

Lecture Night  
23 January 2012

Justice Dyson Heydon AC  
*Threats to Judicial Independence – The Enemy Within*

Master Reader: Good evening. This is the first of this year's series of Reader's Lectures which happily for me, and I expect for you, are no longer delivered by the Reader. The title of the series is 'Academics and practitioners: Friends or Foe'.

Some of the speakers are academics who have had an interface with the practising profession and others are distinguished lawyers who have been both academics and practicing lawyers.

Tonight's lecturer is one of the latter. He is Justice Dyson Heydon who has since 2003 been a Justice of the High Court of Australia, Australia's Supreme Court.

Justice Heydon came to this country in 1964 as a New South Wales Rhodes Scholar to read law at University College Oxford, where one of his tutors was Lord Hoffman.

Whether due to that or not due to that he was awarded a first both in jurisprudence and in the postgraduate Bachelor of Civil Law degree.

In 1968 he became a lecturer in law in the university and a fellow of Keble College.

He returned to Australia in 1973 when he was appointed a professor in the faculty of law at Sydney University. And he became dean of that faculty in 1977.

In 1981 he left his chair to commence full time practice at the New South Wales bar and was appointed Queen's Counsel in 1987.

In 2000 he was appointed directly from the bar to the New South Wales Court of Appeal and thence to the High Court.

We are very honoured that he has agreed to speak to us tonight, not least because he owes no allegiance to the Inner Temple, being a bencher of Gray's Inn.

He has in the past expressed fairly firm views on the subject of judicial activism and his topic tonight, with that in mind, is 'Threats to Judicial Independence – The Enemy Within'. Dyson...

(Applause)

Justice Haydon: Had Simon Thorley told me what the theme of the series of lectures was I might have written a different lecture. The themes of this lecture however can be summed up in four epigraphs.

Chief Justice Dixon said, "I never agreed in anyone else's judgment without later coming to regret it."

He also said, "When judgment is reserved, each judge must retire into some private Gethsemane of his own."

Another outstanding judge, the lamented Lord Bingham, said that "Judicial independence involves independence from one's colleagues."

The fourth epigraph is by the anonymous composer of the following words on the tomb of the 17<sup>th</sup> century judge Mr Justice Walmesley: “His inside was his outside. He ne'er sought to make fair show of what he never thought.”

This address must not be taken to be speaking about any actual features of any particular court of which I've been a member but rather to tendencies or possibilities in courts in general.

It's convenient to begin with some non-judicial threats to judicial independence. They usually come from the executive.

Some threats from the executive have failed. In 1892 the future Russian Tsar Nicholas the 2<sup>nd</sup> was the victim of an assassination attempt while visiting Japan.

A great struggle then took place between the Supreme Court of Japan and the Maji Emperor's advisors as to whether the would-be assassin should be tried on a capital charge.

It turned on Article 116 of the Criminal Code which provided that anyone who attempted to kill the crown prince should be punished by death.

The Supreme Court Judges considered that this applied only to the Japanese crown prince. The executive considered that it applied to any crown prince.

The judiciary, after honourable resistance to a lot of pressure, prevailed and the would-be assassin was sentenced to life imprisonment.

Better known failures by the executive include President Roosevelt's court packing plan in 1937 and Indira Gandhi's attempts to control the Indian judiciary in the 1970s.

But sometimes the executive succeeds. It has recently been alleged – and this must be true because it appeared in that well known journal of record published by the Murdoch empire ‘The Australian’ newspaper – that it was so when Mr Bhutto, former prime minister of Pakistan, was hanged on the 4<sup>th</sup> of April 1979.

The then president of Pakistan, General Zia-ul-Haq, is said to have given hour by hour telephone instructions to the Chief Justice of Pakistan on how Bhutto’s trial should be conducted with a view to prosecution success.

A more recent reported example is that of Judge Maria Afiuni. She is a Venezuelan judge who granted bail to a banker connected with the Venezuelan opposition. The banker thereupon fled Venezuela.

President Chavez then had Judge Afiuni jailed. He announced on television that in another era she might have been brought before a firing squad. His Excellency did not apparently mention whether this event would have been preceded by a trial.

The courts’ threats to their own independence are perhaps more benign but less obvious than these. Before looking at them it’s convenient to consider the views of the scholar [J. Giles Vetta \[0:06:39\]](#) who in 1960 contrasted English and German judicial style thus:

He said that “An essential key to the understanding of England’s judiciary is that it’s composed of judges who are well acquainted with each other and with the bar. The leaders of the bar and the judges, regardless of their position in the hierarchy, are equals and feel like equals.”

“These circumstances explain why the English judicial process is in essence a continuous discussion which in all but superficial or

detailed respects resembles any discussion among educated, informed and reasonable people.”

“Reality bristles in English reports. The style employed is restrained, as befits gentlemen. The style is that of masterful advocates defending their own conclusions and accordingly the very opposite of that employed by members of the judiciary which is ingrained with notions of government, officialdom, and concepts like \*\* [0:07:41].”

In contrast **Vetta** said this of the unified dissent-free German style of 1960: “Standing always unopposed by differing opinions of equal rank a German judgment is a solid, conclusive and solemn \*\* [0:07:58].”

**Vetta** considered that English judgments had a different audience from German. German judgments were addressed to academic scholars. English judgments were addressed to the losing party.

Their function was the rendering of conclusive answers to the allegations of counsel. Naturally the allegations of counsel were closely related to the facts.

Now a discussion between educated, informed and reasonable people who are all equal, about arguments which are closely tied to the facts and which are advanced by advocates as equals to those reasonable people, can result in disagreements without any shame or grounds for criticism arising.

On the other hand an act of state, whether addressed to an academic audience or not, does not permit the expression of disagreement.

Whether or not **Vetta** was right about German judgments in 1960 his views I think have some reality as far as English judges are concerned.

As another scholar has said, “English judgments then had a quite quasi conversational character, readability, and scrupulous attention to the facts.”

Judgments were candid in admitting that their author’s opinions had swung to and fro or remained subject to doubts. They reveal the distress which their authors felt at disagreeing with other judges.

They were frank in expressing regrets about the injustice which the outcome might inflict on one party. They revealed humanity.

They showed that each member of the court has fully met the relevant responsibilities and given the arguments presented scrupulous attention.

And they were not generally concerned to state legal principles which would solve all future problems. The judges were often content merely to decide the case on its legal merits, as they saw them, and leave it to posterity to determine more general principles explaining that particular case and others decided in similar ways.

That is they rested on what is now in a slangy fashion called bottom up rather than top down reasoning.

Two key characteristics were that the judgments were delivered seriatim and very often they were delivered unreserved.

English practice thus stood in contrast with Justice Ginsburg’s description of justice in many continental courts. She said that customarily a case on appeal is initially assigned to one judge as the reported judge who bears responsibility for its preparation.

The judge immerses herself in the case and develops a report plus recommended disposition. "In most cases" she says "as one might expect, the reporters recommendation carries the day."

Now why did Justice Ginsburg say "As one might expect"? One might expect it if judges are of uniform ability and outlook or one might expect it if the non-reporter judges have abdicated responsibility to the reporter judge and failed to examine the case properly for themselves. Either way a question arises about the absence of independence.

Not everyone has praised the English style of 1960. In 1984 A.W.B. Simpson, another recently departed giant, said that the English style produced opinions which were rambling and excessively detached, which revealed undisciplined individualism and which showed a complete lack of any collegiate spirit.

That is a critical observation but it is bittersweet. It does suggest that whatever the disadvantages of the English style in 1960 it both reflected and fostered independence of mind and spirit.

The English tradition of oral trial, and in particular of extempore judgments, was stronger in 1960 than now, though it obviously still survives. It prevents various dangers from arising.

In those days both appeal and trial judges were ignorant of the case until it was called, sometimes deliberately and proudly ignorant but not irrationally so.

Of procedure in the Court of Appeal Lord Evershed said that the court knew nothing of a case until it was opened by the appellant's counsel.

In the Court of Appeal there was no preliminary reading, no written skeleton arguments, no preliminary consultation with other judges. The appropriate parts of the pleadings and advice, any judgment below and any authorities relied on, of which there were many fewer than now, would be read in full and debated with the bench.

An American judge summarised the virtues of this process as follows: "When everything is done in the open, when there are no written submissions, when the judges do no private research and have no staffs, and when they do not even deliberate at the end of argument but immediately deliver their opinion seriatim, public monitoring of judicial performance is facilitated. The judges can be seen to be doing or not doing justice."

Under that procedure counsel is in a position to protest if a significant argument is not dealt with and to insist that the argument be dealt with before orders are made.

And counsel is in a position to protest if the case is decided on the basis of some point or authority not raised in oral argument and to demand that a hearing on that point or authority be granted before the court's orders are made.

The court's knowledge of that possibility, then and now, caused and causes it to stick closely to what had been argued.

Under the practice in 1960 there was much less opportunity than now for points not raised in argument to occur to the judicial mind after reservation, for there was less reservation.

Everyone I think will be aware that these aspects of the oral tradition are becoming attenuated by various forms of what might be called case management.

A key element in case management is the requirement to file written submissions to the increased factual complexity of many cases.

Whether it's the result of the complexity of commercial transactions, or a growth in the detail of medical and other expert evidence, has been added increased complexity and legal analysis and in voluminous reference to case law, much of it unreported and unreportable but easily obtainable by computer searching.

In those circumstances, although the delivery of unreserved judgments is still very common, the practice now often depends on much preliminary work which never took place in former times. The carrying out of that work creates a risk of conveying the appearance and in some hands the reality of prejudice.

One threat to judicial independence can arise from attempts by judicial majorities to muzzle minorities. One took place in the International Military Tribunal for the Far East which tried the major Japanese war criminals at Tokyo in 1946 to 1948.

For various reasons three of the eleven judges arrived late. Before their arrival the other eight judges agreed that there would be no separate or dissenting opinions at the conclusion of the trial.

When Major General Zarianov, the Soviet judge, and Mr Justice Jaranilla from the Philippines arrived, they each accepted that agreement; although in the end Mr Justice Jaranilla did not adhere to it because he wrote a separate judgment which although substantially concurring attacked some of the sentences for leniency.

The Indian judge, Mr Justice Powell, did not accept the agreement and he did not adhere to it either since he dissented on every significant issue.

Apart from the Privy Council at that time and the English Court of Criminal Appeal, to a very large extent it was the tradition of courts in England and India, as it was in other common law courts to permit dissenting judgments.

It is also normal for judges in the common law tradition not to be bound by decisions taken in their absence.

What is significant is the attempt of eight judges to control the others in a climate of opinion which saw the court's conduct as being marred by dissenting opinions.

It is a climate of opinion which is not unique to Tokyo. A somewhat milder form of the Tokyo syndrome could arise in several ways.

It could arise if there were talk within an appellate court of its being a collegiate court or a corporate court. That language must rest on the idea that there exists some college or corporation which possesses an artificial personality and mental state different from and greater than those of the individual human beings comprising the court.

And the Tokyo syndrome could arise if it was said that there is a need to give unanimous guidance on this point. The cry might go up "We must speak with one voice."

If it is pointed out that the court has badly erred in the recent past or even acted *per incuriam* a variant could be "We must not cast doubt on so recent a decision of the court or to criticise what has happened will upset those responsible."

Guileful blandishments can be employed: charm, flattery, humour, and elaborate but insincere displays of courtesy. The message might be transmitted that those who disagree should say they agree. That is polite or jovial invitations might be made to tell lies.

The Chinese Politburo is well known for the popularity amongst its members, its rather elderly members, of black hair dye. That popularity is rivalled there only by the unpopularity of splittism. Splittism can be condemned, though more **urbanely [0:18:01]**, in common law judicial circles as well.

Now dissenters in common law courts, unlike splittists in the Chinese Politburo, cannot be removed by coups or purges. They cannot be engulfed by cultural revolutions and sent out to the fields for re-education. They cannot even be voted out of office by the people except in some parts of the United States, hence the need for blandishments.

To resist those blandishments judges need a form of independence; the independence to work out and say what they think is right irrespective of what advocates may agree on, what academic lawyers may urge, what pressure groups desire, what media groups demand, what their colleagues seem to think, or what their colleagues want them to say.

I want now just to criticise a few justifications sometimes advanced for the practice of giving a unanimous or majority judgment even though one or more of the adherents disagree.

It's been said that in criminal appeals the court should not appear divided because the liberty of the subject is at stake. And it's also said that the courts are channelling the force of the state against its own citizens.

Those considerations don't explain why there are dissents in criminal cases in the Divisional Court of the Queen's Bench Division.

And they don't give a satisfactory answer to the question why lie about whether judicial minds differ on how far liberty should be restricted?

Another assigned justification in criminal appeals for unanimity, advanced by Sir Louis Blom-Cooper and Gavin Drewry, is that to the criminal punishment itself is bitter enough without the salt of a favourable but impotent dissenting judgment being rubbed into the wound.

That is speculative. For all one knows the existence of a dissenting judgment may afford comfort to the unsuccessful appellant. Indeed the same author said a little later that the losing litigant likes to know that someone would have found for him.

The practice of expressing dissent would at least show that one member of the court had considered the loser's arguments closely and hence if judgment were reserved that the majority had also done so when they read the dissenting draft.

And a practice of dissent would show that accused persons are treated in the same way as all other litigants without adverse discrimination.

Then it is argued – and we come to a group of arguments that do have I think considerable power and need to be faced up to – it's argued that both dissenting judgments and concurring majority judgments increase prolixity and uncertainty.

It must be conceded that they have in fact increased length. It doesn't follow that they must inevitably do so. And it certainly doesn't follow that they should do so.

As to uncertainty, the argument that the dissenting judgments increase uncertainty was put thus by Mr Justice White in the United States Supreme Court in these terms: "The only purpose which an elaborate dissent can accomplish, if any, is to weaken the effect of the opinion of the majority and thus engender want of confidence in the conclusion of courts of last resort."

The difficulty with that reasoning seems to me to be this: the law is found in majority judgments; it is not found in dissenting judgments. The majority opinion, if there is a majority opinion, is binding even if there has been a dissent.

A dissent may demonstrate weakness in the reasoning of the majority but it cannot weaken the binding effect of that majority opinion. It is not open to courts bound by a majority opinion to fail to follow it because they happen to lack confidence in its conclusions. Hence I think it's to be doubted whether dissent engenders uncertainty.

A different problem, or a more acute problem, arises with concurring majority judgments. Those which are not merely repetitive may introduce reasoning not found in the main judgment and omit reasoning which is found in the main judgment. And that makes it harder to find out what the ratio of the case is.

What is sobering is that there is strong pressure for single majority judgments from three important sources. The first is judges who are bound by appellate court decisions. The second is the profession. And the third is academic lawyers.

Not all of that pressure is easy to understand. Practising lawyers and university law teachers are often highly specialised and expert. It is their function to identify the ratio decidendi, if there is one.

Further, so far as the profession is concerned, it might be thought that to produce a succession of judgments containing separate assenting and dissenting opinions that expose difficulty in a problem, and alert the profession to possible future changes in the law, is a course which is preferable to the pronouncing of a single judgment that suddenly revolutionises the law without prior warning and damages those who have acted in the expectation that the law would not change.

The former course enables the profession to advise about the risks and draft contracts accommodating them. The latter course does not.

Turning from practitioners to academic lawyers, it may be the case that some modern academic lawyers are not well positioned to complain of incoherence and obscurity in case law.

That is because in many of their activities they're not concerned with attempting to expound the law as a seamless and internally coherent web. Even though that is a valuable activity which many academic lawyers have traditionally carried out, and still do, and which they're better equipped to carry out than judges because of their superior specialised knowledge.

Rather they're concerned to fillet the law, to deride the attempts of judges, to expound the law, and even to try to explode the law. The function of some academic lawyers lies almost exclusively in the defamation of judges.

For journalists the saying goes that good news is no news. Some academics live in the world of 1984. Good judgments are bad judgments but bad judgments are good news.

Like Anglo-Saxon literature much legal academic literature is a literature of lamentation and complaint.

The claim that separate assenting or dissenting judgments generates uncertainty can only be made good I think if unanimous or majority appellate judgments can be demonstrated to engender certainty.

That latter proposition has difficulties. The late F.A. Mann was bold enough to say just before his death, in his habitual blunt style, "Law Lords who agree with an opinion may not necessarily analyse and scrutinise it to the same extent as would be required if they had to write their own opinions."

"Probably they read it through, agree with the result and the broad line of reasoning, perhaps make suggestions, but are less than precise and careful insofar as specific formulations, sentences or dicta are concerned."

Perhaps it would not even be regarded as polite to argue about individual phrases or incidental arguments. And if one were prepared to devote time to the task one could find numerous single speech decisions agreed by every other judge which are not satisfactory.

'**The Unloved**' [0:26:12] decision and Director of Public Prosecutions **and Smith** for example in which Lord Kilmuir delivered a speech extending the law of murder was concurred in by all the other Law Lords. It is now thought by very few people to have been correct.

Mr Justice Fullagar, who was then a judge of the High Court of Australia, said of it: "I understand that in England they are now hanging people for manslaughter."

Another example of the difficulties that can arise from judgments given in a single composite form is Privy Council advice before 1966. It not being possible to express internal disagreements or to express separately internal disagreements, whether they be as to the correctness of the outcome or as to the reasoning leading to the outcome, created tensions.

That composite advice tended to be marked by assertions of an emollient, laconic, and conclusory kind, unsupported by expressed reasoning or any significant expressed reasoning. That type of language, perhaps generated by bargaining, did not assist in making the law certain.

The same thing I think can be true of decisions of the Court of Appeal in criminal cases. Composite judgments raise questions. Who did the work? Did every judge understand the case or closely examine it? Did a confident specialist assume dominance over nervous generalists? What if any compromises were made?

Sometimes where composite judgments are concerned statements are made as to which member of the court played what part. And sometimes it is said that all members of the court contributed equally to a composite judgment.

The intellectual activity involved cannot be measured to that degree of precision. But if you put that on one side that is an extreme illustration of the fundamental difficulty in composite judgments.

The same difficulty exists where one judge delivers a full judgment and the remaining judges say, "I agree." No doubt the judges

agree, but on what, on the main steps in the reasoning or on every word including split infinitives and floating participles, or on something in-between?

The same suspicions arise as are raised by slab quotation of evidence, or slab quotation of authorities or legal writings, or by the verbatim acceptance of submissions.

The suspicion is that the material which is so lavishly adopted has not in truth been properly understood and evaluated as a result of personal exertion of the mind of the particular judge.

So if I can pause at this point, in a strict sense dissenting judgments do not create uncertainty. Nor I think in a strict sense do separate majority judgments do so, so long as a ratio can be discerned.

The main source of uncertainty is discordant dicta among members of the majority or succeeding majorities. The solution is not to shun dissent or multiple majority opinions, it is to minimise dicta of all kinds.

Let me go, having looked at some of the arguments against dissent and separate assenting judgments, to this fact: that the separate dissenting or assenting judgments, whatever the arguments against it, that technique does reflect the traditional freedom of judicial expression in the common law tradition.

Very distinguished names have favoured it. It was the practice of the United States Supreme Court in its earliest day. Lord Reed followed the practice in 80% of the appeals he sat on.

He justified it on the ground that judicial prose should not be construed as if it were a statute and that legal development was

best fostered by separate concurring opinions pointing to a range of possible applications of principle in different instances in future.

Lord Bingham favoured the same practice in civil cases. It was a practice which Mr Justice Frankfurter thought healthy. And it was a practice which Thomas Jefferson supported.

Many arguments can be advanced in support of the judicial freedom to dissent or give a separate opinion.

On this occasion it's desirable simply to concentrate on those which are relevant to judicial independence. They can be grouped I think under four overlapping heads.

The first is that it is important that judges fulfil a duty of accountability to the parties and to the public by revealing what each judge actually thinks.

The second is that it is important that each judge arrive at the orders which that judge votes for after having given the case the closest personal and individual attention and to show that this has been done.

The third is connected with the need to resist and control a class which I will call excessively dominant judicial personalities.

The fourth concerns the importance of not drifting away from the issues which the parties want decided, as distinct from other questions which are attractive to the minds of the bench.

The significance of the first factor is that on many legal and factual questions sincere unanimity may not be possible. The appearance of unanimity may require compromise. Compromise can be misleading because by definition a compromise is a decision which no party to it believes to be entirely correct.

The course by which judges avoid compromise and instead state – after conscientious consideration – what they believe can be superior to expressing an agreement with what they actually disbelieve.

While many executive decisions do not have to be explained, all significant judicial decisions do.

Lord Devlin said that judicial decisions contain the judiciary's account to the nation of the way in which the judges are using their vast powers. If so, the account should state the position of all judges, not just the majority.

If it is true that the law is unclear, in the sense that judges disagree about its content, it is preferable that the truth about that disagreement be communicated not concealed.

The second factor of this group of four supporting separate assenting or dissenting opinions is that those opinions should reflect the personal attention of the judges to the case and give evidence to the world at large that judicial responsibilities have been discharged.

Joint judgments may suggest, correctly or not, that the judicial process has been perfunctory or skimmed or nonchalant. Separate judgments deflect that suggestion.

Separate judgments show individual judges facing up personally to the agony of decision rather than taking the easy way out and siding with the crowd.

One has to bear in mind I think the particular problem of the appellant, the loser in the court below. Appeals are heard by judges more numerous than, often more senior than, and perhaps better

than the members of the court complained about. That is so for a reason.

The loser is entitled to have the complaint being made given the full consideration of all members of the appellate court, not just the full consideration of one of them and a skimpier examination by the others.

A detailed appellate judgment by one judge to which the others merely indicate assent, without more, inevitably conveys the impression that the outcome is the fully considered decision of the first judge but not necessarily of the others.

One comes then to the third factor or a third argument in favour of separate assenting or dissenting opinions. It derives from what I think is a plain empirical fact: the tendency of stronger judicial spirits to prevail over weaker ones.

The name of Wilfred Trotter at once comes to mind, that distinguished surgeon who flourished in the \*\* [0:34:51] before the Second World War.

He was a humble unassuming man who when he conducted a lung operation on King George V at Buckingham Palace chose to journey there not by car or cab but by bus.

He considered that one fundamental instinct in human nature which had been overlooked was the herd instinct. He wrote a book, famous in its day but now forgotten, called 'The Instincts of the Herd in Peace and War'. There is room for an expanded edition, 'The Instincts of the Herd in Peace, War and Appellate Courts'.

There is room too for a re-telling of the most famous account in history of herd behaviour, that of the Gadarene swine who rushed headlong down a steep cliff into the Sea of Galilee and drowned.

Indeed even apart from the risk of strong judicial personalities, there may in small groups be what is called a cascading effect by which on any issue people will tend to flow along with what they perceive to be the majority opinion.

There is no doubt that some personalities can be more forceful than others. A few have the perhaps unconscious aura of Lord Reed of whom it was said that in post-hearing conferences not only a judge but a statesman was speaking.

Others are forceful personalities conscious of their force and prepared to exert it. That appears to have been the case for Lord Diplock.

Lord Wilberforce, who certainly had no weaknesses of intellect or character, said of him: "Lord Diplock possessed the quality of persuading his colleagues to the extreme. It almost got to the stage of a mesmeric quality. Lord Diplock was a very persuasive man. He was a man who got his way in almost everything."

He prepared for oral hearings very thoroughly, to the extent that according to one author it was not unusual for him to have made up his mind before the appeal began. And indeed sometimes even to have written the judgment before the appeal began.

That author said he would bully counsel who would not stand up to him in order to speed up the hearing.

His biographers said that his consciousness of his ability made him dismissive of ideas at which his own fast brain had not arrived first.

They also said the disdain he found increasingly difficult to conceal for judicial views contrary to his own sometimes stifled discussion and dissent.

Lord Hope, looking back on his days as a barrister appearing before Lord Diplock, said “He didn’t allow arguments to develop that he thought had nothing in them and he would sit on you at the very start of an appeal and really cut you short. It was very difficult to get through” – and then I would stress these words – “and his colleagues on the whole did seem to be pretty compliant and didn’t really feel they could speak up if he was saying there wasn’t anything in the case. And then you found he wrote the judgment.”

So Lord Diplock was an example of a group described by Lord McDermott as having read their written material closely beforehand, who tended to push each other’s into a line of thought too early.

A Law Lord said that there was only one way for counsel to deal with Lord Diplock: hit the ball back to him as hard as possible in the hope of stunning his hand. It was the only way to stop him walking all over you. From this I think it can be inferred that his colleagues found Lord Diplock as hard to resist as counsel did.

So there is to be accepted as a fact I think the fact that stronger judicial personalities tend to push the weaker into decision.

They stare out of their judgments with the superb arrogance of noblemen in renaissance portraits, utterly confident of their own ability; pretty sure that no other judge has yet grasped the key points and that some may never do; certain that the parties have not grasped the points; glorying in their own self-perceived terribilita.

It is no sin to have a strong judicial personality. Independent judges often need to display gumption. But a combination of those personalities taken with judicial herd behaviour can I think cause grave dangers.

That is particularly so in relation to the now fashionable judicial conferences, whether the conference is held before oral argument commences or just after it is concluded.

Those conferences are antithetical to the common law adversary tradition, according to which all judicial work except for the solitary composition of reserve judgments was conducted in public.

The leaders of the judicial herd have much less power in open court because their activities can be detected and disrupted by barristers. But they have considerable power before oral argument begins.

Those conferences have value because they can help the court to isolate what is in issue and they can help it to give the parties advance notice of points which may have been overlooked or insufficiently developed.

But in pre-hearing judicial conferences the activities of dominant judicial personalities carry the danger of creating a premature closure of the mind; not only on their own part but of those of all others present; a closure of the mind before a word of oral argument has been uttered.

There's a sense in which the independence of the bench rests in large measure on the independence of the bar. And the independence of the bar is at its most important during oral adversary argument in public.

Pre-hearing judicial conferences can impede the exercise by advocates of their independence of approach.

Chief Justice Dixon, perhaps thinking of the in-court style of his earliest predecessor, Chief Justice Griffith, spoke of arguments being torn to shreds before they had been properly admitted to the mind. Some counsel in our day think that they're often torn to shreds before they've fully left counsel's mouth.

There's no doubt that some counsel dislike intervention; not all, but some do, because it can disturb the flow of an address. Those who don't mind it like it because it leads to a kind of broken battle in which the quick witted can prevail.

A disruption of oral argument can cause ideas which counsel meant to develop to be side-lined and eventually to vanish into oblivion.

For the same reason some judges dislike intervention. They dislike judicial interruptions which prevent a plausible but not fully understood argument by counsel from being put in the way that counsel wish it to be put.

Doctor Sukarno, President of Indonesia, used to boast about how under his dictatorship Indonesia enjoyed guided democracy.

Some judges may give the parties the benefit of guided advocacy, through which by a series of ponderous pushes and leading questions the debate is moved into an area which may suit the court but is not that on which the parties chose to fight.

If those tactics fail others can be employed. The questions of other judges which may illuminate the arguments which the parties wish to advance can be interrupted or the answers can be thwarted.

So judges who may be minded to dissent or even judges who wish merely to understand precisely what argument is being put are deprived of the assistance which they're entitled to receive.

I think a further problem is that a court which is afflicted by prejudgment, arrived at at a pre-hearing conference, is likely in the end to fail to deal fully and fairly with the reasoning advanced for the losing party either in oral argument or in the judgment.

It is likely to limit its own reasoning to dogmatic pronouncements of conclusion on one particular point which is seen as crucial.

The proneness of counsel towards prolixity, and perhaps latterly their fear of being sued for negligence, often causes them to advance many arguments, some of which are undoubtedly too trivial to merit substantial separate treatment.

But strong judicial personalities can seek to identify a supposedly crucial point and then conclude that no other point need be dealt with and that nothing need be said about it in the judgment.

The losing party is then left to wonder whether the court gave adequate opportunity for its arguments to be presented; if it did, whether those arguments were actually considered; and if they weren't considered whether if they had been the result would have been different.

Slightly different dangers arise – and now we're turning to the fourth of these four factors – from collective deliberation after oral argument has concluded.

The danger is that the secret debate among the bench can move – and after all advocacy turns on public not secret debate – can move

further and further from the parameters of the public debate between bench and bar.

That can happen even if there's no single dominant judicial personality. But the process can certainly be accentuated by the presence of one or more of them.

Bright idea can be trumped by brighter idea. The meeting can be seduced by suave glittering phrases. Each bright idea, each brilliant phrase, can move the participants away from what the parties said, away from the particular facts of the case, and towards general pronouncements about the future of the law unaided by the submissions or the particular predicament of the parties.

By a process of self-hypnosis those at the meeting can begin to drift away from their duty to solve the parties' problem and to begin a process of regulating the affairs of much wider classes.

It's obvious I think that justice is not delivered and the law is not satisfactorily developed by judges who simply propound propositions attractive to their minds without notice to the parties.

A related difficulty caused post-hearing discussions to be disfavoured by Mr Justice Walsh. Torts specialists will remember that his judgment at trial in the Wagon Mound was praised by the Privy Council in the appeal in that case.

In a recent reminiscence Sir Anthony Mason, who sat briefly with him in the High Court before his untimely death, after paying tribute to him as an extremely good but rather unfashionable lawyer who had a fine disciplined mind and was greatly admired by the bar, said that he had one unusual characteristic. And I stress the adjective unusual.

He was unwilling to discuss a judgment after argument had concluded unless he had thought the case through and arrived at his final conclusion. He evidently thought that by expressing a tentative view he might compromise his impartial judgment.

Now Mr Justice Walsh thus thought that the role of judges is not to search for the collective view of a college or corporation of judges, but after hearing evidence and argument presented by adversaries to arrive at an individual, unassisted, reflective, personal response to that argument and that evidence.

There is another risk I think associated with post-hearing judicial conferences, at least under certain factual circumstances.

One can imagine that post-hearing meetings may lead to the selection of one judge to do a first draft and that judge, who may well have taken a confident and aggressive role at the meeting, then puts considerable effort into the preparation of a long draft.

It may contain a complex and detailed analysis of a mass of evidence. It may contain, even though it shouldn't contain, discussion of many authorities not referred to by the parties, not mentioned in open court, and not mentioned in the post-hearing meeting either.

If some other judges were then to circulate indications of agreement 30 minutes later, or an hour or two later, a critic might say that there has not been a careful absorption and checking of everything said in the long circulated judgment.

If those judges were challenged in that way they might respond by saying that speedy concurrence is entirely in order if one is well prepared, if one is familiar with the law, if one followed the oral argument closely, and if you attended carefully to what was said in

the post-hearing meeting. But as Churchill said in the different context of the Gallipoli Campaign, “The terrible ifs accumulate.”

Now critics of multiple judgments sometimes advance a fall-back position which has a considerable prime facie attraction. That fall-back position is that there should be an attempt to avoid needless repetition among several judgments by ensuring that only one sets out the facts, the statutes, perhaps the relevant authorities and perhaps the parties’ arguments.

It is said that it is more desirable to be more collegiate and waste less time in duplicating work.

There is no doubt that seeming repetition can be very tedious for the reader. The trouble is that individual perceptions of the material facts can differ subtly but crucially. So can perceptions of what actually are the issues, of what the relevant authorities are, and of what the parties’ arguments are.

More fundamentally, if one puts aside a particular judge’s dislike of another judge’s techniques of style, which can sometimes be a trivial thing and sometimes more than a trivial thing, attempts to state ideas and particular sets of words can alter the ideas as the words change.

One doesn’t really grasp the flow of a chain of reasoning until one writes it out in one’s own words. Assent to what one conceives to be the reasoning, after reading another’s words, is not necessarily a good substitute.

Delegation, whether in whole or in part, and whether in the American style to clerks or in a more universal style to the writer of the first judgment, can be a pernicious thing.

Like much other legal work judicial work is personal. Judges cannot understand the evidence and the law unless they work it through for themselves.

It's said sometimes that any encouragement to judges to dissent or to write concurring opinions, who would not otherwise dissent or write those opinions, is encouraging an increase in the length of the overall judgments.

It's also said that that increase will tend to flow from any encouragement to judges to set out the facts, issues and arguments in their own way.

There is no doubt that in itself excessive length is bad and to be avoided. Length in judgments in the common law system has grown, is continuing to grow, and it ought to be **reduced [0:50:37]**.

It may be correct to write a separate opinion but it need not be a long separate opinion. The brevity with which points are made often greatly increases their power.

The problem, and this is a major and perhaps insoluble problem, is that often it takes time to achieve brevity and appellate judges who are under pressure, and I'm thinking in particular of judges in intermediate appellate courts who are under pressure to produce speedy judgments, do not have much time.

One theme of what I've said is that it is wrong for judges to abstain from disagreement merely because it is convenient to drift along with the majority view or to submit to raw power; or to avoid unpleasantness; or to escape the work involved in explaining why a majority is wrong; or to avoid lowering the public reputation of the institution; or to seek to achieve the appearance of unity and uniformity.

Members of the legislative branch of government or the executive branch of government can often legitimately behave in that way. The judicial branch of government is different.

The legislative and executive branches can legitimately make compromises in the interest of achieving practical outcomes; compromises alien to the process of doing justice according to law. For the facts properly found can only take one form. The law can only take one form. The application of the latter to the former, leaving aside discretionary decisions, can only lead to one result.

The difficulties which lead to judicial disagreements on these questions are better revealed than concealed. Those judges who advocate or choose the course of concealment rather than revelation constitute the most insidious of threats to judicial independence. Whether they realise it or not they are adopting the role of the enemy within. (Applause)

Male:

Dyson, thank you very much. There was one moment during that address when I had an element of sympathy for anybody who had appeared in front of Lord Diplock, including myself. (Laughter) It was good to know that his fellow judges were as sufficiently in awe of him as we were.

There was one occasion, no doubt apocryphal, when a junior counsel was invited by Lord Diplock as to whether he wished to follow his leading counsel. And he responded "Only with a crash helmet on." (Laughter)

The other thought that occurred to me whilst Justice Heydon was speaking was that we ought to get a transcript of his speech and

send it to the judges of the Court of Justice of the European Community.

Of course being an Australian judge you don't get inflicted too often with the judgments that come down from on high in Luxembourg. But undoubtedly the desire for unanimity leads to an enormous watering down of whatever occurs.

I'm very grateful to you Dyson for addressing us. The great principle of the Inner Temple is that no lecture lasts for more than one hour and therefore the speaker has the alternative of speaking for less than one hour and answering questions or speaking for precisely one hour and avoiding the questions.

As you probably heard, the vagaries of the British climate have had an effect on Justice Heydon's voice and therefore with your leave I'm going to avoid giving you the opportunity to ask him questions so he can go and lubricate the tonsils.

And I would be grateful if you could all thank him in the usual way for his kindness in coming today. (Applause)

There are now refreshments through in the Parliament Chamber and in the Luncheon Room.

Those of you that need CPD points should sign the form. And could somebody who is rather more physically able than I am bring me a form so that I can sign it to get my CPD point. (Laughter)

Thank you all very much. (Applause)

END AUDIO

[www.uktranscription.com](http://www.uktranscription.com)