



Dissenting Judgments

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The American behavioural psychologist, Professor Daniel Kahneman, in his book *Thinking, Fast and Slow*, describes a study carried out into the behaviour of parole judges in Israel. The practice there is that a criminal seeking parole has on average about 6 minutes to persuade the panel that he is sufficiently reformed to deserve it, after which the judges decide, there and then, whether to grant or refuse. The judges hear case after case in rapid succession, with three breaks during the day for refreshment. Crucially for the study, the time of each grant or refusal is recorded. On average, parole is granted in only about 35% of cases. If you look at, as the researchers did, several months' work, a distinct pattern begins to emerge. In the hour or so at the start of the day, and again in the hour or so after each refreshment break, the judges tend on average to approve about 65%. But in the hour or so *before* each refreshment break, it is rather different. Indeed, such is the lack of sympathy among the judges just before they get their lunch or their tea that the approval rate drops to almost nil. The moral of the story is that tired and hungry people make a less sympathetic audience, and that lawyers, however

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conscientious, are no different. For my part I am therefore very grateful to be speaking immediately after lunch. I hope that I have found a subject which you will find, along with your lunch, reasonably digestible.

I am going to speak, for more than 6 minutes but not for a very long time, about how dissenting judgments have come to be a feature of our common law legal system; what role they play, and ought to play; whether dissenting judgments are to be encouraged or resisted wherever possible; and what use practitioners should make of them; and about their style.

Now most of us would say, I expect, that there is nothing remarkable about the fact that when a court comprising several judges decides a case, it is generally open to any judge to give a separate judgment explaining why he or she does not agree with the majority or with some aspect of their reasoning. This can be either a dissenting judgment properly so called—‘I would have allowed the appeal, not dismissed it’—or a concurring judgment—‘I would reach the same destination though I do not agree entirely about how to get there’.

Such judgments are a common feature of judicial decision-making across the whole common law world and, of course, in the United States. But if we lift our eyes for a moment from the common law and consider other legal systems, we find that it is actually a comparatively unusual thing. In France, Belgium, the



Netherlands, Italy and indeed most of the civil law countries of the world, dissenting judgments are not merely *not* the practice: they are positively prohibited: the court *must* deliver a single statement of its reasons.² Particularly in the French tradition, the judgments are terse and assertive and rely heavily on the repetition of identical verbal formulae. This goes back a long way. Indeed, around about the time that Christopher Columbus was setting off in the direction of this island, an ordinance of Medina-Sidonia in Spain provided that any judge who did not agree with the majority's decision could make a note of this fact, his '*voto reservado*', but only in a secret book.³

In other civilian jurisdictions, dissenting judgments are permitted, though scarcely encouraged, at least in the dedicated constitutional courts which are a feature of many of them. For example, 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 dissenting opinions *should* be permitted in the constitutional court, but this was rejected by the commission which was considering the question. Their

² See M Kirby, 'Judicial dissent - common law and civil law traditions' [2007] LQR 379.

³ K Kelemen, 'Dissenting Opinions in Constitutional Courts' 14 German Law Journal (2013).



reasons are rather instructive. One was that the publication of dissent would be ‘incompatible with the authority of the courts and good relations between the judges.’ Another was that it would foster ‘vanity and disputatiousness.’⁴ 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.

Why are the common law jurisdictions different? It is tempting to think that our willingness to entertain the possibility of public disagreement among our judges actually *derives* from some fundamental difference in the nature of our societies. One might, after all, perhaps detect something of a positive correlation between the jurisdictions which routinely permit judicial dissent and jurisdictions which have long enjoyed the rule of law and political stability.

But that would be a more sweeping claim than I am qualified to make. And anyway there are plenty of other aspects of our systems of governance which do not permit open dispute in this way: members of the Cabinet, for example, are not expected to issue dissenting opinions if they get outvoted by their colleagues.

⁴ Kelemen *op cit.*



A more modest claim is that the prevalence of dissenting judgments in our courts is, at least in part, a product of history. It results from a phenomenon similar to that about which Winston Churchill commented in 1943. He was explaining why he thought Britain should resist the temptation to rebuild the bombed-out House of Commons in a different shape: as a semi-circle, say, like they do on the Continent of Europe. Churchill famously said, ‘we shape our buildings and afterwards our buildings shape us.’⁵

What has dissent to do with that? Well, dissent, self-evidently, occurs at the appellate level, where there is a multi-member court. Most common law appellate courts are, in historical terms, a relative novelty. The Court of Appeal in England was only established in 1875 to replace an assortment of other appellate courts set up piecemeal earlier in the century. But there was, of course, a much earlier form of appeal, namely to petition the King in Parliament. It went back to the 13th century.⁶ Skirting quickly over a lot of arguments between Lords and Commons, we come to the position that, by about the 18th century, petitions to reverse judgments at first instance from the courts of England, Ireland and Scotland were

⁵ HC Deb 28 October 1943 vol 393 col 403. There was dissent about this. The leader of the Independent Labour Party proposed building a grand, new chamber in parkland 20 miles from London with its own dedicated airport, railway station and ‘a fine car park.’

⁶ Kirby, *op cit*.



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 a motion being debated in the House. The cases were simply debated like any other subject on the day's order paper, albeit with the benefit of argument from counsel standing at the bar of 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 United Kingdom.

In these circumstances it is not surprising, going back to the 19th century, that the judges of the intermediate appellate courts 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 we shaped the institution and it shaped our practice.

There are and have been, of course, exceptions. In criminal cases in England and Wales, the Court of Appeal is bound by statute to deliver a single judgment of the



Court.⁷ More fundamentally, there were those cases in which no appeal lay to the King in Parliament because the place from which the appeal came (like the Isle of Man, for example) was not part of the Kingdom of England. Here, one petitioned the King *in Council*, in other words the King who in theory was advised (though in reality, except in the very distant past, was told) by the Privy Council how to dispose of the appeal. Once again it was really an appeal to a court, but one pretended otherwise. This arrangement, as you will all know, spread around the world, covering at its zenith about a quarter of the world's population, and was put onto a statutory footing in the 19th century by the Judicial Committee Acts. The countries to which it now applies are fewer in number but not in importance. Here, the constitutional fiction worked the other way round. It would hardly do for the monarch to receive conflicting advice from his or her judges, so the convention was that there had to be a single report of the Board. This did not, of course, mean that the judges necessarily all agreed. Just as in medieval Spain, dissenters were allowed sign a book that no-one saw.⁸ In 1877⁹ someone leaked to the press the fact that some Privy Councillors had not agreed with the majority's decision on what, to our eyes, seems an extraordinarily obscure case about

⁷ Senior Courts Act 1981, s.59.

⁸ T Bingham, *The Rule of Law* (Penguin Books, 2010), p 44.

⁹ R Munday, 'Judicial configurations: permutations of the court and properties of judgment' [2002] CLJ 612.



ecclesiastical practice.¹⁰ This prompted an order of 1878 expressly forbidding ‘publication by any man how particular voices and opinions went.’¹¹ Remarkably, that order remained in force until 1966 when a new order for the first time permitted any judge of the Judicial Committee who dissented to say so and to explain why.¹² Within weeks, the Judicial Committee saw its first dissenting judgment¹³ and there has since then been a steady flow of them, and of concurring opinions, too (even though the latter are, as far as I can see, strictly speaking still not allowed).

Another possible explanation for the prevalence of the dissenting opinion in the common law world relates to the career path of the typical judge.¹⁴ On the continent of Europe, 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 often worked as lawyers in the private sector for many years before moving to the bench. Their personalities are likely, one might say, to have solidified long before they ever get to the bench.

¹⁰ *Ridsdale v Clifton (No 2)* (1877) 2 PD 276. The case concerned inter alia the vestments which might lawfully be worn by a vicar during Holy Communion.

¹¹ Order of 4 February 1878.

¹² Judicial Committee (Dissenting Opinions) Order 1966.

¹³ *National and Grindlays Bank Ltd v Dharamshi Vallabhji* [1967] 1 A.C. 207

¹⁴ Kirby, op cit.



It is obvious which arrangement is less likely to produce judges who feel obliged to go along with what the others say.

If those, then, are some reasons why we have dissenting judgments, the question still remains: what are they for? Should judges feel any inhibition about giving a dissent, and only do so if consensus proves impossible? Or is the right approach for a judge simply to set out his or her view and not to worry too much about what anyone else thinks? Oddly, for what one might think are rather important questions about the very nature of judicial office, there is not much guidance. Such views as I offer, I offer with an extreme diffidence born, among other things, of the fact that I am not a judge. I am, as it were, very familiar with the end product of their work but not with the manufacturing process.

As for what dissenting judgments are for, there are at least two answers. One is simply that 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 a second answer is that 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.’¹⁵ One thinks perhaps of Lord Atkin’s celebrated 1942 dissent in *Liverside v Anderson*,¹⁶ 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.’ Sometimes it is the other way round, the dissenting judge holding out against a tide going firmly the other way. Consider Sir Gerald Fitzmaurice’s dissent in the 1978 case in which the European Court of Human Rights held that the Isle of Man could no longer use the birch on its young miscreants:¹⁷ no boy at the school *he* had gone to, Sir Gerald confided, had ever felt the least bit ‘degraded’ by being caned.

While the ‘appeal to [...] the intelligence of another day’ might mean an appeal to another day long in the future, it is not necessarily so. In a case in 2004 called *Cartwright*,¹⁸ the United States wanted to extradite certain defendants from The Bahamas to face drug trafficking charges. The US had an overwhelming case and got their order for committal. The defendants applied for habeas corpus and, for good measure, for an order of certiorari to quash the order for committal. The

¹⁵ C E Hughes, *The Supreme Court of the United States* (Columbia University Press, 1928), p68.

¹⁶ [1942] AC 206.

¹⁷ *Tyrer v United Kingdom* (1979-80) 2 E.H.R.R. 1.

¹⁸ *Cartwright v Superintendent of Her Majesty’s Prison* [2004] UKPC 10, [2004] 1 W.L.R. 902



judge, for highly technical and plainly erroneous reasons, granted habeas corpus and ordered the defendants' release. He made no order on the certiorari application, though he did say that the orders for committal were 'void'. The United States appealed. The difficulty was that in The Bahamas at the time there was no right of appeal against a successful habeas corpus application. The Court of Appeal got around this by saying that the judge had 'based his decision on judicial review', and that since both sides had a right of appeal in a judicial review case, the Court had jurisdiction to entertain the appeal and to reverse the order. In the Privy Council, a majority agreed, adding that it was adopting a 'purposive' and 'dynamic' interpretation of the law to make extradition work effectively. Lords Hoffmann and Roger gave a joint dissenting judgment. It is a model of the genre. As they put it:

'The interpretation given by the majority to the judgment of [the judge] means that not only did he (presumably on the authority of Molière¹⁹) make [...] [an] order of certiorari without realising that he was doing so, but that he did nothing else. The notional order... [is] conjured up in order to be set aside on appeal and, this being accomplished, the actual order against which there was no appeal vanishes in a puff of smoke [...]. People facing extradition, however unmeritorious they may be, are entitled to the law. If Parliament has

¹⁹ *Le Bourgeois Gentilhomme*, Act II, Scene 4: 'Monsieur Jourdain: Quoi? quand je dis: "Nicole, apportez-moi mes pantoufles, et me donnez mon bonnet de nuit", c'est de la prose? Maître de philosophie: Oui, Monsieur. Monsieur Jourdain: Par ma foi! il y a plus de quarante ans que je dis de la prose sans que j'en susse rien, et je vous suis le plus obligé du monde de m'avoir appris cela.'



made no provision for appeal against an erroneous order for their release, they are entitled to the benefit of that order. ’

Exactly the same point cropped up again in 2007 in a case called *Gibson*²⁰, when a co-conspirator brought a separate appeal against the Court of Appeal’s order. A 7-judge panel of the Judicial Committee agreed unanimously with the view of the dissentients in the earlier appeal. The Judicial Committee agreed to depart from the earlier decision and allowed the appeal. So the dissenters were vindicated within three years.

But the second case itself included a powerful dissent, this time on the question of the law of precedent. Three of the seven—including, ironically, Lord Hoffmann himself—would have followed the erroneous decision in *Cartwright* out of respect for the principle of *stare decisis*. Although that is a subject for another day, we may expect it to be a recurring theme, both in the Judicial Committee and in the Caribbean Court of Justice. Indeed, a judgment is, as I speak, awaited from the Judicial Committee on a Trinidad and Tobago case called *Hunte* in which the state, encouraged by a powerful dissent, has invited the Board to reconsider its

²⁰ *Gibson v Government of the United States of America* [2007] UKPC 52, [2007] 1 W.L.R. 2367.



ruling in *Ramdeen*,²¹ as recently as last year, about its powers in death penalty cases.

So when ought a judge to dissent? The starting-point, I would say, is 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 this is true of the concurring opinion along the lines, ‘I agree with the result but not the reasons.’ 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.’²²

But in my view it goes no further than that. None of us, I expect, is likely to be much attracted by the nineteenth 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. The contrary view would be

²¹ *Ramdeen v State of Trinidad and Tobago* [2014] UKPC 7, [2015] A.C. 562.

²² T Bingham, ‘The Rule of Law’ [2007] 66 CLJ 67 at 69.



reminiscent of the justification, now largely rejected in the common law world, for the old offence of ‘scandalising the court’: that the people could not be trusted to know too much about the judges’ failings.²³

More practically, a court which strives to attain consensus on every point is likely quite often to be a bad court. That is, indeed, verifiable if one tries to read, as we have to though you, happily, do not, the judgments of the Court of Justice of the European Union, in theory giving answers to questions about EU law from national courts. There, 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, not altogether diplomatically, has said:

‘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.’²⁴

I would be risking the fate of an Israeli convict just before lunch if I were to attempt to make that criticism good with much citation, but the sort of thing he

²³ See *Dhooharika v Director of Public Prosecutions (Commonwealth Lawyers' Association intervening)* [2014] UKPC 11 [2014] 3 W.L.R. 1081.

²⁴ Lord Neuberger, ‘No judgment, no justice’, First Annual BAILII Lecture, 20 November 2012.



might have had in mind is perhaps the Court's recent decision in a competition law case called *Expedia*.²⁵ It was about article 101 of the Treaty, which invalidates agreements which have as their 'object or effect' the restriction of competition. In the course of its judgment the Court said that this only applied 'where that agreement perceptibly restricts competition within the common market'²⁶ but then appeared to change tack, stating that an agreement with 'an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.'²⁷ You get, as it were, the both the majority judgment and the dissent, all in the same judgment. Interesting, but not very helpful if you are trying to advise a client.

Even if this may be an extreme consequence of consensus, it seems to me that the prospects of, first, doing justice in the particular case and, secondly, improving the law as a whole are promoted more by a general willingness on the part of each judge to speak (or, as often nowadays, to write) for him- or herself, whether in concurrence or dissent, than they are by a feeling that the objective is to get to consensus.

²⁵ *Expedia Inc v Autorité de la Concurrence* (Case C-226/11) [2013] 4 C.M.L.R. 14.

²⁶ Para 20.

²⁷ Para 37.



As regards the chance of doing justice in the particular case, there are, of course, very many appeals, particularly at the Court of Appeal level, which are straightforwardly either unmeritorious or wholly unanswerable. In these sort of cases it makes a lot of sense for one judge to give a judgment and the others to concur (or, as is nowadays common in the Caribbean as in England for there to be a single judgment of the court). 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. We must all have had experience of trying to draft a skeleton argument, or a letter to the other side, arguing a bad point. It is generally harder to do than writing a good point. So a good way to test whether what a colleague is saying is correct is to try to express it oneself.

I wonder whether this approach might have worked in two recent English cases about immigration. They were called *Mirza*²⁸ and *Sapkota*²⁹. In the first one, the claimant's argument was that when the Home Secretary turned down his application for leave to remain longer in the United Kingdom, as she had done,

²⁸ *R (Mirza and Others) v Secretary of State for the Home Department* [2011] EWCA Civ 159, [2011] I.N.L.R. 464.

²⁹ *Sapkota v Secretary of State for the Home Department* [2011] EWCA Civ 1320; [2012] I.N.L.R. 218.



she was obliged, at the same time or shortly afterwards, to exercise her statutory power to direct that he be removed from the country. This she had not done. The reason for the claimant's rather counterintuitive suggestion that the Home Secretary had acted unlawfully by not trying to evict him from the country he wanted to stay in was the fact that the mere refusal of further leave was unappealable, whereas the direction for actual removal carried a right of appeal to a specialist immigration tribunal. There, the claimant could argue that his human right to a family life would be infringed by being removed, and so try get to a stage where he could not be removed and would in the end get to stay after all. The Home Secretary, the argument went, was *obliged* to exercise her apparently discretionary removal power so as to facilitate the claimant's access to the tribunal, because the overall policy of the legislation was to ensure that a decision was taken, one way or the other, about the claimant's status.

One judge, in a 47-paragraph written judgment, accepted this argument. The other two judges simply said that they agreed.

In the other case the argument was taken a step further: if the Home Secretary made an order refusing leave without, at the same time or shortly afterwards, making the necessary removal order, the order refusing leave itself became



unlawful. One judge, over 125 paragraphs of written judgment, with 83 footnotes, accepted this argument, too. Another dissented. The third, without giving reasons of his own, simply said that he accepted the argument.

Now, I suppose the arguments had a superficial attraction. But with all respect to the judges who accepted them, both were bad ones, as indeed the Supreme Court later held in a very short and rather withering judgment.³⁰ When Parliament had said that the minister ‘may’ decide to remove somebody from the country, how could it possibly have meant that she *must* do it, and moreover do it for the collateral purpose of giving the person a chance to argue that her decision was wrong? And it was even more unsound still to suggest that an apparently lawful refusal to extend someone’s leave to remain could later be invalidated by a failure to follow it up with an order for removal.

Yet one judge in each case had managed to write a judgment which concluded that these bad arguments were good ones. I might, of course, be grievously wronging the judges who merely said ‘I agree’ rather than setting out their reasoning for themselves. But I do wonder if the Supreme Court would have been saved some trouble if only they had sought to do so.

³⁰ *Patel v Secretary of State for the Home Department* [2013] UKSC 72, [2014] A.C. 651 at [27].



But why do I say that multiple judgments, including dissenting ones, are good for the law? It is because 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 those sort of statements crop up a lot in the case law of the European Court of Human Rights, in Strasbourg. Even though it does permit dissenting judgments, its judgments are in practice along somewhat similar lines to those of the Court of Justice of the European Union, and thus the continental model. Some years ago the Court was asked to rule whether it was an infringement of article 5 of the Convention (the right to liberty except in certain limited cases) for a man to be detained in a super high-security mental hospital, rather than the more liberal establishment for which his doctors had assessed him as suitable. The Court said that while it accepted that there must be ‘some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention’ article 5 was really about the question of detention or no detention, not



about the conditions of detention, so the claim failed.³¹ But that formula, ‘some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention’, has gradually acquired a life of its own, being applied somewhat mechanistically in case after case to justify findings of article 5 infringements in cases where the complaint was really that the conditions of detention were inadequate.³² As a common lawyer, one wants to read a judgment where the judges debate what the underlying principles are and how they apply.

There are, of course, many other arguments in favour of dissenting judgments. As judges have pointed out, the need to respond to the dissenting argument can force the majority to hone their opinions.³³ Dissent can also curb the majority from making over-expansive claims. And it is positively healthy for the fact of disagreement to be acknowledged.

What practical use are dissenting judgments? Except in those cases where we are actively trying to get a court to agree with a previous dissent, 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

³¹ *Ashingdane v United Kingdom* (1985) 7 EHRR 528.

³² *Mayeka v Belgium* (2008) 46 EHRR 449, *Riad v Belgium* (unreported, 24 January 2008), *Kanagaratnam v Belgium* (2012) 55 EHRR 26, *Musa v Malta* (2015) 60 E.H.R.R. 23.

³³ See, e.g., S Day O’Connor, *The Majesty of the Law* (Random House, 2003), p121.



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, to return to my presumptuous advice about dissenting, there is the question of style. How should one go about it? 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, then a relatively new first-instance judge brought in to the Court of Appeal to make up the numbers, got it right in a case called *Medcalf*.³⁴ ‘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 must presumably have been not entirely displeased to have been vindicated when the case went to the House of Lords and his view prevailed.³⁵) There is, of course, also a certain amount of what the Germans might call ‘vanity and disputatiousness.’ Dissent can be pointed; and it may not perhaps have been strictly necessary for Lords Hoffmann and Rodger to allude to Molière

³⁴ *Medcalf v Mardell* [2001] P.N.L.R. 14

³⁵ [2002] UKHL 27, [2003] 1 A.C. 120.



to show why the majority in *Cartwright* were wrong. But by and large the tone is civil.

Not so, of course, in the United States, which here performs that great nation's occasional role as a living warning to other countries of how things might go wrong if they are not careful. As I am not an American constitutional lawyer, it is not my place to say whether Scalia J was right or wrong to disagree with the majority decision in *United States v Windsor*,³⁶ the case about same-sex marriage, nor whether he was right to feel highly provoked by it. But I hope we do not see a day in England, or in Trinidad and Tobago, 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 know we are in trouble.

5 June 2015

³⁶ 133 S. Ct. 2675.