Judicial Independence and Individuality: Liberty as a Paradigm Shift from 'Judicial to People' Voicing Disagreement

*by Andrew Lynch and Giovanna Tieghi**

Abstract: *Indipendenza e individualità giudiziaria: la libertà come paradigma. Passaggio da un sistema giudiziario a uno popolare. Esprimere il dissenso* – The ongoing debate in Italy on the dichotomy between judicial independence and individuality, with the eventual judicial capacity to express dissent, and the modern impulse in Australia towards joint judgments where possible create a fruitful comparative dialogue on the topic of judicial dissent. In this article, we explore the stimulating perspective of liberty as a paradigm shift in discussions around the role of dissent in contemporary final courts. Three different levels of dialogical analysis are used in this article to consider the potential contribution of Australian judicial decision-making practices to promote the High Court as a significant model of a reflective judicial institution, well-positioned to inform the broader dialogue on comparative judicial behaviour studies.

Keywords: Australian High Court; Consensus/dissent; Liberty; Independence; Individuality

"Judicial Independence includes Independence from each other".
Hon former Justice Michael Kirby – High Court of Australia[1]

1. Does Liberty still Divide when Thinking of New Generations? Insights from an Ongoing Comparative Dialogue Starting from the Case of the High Court of Australia

This is an important time for comparative analysis of the role of national final courts at a moment when the global significance of their decisions may be said to be increasing. There is a dual need to both articulate an updated narrative on judicial behavior for academic studies and also the urgency to

* The paper is the outcome of a common reflection of the two authors in continuous dialogue, before, within and after the webinar on "The Australian Legal System: A Comparative Outlook – Dialogue 'In Academic Partnership", held May 30, 2024. It should be noted, however, that Section 1, and the parts of the Sections introduced by the expression "from a continental perspective" have been written by Giovanna Tieghi, while the parts of the Sections introduced by expression "from an Australian perspective" have been written by Andrew Lynch.

[1] M. Kirby, *Address Given by the Honourable Justice Michael Kirby*, in *JCU L. Rev. 1*, *12 James Cook Univ. L. Rev.* 4 (2005).

reinvigorate a substantial discussion on the role of independent voices of judicial disagreement through a comparative perspective. In this context, the High Court of Australia (hereafter 'the High Court') has arguably acquired a significant role as an exemplar at a crossroad of practices in common and civil law jurisdictions.

While the traditions and legendary qualities of judicial dissent on the United States Supreme Court are well known, and American academic scholarship on judicial behavior remains dominant,[2] the High Court offers a signature case study. The Justices of that Court have traditionally practiced the delivery of judicial opinions *in seriatim*,[3] which in combination with a recent modern emphasis on deliberative institutional practices, may be said to have supported a multidirectional 'competition of ideas' at the heart of the Court's work[4]. This warrants serious attention by comparativist scholars. While that may occur through numerous perspectives, here we explore the role of liberty as a basis for justifying a decision-making practice that supports and publicly ventilates judicial disagreement for the people to observe.

The analysis is intended to be framed within an context that is bounded between two familiar positions: on the one side, the virtues of judicial individuality, calling to mind former High Court Justice, Michael Kirby's insistence that "truth, independence and conscience" are goals not to be sacrificed, even in the name of clarity and certainty in the law[5]; on the other side, by the crucial concern about the way the relationship between liberty and judicial division is traditionally conceived[6]. Starting from these theoretical premises, the authors' joint intent is to contribute to discussion on the inherently constitutional nature of the freedom-division tension. To that end, the paper takes its cue from an awareness of the value, if not need, to contextualize the opportunities for judicial vocalization within a global appreciation of justice and liberty, but, at the same time, within the so-called transformative constitutionalism: exactly at a conjunction where

[2] The field has transformed into a global research. Recently, N. Garoupa, R.D. Gill, L.B. Tiede (Eds), *High Courts in Global Perspective*, Charlottesville and London, 2021, which includes the Australian outlook by R. Smyth, *Empirical Studies of Judicial Behaviour and Decision-Making Process in Australia and New Zealand*, 108-128.

[3] Due to the influence of the English common law tradition.

[4] J. Gleeson, *Court Education is just not for Lawyers*, Kathleen Burrow Research Institute Lecture, delivered at the University of Sydney, October 5, 2022, at https://www.hcourt.gov.au/assets/publications/speeches/current-justices/gleesonj/Court%20Education%20Is%20Not%20Just%20For%20Lawyers.pdf.

[5] "There are many in society, including appellate judges, who hate disagreement, demand unanimity and insist on more consensus. They speak endlessly of the need for clarity and certainty in the law. Truly, these are goals to be attained if at all possible. But judges must not achieve them at the sacrifice of truth, independence and conscience": *Address Given by the Honourable Justice Michael Kirby*, in *JCU L. Rev.*, 2005, delivered to Inter Alia, the Law Students' Society of James Cook University in Cairns, Saturday February 26, 2005.

[6] For a preliminary provoking input, see: A. J. Brown, *When Liberty Divides: Judicial Cleavages and their Consequences in* AI-Kateb v Godwin (2004), in A. Lynch (ed.), *Great Australian Dissents*, Cambridge, 2016.

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"incrementalism reveals its contribution as a theory of freedom *and* limitation"[7].

To open an effective comparative dialogue on both the merits and the future direction of judicial decision-making as it relates to the contemporary challenges of judicial independence,[8] a question underlies the three levels of inquiry we take (Sec. 2, 3, and 4). Can it be said that judicial freedom and individuality will still destabilize the judicial arm – according to what is the greatest concern in the civil law traditions (and, above all, in Italy) - when we think about the next generation going into the mid-21st century and their right to information about institutional power as a reasonable assumption? Will not their capacity to lead democracies through such complex and transitioning times be enhanced, rather than impaired, by access to judicial dialogue of competing visions?

Our direct invocation of the role of forthcoming generations in the context of a comparative analysis of judicial behaviour is intended to give stronger value to the "global research enterprise with scholars drawing on history, economics, and psychology to illuminate *how and why judges make the choices they do and the consequences of their choices… for society*"[9]. Hence, the issue of generational expectations and need promotes a discussion not just on the preferability of the methods of final courts, but more broadly, on best securing the legitimacy of those courts to fulfil their pivotal role worldwide.

New generations are facing complex issues of competing constitutional values: "The guarantee schemes developed by constitutionalism in its historical evolution", it has been clearly underlined, "are exposed to difficult challenges". So, if "letting down one's guard, setting aside a historic transformative factor proven by *Western legal culture* and successfully tested in many other contexts" has been considered "not a good strategy", what are the new tools and the proper culture Courts can promote to let new generations believe in the statement that "the challenge for

[7] "Incrementalism is a theory of freedom *and* limitation. As a descriptive theory incrementalism recognizes the freedom of decision-makers, including judges, but emphasizes that in the real-world decision is narrowly confined. As a prescriptive theory incrementalism requires of the judge, as political decision-maker, that he acts cautiously and according to the rules of legal craftsmanship so dear to the hearts of legalists. The principal advantage of incrementalism to the legal fraternity may well be that it provides a middle and common ground for those who revel in the newfound freedom of judges and those who fear the excesses of that freedom": M. Shapiro, *Stability and Change in Judicial Decision-Making Process*, in *L. in Trans. Quart.*, 157 (1965).

[8] W. Van Caenegem, *Judicial independence, impartiality, and judicial decisions: Judicial Impartiality and Cognitive Bias; Truth, Evidentiary Powers of the Judge and Confirmation Bias; Automated Judicial Decision based on Artificial Intelligence, Independence, and Impartiality, 2023*, Advance online publication (Final version to be published November 2024), at https://pure.bond.edu.au/ws/portalfiles/portal/225986223/Judicial_independence_-_Australian_National_Report_-_IAPL_2023_-_W_van_Caenegem_-_PDF_Pre-publication_version.pdf.

[9] L. Epstein, G. Grendstad, U. Sadl, K. Weinshall, *Introduction*, in L. Epstein, G. Grendstad, U. Sadl, K. Weinshall (Eds), *Oxford Handbook of Comparative Judicial Behaviour*, forthcoming, 1.

freedom changes forms and spatiotemporal dimensions, but it cannot stop"[10]?

In light of this, this article focuses on three different levels of dialogical analysis: first, the often misunderstood/unrecognized (from a continental perspective) Australian constitutional "culture" and the impressive value of the "competition of ideas" to be analysed primarily through contrasting the positions of members of the High Court as an expression of relatively recent shifts in the judicial style of the High Court against the backdrop of the current debate in Italy (Sec. 2). Second, the contribution of Australian scholars – and external criticisms – on how to conduct empirical studies on judicial behaviour, specifically focusing on 'diversity' and the impact of difference between judges (Sec.3). Third, discussion of the potential contribution of Australian judicial behaviour practices and studies to promote the example of the High Court as a world-leading model of a reflective judicial institution to inform the broader dialogue on comparative judicial behaviour studies (Sec.4).

Deliberately, the topic will be investigated and discussed by the authors using a dialogical-legal discourse methodology[11] whose different views will be made explicit by indicating the perspective - continental or Australian - of the two different authors: a way it was thought the analysis could be most effective in comparative terms.

1.1 Some Methodological Premises on the Dialogical Language to Look at the Disagreement as "a Source" of Liberty

From a continental perspective the topic of disagreement is extremely challenging. Nearly ten years after the Australian Conference on "*Judicial Independence in Australia - Contemporary Challenges, Future Directions*"[12], the ongoing debate in Italy on the judicial capacity to express dissent remains stalled. The legacy of Australia's first female Chief Justice, Susan Kiefel (2017-2023) to work for unanimity where possible has paved the way for a comparative dialogue on the topic of judicial dissent, offering the stimulating perspective of liberty as a paradigm shift in the investigation of the role of dissent in contemporary final courts. It consists of conceiving liberty as a turning point in judicial decision-making in both its different aspects: not only on the part of the judges, but also on the part of those seeking justice: the People. The question for comparatist scholars, and especially from a Law

[10] G.F. Ferrari, *I diritti nel costituzionalismo globale: luci e ombre*, Modena, 2023, inside cover.

[11] "We live in a dialogical world. The normative environment around us is many-voiced. Legal activities like drafting, negotiating, interpreting, judging, invoking, and protesting the law take place in dialogical encounters, all of which presuppose entrenched forms of social dialogue. And yet, the dominant modes of thinking about the law remain monological", in J. Etxabe, *The Dialogical Language of Law*, in 59(2) *Osgoode Hall L. J.*, 429 (2022).

[12] The following Volume brings together some of Australia's leading constitutional scholars' speeches on Judicial independence as a fundamental aspect of law and governance in Australia: R. Anian-Welsh, J. Crowe (Eds), *Judicial Independence in Australia - Contemporary Challenges, Future Directions*, Alexandria NSW, 2016.

and Justice perspective, seems to be: "How can we bring our legal conceptions into alignment with the dialogical world in which we live?"[13].

To reply to this provocation, the importance of a dialogue among scholars on these issues is undoubtedly a starting point to state the awareness of the crucial value of dialogue even among the justices themselves. The assumption by which "Australian Judicial Behaviour requires more sustained scholarly attention to provide a deeper account of how the Australian High Court has acquired a leading position on the ongoing debate consensus-dissent"[14] seems to open, especially from the Italian side, the possibility of rethinking some basic pillars which involve liberty also as a judicial paradigm.

In particular, remarkably important is the idea of the dissent as simultaneously a source of innovation a source of uncertainty"[15]. This double-faceted feature may be said to to include liberty as a turning point in judicial decision-making in both its different aspects: that is, not only on the part of the judges, but also for those seeking justice from the courts.

The proposal, indeed, is to consider looking at the disagreement as "a source" of liberty. In this direction, of great help is the affirmation of Ahron Barak, former President of the Israeli Supreme Court: "The judge is part of the people" as "trustee"[16]. This view includes a deeper message which helps to better investigate the judicial outlook: "We demand that others act according to the law. This is also the demand that we make of ourselves. When we sit at trial, we stand on trial"[17]. Looking at the example of the High Court of Australia and the internal debate on the role of its contemporary justices, it seems comparative scholars should consider that Court as effectively revealing its liberty's vital role in understanding the voicing of judicial disagreement in a global context.

The challenge is properly to bring our legal conceptions into alignment but, at the same time, the premises mentioned above reveal the importance of heeding our distinct legal traditions. For a view of law as fundamentally capable of being dialogical is central to the common law method, albeit long masked by formal adherence to the so-called 'declaratory theory'[18]. Judicial disagreement, says Professor Tamanaha, confirms that "open questions and hard cases are inevitable in law, judges are humans subject to cognitive biases and motivated reasoning, and judges perceive their role in various ways' and that 'a realistic construction of the rule of law would accept these factors as given, unavoidable conditions of judging"[19].

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[13] J. Etxabe, *The Dialogical Language of Law*, quot., 429.

[14] R. Smyth, *Empirical Studies of Judicial Behavior and Decision-Making Process in Australia and New Zealand*, quot., from 108.

[15] A. Lynch, *Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia*, in 27(3) *Melb. Univ. L. Rev.*, 724 (2003).

[16] "The view of public officials as public trustees, is not just judicial rhetoric. (…) Trusteeship demands fairness. (…). Public officials owe a duty of fairness, derives also from their role as public trustees": A. Barak, *The Judge in a Democracy*, Princeton, 2006, 220.

[17] A. Barak, *A Judge on Judging: The Role of a Supreme Court in A Democracy*, Cambridge, 2002,162.

[18] Lord Reid, *The Judge as Law Maker*, in12 *J. of the Soc. of Pub. Teachers of L.*, 22 (1972).

[19] B.Z. Tamanaha, *Beyond the Formalist-Realist Divide*, Princeton, 2009, 150, 187.

There is no doubt that the High Court's practices of conferencing, deliberating and deciding benefitted from the illumination that several members of the Court gave them following the call for strict judicial independence by its departing Justice, Dyson Heydon, in 2013[20]. What ensued was helpful in understanding the different principles and approaches across the Court, but this episode was notable by international standards also. But elsewhere I have questioned whether this amounted to a 'debate' amongst the individuals involved, and I think I must also query whether there was a 'dialogue' by the same measure[21]. The more accurate term is an 'exchange' of different views by different judges of their *own* conception of what is required in the setting of a multi-member court.

Moreover, the idea that the expression of judicial disagreement is a potential source of future law is captured in the iconic words of America's Chief Justice Hughes when he spoke of dissent as "an appeal…the intelligence of a future day"[22]. Liberty of judicial self-expression is intrinsic to this conception of dissent as valuable. The potential uncertainty that may result is the price we pay for that benefit. As we know, in the lives of our own political communities, the opportunity for the electorate to achieve change and a degree of uncertainty go together – that's what liberty entails. If we are uncomfortable with that, then the curtailment of liberty provides certainty but will suppress dynamism and change. So, individual judicial liberty – which would be more commonly spoken of in terms of judicial *independence*, even from one's colleagues, underpins the practice and benefits of dissent (though as the Australian discussion last decade sought to make plain, that freedom does not require an unyielding and absolute exercise, at the expense of the benefits of judicial deliberation to aid decision-making)[23].

The suggestion of judicial disagreement as a "source" of liberty turns us to the place of the public that is served by the courts. While "source" may be too strong a word, the visible expression of dissent by the judicial arm promotes plurality and democratic ideals more generally in society in a way that is at the very least *consistent* with liberty.[24] Particularly important in our age of political polarization, it may also be said to highlight that the 'competing societal values', which Alder says dissents reflect,[25] are capable of being expressed and justified, sometimes forcefully, and also contained within a public institution.[26] It is important not to go further than this and

[20] JD. Heydon, *Threats to Judicial Independence: The Enemy Within*, in 205 *L. Quart. Rev.*, 129 (2013).
[21] R. Anian-Welsh, J. Crowe (Eds), *Judicial Independence in Australia - Contemporary Challenges, Future Directions*, Alexandria NSW, 2016, 158.
[22] C. E Hughes, *The Supreme Court of the United States*, New York, 1928, 68.
[23] See Justice Stephen Gageler, *Why Write Judgments?*, in 36 *Sydney L. Rev.* 189,195 (2014); Justice Patrick Keane, *The Idea of the Professional Judge: The Challenges of Communication* (Speech delivered at Judicial Conference of Australia Colloquium, Noosa, 11 October 2014), 19.
[24] W.O. Douglas, *The Dissent: A Safeguard of Democracy*, in 32 *J. of Am. Judic. Soc.*,104 (1948); KM. Stack, *The Practice of Dissent in the Supreme Court*, in 105 *Yale L. J.* 2235, 2254 (1996).
[25] J Alder, *Dissents in Courts of Last Resort: Tragic Choices?*, in 20 *Oxford J. of Leg. Stud.*, 221 (2000).
[26] RW Bennett, *Counter-Conversationalism and the Sense of Difficulty*, in 95 *Northwestern Univ. L. Rev.* 845, 885-6 (2001).

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simply equate the dissenting opinions themselves to having a liberty-supporting effect – that may not be the case and it is a mistake to adopt the sometimes romanticised ideal of the dissenting judge as a valiant hero defending our liberty. That may occasionally be the case, but there is no reason it must be and sometimes the converse is true.

With one significant qualification, it can be said that any final court where individual judicial expression is available to its members and occurs with reassuring regularity that the people can observe the court's judges exercising their independence, is an example of liberty that buttresses a democratic society. Taking a cue from the quote of Ahron Barak above, the Supreme Court of Israel is a very good example – and, of course, the political attempts not long ago to curb the powers of the Court led to massive public protest as the people saw the attack on the Court as having consequences for their own freedom. Justices of the High Court of Australia had an unusually candid period of reflection about how that court decides cases in recent years, and there is much of interest in what was said, but it does not offer a uniquely distinctive example.

The qualification on the ability of any court to demonstrate liberty's role through the practice of judicial dissent is this: the public confidence that may be enhanced by courts which are open and transparent about judicial differences of opinion will *not* arise when the court splits routinely on grounds that reflect party political ideology and stem from the politicized nature of judicial appointments. Indeed, the opposite is true – the Court is diminished, both as to its standing in the community and the authority of its jurisprudence, including as of interest and any influence to courts elsewhere and global audiences. Obviously, the current state of the Supreme Court of the United States readily comes to mind. It offers an example that many would see as counter to allowing judicial dissent – but that is due much more to problems in American congressional politics and specifically in its method of judicial appointments than it is to the capacity for judicial dissent in and of itself.

2. The Australian Constitutional "Culture" of Seriatim Judgments and the Value of the "Competition of Ideas": A Forward-Looking Model of Law and Justice?

From a continental perspective this comparative dialogue on the delicate topic of individual voices[27] has been clearly stimulated by some important arguments of Michael Kirby, formerly a Justice of the High Court, known as Australia's "Great Dissenter"[28]. His incisive remarks on the merits of giving

[27] "[There are] three patterns of appellate judgments by collegial courts: seriatim opinions by each member of the bench, which is the British tradition; a single anonymous judgment with no dissent made public, which is the civil law prototype; and the middle way familiar in the United States – generally an opinion for the court, from which individual judges sometimes disassociate themselves in varying degrees": Justice R. B. Ginsburg, *Remarks on Writing Separately*, in 65 *Washington L. Rev.* 133, 134 (1990).

[28] "The whole notion of 'greatness' is a complex one, strongly linked to judicial reputation. Occasionally, Justices of the High Court of Australia have acquired the sobriquet of 'Great Dissenter'. (…) a reputation for dissent defines the judicial careers

voice to judicial disagreement, have also been studied by students from different nationalities within the ELP-Global English for Legal Studies course as a stimulus to discussions of judicial method generally. We may primarily focus on his assumption that "Expressing the law is inescapably a process shaped by values"[29].

This statement gives a direct and clear understanding on the strategic issue - derived from the Anglo-Australian judicial culture of seriatim judgments - which may express not just the outcome to legal issues before the court but also, as pointed out, "the values inherent in questions of precedent and change" that are held by the individual Justices[30]. This approach, in particular from a civil law perspective, seems to encourage the importance of a reflection on the substantial and empirical "degree of diversity" that, on the one hand, is physiologically contained within the Court as an institution. On the other, it could potentially enrich the dialogue among the justices themselves about those values through a 'competition of ideas'[31]. That seems to fit, with a broader – and global - understanding of an engaging and proactive conception of individuality which, paradoxically, can perfectly co-exist with the free choice of joint opinions and, simultaneously, contribute to the broader conversation of democratic deliberation[32].

In the same line, judicial independence adds some crucial insights into the topic. "Judicial independence includes *independence from each other*"[33]: this statement by former Justice Kirby, chosen as a key input of the whole paper and quoted in our front page, explicitly pushes for an upgrade of the level of discussion on the judicial choices. It enhances an understanding of judicial independence[34] (also to dissent) as a reflection of the people's (i.e.

of two later Justices – Lionel Murphy and Michael Kirby. The status of both as a minority voice on the bench shapes scholarly assessment of their contribution. (…) So far this century, the Australian media have identified Kirby J and then Heydon J in quick succession as the Great Dissenter on the High Court": A. Lynch (ed.), *Great Australian Dissents*, quot., 4 and 5. Moreover, among others, G. Jacobsen, *New Great Dissenter takes Kirby's place in High Court battlefield*, 2012, at https://www.smh.com.au/politics/federal/new-great-dissenter-takes-kirbys-place-in-high-court-battlefield-20120216-1tc0c.html: "After two years of unprecedented unanimity, the High Court has a new 'great dissenter'. He is Justice Dyson Heydon, who disagreed with his colleagues in nearly half of all cases he dealt with (…). Heydon has only one year to outdo Kirby's dissenting record, because he has to retire by March 2013, when he turns 70".

[29] M. Kirby, *Address Given by the Honourable Justice Michael Kirby*, quot.

[30] A. Lynch, *Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia*, quot., 769.

[31] "Marketplace of competing ideas": W.J. Brennan, *In Defence of Dissent*, in 37 *Hastings L. J.*, 430 (1986).

[32] Which reproduces, nearly 10 year after, the question on "How do individual members of such Courts balance the institutional benefits of joint opinions against the attraction of speaking separately?": A Lynch, *Keep Your Distance: Independence, Individualism and Decision-Making on Multi-Member Courts*, in R. Ananian-Welsh and J. Crowe (Eds), *Judicial Independence in Australia – Contemporary Challenges, Future Directions*, Annandale, 2016, 156.

[33] M. Kirby, *Address Given by the Honourable Justice Michael Kirby*, quot.

[34] R. Ananian-Welsh, J. Crowe (Eds), *Judicial Independence in Australia. Contemporary Challenges, Future Directions*, quot.

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minority) freedom. It firmly introduces the accountability tool as directly connected with liberty: a way to emphasise the honesty required by the judicial role[35], and in turn representing – within what is called 'the monolithic solidarity' of the Court - the diversity of expression within the larger community[36]. He has also stressed the crucial idea, with a deep impact on the ongoing Eurocentric debate, that "the demand by observers for unanimity amongst judges is often infantile. If it is an insistence that judges hide their disagreements from the public they serve, it denies the ultimate sovereign, the people, the right to evaluate, and criticize, judicial choices"[37]: looking at the Australian experience, the above-mentioned approach, based on accountability and transparency, seems to help outlining the Australian case as a more transparent and contemporary model of law and justice[38] and, potentially, to contribute to the ongoing debate in a global perspective.

Acknowledging the "free choice of judicial opinions" is also a critical dimension of what we must mean when we talk about liberty as manifested by the judiciary. The rise of joint judgments in the High Court of Australia has undoubtedly been a welcome and valuable development – when judges do agree, there can be no harm and much benefit in the joint, even unanimous, expression of that agreement. Not only does that provide greater certainty, and often greater clarity, to the law, but it also provides useful contrast to the cases where the bench has genuine disagreement that requires different forms of expression. When a court only produces judgments in one mode – whether unanimous or seriatim – its power of communication to the people is one dimensional.

That said, it is appropriate to be cautious about drawing too direct an equivalence between judicial independence and minority freedom. The former is a vital constitutional principle that exists to assure the institutional integrity of the judicial arm of government, not to serve or protect the judges as individuals *in their own right*. There is a wariness in Australia about the endpoint of arguments for judicial independence that focus too absolutely on the individual judge and their freedom. The expression by former Justice Dyson Heydon of these ideals amounted almost to a call for judicial isolation – bordering on a repudiation of the Justice as a member of the Court in an institutional sense.[39] Other judges responded by saying the price of that degree of independence might just be poorer decisions and instead deliberation was possible while still ensuring independence.[40] The

[35] "(…) judges should be honest. If they create new law, they should say that. They should note hide behind the rhetoric that judges declare what the law is but do not make it. Judges make the law, and the public should know that they do. The public has the right to know that we make law and how we do it; the public should not be deceived. (…) Public confidence in the judiciary increases when the public is told the truth": A. Barak, *The Judge in a Democracy*, quot., 112.

[36] S. Jay, *Most Humble Servants. The Advisory Role of Early Judges*, New Haven, 1997.

[37] M. Kirby, *Address Given by the Honourable Justice Michael Kirby*, quot.

[38] " (…) the more subdued complexity and variety of judicial dissent in Australia is no less fascinating than the American experience": A. Lynch (ed.), *Great Australian Dissents*, quot., 12.

[39] JD. Heydon, *Threats to Judicial Independence: the Enemy Within*, in 205 *L. Quart. Rev.*, 129 (2013).

[40] P. Heerey, *The judicial herd: Seduced by suave glittering phrases?*, 87 *Aust. L. J.* 460, 461 (2013).

overall outcome of this exchange is that Justices must enjoy 'decisional independence' and they will decide the strategy that best ensures that in practice.[41]

2.1 Australian Shifts in the Judicial Style of the High Court and the Ongoing Judicial Debate in Italy

From a continental perspective, some current shifts in the judicial style of the High Court seems to significantly express the enduring dialogue – and the consequent experimental practices of changes of approaches - to find the proper balance within each single Court (i.e. when leadership of the Court passes from one Chief Justice to another). Specifically, what is remarkably interesting from a law and justice comparative outlook, is not the modern Australian lean to joint judgments where possible – which reached its most candid expression in the era of Chief Justice Susan Kiefel, the first woman to be sworn in as the leader of the High Court of Australia and whose first major address "was to once again describe and justify this practice and emphasize the benefits it provides of institutional coherence and certainty"[42] – but, rather, the vital debate on the role of judicial individuality which comes directly from the Justices' experiences and their deliberative choices. Justice Kirby and Chief Justice Kiefel[43] are a proper example of the issue, with their two opposite approaches –both equally legitimate, as related to the role of legal reasoning in complex societies. The problem, at this stage of investigation, seems to be related, firstly, to the importance of a discussion on judicial method and on the "primarily relational, rather than substantive, nature"[44] of what determines the status of a dissent.

On the merit, moreover, the issue concerns the effects and implications of talking down the use of judicial dissent: on the one hand, by a Court with a deep legal tradition of seriatim judgments and, on the other hand, the decision to resist dissent in a historical moment of globalism, deeply characterized by a pluralist society and by judicial dynamics in which the principle of pluralism seems to represent the contemporary, multiple viewpoints. From the Italian side, the issue is denied at the root: the problem

[41] A Lynch, *Keep Your Distance: Independence, Individualism and Decision-Making on Multi-Member Courts*, quot.,161-66.
[42] A. Lynch, G. Williams, *The High Court on Constitutional Law: The 2017 Statistics*, in 41 (4) *UNSW L. J.*, 1135 (2018).
[43] Justice Susan Kiefel, *The Individual Judge'*, 88 *Aust. L. J.* 554 (2014); and Chief Justice Susan Kiefel, Selden Society Lecture Supreme Court of Queensland, 28 November 2017: *Judicial Courage and the Decorum of Dissent* at https://www.hcourt.gov.au/assets/publications/speeches/current-justices/kiefelj/KiefelCJ28Nov2017_1.pdf; Chief Justice Susan Kiefel, Law Right Public Interest Address, Monday 25 October 2021, at Customs House Brisbane, on *The role of courts in our society* at https://cdn.hcourt.gov.au/assets/publications/speeches/current-justices/kiefelj/LawRight%20Public%20Interest%20Address.pdf.
[44] A. Lynch, *Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia*, quot., 749.

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can only be posed as a scholarly debate[45] because it is not given to testing in the field - except for a few, crucial stances by some former judges on the importance of dissents for the judicial dynamic[46] - how the individual judge's way of operating can best contribute to the resolution of cases of constitutional illegitimacy in terms of judicial dialogue, through individuality: i.e., in terms of freedom and accountability, to be considered as pre-requirements to voice their disagreement.

The two mentioned instances by the Italian former justices, almost a decade later, to be deeply understood, need to be contextualized in the current Italian framework of law and justice and, specifically, as done for the

[45] "The fact is that the absence of a transparent and public dissent, made not of inference but of argument, has been the subject of debate for decades, both in doctrine and among constitutional judges themselves": N. Zanon, *Le opinioni dissenzienti in Corte costituzionale. Dieci casi*, Bologna, 2024, 3 (translation by the author). For a brief bibliographical indication on the subject covering a time span of about sixty years, see: C. Mortati (ed.), *Le opinioni dissenzienti dei giudici costituzionali ed internazionali. Scritti raccolti a cura di Costantino Mortati*, Milano,1964; G. Lombardi, *Pubblicità e segretezza nelle deliberazioni della Corte costituzionale*, in *Riv. trim. dir. proc. civ.*, 1146-1158 (1965); C. Mortati, *Considerazioni sul problema dell'introduzione del "dissent" nelle pronunce della Corte costituzionale italiana*, in G. Maranini (ed.), *La giustizia costituzionale: atti di una tavola rotonda organizzata in collaborazione con la fondazione A. Olivetti e l'United States Information Service*, Firenze, 1966, 155-172; S. Rodotà, *L'opinione dissenziente dei giudici costituzionali*, in *Pol. del Dir.*, 637-639 (1979); A. Anzon (ed.), *L'Opinione Dissenziente. Atti del seminario svoltosi in Roma, Palazzo della Consulta, nei giorni 5 e 6 novembre 1993*, Milano,1995; B. Caravita di Toritto, *E ora introduciamo la dissenting opinion*, in 20 *federalismi.it* (2009); P. De Luca, *Che fine ha fatto l'introduzione dell'opinione dissenziente? Suggestioni a partire da un'interessante risposta del Presidente emerito G. Silvestri*, 19 novembre 2014 (at http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2014/12/deluca.pdf); A. Di Martino, *Le opinioni dissenzienti dei giudici costituzionali. Uno studio comparativo*, Napoli, 2016; N. Zanon, G. Ragone (Eds), *The dissenting Opinion. Selected essays*, Milano, 2019; G. Bergonzini, *Corte costituzionale, autorevolezza, educazione alla democrazia: oltre l'unanimità e la segretezza?*, in M. Bertolissi, G. Bergonzini, G. Tieghi, *Corte costituzionale in pubblico. L'autorevolezza del giudice*, Napoli, 2023, from 139.

[46] Primarily, nearly ten years ago, former Justice Sabino Cassese: "*Dissenting opinion. A mouldy or fearful world?* The Court has repeatedly debated the legitimacy and appropriateness of the introduction of dissenting opinion. In early 2010, the scene repeated itself. The meeting is informal, there is no obligation of secrecy. Only three of us are of the opinion that dissent can be introduced without recourse to law. And only four in favor of introducing dissent. I gave the court a lecture on the subject, which was later published" (Seminar on *L'opinione dissenziente*, Palazzo della Consulta, June 22, 2009 at http://www.cortecostituzionale.it/convegniSeminari.do). "I simply say that the contrary argument invoking high conflict can be reversed: precisely because the country is so conflictual, it is good for the Court to be able to express and make known divergent and argued opinions", S. Cassese, *Dentro la Corte. Diario di un giudice costituzionale*, Bologna, 2015, 134 (translation by the author). Recently, ten years later, former Justice Nicolò Zanon has emphazised the idea that "The absence of the dissenting opinion in the Constitutional Court is a legacy of a tradition that must be overcome. Its introduction would not only make it possible to show the plurality of possible interpretations of the Constitution, but the knowability of the remaining minority theses would also increase pluralism, transparency, and public discussion on the most important constitutional issues: a form of integration through debate between different ideas and an appeal to the intelligence of future days": N. Zanon, *Le opinioni dissenzienti in Corte costituzionale*, quot., back cover.

Australian side, considering the justifications of the counterpart approach, recently made official by the current Chief Justice of the Italian Constitutional Court in his recent Annual Report[47]. His speech assumes the role of a formal reply to decades of attempts to look at the issue from a different perspective, here summed up by the two former justices' beliefs: firstly, to the idea that making known argued divergent opinions "enriches debate, not enlivens it"[48]; more recently, to the conviction that "(...) above all, in some crucial and sensitive matters (...) to remain bound to a majority choice is like a shirt of Nesso, and it is very unfulfilling exercise to collaborate in making better (from one's own point of view) a rationale that one just does not share"[49]. Thus, the decision by a former Justice to publish his own dissents in ten cases for which he would have written – if possible – a dissenting opinion[50]: "My purpose", he has underlined, "is to bring to the outside world, from the confines of the council chamber, a little of this vivid argumentative richness, in the belief that it is not always good that voices from inside, inside must remain"[51].

The consideration of a 'vivid argumentative richness' has been immediately challenged reaffirming the lack of "need to introduce forms of dissenting opinions", due to the fact that "there is no aspect of a decision (including the most minute grammatical issues and choice of wording!) that has not been subject to thorough discussion among us" and that "majorities are formed and dissolved from time to time"[52]. It seems, indeed, properly underlying the two aspects of an inside "thorough discussion" and the changing majorities, the confirmation that we are losing an important feature of the decision-making process: transparency, and what this means for the "right to knowledge". Moreover, taking advantage of the positions adopted by diverse members of the Australian judiciary, as an expression of shifts in the judicial style of the High Court, some comparative considerations could strength the urgency for a new conception of the role of secrecy, against the backdrop of the current debate in Italy[53].

[47] Extraordinary Meeting of the Constitutional Court, *Report of the President of the Constitutional Court Professor Augusto Antonio Barbera*, Rome, Palazzo della Consulta, Salone Belvedere, 18 March 2024, at https://www.cortecostituzionale.it/annuario2023/pdf/Relazione_annuale_2023_ENG.pdf.

[48] S. Cassese, *Dentro la Corte*, quot., 134 (translation by the author).

[49] N. Zanon, *Le opinioni dissenzienti in Corte costituzionale*, quot., 5 (translation by the author).

[50] "Therefore, I had no choice but to wait until I ceased office, and publish these opinions unofficially, and precisely posthumously": N. Zanon, *Le opinioni dissenzienti in Corte costituzionale*, quot., 29 (translation by the author).

[51] N. Zanon, *Le opinioni dissenzienti in Corte costituzionale*, quot., 30 (translation by the author).

[52] *Report of the President of the Constitutional Court Professor Augusto Antonio Barbera*, quot., at https://www.cortecostituzionale.it/annuario2023/pdf/Relazione_annuale_2023_ENG.pdf, 20.

[53] "(…) the secrecy of the deliberations in chambers must nevertheless be observed, a point I wish to strongly emphasize. Secrecy that is not intended to bolster the outdated notion of *arcana imperii*, but that is necessary to ensure the freedom and independence of the Constitutional Court", *Report of the President of the Constitutional Court Professor Augusto Antonio Barbera*, quot., 21. To this recent, mentioned statement, former Justice

At least as regards the judicial debate on the issue, it seems to have a specific meaning from a comparative law outlook – the apparent 'paradox' of searching for publicly voiced disagreement (when denied) and promoting the consensus approach (where voicing disagreement is allowed). Accordingly, the risk is to look at the Australian modern trend without catching the core issue: which is, especially for comparatist scholars, to look at the use of separate opinions not as an accountable choice by the single, independent judge, but as an attack to its own Constitution, to be "understood (…) not as a document brandished for divisive interpretation but as the fabric that, through the sharing of its principles, sustains and unifies the Republic"[54].

This is not a matter of two opposite trends of a civil law jurisdiction and a common law one. And neither is it a matter of different procedures for appointing judges, which goes directly to the responsibility of the judge' choices on his/her judicial behaviour[55]. To think plurally, seems instead to be, now more than ever, a matter of fact[56]: as recently reminded, "the manifold is in things, in the finiteness of man"[57]. And considering that the judge is human, he/she cannot avoid considering the core value of independence in the way it has been conceived by the Italian Constitutional Court itself: "independence is a moral value, which is realized in its fullness precisely when it is expressed in the transparency of behaviour"[58].

From an Australian perspective, understanding dissent as a purely relational phenomenon rather than in any way substantive is critical to any

Cassese had already replied: "I make an analysis of the scope of the opposite principle, that of secrecy, showing how uncertain it is (...). As proof, I remember how many judges, when their term of office ended, also gave in conferences news about the ways in which questions of constitutionality were decided": S. Cassese, *Dentro la Corte*, quot., 134 (translation by the author).

[54] *Report of the President of the Constitutional Court Professor Augusto Antonio Barbera*, quot., 21.

[55] "(…) *the authority, like the rule of law, depends on trust, a trust that the Court is guided by legal principle. (…) There are no shortcuts to trust*", from *The Scalia Lecture*, 2021, now in S. Breyer, *The Authority of the Court and the Peril of Politics*, London, 2021.

[56] "Unity is certainly a value; but (it too) not an absolute value; and one must question its limits, when it ends up taking on paternalistic and simplifying connotations, which risk alienating the citizenry, almost anesthetizing it" (translation by the author): G. Bergonzini, G. Tieghi, *Sull'autorevolezza del Giudice costituzionale. Riflessioni conclusive*, in M. Bertolissi, G. Bergonzini, G. Tieghi, *Corte costituzionale in pubblico. L'autorevolezza del giudice*, quot. 186, within the section entitled *Sentiment and responsibility, for a (genuine) constitutional pluralism shared.*

[57] Online debate on *Corte Costituzionale e diritto alla conoscenza*, May 27, 2024: presentation of the two books M. Bertolissi, G. Bergonzini, G. Tieghi, *Corte costituzionale in pubblico. L'autorevolezza del giudice*, quot., and N. Zanon, *Le opinioni dissenzienti in Corte costituzionale*, quot., at https://www.radioradicale.it/scheda/729720/corte-costituzionale-e-diritto-alla-conoscenza/stampa-e-regime. Along the same lines, with specific reference to dissenting opinions: "dissenting opinion could correct the meaning" (i.e. of collegiality) "which today seems to me to coincide with fixity and non-responsibility; responsibility, which must always be, instead, to acquire a value ethical, personal": M. Bertolissi, *L'udienza pubblica dinanzi alla Corte costituzionale*, in M. Bertolissi, G. Bergonzini, G. Tieghi, *Corte costituzionale in pubblico*, quot., 57 (translation by the author).

[58] Italian Constitutional Court, decision no. 18, January 19, 1989, sec. 25 of the Legal Reasoning, and Italian Constitutional Court, decision no.19, January 23, 1990, second paragraph of the Legal reasoning (translation by the author).

examination, much less theorizing, about it. Under the traditional seriatim practices of the Anglo-Australian courts, a minority opinion acquired that character simply because a greater number of the other opinions across the court went the other way. Even now with a greater tendency for judges in the majority to express their reasons jointly (but in Australia this is by no means always the case and certainly not *all* members of the majority will join a single joint opinion), to which it may appear the dissenting judgment is made in response, that is still to define the latter by its relationship to the former. The qualities of the dissenting judgment itself may be anything – it may be a deeply conservative opinion or wildly radical, it may have soaring prose destined to become iconic or it may be dully pedestrian.

Accepting dissenting judgments in this fundamentally neutral way means inevitably that to discuss them as a practice is to discuss judicial method, rather than anything else such as judicial ideology or heroism. Australian judicial culture has been very sceptical of American romanticism about dissenting opinions, with Chief Justice Murray Gleeson remarking, "Only someone given to mock heroics or lacking a sense of the ridiculous could characterise differences of judicial opinion in terms of bravery"[59].

The Italian initiatives by former Justices are so interesting because they suggest a fear of unknown consequences! Were Italy to relax its practice of unanimity and to welcome the filing of dissenting opinions, it is a genuine question as to how that may be experienced in practice and what this may mean for judicial method. As the responses of different Australian judges to Justice Heydon's insistence on strict individual independence illustrated, there is a keen judicial sensibility about the institution's functionality, the clarity and coherence of its decisions and, ultimately, its reputation. But this has been honed over more a long tradition of balancing disagreement with certainty. A move towards possible judicial fragmentation in uncertain times would give pause for thought.

The proliferation a decade ago in Australia of published judicial reflection on the value of individual expression of reasons and also institutional priorities that might suggest that individualism should be tempered has significance to other jurisdictions. But, at the same time, there is clearly a very similar exchange of perspectives happening amongst the senior members of the Italian judiciary presently – and that have a special forcefulness. Where I do think the Australian perspectives might have particular comparative value is in the very balanced way Chief Justices Kiefel and Gageler have approached the topic of judicial individualism. They have different views, with Kiefel more overtly championing the benefits of joint judgments and court processes that will support them, while Gageler does prioritise a judicial method that focuses on individual judicial responsibility. But neither is absolutist, and both would concede – and have, of course demonstrated – that depending on the circumstances of the case, a judge may be able to join with colleagues or may feel the need to write reasons alone.

[59] A. M. Gleeson, *The Rule of Law and the Constitution*, Sydney, 2000, 136. See also Chief Justice Susan Kiefel, Selden Society Lecture Supreme Court of Queensland, 28 November 2017: *Judicial Courage and the Decorum of Dissent* at https://www.hcourt.gov.au/assets/publications/speeches/current-justices/kiefelj/KiefelCJ28Nov2017_1.pdf, 8-9.

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It is not enough for a Court to say that it disagrees in private but then somehow puts all that aside to produce a single view. If that is intended to defend the Court and the authority of the Constitution, then to my mind, it does neither. It certainly compromises the principle of judicial independence by submerging it too deeply underneath institutional considerations, as valid as they may themselves be to the law and the work and standing of the Court.

Courts should be transparent about the inescapable need, on occasion but frequently in constitutional interpretation, for judicial choice. Another former Chief Justice of Australia, Sir Gerard Brennan, admitted choice was part of adjudication since a 'judge is not a juridical robot'.[60] No Australian judge has ever argued for a veneer of unanimity over seriously held disagreement – on the contrary, it was mainly due to the objections of Sir Garfield Barwick, when as Chief Justice of Australia he also served on the Privy Council of the United Kingdom, that the latter's practice of compulsory unanimity was ended[61].

3. Contribution and Challenges of Empirical Studies Using Liberty as a Diversity Key Tool

From a continental perspective, shifting to the debate among scholars, and considering the new era of investigation by the Italian doctrine[62] which derives from the new wave of "openness of the Court"[63], the consistent

[60] G. Brennan, *The Selection of Judges for Commonwealth Courts*, paper presented at the Senate Occasional Lecture Series at Parliament House, Canberra, 10 August 2007.

[61] O. Jones, *Public Prosecutor v Oie Hee Koi* (1968): *Not so humbly advising? Sir Garfield Barwick and the Introduction of Dissenting Reasons to the Judicial Committee of the Privy Council*, in A. Lynch (ed.) *Great Australian Dissents*, quot., 173.

[62] D. Tega, *La Corte costituzionale allo specchio del dibattito sull'opinione dissenziente*, in *Quad. cost.*, 1, 2020, 91 ff.; N. Zanon, *E' tempo che la Corte faccia conoscere l'opinione dissenziente*, in *il Manifesto* del 29 dicembre 2020; B. Caravita, *Ai margini della dissenting opinion. Lo "strano caso" della sostituzione del relatore nel giudizio costituzionale*, Torino, 2021; A. Ruggeri, *Ancora in tema di opinioni dissenzienti dei giudici costituzionali: è meglio accendere i riflettori sulla Consulta o lasciarla in penombra?*, in *Giustiziainsieme.it* (2021) and *Tornando a ripensare al dissent nei giudizi di costituzionalità (spunti offerti da un libro recente)*, in *Giustiziainsieme.it* (2021); A. Anzon Demmig, *Ripensando alle opinioni dissenzienti dei giudici costituzionali e alla legittimazione della Corte*, in *Giur. cost.*, 5, 2571 ff. (2020); A. Fusco, *L'indipendenza dei custodi*, Napoli, 2019, in particular Chapter IV; A. Fusco, *"Ne riparleremo, dunque, tra qualche tempo": a proposito dell'introduzione delle opinioni separate (e non meramente dissenzienti) vs. l'attuale forma di "dissenso mascherato"*, in *Riv. del Gr. di Pisa*, 1, 360 ff. (2021); D. Camoni, *Due importanti lezioni europee per l'introduzione dell'opinione dissenziente nella Corte costituzionale italiana*, in *Oss. AIC*, 3 (2021).

[63] *"A new wind blows at Palazzo della Consulta. The reason is not only the election, for the first time in the history of the Italian Constitutional Court, of a woman, Professor Marta Cartabia, to the Court's Presidency, a development that, for a moment, has put this institution, often neglected by media and public alike, in the spotlight. The press release of 11 January 2020, under the momentous title "The Court opens up to hearing the voice of civil society", announced that substantial changes were introduced by the Court in its collegiality to the rules governing its proceedings. This is an unprecedented innovation in its sixty-four years of activity and one that is likely to reverberate on the Court's relationship with society and, not least, on the attitude of citizens towards public authorities*": T. Groppi, *Towards Openness and Transparency:*

contribution of Australian scholars on how to conduct empirical studies on judicial behaviour, seems to have a specific impact as regards the investigation on the 'diversity' tool: which, from the Italian side, could be defined as following: "there is the court, but also the judge; collegiality, but also the personality of the individual member of the body, which should never fail, because it is overshadowed"[64]. This approach reveals to be a distinctive implementation for the ongoing discussion, especially for the continental judicial systems and traditions. That way, for the purpose of the comparative dialogue of this paper, some important data has to be investigated, from a methodological point of view. In particular, the issue is how to respond to criticism on a) the "lack of critical mass"; b) the fact that "the nuances have not been explored ad we do not have a critical mass of evidence from which to draw firm conclusions"; c) the existence of "lack of panel data models"; d) the fact that there is "no real tradition of multidisciplinary research agenda" and to the assignment that "we need more studies in which testable theories developed in the social sciences"[65]. Moreover, it would be of a significant impact to investigate if the Australian empirical and statistic studies in the tradition of the annual *Harvard Law Review* statistics for the US Supreme Court, can suggest something on the presumed need to "incorporate methodological advances in measurement in the empirical legal studies literature for other countries"[66].

Within this framework, the diversity tool - to be conceived in a broad way for concretely fostering an updated approach through which liberty can become the paradigm shift from 'judicial to People' voicing disagreement - appears to give strength to the empirical studies aimed to "create a framework for a comparative analysis that weaves together a collective narrative on high court behaviour and the scholarship needed for a deeper understanding of cross-national context"[67]. And this is, from my side, not opposite to the "goal that unites the members of the Court" which has been

Recent Developments in the 'Italian-Style' Constitutional Justice, at http://www.ijpl.eu/assets/files/pdf/2019_volume_2/1.Editorial.pdf, 468). On the topic, and with a specific outlook on the communicative purpose of the oral argument: "Recent signs of 'openness to listen to society' by the Italian Constitutional Court, in evaluating new scenarios raise the question of when openness - and, with it, adversarial discussion - can better contribute to the implementation of the democratic nature of the system. Scarce attention has always been paid to how the oral argument should be held. From this perspective, indicators of openness (generated by the way constitutional justices and lawyers interact – or not – at the hearing) help to delineate a constitutional justice that is authentically inclusive of its real neEds Hence, the proposal to reconsider 'dialogical' argumentative techniques used, mainly, in contemporary common law systems", G. Tieghi, *Esperienze communicative*, questioning: *Nuovi itinerari di giustizia costituzionale?*, in M. Bertolissi, G. Bergonzini, G. Tieghi, *Corte costituzionale in pubblico. L'autorevolezza del Giudice*, quot., from 59.

[64] "(…) *c'è la* Corte, *ma anche il* giudice; la collegialità, ma anche la personalità del singolo componente dell'organo, che non dovrebbe mai venire meno, perché in ombra": M. Bertolissi, *Livio Paladin Appunti riflessioni ricordi di un allievo*, Napoli, 2015, 31.

[65] R. Smyth, *Empirical Studies of Judicial Behavior and Decision-Making Process in Australia and New Zealand*, quot., 108, 112, 114, 117, 118.

[66] R. Smyth, *Empirical Studies of Judicial Behavior and Decision-Making Process in Australia and New Zealand*, quot., 118.

[67] N. Garoupa, R.D. Gill, L.B. Tiede (Eds), *High Courts in Global Perspective*, quot., inside cover.

identified in "the protection and development of our Constitution"[68]. We just need a different approach to face the issue. The one recently suggested and summarized as follow: "One should speak - reversing the motion of the institutions - not of constitutional court, but of constitutional judge; not of opinion, but of opinions; not of argument, but of arguments; not of solution, but of solutions"[69]. It should be noted, by the way, that the latter is consistent with the idea of Constitutional Courts as *"Institutions of Pluralism"*, as expressed by the former Italian Chief Justice of the Constitutional Court, Silvana Sciarra[70]. Considering the Australian experience, is there perhaps some potential outcome in compliance with the need of representing the plural voices within the Courts as institutions of pluralism?

In the context we are exploring, in fact, the diversity tool assumes a crucial role as it includes a peculiar feature – with a strictly legal meaning[71] –. It necessarily comes from the peculiar impact of judges' experiences: what U.S. Associate Justice Sotomayor has called emotional intelligence[72]. As an aspect of the inclusion of the consideration of the people in the competing visions among the Justices, the latter could introduce a service-oriented approach[73] to look at the Justice and his/her role in contemporary,

[68] *Report of the President of the Constitutional Court Professor Augusto Antonio Barbera*, quot., 21.
[69] M. Bertolissi, *L'udienza pubblica dinanzi alla Corte costituzionale*, quot., 57.
[70] S. Sciarra, *Rule of Law and Mutual Trust: A Short Note on Constitutional Courts as "Institutions of Pluralism"*, at www.cortecostituzionale.it.
[71] "(…) increasingly arguing that emotions should be accepted as proper tools in legal processes and decision-making": Conference held in Sydney, 26-28 September 2016, on the topic *Emotions in Legal Practices: Historical and Modern Attitudes Compared*, at http://www.historyofe-motions.org.au/events/emotions-in-legal-practices-historical-and-modern-attitudes-compared. Moreover: A. J. Wistrich, J.J. Rachlinski, C. Guthurie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, in 93:855 *Texas L. Rev.* (2015). For a deep investigation on the role of the Judge in a contemporary era through the law and emotions field of study: "The historicity of events, achievements and defeats places the jurist - as well as the contemporary Judge - and, in particular, that of civil law, in the compelling condition of disengaging from sterile and misleading dogmatism to resume the perception of 'the spontaneous order of the society'(P. Grossi, 2017). The comparison between the experiences of 'liberal' and 'Jacobin' constitutionalism shows that it is fundamental not to exhaust the legal dimension in the mere positivist normative perimeter. The figure of a Constitutional Justice is, in this context, both a key element and a link between society and law, potentially decisive in favoring 'restauration for the law' through a propulsive prototype experience of the judge-man. Therefore, the interpretative activity of *inventio* for the 'restauration for a renewed legal pluralism', as well as 'for a right worthy of the times' (P. Grossi, 2018) lays the foundations to enable us, in the logic of the *Education* of the new generations (S. Sotomayor, 2017 - P. Grossi 2018), to effectively adjust the repositioning of the integrity of the individual - including that of the Constitutional Justice - as a criterion for defining the 'constitutional dimension of coexistence' (P. Grossi, 2017)": G. Tieghi, *Educare, non solo decidere. Nuovi scenari dalle recenti opere dei giudici costituzionali Grossi e Sotomayor*, in *Riv. AIC*, 1, 165-199 (2020).
[72] "Leveraging emotional intelligence in the courtroom, as in life, depends on being attentive; the key is always to watch and listen": S. Sotomayor, *My beloved Love*, New York, 2013.
[73] Sec. 3.2. (Value 3, Integrity) of the Bangalore Principles on Judicial Conduct, adopted by the Judicial Group on Strengthening Judicial Integrity within the United Nations in 2002, affirms that "The behavior and conduct of a judge must reaffirm the people's

pluralistic democracies[74] and pave the way for trying to reverse the conception of secrecy itself. By the way, this is not new, even in the Italian debate, with a member of the Constituent Assembly of Italy in 1945, saying that "The secrecy of the conference room is the institutional consecration of conformity: the judge can think with his own head in secret, as long as outside does not know it no one"[75]. The doubt, however, is if, from a comparative perspective, there is enough awareness for including in the debate the connection between "judicial emotion" and "the evolution of the law"[76].

The Australian experience supports the importance of empirical studies, but also the fact that these may be offered at different levels of sophistication. One of the author's own contribution to measuring rates of unanimity, concurrence and dissent in the High Court is extremely basic – really just an adaptation of the *Harvard Law Review* approach pioneered by Felix Frankfurter and John Landis close to a century ago[77]. This simple tallying still records something of value, and confirms or dispels anecdotal impressions of how the Court is operating. But this may be contrasted with the substantial and varied work of Professor Russell Smyth, which is much richer and diverse in what it tells us about the Court. Aside from some very early work in the 1970s that was not continued[78], it has only been this century that judicial studies in Australia have included an interest in statistics. There can be no reason not to make a start at approaching the work of courts through data or statistical lens.

It is one thing to say that courts should be transparent, and individual judges should be at liberty to express their reasons for decision and really to accept and see the value in judicial disagreement. But it is another to ponder whether pluralism should be an objective of the institution that may even guide appointments to the Court. Professor John Orth has said that the practice of staffing appellate courts with an odd number of judicial officers reflects that 'we have come to expect (and accept) disagreement on legal

faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done", at https://www.unodc.org/res/ji/import/international_standards/bangalore_principles/bangalore_principles_English.pdf.

[74] "(…) *rather than strive for 'dispassionate wisdom', our judicial figures ought to strive for a wide-ranging wisdom that aims to consider different perspectives with feeling and imagination*", in R. Lee, *Sonia Sotomayor: Role Model of Empathy and Purposeful Ambition, Reviewing My Beloved World* by Sonja Sotomayor, in 98:73, *Minn. L. Rev. Headnotes*, 82 (2013).

[75] P. Calamandrei, *Elogio dei giudici scritto da un avvocato*, Milano, 2001, 274 (translation by the author).

[76] "Sensitivity to one's intuitive and passionate responses (…) is (…) not only an inevitable but a desirable part of the judicial process": W. J. Brennan, *Reason, Passion and 'The Progress of the Law'*, in 10 *Cardozo L. Rev.* 3,10 (1988), in G. Tieghi, *Educare, non solo decidere. Nuovi scenari dalle recenti opere dei giudici costituzionali Grossi e Sotomayor*, quot., 184.

[77] F. Frankfurter & J. M. Landis, *The Business of the Supreme Court at October Term, 1928'*, in 43 *Harv. L. Rev.* 33 (1929).

[78] A.R. Blackshield, *Quantitative Analysis: The High Court of Australia, 1964-*1969, in 3 *Lawasia*,1 (1972).

issues',[79] but even more to the point, Professor Tony Blackshield has said that size of final appellate courts makes clear that, when appointing judges, *homogeneity* cannot be an objective.[80] In short, a criteria of appointment must be not only the merit of the selected individual, but how they will complement the experience and values of those who they will join on the Court. The bedrock of this, which may seem controversial to some, is not simply a capacity to dissent, rather it is the ambiguity and room for choice in the law itself that, in turn, finds expression through separate judgments in common law courts.

The concept of "judicial emotion" is a little too vague and unwieldy – and risks the projection of subjective assessments on candidates for selection to the bench which may be unfair and biased. Of course, judges have emotion, but they are normally required to control it. But what they undoubtedly have, and which can certainly influence the decisions they may as a judge, is life experience. That may, at least, include professional experience as one type of lawyer rather than another, but it will also include gender, sexuality, race, disability, and poverty. The idea that these attributes and experiences are of no relevance, never mind fears that they impair judicial impartiality, simply do not sufficiently acknowledge the impossibility of judges not drawing on their personal knowledge as humans *where there is room in the law for them to do so*. That last part is critical, for as Lady Brenda Hale said "a point of view is not the same as an agenda'.[81]

4. The High Court as a World-Leading Model Able to Update the Dialogue on Comparative Judicial Behavior Studies?

From a continental perspective, within the global scenarios, the challenge is to identify the main features – in terms of best practices - that the High Court of Australia could disseminate to compete as a world-leading model. Specifically, it will become increasingly important to frame the key features – in terms of upgrading the diversity tool as a liberty tool for each Justice - to reply to the criticism advanced in the Italian justice system and give voice to individuality.

In fact, contextualizing the topic we have chosen for our comparative discussion within the global constitutional discourse[82] new scenarios seem

[79] John V Orth, *How Many Judges does it Take to Make a Supreme Court'*, in 19 *Const. Comm.* 681, 688 (2002).

[80] A.R. Blackshield, *The Appointment and Removal of Federal Judges*, in B. Opeskin and F. Walker (Eds), *The Australian Federal Judicial System*, Melbourne, 2000, 429-30.

[81] B. Hale, *A Minority Opinion?*, in 154 *Proceed. of the Brit. Acad.* 319, 336 (2008).

[82] "Global constitutionalism as a discourse necessarily refers to multiple levels of governance; it relates both to state constitutions and to international constitutional law. In the course of constitutionalization, processes of norm migration, cross-fertilization, harmonization, and hybridization occur in many directions, both "vertically" (among the levels of national law and international law) and "horizontally" (among national constitutions)": A. Peters, *Global Constitutionalism and Global Governance*, project "The EU-Japan Relationship in the Context of an On-going Power-shift in the Global Society", at https://www.mpil.de/en/pub/research/areas/public-international-law/global-constitutionalism.cfm. On the issue, see also: T. Suami, M.

to be fostered by an experiential, incremental judicial method[83] which – by definition - can only be one that also values the behavior of the individual judge in terms of behavioral choices, including, precisely, the possibility of voicing disagreement. The tradition of the Australian High Court, enriched by the debate and practices on the consensus-dissent dichotomy, appears to be a significant model of constitutional justice able to update the dialogue on comparative judicial behavior studies. The challenge should be to identify the the arguments against this thesis.

Moreover, to contextualize the role of constitutional justice in the current retrogression of liberal democracies[84] the comparativist scholar needs to evoke precise parameters: accountability, integrity and pragmatism. The following guiding principle appears to be consistent with the call – especially from the Italian side – to rethink the role of the judge himself/herself through his/her behaviour: "We must expect from the judge the strength and courage required from all other servants of public office. If they are faithful to their responsibilities and to tradition, they cannot hesitate to speak frankly and simply on the great occasions that come before them. In doing so they will prove their worth, showing their independence and strength. (...) Their discussion and the dissemination of the great principles of the Charter can keep democratic ideals alive in the days of retrogression, uncertainty and despair"[85]. Within this line, it has also been stated that "now is arguably the best time ever to be conducting that" (on judicial behaviour and on cross-national research on judicial politics) "research"[86]: and precisely, it has been affirmed something in compliance with the dialogical methodology and project we decided to apply, starting properly from the writing of this paper. A demonstration that "cross-

Kumm, A. Peters, D. Vanoverbeke, *Global Constitutionalism from European and East Asian Perspectives*, Cambridge, 2018.

[83] Incrementalism to be conceived as a "*method of decision-making process that proceeds by a series of incremental judgments as opposed to a single judgment made on the basis of rational manipulation of all the ideally relevant considerations*": M. Shapiro, *Stability and Change in Judicial Decision-Making Process*, in *L. in Trans. Quart.*, 137 (1965).

[84] "(Constitutional regression is) distinct from authoritarian reversion for three reasons: first, it occurs slowly; second, it involves different mechanisms; and third, its modal endpoint is quasi-authoritarianism (although a further slide to authoritarianism is possible. Because retrogression occurs piecemeal, it necessarily involves many incremental changes to legal regimes and institutions. Each of these changes may be innocuous or even defensible in isolation. It is only by their cumulative, interactive effect that retrogression occurs": A.Z. Huq, T. Ginsburg, *How to Lose A Constitutional Democracy*, in 65 *UCLA L. Rev.* 78, 97 (2018). "The recent phenomenon of worldwide forms of 'transition' of constitutionalism has outlined the importance of upgrading the comparative constitutional law approach from a Law & Society perspective to traditional constitutionalism": G. Tieghi, *Uguaglianza e Global Constitutionalism. Nuove sfide di intersezionalità tra legal reasoning e "constitutional quality"*, in *DPCE*, 4, 873 (2022).

[85] W. D. Douglas, *Il «dissent»: una salvaguardia per la democrazia*, in C. Mortati (ed.), *Le opinioni dissenzienti dei giudici costituzionali e internazionali, Scritti raccolti a cura di Costantino Mortati*, quot., 111.

[86] R. Gill, C. Zorn, *Overcoming the Barriers to Comparative Judicial Behavior Research*, in N. Garoupa, R.D. Gill, L.B. Tiede (Eds), *High Courts in Global Perspective*, quot., 323-324. "While the number and range of challenges" ("regarding data", "to measurement" and "institutional") "facing such research is large, we are nonetheless optimistic about the future of that research" (308).

national collaboration offers the potential to integrate theoretical, methodological and area knowledge in ways that will improve all three"[87]. Between our two systems we have definitely found a perfect conjunction on terms of historical moment, richness of the debate and – from the Australian side - candour and demonstration of diverse practices[88]. The doubt is if the issue here discussed can be used as a potential input to redirect the time and energy of researchers out of the traditional path of investigation to map "our concepts of interest onto these measures in ways that make sense across institutional and cultural" comparative "contexts"[89].

The High Court was prompted into a period of reflection on the value of individual independence vs institutional values that assist law and justice, and this may serve as a useful catalyst for others to do the same. Of course, the fact that the Court has undergone substantial changes in personnel in the years since, means that perhaps its members should revisit the topic. It is certainly helpful for people studying the court to have access to the views and approaches of its members on judicial method.

The actual practice of separate opinions, both dissenting and concurring, is not so remarkable as to serve as a "world-leading model", and there are concerns about a distinctive practice on the Court called "joining in" which obscures the identity of those who author the opinions to which others are able to put their name.[90] Although it has been defended as encouraging joint judgments and the "desirability of a final appellate court speaking with fewer, rather than more, voices",[91] that practice seems to fundamentally obscure transparency in a way that the decision-making processes of, say, the United Kingdom Supreme Court does not.

Courts are such human and changeable institutions. So, while the ebb and flow of different judicial styles influence the institutional approach and this can be appreciated as fertile and even instructive in the resilience of the institution as it simultaneously manages both change and continuity, the Court never stands still. In the new era under Chief Justice Gageler, the Court is different from the institution it was just a decade ago – and, importantly in this context, its concerns and internal views on disagreement are different. How else to explain the delivery by the Court under its new Chief Justice in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*[92] of what purported to be a unanimous judgment, but contained within it the expressly separate views of Justice Edelman on one aspect of the case?

[87] R. Gill, C. Zorn, *Overcoming the Barriers to Comparative Judicial Behavior Research*, quot., 325-326.

[88] "I have found comparative law to be of a great assistance in realizing my role as a judge. (…) Indeed, comparing oneself to others allows for greater self-knowledge. With comparative law, the judge expands the horizon and the interpretative field of vision. Comparative law enriches the options available to us": A. Barak, *The Judge in a Democracy*, quot., 197.

[89] R. Gill, C. Zorn, *Overcoming the Barriers to Comparative Judicial Behavior Research*, quot., 326.

[90] A. Lynch, *Individual Judicial Style and Institutional Norms*, in G. Appleby and A. Lynch, *The Judge, The Judiciary and the Court – Individual, Collegial and Institutional Judicial Dynamics in Australia* Cambridge, 2021, 208.

[91] Justice V. Bell, *Examining the Judge*, Launch of Issue, in 40(2) *UNSW L. J.*, 2 (2017).

[92] [2023] HCA 37 (28 November 2023).

As democracies come under a range of pressures and the role of the courts becomes even more critically important to prevent constitutional subversion, then comparative research on the judiciary is so important. The rapid decline in standing of the US Supreme Court, both with the American people and the international community, is a stark demonstration of how easily a venerable and respected final court can become part of the narrative of a contraction of constitutional values.

Critical to comparative studies of judicial behavior must be learning the optimal settings for robust judicial independence, at least within the tolerable variance of diverse constitutional traditions. In the dialogue between us as co-authors, we have approached that through the prism of judicial disagreement and dissent. That has been a very live topic of judicial attention in both our countries over recent years – albeit for quite different reasons. One of us has been hesitant to ascribe to the High Court of Australia a status of "world-leading" or "best practice". This is not because the Court has failed to set the right course between individualism and institutionalism – on balance, it has. But other courts, possibly without as much introspection, have also continued to provide worthy and interesting examples of how to navigate between these ideals. It will be interesting to see to what extent reference to the High Court and the final courts of other jurisdictions assist to progress the debate amongst Italy's judiciary. While we can assume that internal voices present the strongest case for change, the experience of foreign jurisdictions can at least provide reassurance that in pluralism and transparency can lie strength that sustains a strongly independent judiciary.

From a common perspective, in conclusion, the challenge is to give enhanced credibility to the process of learning from each other[93], and to the belief, strengthened by experience, that "A good court is a pluralistic court, containing different and diverse views"[94].

The hope is to continue to learn from each other. As Justice Claire L'Heureux-Dubè of the Canadian Supreme Court has foresighted observed, "If we continue to learn from each other, we as judges, lawyers, and scholars

[93] "There has been a cultural change across the Australian judiciary over the past twenty years. The change has allowed judges to see themselves as life-long learners. It has been very much a change for the better": S. Gageler, *John Doyle Oration*, 6 April 2024, at https://www.hcourt.gov.au/assets/publications/speeches/current-justices/gagelerj/John%20Doyle%20Oration%20FINAL.pdf, 8. This assumption finds a symmetrical belief from the Italian side: "(…) independence and authority are also gained through the public confrontation of different and perhaps opposing arguments, which legitimize each other in a public discussion that enriches all" N. Zanon, *Le opinioni dissenzienti in Corte costituzionale*, quot., 30-31 (translation by the author).

[94] A. Barak, *The Judge in a Democracy*, quot., 197. The former President, by the way, had a very clear idea on 'The judge as part of the panel' and, specifically, on the use of the dissent: "Through the years my view has been that, as a rule, I accept the majority opinion and do not repeat my dissent. The law is as the majority decides, and I accept the yoke of that law. That is the rule, and I have created an important exception. I will reiterate my dissenting opinion in the cases that cut to the heart of the matter of realizing the judicial role. In such cases, I will use every attempt to bring about a change in the majority opinion. I will not hesitate to repeat my dissenting opinion" (211).

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will contribute in the best possible way not only to the advancement of human rights but to the pursuit of justice itself, wherever we are"[95].

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[95] C. L'Heureux-Dubé, *The importance of Dialogue: Globalization, The Rehnquist Court, and Human Rights*, in M. H. Belsky (ed.), *The Rehnquist Court: A Retrospective*, Oxford, 2002, 242.