in conference.

of a majority that does not exist.<sup>10</sup> This would permit him to grasp the initiative by drafting the 'majority opinion'. It has also been suggested that the Chief Justice is entitled to modify his views on a case to ensure that he forms part of a majority, thereby mitigating the impact of an unwelcome decision by retaining choice of the majority writer.<sup>11</sup> The Chief Justice could choose to write for the court where his views did not command a majority because of a belief that institutional solidarity on the point was more important than the expression of individual opinion.<sup>12</sup> A Chief Justice may employ a tentative or uncertain member of the majority to write the court's opinion so cementing him to the group by forcing him to make the opinion his own.<sup>13</sup>

The conference and selection of the majority opinion writer constitutes the first formal stage of the process. It may be, however, that prior to the conference, some Justices might consolidate a position on a case and form a strategy for dealing with any possible opposition.<sup>14</sup>

After the conference the Justices tend to freely discuss the case and the views of their colleagues with their law clerks.<sup>15</sup> If the case is a controversial one, discussion, negotiation, and mediation will continue. The judges might deal directly with each other, or the law clerks may act as intermediaries.<sup>16</sup> An important tool in the negotiation process is the draft or slip opinion. These drafts are prepared by the majority writer and dissenters or judges unhappy with a majority draft. Draft opinions are printed and circulated - although not necessarily to all the Justices.<sup>17</sup> The circulation of a draft opinion has the effect of forcing the other judges to respond. It puts the ball in their court.<sup>18</sup> An opinion may go through a dozen drafts and take months to finalize.

During the drafting stage it is possible for an erosion to occur. This may be towards a dissenting opinion, or to the opinion of a disaffected

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10 Woodward and Armstrong accuse Chief Justice Warren Burger of unfairly engaging in this tactic, *supra* n 5 at 113, 188.

11 Danelski, *supra* n 6 at 530; Woodward and Armstrong, *supra* n 5 at 71. According to Grossman, *supra* n 9 at 433

'Because this power (of assignment) is so important, Chief Justices have guarded it jealously. Usually this means retaining a personal inclination to dissent to retain the opportunity to minimize the 'harm' of a majority decision. On average, Chief Justices cast fewer dissents than other justices for just this reason. Burger, however, dissented much more frequently than expected in his first few years on the Court.'

12 Danelski, *ibid*.

13 Woodward and Armstrong, *supra* n 5 at 152.

14 According to Woodward and Armstrong, *supra* n 5 at 49, it was the practice of Warren and Brennan to meet early so as to 'orchestrate' the conference.

15 See Brennan, 'Working at Justice' in Westin (ed), *An Autobiography of the Supreme Court* (1963) 304; Woodford Howard, 'On the Fluidity of Judicial Choice' in Woodward and Armstrong, *supra* n 5 at 535-538; Jaffe, 'An Impression of Mr Justice Brandeis' (1957) 8 Harv L School Bull 333; McCormack, 'A Law Clerk's Recollections' (1946) 467 Columbia LR 710; McElwain, 'The Business of the Supreme Court as Conducted by Chief Justice Hughes' (1949) 63 Harv LR 5. Of course the amount of interchange depends on the case and the judges involved: see Powell, 'What the Justices are Saying' (1976) ABAJ 1454 indicating that informal interchange between chambers is minimal and that most interchange is by correspondence and memoranda.

16 Woodward and Armstrong give examples of clerks lobbying other Justices through their counterparts, *ibid* 123, 213; see also Grossman, *supra* n 9 at 436, 437; Jaffe, *ibid* 11.

17 McCormack, *supra* n 15 at 711, 715.

18 Murphy and Pritchett, *supra* n 5 at 518-519; see also comment by Lord Radcliffe quoted in Paterson, *supra* n 2 at 100.

majority judge.<sup>19</sup> Dissenters might also join the majority.<sup>20</sup> It is the nature of things that judges are distressed at loss of support just as they are joyed by gaining votes. A judge writing an opinion might change portions of the work to hold or gain votes. It was said of Chief Justice Hughes:

'[If] in order to secure a vote he was forced to put in some disconnected or disjointed thoughts or sentences, in they went and let the law schools concern themselves with what they meant. Similarly, when other Justices seemed fairly close together, he would try to save dissent or a concurring opinion by suggesting the addition or subtraction of a paragraph here or a word there in one of the proposed opinions.'<sup>21</sup>

Much criticism can be directed at this 'horse trading' aspect of the consensus model. Thomas Jefferson opposed opinions drafted by Justices, 'huddled up in conclave, perhaps by a majority of one, delivered as if unanimous and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his mind by the turn of his own reasoning'.<sup>22</sup> The role of the law clerk as a ghost opinion writer is also seen to detract from judicial independence.<sup>23</sup>

Various factors, however, can produce a change of position - not all of them inconsistent with independent thought. Judges might change their minds after a period of reflection, or after listening to the arguments of their colleagues or law clerks, or on reading a forceful opinion.<sup>24</sup> They may also join an opinion that has become more palatable as a result of modifications produced by their own views.<sup>25</sup> A judge may leave an opinion because of unhappiness with the reasoning, or the language of the writer - such a judge might write a separate opinion or join another judgment.

Other more troubling motivations might cause a judge to change votes. A Justice might be persuaded that the court should speak with one voice on a controversial issue. In the two Japanese relocation cases for example,<sup>26</sup> 'Justice Murphy stifled a powerful lone dissenter in the first...under the badgering and patriotic appeals of Justice Frankfurter; and Justice Douglas did the same in the second...'<sup>27</sup> Justice Stone chose not to dissent when he might otherwise have done so 'from an anxious desire not to appear contentious, or dissatisfied, or desirous of weakening the...influence of the court'.<sup>28</sup> A judge might not wish to break with a traditional ally,

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19 Ibid 516-519; Danelski, supra n 6 at 532; Woodward and Armstrong, supra n 2 at 78.

20 Woodford Howard, supra n 15 at 537.

21 McElwain, supra n 15 at 19; 'Justice Holmes used to say, when we asked him to excise portions of his opinion which he thought pretty good, that he was willing to be 'reasonably raped'. I feel the same way.' Quoting Hughes, in Woodford Howard, ibid 535.

22 *Jefferson's Works*, Vol 7, 191, letter to Thomas Ritchie, 25 December 1820. Referred to by McWhinney, supra n 3 at 609.

23 Literature defending and condemning is extensive, see Oakley and Thompson, *Law Clerks and the Judicial Process* (1980) 3-5 and accompanying notes.

24 Woodford Howard, supra n 15 at 536-537.

25 See supra n 21 and accompanying text.

26 *Hirabayashi v United States* 320 US 81 (1943); *Korematsu v United States* 323 US 214 (1944).

27 Woodford Howard, supra n 15 at 536.

28 Murphy and Pritchett, supra n 5 at 519 quoting Justice Story.

or be fearful of appearing on the wrong side of a powerful opinion writer.<sup>29</sup> It has been suggested that a Justice might even trade a vote in one case for support in another.<sup>30</sup> In particular, a judge may not wish to antagonise the Chief Justice by appearing a poor teamplayer. The Chief Justice can, after all, make a judge's life uncomfortable by allocating uninteresting cases or by causing administrative problems.<sup>31</sup>

When the positions of the various justices have consolidated, the opinions are handed down. The court tries to finalise its docket at the end of each term. It is apparently now unknown for a Justice to engage in stalling tactics by holding back a dissent hoping for more time to get a change of vote.<sup>32</sup> Only final opinions of the court are published and the justices do not necessarily make all of their reasoning public.

### 3. PROBLEMS OF U.S. PRACTICE - THE AUSTRALIAN EXPERIENCE

From this description it can be seen how some judges would be unhappy with the system. This was the Australian experience. The first volume of the Commonwealth Law Reports indicates that a unity seeking approach was employed by the Griffith Court.<sup>33</sup> Concurring opinions soon, however, began to proliferate. This was probably due to the personal antagonisms produced by new additions to the court.<sup>34</sup> In the early 1970's Sir Garfield Barwick attempted to revive the conference and majority judgment practice.

29 Ibid 517; Danelski, supra n 6 at 527.

30 Woodward and Armstrong claim that Justice Brennan voted to affirm a criminal conviction in order to curry favour with Justice Blackmun (the author of the court's opinion) in order to attract Blackmun's votes in future abortion and obscenity cases. Supra n 5 at 224-225; cf Lewis, 'Supreme Court Confidential', who points out that '[t]here is substantial evidence that justices will forego dissenting to...induce goodwill for future use' in Grossman, supra n 9 at 430.

31 Woodward and Armstrong, ibid 75-76; Danelski, supra n 6 at 530.

32 By tradition single justices can insist that an opinion not come down until they have finished their own opinion. Woodward and Armstrong accuse Justice Black of using this courtesy to lobby for votes. Ibid 102.

33 Volume 1 of the Commonwealth Law Reports (1903-4) reveals that of the 36 cases heard by the Full Court (Griffith CJ and Barton and O'Connor JJ), in 26 cases only one judgment was delivered; in eight cases concurring opinions were delivered where there were differences in emphasis; and in two cases there were formal dissents. It seems, therefore, that the judges were somewhat constrained in delivering seriatim opinions. In *Deakin v Webb* (1904) 1 CLR 585, Barton J in delivering a concurrence speaks of it not being unreasonable for him to say something about the history of a provision, ibid 626. See also Joyce, *Samuel Walker Griffith* (1984) 261, '[w]hile he agreed that any decision could be 'challenged discussed and over-ruled', he thought that the judges should be unanimous. The working rule he suggested for guidance...was that where there was disagreement and the judge in the minority so desired, a new hearing should be ordered.'

34 It seems clear that Isaacs was disliked by Barton and Griffith and probably also by Higgins, see Cowen, *Isaac Isaacs* (1967) 116-117 who points out that on occasions in their judgments Griffith could barely conceal his contempt for Isaacs and vice versa. Rather than working for unanimity Isaacs is accused of hiding authorities and glossing over issues during argument so as to give himself an advantage over his brethren when writing his judgment. Ibid 124-125. John Rickard says of Higgins, '[t]hroughout his 22 years on the High Court Higgins wrote his own individual judgments...This was, perhaps a matter of pride (it was just as distasteful for him to defer legally to Isaacs as to Griffith)...' Rickard, *H.B. Higgins* (1984) 286. Conditions on the court did not improve under Chief Justice Latham; see C Lloyd, 'Not Peace but a Sword! - The High Court Under J.G. Latham' (1987) 11 Adel LR (this issue). Shortly before his retirement from the bench Starke J was told by McTiernan J that he could no longer continue to sit with him: *Sydney Morning Herald*, 23 October 1948, cited by McWhinney, supra n 3 at 615, note 83.

The attempt was unsuccessful because two judges did not want Barwick's writing style to become that of the court. They also questioned his willingness and ability to work within a system requiring give and take.<sup>35</sup> Independent opinion writing was seen as preventing stronger personalities and more senior judges from exercising undue influence over their brethren. Clashing personalities and ideologies might also play a part in rejecting the conference approach. Judges who dislike each other personally, or each other's views, might simply be unwilling to work together.<sup>36</sup> Without the United States form of law clerk to soften the exchanges these judges are unable to deal with each other.

The bottom line of the unity seeking model, however, is that individual judges must be willing to compromise individual positions on issues of language, law or policy that are secondary to the fundamental issues of the case.<sup>37</sup> While it is clear that disagreement regarding fundamentals should produce dissent, some judges probably view any compromise as inconsistent with judicial integrity.<sup>38</sup> Moreover, views might vary strongly as to what is primary and what is secondary to the determination of a case. But what are the alternatives?

#### 4. AUSTRALIAN HIGH COURT PRACTICE: THE BARWICK COURT

The practices of the Barwick court are a good example of appellate judicial decision making where the court was not committed to seeking a consensus of opinion. Prior to oral argument there appears to have been little discussion on the merits of a case.<sup>39</sup> The judges might, however, have gained some idea of the thinking of their colleagues from questions directed at counsel and exchanges on the bench.<sup>40</sup> Apart from this, there appears to have been little discussion of the case during the hearing.<sup>41</sup> At the end of a case, if the matter involved a particular judge's area of expertise, that judge might offer to write the judgment of the court: but such arrangements were rare.<sup>42</sup> Often the judges wrote their opinions alone.<sup>43</sup> However, the judgments were not prepared in complete isolation:

'Consultation between the judges at this stage of the proceedings depended on friendship, speciality and geography...Each decision went to Barwick...[who] circulated a copy to each of the judges sitting on the case. The amount

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35 Marr, *Barwick* (1980) 233.

36 'The six men of the 'old chief's' High Court were neither particularly happy nor particularly close when Barwick inherited them. It was not unusual to see six or seven cars waiting in Taylor Square to take each judge to lunch, separately, at the Australian Club. The court was not, in any real sense, a corporate institution.' *Ibid* 215. See also Cowan, *supra* n 34 at 115-120. Of the Latham Court Lloyd says, 'Starke refused to have any consultation with Evatt, to exchange reasons for judgments and draft judgments with him, or even to supply him with final judgments. Starke applied similar sanctions to other judges, particularly Dixon, but only with Evatt was the veto absolute...Evatt, in turn, refused to cooperate with Starke.' *Supra* p182.

37 Danelski, *supra* n 6 at 541; Woodford Howard, *supra* n 15 at 540-542.  
38 W F Murphy, 'Judicial Strategy and Judicial Ethics' in Murphy and Pritchett, *supra* n 5 at 542-543.

39 Marr, *supra* n 35 at 211.

40 Barwick encouraged judges particularly when they sat on a bench of three to confer during argument and cut short the case if it appeared that the appeal should not succeed. *Ibid* 222.

41 *Ibid*.

42 *Ibid*.

43 *Ibid*.

of material then in circulation was often absurd. The judgments were windy, among the longest and most tortuous of high appellate courts in the English-speaking world. Many of the High Court's judgments differed only in detail and emphasis. Once they were in circulation however, bargaining might begin...Sometimes drafts were abandoned and rewritten; occasionally judges agreed to pool their drafts and produce a joint judgment. Frequently, a fighting draft designed to sway the bench was withdrawn and replaced by a more temperate version for public consumption...

The system of bargaining was casual and ad hoc. Barwick bargained on the intercom. His puisne judges made calls on each other's chambers, but the system involved much of the horse trading condemned by critics of the United States Supreme Court. The difference was that the Australian judges were able to produce very few joint majority decisions of the court...and even joint opinions became less common...The more important the issue, the less likely the High Court was to arrive at a coherent decision...'<sup>44</sup>

Marr gives Barwick's inflexibility as the reason for failure.<sup>45</sup> General inflexibility among the judges is probably more accurate. The search for consensus occurred only after the judges had expended effort and committed themselves to a judgment. Under the circumstances it is not surprising that they were unwilling to waste what they had done and had become entrenched in their positions. The result of this process was a mixed bag. Occasionally there was a judgment of the Court;<sup>46</sup> occasionally there were joint judgments;<sup>47</sup> often, there were seriatim opinions.<sup>48</sup> Sometimes these latter opinions indicated that the writers had considered the views of their colleagues;<sup>49</sup> other times arguments of concurrens and dissenters were equally ignored.<sup>50</sup> Occasionally, there was nothing in the context of a judgment to indicate that the judge was aware that he was writing in majority or dissent.<sup>51</sup>

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44 Ibid 222-223.

45 He also gave Barwick's lack of juristic dominance as another reason for failure of the system. Ibid 223. It seems clear, however, that the lack of these qualities in a Chief Justice does not of itself mean that consensus will not be achieved - another judge can assume the task. Danelski supra n 6 at 527.

46 See for example: *Kane v McClelland* (1962) 111 CLR 619; *Re Luck*; *Ex Parte McManus* (1965) 112 CLR 1; *R v Austin and Another Ex Parte Farmers and Graziers Co-operative Co Ltd & Ors* (1964) 112 CLR 619.

47 See for example: *Public Transport Commission of NSW v Perry* (1977) 137 CLR 107; *Cam & Sons Pty Ltd v Commissioner of Land Tax* (1965) 112 CLR 139.

48 Volume 138 of the CLR (1977-1978) shows that of the 23 cases heard, in 14 seriatim opinions were delivered by the majority of judges (ie in some cases one judge would formally concur with another judgment), and in nine there were more than two separate opinions.

49 See for example *Demirok v R* (1977) 137 CLR 20, judgment of Barwick CJ (dissenting).

50 See *Public Transport Commission of NSW v Perry* (1977) 137 CLR 107, *R v Heagney & Anor Ex Parte AJC Employers Federation & Others* (1977) 134 CLR 86 - judgments of Barwick CJ.

51 See *ibid* and *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54 - judgments of Murphy and Aickin JJ.

## 5. PROBLEMS OF NON-UNITY OPINION WRITING

Criticism of individual opinion writing focuses on obscurity, the waste of effort and the lack of impact of the approach.<sup>52</sup> While the process of achieving consensus might result in intentional ambiguity in areas of disagreement, majority opinions may be seen to state the law more clearly than a series of judgments, with their independent nuances of thought and language.<sup>53</sup> Issues, arguments and precedents addressed by one judge might be ignored by others; confusing mis-statements of law and fact may arise when judges write separately.<sup>54</sup> Separate opinions can intentionally or unintentionally confuse the majority view.<sup>55</sup> Moreover, the views of particularly eloquent judges tend to be given more weight by the profession than those of their colleagues. On the other hand, the use of majority judgments would better employ the skills and expertise of individual judges. A majority judgment tends to carry more weight than a series of individual opinions.<sup>56</sup>

Apart from the perceived tendency to obfuscate the law by increasing the difficulties of establishing the ratio decidendi of a case, the practice of delivering individual judgments is seen as wasting the time of judges, practitioners, academics and students who have to read a series of judgments which they find, ultimately, to say the same thing.<sup>57</sup>

## 6. IMPACT OF CONFERENCES AND NON-CONFERENCE PRACTICE ON FORM OF JUDGMENTS

Both systems have their problems. The difficulties, however, ultimately resolve themselves into form and effect. To what extent does a decision made by a group after discussion and negotiation affect its nature, its form, and ultimately the reasoning that it contains? To what extent will it differ from individual efforts? C P Snow makes the following comment about groups and their moods:

‘Groups of men, even small groups, act strangely differently from individuals. They have less humour and simpler humour;

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52 Blom-Cooper and Drewry, *Final Appeal*, (1972) 93; Sawyer, *Australian Federalism in the Courts* (1967) 50-51. For criticism of plurality judgments in the United States, see Davis and Reynolds, ‘Juridical Cripples: Plurality Opinions in the Supreme Court’ [1974] *Duke LJ* 59.

53 *Ibid.* It will be seen that some writers take the view that seriatim opinions can make the law clearer by the airing of different perspectives, see the statement of Lord Reid in *Gallie v Lee* [1971] AC 1004, 1015, ‘[t]he true ratio of a decision generally appears more clearly from the comparison of two or more statements in different words which are intended to supplement each other’. See also Rehnquist, ‘All Discord, Harmony Not Understood: The Performance of the Supreme Court of the United States’ (1980) 22 *Arizona LR* 972, 978.

54 ‘As we are human, I cannot feel that we are never mistaken, but I feel that if five or seven trained minds all concentrate on trying to produce a judgment that is right, they should have a reasonable chance of succeeding’, address of the Right Hon Lord Morton of Henryton, (1949) 32 *Proceedings of the Can Bar Ass* 107, 116 quoted by McWhinney *supra* n 3 at 601.

55 ‘Isaacs uses his opinion which ostensibly agrees with mine to put his own interpretation on questions so as to give some answer, and just the answer Higgins wants...’ A letter from Barton to Griffith quoted in Cowen, *supra* n 34 at 116; Note, ‘Plurality Decisions and Judicial Decision Making’ (1981) 94 *Harv LR* 1127, 1130-1135.

56 This was the reason why the Supreme Court of the United States adopted the practice of majority judgments, Murphy and Pritchett, *supra* n 5 at 495.

57 Sawyer, *supra* n 52 at 50-51.



they...enjoy firm, flat, competent expositions which a man by himself would find inexcusably dull.’<sup>58</sup>

Justice Cardozo makes the same point in the context of a judge writing for the court:

‘The spokesman of the court is cautious, timid, fearful of the vivid word, the heightened phrase. He dreams of an unworthy brood of scions, the spawn of careless *dicta*, disowned by the *ratio decidendi*...The result is to cramp and paralyze.’<sup>59</sup>

Holmes similarly speaks of resolutions of committee as always being ‘flat’.<sup>60</sup>

A study made of judicial styles<sup>61</sup> indicates that this tendency is manifesting itself in the form that judgments typically take in the United States as compared to those of the United Kingdom. The typical English judgment commences with an expose of the facts - smooth, not necessarily relevant, and sometimes told in story form, ‘Old Peter Beswick was a coal merchant...’<sup>62</sup> The ideal is to be understandable and, if possible, interesting, the English judge having two roles - decision maker and teacher of the law. The same writer points out that English judgments tend to be much longer than American equivalents.<sup>63</sup> The form of reasoning is inductive, ‘a more creative form’ requiring talent and flair. English judgments frequently use analogies and hypotheses of fact and law. Similarities to the case in issue are drawn from precedents dealing with fundamentally different fact situations.

The US opinion is described in the following manner:

‘The short opening paragraph of the opinion will usually place the case in its procedural context...[Then] the judge in a dry but lengthy manner will recite the facts...No story-telling style, no fantasy...the judge...will put a stress on relevance unknown to his English colleague...The judge will [then] cite the rule he finds governing, and state his conclusions in the same telegram style sentence, followed by citation of some encyclopedia, the Restatement, Corbin on Contract and an avalanche of cases...All these sources are cited together, at the same level; they all seem to have the same authority and the same justificatory value. As a result, the inductive part of precedential reasoning has vanished and only the deductive stage is left.’<sup>64</sup>

Various reasons are given by the writer for these differences in form.<sup>65</sup> It seems to me, however, that the basic reason lies in differences of practice.

58 Snow, *Strangers and Brothers* vol II (1972) 79.

59 Cardozo, ‘Law and Literature’, (1925) 14 Yale LR 699, 715-716.

60 Howe ed, *Holmes-Laski letters* (1953) 1258-9. See also Coffin, *The Ways of a Judge* (1980) 174.

61 Goutal, ‘Characteristics of Judicial Style in France, Britain and the USA’ (1975) 24 Am J Comp L 43.

62 Lord Denning in *Beswick v Beswick* [1966] Ch 538, 549.

63 Goutal, *supra* n 61 at 65.

64 *Ibid* 52-53.

65 Goutal gives differences in historical experience, the position of judiciaries, the need for standardization produced by the proliferation of courts in the US and the subsequent lowering of judicial standards as reasons for producing the differences in form. *Ibid*.

What is the position of judges at the end of oral argument? Judges might be convinced of the justice of a particular litigant's case; they might be clear on the applicable law, and have determined how best to serve the policies involved. If they are uncertain, or unclear of their position, they might engage in further research and reflection. If at this point they sit down without further discussion to write their judgment, knowing that the brethren are doing the same, their approach will be much the same as an advocate's. But while advocates must make the most convincing case for their clients, judges must make a convincing case for themselves as judges. They must convince those who read the judgment of the rectitude of their judicial position. They must display their grasp of the facts and law, their reasoning and analytical skills, their wisdom, and their humanity and prudence as lawmakers. Theirs must shine out among the other opinions, or at least be as worthy.<sup>66</sup>

Logic, analogy, hypothesis, rhetoric, simple appeals to human emotion, etc are all called in service of the function. Statute and judicial opinions will be analysed in detail to show the integrity of the position taken. Sometimes, to strengthen an argument, a law seeking mode is adopted. As in a mystery story, judges engage in written search for the law. Purporting not to know the solution that will be reached, they go through a polished version of their initial reasoning until the law is discovered.<sup>67</sup> This approach places emphasis on impartiality.

The conference approach takes the reasoning process several steps further and modifies the form. The would-be writer is immediately required to vindicate his or her views, not merely in legal terms, but also in terms of policy, linguistics, and politics.<sup>68</sup> The writer must counter the arguments of the opposition, and attempt to work for some harmony within the framework of the institution. The purpose is no longer to shine individually. Individuality in a sense becomes subsumed into the identity of the group.<sup>69</sup> But the consensus of the group also gives authority to opinion.<sup>70</sup> The arguments, negotiations, and discussions hone the judgment to a sharp edge of agreement. Because of this, the form of the judgment no longer seeks to convince by detailed analysis of pre-existing authority. Authorities need not be canvassed or examined in detail because this has been done previously in vindicating the majority's position and now becomes almost as given. Moreover, the opinion constitutes its own authority derived as it were from the consensus of the majority. The focus of the opinion will tend to be on the social policies that the opinion reflects. A result of this will be the diminution of the doctrine of *stare decisis* both in majority judgments and in individual opinions. This is because social and political values will change from judge to judge and fact situation to fact situation.<sup>71</sup>

66 See Ballantine, 'The Supreme Court: Principles and Personalities' (1945) *Am Bar Assn J* 113; Lawson, 'Comparative Judicial Style' (1977) 25 *Am J Comp L* 364, 366; Paterson, *supra* n 2 at 97.

67 Compare for example the judgments of Mason J (adopting this approach) with that of Murphy J (not adopting the approach) in *Commonwealth v Tasmania* (1983) 57 *ALJR* 450, 484-511.

68 Coffin, *supra* n 60 at 135-140; Murphy, *supra* n 5 at 543-551; Woodford Howard, *supra* n 15 at 538-540.

69 See text accompanying nn 58-60 *supra*; see also Coffin, *ibid* 174.

70 See *supra* n 54, comment of Lord Morton.

71 Easterbrook, 'Ways of Criticizing the Court', (1982) 95 *Harv LR* 802, 811-823; Note, 'Plurality Decisions and Judicial Decision Making', (1981) 94 *Harv LR* 1127, 1140-44; Monaghan, 'Taking Supreme Court Opinions Seriously' (1979) 39 *MLR* 1.

There is another important reason why precedent is not analysed in the same detail under the conference approach. This is because under the non-conference system, judges have to deal with the fact that in the cases that have gone before, earlier judges have also written their own independent opinions. It is necessary, therefore, for the judge to engage in some search for the ratio decidendi of these cases. This involves a close scrutiny of the words employed by each judge together with the meanings that they might contain. These are then compared with what was said by the other judges. It will be seen that this necessity has a dramatic impact on legal reasoning per se. There is less need for such an analysis of precedent when the conference method is employed. The meaning of the earlier majority must be sought, but this involves less of a linguistic analysis than where various judges' opinions are either different, subtly different, or subtly the same.

Another difference in the finished product is that it is less likely that the conference approach will produce much obiter. Foresight and learning are demonstrated by obiter, a piece of reasoning often good but never relevant, that the writer is unwilling to abandon. Obiter, therefore, is a personal note that may be of little interest to the group. The difficulty getting consensus generally might make the effort in getting agreement on obiter more trouble than it's worth.

## 7. IMPACT ON JURISPRUDENCE

The impact of conference decision making and majority judgments extends even further than the form and tone of judgments; it has an impact ultimately, I believe, on the underlying philosophy of the system itself. Individual opinions by appellate court judges tend to foster a positivist constructionalist jurisprudence while majority judgments tend to lead to more socially oriented, naturalist modes of thought. One focuses on the search for the law, the other emphasizes the policies that rationalize the laws.

As described above, the use of individual judgments imposes the task of ascertaining the ratio decidendi of cases on law students, law teachers and practitioners alike. Establishing the ratio of a case requires the strict focus on the language employed in each of the judgments. What the judge says and how the judge interprets the opinions of other judges is made the subject of close scrutiny. The various opinions are then synthesized to establish points of agreement and disagreement. Obiter is identified and put to one side. The ratio is established.

Students are taught this technique in their early days at law school and appellate court judges continue to employ it in their judicial pronouncements. Linguistic scrutiny of this type is carried over to the construction of other legal documents, statutes and constitutions. The concentration on distilling the authority of precedent does not necessarily prohibit consideration of policy issues but it certainly distracts from it. The technique focusses attention on the search for the law rather than on the value of the law.

The conference approach ordinarily produces one judgment that is authoritative. While there may be concurrences and dissents attacking the majority's position, they don't detract from the authority of the majority judgment unless the criticism is intrinsically valid. Except to the extent that a majority judgment is unclear or inconsistent, there is no need for an extensive search for the ratio of a case. Because of this judges, students

and practitioners alike will tend to focus their attention on the underpinnings of the decision. Time is not spent on discovering what was said, but whether what was said was good or bad. Under the conference system establishing the controlling law is but a precursor to a wider ranging enquiry. The search for consensus is not only a search for what the law is but also what it should be.

This is not to suggest that policy is not a relevant factor in non-conference systems, or that stare decisis is irrelevant when judges confer. It does say that use of a particular method can determine emphasis of thought which in turn can affect reasoning patterns - that if attention is directed immediately to the rationale of a decision, more attention will be directed at the validity of that rationale than otherwise.

## **7. THE VALUE OF EACH SYSTEM IN THE EXPOSITION AND DEVELOPMENT OF LAW**

A primary criticism of independent judgments is that they tend to confuse rather than clarify the law. Is this true? It is true to say that one person speaking for a group will probably give a clearer indication of the group's viewpoint than if each person speaks independently. But does this clearly indicate what the law is?

The articulation of principle is not inevitably free from individual abilities, perceptions, prejudices, and values. A more accurate understanding might be had from a variety of perspectives. This will depend on the abilities of those involved. If the principle is examined from different angles, if more colour is given, the idea of the thing will be enhanced. If, however, several judgments are all saying the same thing, but in a confusing and repetitive way, the audience will become bored, may cease to listen, or may become confused.

However, if the conference approach, described above, is adopted, the judgment may contain only that which the group was minimally able to agree on. To that extent it will be clear. But it will also contain hidden defects. Points that were strongly disagreed upon might be glossed over or described in ambiguous language, perhaps omitted altogether. Moreover, members of the group might be hanging onto a particular aspect of the judgment by the flimsiest of threads. A change of mind by one member may cause a complete shift of view.

Individual opinions might be confusing and time wasting at their worst; but at their best they give more insights into the law, and they flag disagreement and individual differences much more clearly than a description that is the product of a compromise.

## **8. CONCLUSION**

Some peoples have preferred to have many gods speak to them. Such a system has its advantages, particularly if the gods are unclear. Pronouncements can be manipulated to vindicate almost any position, particularly with the help of a skilled priest. On the other hand a person might go mad trying to obey many gods. Certainty, if only for a while, may better soothe the soul.