Agreeing to disagree

Thomas Roe QC discusses dissenting judgments

Dissenting judgments, and judgments agreeing with the majority but for different reasons, are common in the common law world. Yet in most of the civil law countries, they are not merely *not* the practice but positively prohibited (M Kirby, "Judicial dissent—common law and civil law traditions" [2007] LQR 379). Particularly in the French tradition, the judgments are terse and assertive and rely heavily on the repetition of identical verbal formulae. Most of the cities and states which now make up Germany did not permit dissenting opinions. When, in 1877, the Germans came to draft the rules for the courts of their newly unified Reich, there was a proposal that dissents *should* be permitted in the constitutional court, but this was rejected as "incompatible with the authority of the courts and good relations between the judges" and as likely to foster "vanity and disputatiousness" (K Kelemen, "Dissenting Opinions in Constitutional Courts", 14 German Law Journal (2013)). Dissenting judgments are nowadays allowed in the German Constitutional Court, but the single judgment is still very much the norm. Indeed, in the ordinary courts, as opposed to special constitutional courts, only two countries in continental Europe permit dissenting judgments at all.

Common law differences

Why are the common law jurisdictions different? At least in part it is a matter of history. Dissent usually occurs in a multi-member appellate court. Most common law appellate courts are, in historical terms, a relative novelty: the Court of Appeal in England was only established in 1875. But there was a much earlier form of appeal, namely to petition the King-in-Parliament. It went back to the 13th century. By about the 18th century, petitions to reverse judgments at first instance from the courts of England, Ireland and Scotland were coming from time to time before the House of Lords. No-one appears to have thought to devise a special procedure for such cases. The constitutional fiction was that one was not dealing with a court at all but with a motion being debated in the House. Each Lord who was participating would give a speech setting out his own view of what the outcome should be and why. There was no such thing as a judgment of the court. And of course that practice continued, albeit formalised by the creation of a special class of non-hereditary Lords, the Law Lords, who sat on a special committee, the Appellate Committee, right up until 2009 when a government with little time for constitutional fictions swept it away and set up the Supreme Court of the UK.

In these circumstances it is not surprising that the judges of the intermediate appellate courts set up in England and around the common law world took it for granted that their role involved each of them delivering an individual judgment, even if only to say "I concur". Thus (rather as Churchill said about buildings) we shaped the institution and afterwards it shaped our practice.

Judicial career paths

The career path of the typical judge may also be relevant. On the Continent it is not uncommon to find men and women in their twenties who have gone in at the bottom of the judiciary fresh from university and are, as it were, working their way up through the judicial firm, learning the ropes as they go. Judges in the common law world, of course, have worked as lawyers in the private sector for many years before moving to the bench. It is obvious which arrangement is less likely to produce judges who feel obliged to go along with what the others say.

The possibility of dissent permits the judge to state honestly what he or she thinks of the case. A judge who dissents does not necessarily have any particular agenda but simply is not prepared to pretend to believe that the errors of the majority are not errors. But in many cases the judge who dissents hopes one day to change the law. An American who became Chief Justice once said, rather portentously, that a dissent is "an appeal to the brooding spirit of the law, to the intelligence of another day" (C E Hughes, *The Supreme Court of the United States* (Columbia University Press, 1928), p 68). One thinks perhaps of Lord Atkin's celebrated 1941 dissent in *Liverside v Anderson* [1942] AC 206, [1941] 3 All ER 338, refusing to agree that the court was unable to review the reasonableness of the minister's belief that the plaintiff was a "hostile" person who could therefore be detained; and declaiming, in words which would end up in every public lawyer's textbook, that "[i]n this country, amid the clash of arms, the laws are not silent".

Timing for dissent

So when ought a judge to dissent? I would say that dissents ought not to be entered into (as one says of marriages) lightly, or unadvisedly. The law is complicated enough. If it is really not necessary to dissent, then it is probably necessary not to do so. Certainly, in a system governed

by judicial precedent, it is not helpful to the rule of law for Judge 1 to say "I allow the appeal for reason A", Judge 2 to say "I allow the appeal for reason B" and Judge 3 to say "I agree with both judgments" (or for that matter with neither of them). As the late Lord Bingham put it, "whatever the diversity of opinion the judges should recognise a duty […] to try to ensure that there is a clear majority ratio" (T Bingham, "The Rule of Law" [2007] 66 CLJ 67 at 69).

But in my view it goes no further. None of us is likely to be much attracted by the 19th century German argument that the "authority of the court" is diminished by accepting that some questions are difficult and that judges, being human, sometimes disagree.

No dissent?

More practically, a court which strives to attain consensus on every point is not likely to produce a very good judgment. This is verifiable in the judgments of the Court of Justice of the European Union, where dissenting judgments are never permitted. One never knows for sure whether the decision was unanimous or was clinched by a bare majority. But one often suspects that there has been a big effort to accommodate everyone's views. Lord Neuberger has said, not altogether diplomatically: "One only has to look at some of the judgments of the [court] in Luxembourg to see how compulsory unanimity can result in decisions which (i) are incomprehensible, (ii) have internally inconsistent reasoning, (iii) do not answer the issue that has been referred, or (iv) manage to enjoy all these three regrettable characteristics" (Lord Neuberger, "No judgment, no justice", First Annual BAILII Lecture, 20 November 2012).

There are, of course many appeals which are straightforwardly either unmeritorious or wholly unanswerable. Here it makes a lot of sense for one judge to give a judgment and the others to concur. But where the point is one of difficulty there must be a real advantage—considerations of time permitting, of course—in each judge attempting to put the matter, however briefly, into his or her own words. I say this because, by and large, sound reasoning writes itself. Bad reasoning very often does not. A good way to test whether what a colleague is saying is correct is to try to express it in one's own words.

Moreover, soundly based principles are likely to be capable of being explained in more than one way. And if a principle has been so explained, and indeed the arguments against its being the right principle have also been explained, a court which comes to the problem later has a much better chance of understanding the underlying principle than if it is simply confronted with a unanimous, quasi-legislative statement as to what the law is. Examples of that sort of statements crop up a lot in the case law of the European Court of Human Rights, in Strasbourg. As a common lawyer, one wants to read a judgment where the judges debate what the underlying principles are and how they apply rather than repeating set phrases from earlier cases.

Honing opinion

There are, of course, other arguments in favour of dissenting judgments. The need to respond to the dissenting argument can force the majority to hone their opinions (see, for example, S Day O'Connor, *The Majesty of the Law* (Random House, 2003), p 121). Dissent can also curb the majority from making over-expansive claims. And it is positively healthy for the fact of disagreement to be acknowledged.

Practical use

What practical use are dissenting judgments? Should we read them at all? I would say that we should. A majority judgment is likely to contain the facts, the legal background, and the various reasons for the decision. But a dissent is very often a direct route to the essence of the majority reasoning. Reading it can highlight, perhaps more easily than wading through the majority judgments, the key point on which the case turned and thus what is it really about.

Finally, style. If dissenting, like marrying, is not to be done unadvisedly or lightly, then perhaps when it *is* done it should be done reverently and discreetly, if not necessarily in the fear of God. This is certainly the common law tradition. Wilson J (now Lord Wilson of the Supreme Court) got it right in a case called *Medcalf v Mardell* [2001] Lloyd's Rep PN 146, [2000] All ER (D) 1969. "Notwithstanding my profound respect for the two senior members of this court", he began, before going on systematically to explain why they had got it all wrong. (He was vindicated in the House of Lords ([2002] UKHL 27, [2002] 3 All ER 721).) Other judges may occasionally introduce a little "vanity and disputatiousness" but by and large the tone is civil.

It is not always so in the US. It is not for me to say whether Scalia J was right or wrong to disagree with the majority decision in *United States v Windsor* 133 S. Ct. 2675, nor whether he was right to feel highly provoked by it. But I hope we do not see a day in England when the minority feels it has to accuse the majority's reasoning of being "jaw-dropping", "bear[ing] no resemblance to our jurisprudence", and of amounting to little more than a "disappearing trail of […] legalistic argle-bargle". If it gets like that, we shall know we are in trouble. **NLJ**

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