The proliferation of dissenting opinions in international law: A comparative analysis of the exercise of the right to dissent at the ICJ and IACtHR

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1 The exercise of the right to dissent in domestic jurisdictions

1.1. The sin of analogy from municipal law

As noted in the introduction to this Part, dissenting opinions are not an institution created by international law. Reference to the main systems of law that exist at the domestic level may thus be useful as a first stepping stone for analysis of dissenting opinions in international law.

A reference to domestic law must, however, take account of statements such as from Joseph Weiler, who has noted that "[a]nalogies to domestic law are impermissible, though most of us are habitual sinners in this respect",[1] or from Mary Ellen O'Connell, who has indicated that an analogy to domestic law is false.[2] These observations regarding the impermissibility and falseness of the plain use of analogies are based on the fact that, important differences exist between both legal orders and they must, at the very least, be taken into account when elements or discussions from one legal order are to be used to build upon in the other.[3] For instance, in relation to the concept of *the rule of law*, Robert McCorquodale observed that two are the most fundamental aspects to be taken into account, when pretending to apply the concept of the rule of law from national systems to international law. On the one hand, there is not just one definition of the concept. The common law tradition indicates that three are the main aspects of the concept, namely, the absolute supremacy of the law over government power, equality before the law and enforcement before the courts. The civil law tradition focuses less on the judicial process and more on the nature of the state in the form of the law-based state. On the other hand, the basis for the concept cannot be found in domestic law since international law lacks a binding court, an executive

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1 Joseph H. H. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, 547, 550.

2 Mary E. O'Connell, 'Enforcement and the Success of International Environmental Law', (1995) 5 *Indian Journal of Global Legal Studies*, 47, 50.

3 Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Lawbook Exchange1927), 84 – 85; Mohamed Shahabuddeen, 'Municipal Law Reasoning in International Law', in in Vaughan Lowe *et al* (eds.) *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Martinus Nijhoff Publishers 1996), 90, 91; Marti Koskenniemi, 'International Law in Europe: Between Tradition and Renewal', (2005) 16 *European Journal of International Law*, 113, 122; Thomas Poole, 'Sovereign Indignities: International Law as Public Law', (2011) 22 *European Journal of International Law*, 351; Ciarán Burke, 'Moving while Standing Still: Law, Politics and Hard Cases', in Nikolas M. Rajkovic *et al* (eds.) *The Power of Legality: Practices of International Law and Politics* (Cambridge University Press 2016), 125, 146.

and legislative branch do not exist, there is no separation of powers and that there is the sovereignty of states with which to contend.[4]

Specifically in relation to adjudication and the role of courts Mohamed Shahabuddeen has also elaborated upon differences in the structure of international law and municipal law, in an academic writing while he was a member of the International Court of Justice. He has observed that not every relation between states has its counterpart in municipal law. In this regard, he has also highlighted that the absence of a universally compulsory judicial tribunal to determine what the law is and the existence of a central authority to enforce it.[5] As he put it,

> "to overestimate the relevance of private law analogies is to overlook significance differences between the legal framework of national societies and that of the international community, as well as differences between the jurisdictional basis and powers of the Court and those of national courts".[6]

The consideration of municipal law as a relevant source, from where to borrow reasons and insights, has traditionally been considered with suspicion.[7] Consequently, this may also have consequences for the use of the discussions on dissenting opinions in municipal law, for the purpose of analysing dissenting opinions in international adjudication.

Nonetheless, the existing differences between international law and municipal law, does not turn (as suggested by Joseph Weiler) every use of the latter into a sin. Only when an analogy is made between municipal and international law, without taking into account their differences, is it possible to assert the commission of a sin. One can therefore say that, it is only when "importing [municipal] law institutions "lock, stock and barrel", ready-made and fully equipped with a set of rules"[8] as such, that one has committed a sin. Conversely, when acting with great caution and bearing in mind the existing differences, reference to municipal systems may certainly be useful.

In that order of ideas, the genesis, *raison d'être*, structure and use of dissenting opinions in municipal law is relevant for analysing dissenting opinions in international law, as "features or terminology which are reminiscent of the rules and institutions of [municipal] law as an indication

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4 *Cf.* Robert McCorquodale, 'Defining the International Rule of Law: Defying Gravity?", (2016) 65 *International and Comparative Law Quarterly*, 277, 279 – 289. See also, *Certain Phosphates Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment of 26 June 1992, [1992] ICJ Rep. 240, (Dissenting Opinion, Judge Schwebel), 330.

5 Mohamed Shahabuddeen, *'Municipal Law Reasoning in International Law'*, in in Vaughan Lowe et al (eds.) Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings (Martinus Nijhoff Publishers 1996), p. 92.

6 *Certain Phosphates Lands in Nauru (Nauru v. Australia)*, *supra* note 4, (Separate Opinion, Judge Shahabuddeen), p. 289.

7 André Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press 2011), 274.

8 *International Status of South-West Africa*, Advisory Opinion of 11 July 1950, [1950] ICJ Rep 128, (Separate Opinion, Judge McNair), p. 148.

of policy and principles rather than as directly importing these rules and institutions."[9]

Some judges of the International Court of Justice have made use of municipal law, in their individual opinions, for the analysis of the case submitted to it.[10] They have moreover made use of it, taking account of the approach mentioned in the paragraph above. Two recent examples are worth mentioning in this regard. In the first place, the analysis of judge Bruno Simma on whether the *exceptio non adimpleti contractus* forms part of international law. He noted in the separate opinion that he appended to the judgment in the case concerning *Application of the Interim Accord of 13 September 1995* that,

> "[t]he problem that we face [on the transferability of such a concept developed *foro domestico* to international plane] is that in fully developed national legal systems the functional synallagma will operate under the control of the courts, that it, at least, such control will always be available (…) What we encounter at the level of international law, however, will all too often be instances of non-performance of treaty obligations accompanied by invocation of our principle, but without availability of recourse to impartial adjudication of the legality of the measures."[11]

A more recent example regarding an approach of this kind, can be found in the separate opinion appended by the former judge and president of the ICJ, Hisashi Owada, to one of most recent orders on the indication of provisional measures. When referring to the standard adopted by the ICJ in requests for the indication of provisional measures, concerning the need that the rights sought to be protected must be at least plausible, he noted that,

> "[w]hile a facile analogy of this legal institution with similar institutions in private law should naturally be carefully avoided, given that the specific purposes for which a legal institution similar in name could be considerably different, it is important to recognize that the *rationale* for this institution introduced in the Statute of the Court finds resonance in similar institutions stipulated in a number of domestic legal systems."[12]

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9 Id.

10 Judge Hersch Lauterpacht has for instance taken account of municipal law for analysing whether guardianship is an institution from private law. He noted that "[a]n examination of the main systems of municipal law in the matter of guardianship does not corroborate the view that is a merely family institution of a private law nature." Cf. *Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden)*, Judgment of 28 November 1958, [1958] ICJ Rep. 55, (Separate Opinion, Judge Lauterpacht), p. 84.

11 *Application of the Interim Accord of 13 September 1995 (Former Yugoslav Republic of Macedonia v. Greece)*, Merits, Judgment of 5 December 2011, [2011] ICJ Rep. 644, (Separate Opinion, Judge Simma), p. 700, para. 13.

12 *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all forms of Racial Discrimination (Ukraine v. Russian Federation)*, Request for the Indication of Provisional Measures, Order of 19 April 2017, [2017] ICJ Rep. 104, (Separate Opinion, Judge Owada), p. 1, para. 4.

It precisely in this sense, and based on the idea of resonance, that municipal law is relevant for the purposes of this dissertation, *i.e.* since it amounts to an important indication of policy and principles to be taken into account, as far it does not contradict the structure of international law. Consequently and for the purposes of this dissertation, the discussions on dissenting opinions in municipal law will be used as a source of inspiration that takes account of the structural differences between the municipal and international order, thus in full awareness that these differences might on occasion prevent the transposition of certain arguments to the international level.[13]

In fact, the most relevant differences between domestic and international law are (i) the non-compulsory nature and possibility for states to opt out from the jurisdiction of an international court or tribunal; (ii) the mandatory use of precedents in some domestic jurisdictions; (iii) the fact that some international courts and tribunals exercise subsidiary jurisdiction; (iv) different rules and dynamics regarding compliance and enforcement of decisions; (v) the composition of the bench that in some international courts and tribunals includes a national element but is otherwise not part of an overarching structured system.

1.2. The relevance of the approaches of civil or continental law systems on dissenting opinions

Further, in this attempt for looking at municipal law, an additional question arises concerning the relevance of the views from the civil or continental law system and not only from the common law system. This is so, since this legal system has classically been known for rejecting (or limiting to the fullest extent possible) the use of any kind of individual opinions. To put it differently, dissenting opinions have been considered as a regular feature in the common law systems.[14] Consequently, it is important to question if only the views from the common law system are relevant for the purposes of the present Chapter.

In this regard, it should be noted, as indicated elsewhere, that the "differences between Anglo-Saxon and continental attitudes should [not] simply be ignored… [these] differences in perspective… continue to engender

13 For instance, the role and function of dissents in the common law system might be broader in scope. In fact, in a recent study eight hypotheses have been presented as to why judges participate more often in opinion writing than others. Most of these hypotheses are not relevant for determining the role and function of dissenting opinions in international adjudication, as the said hypotheses are presented in the context of the United States legal system. *Cf.* Saul Brenner & Eric S. Heberlig, '"In My Opinion…": Justices Opinion Writing in the U.S. Supreme Court, 1946 – 1997', (2002) 83 *Social Science Quarterly*, 762, 763 – 765.

14 Rainer Hoffmann & Tilmann Laubner, 'Article 57', in Andreas Zimmermann et al (eds.), The Statute of the International Court of Justice: A Commentary (2nd edn, Oxford University Press 2012), 1384.

lively and interesting discussions and international law is richer because of it".[15] Moreover, the international adjudicatory system is a mix of both, the common and civil law systems.[16] Consequently, it is also necessary to take into account the views on the matter asserted in the latter, since it might be in the light of the views asserted in the civil law system, that it is possible to explain why an aspect from dissents in the common law system, has not been transplanted to the international plane.

By the same token, an additional and more foundational argument exists as to the need for considering the views from both municipal systems of law and this is that dissenting opinions in general (*i.e.* in both municipal and international law) are inextricably linked (from a positivistic perspective) to the very concept and nature of law in general and the role of the judge.

Both the civil law and common law systems have different approaches (from a positivistic perspective) with regard to how law is defined and what is the role of the judiciary when a dispute is submitted to it.[17] On the one hand, the civil law system is considered as a code-based system, where instead of listing special rules for particular situations a body of general principles is systematized to regulate all situations in the society.[18] The role of the judge is to act as the mouthpiece of the law (*bouche de la loi*).[19] In other words, he is a passive representative of the law-maker who mechanically applies the law[20] and therefore performs uncreative functions.[21] Nevertheless, when applying the law the judge sometimes needs to interpret it and throughout this process he might extend its scope and fill gaps on points where the written law is silent.[22] The law lays down principles and does not get into the details that may arise in each circumstance; those details must be addressed and filled by the judge.[23] She or he must, however, use only

15 James Crawford and Allain Pellet, 'Anglo Saxon and Continental Approaches to Pleading before the ICJ', in Ian Buffard *et al* (eds.) *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Martinus Nijhoff Publishers 2008), 931, 967.

16 International law has for instance adopted the approach of the civil law system, with regard to the burden of persuasion. *Cf.* Eduardo Valencia-Ospina, 'Evidence before the International Court of Justice', (1999) 1 *International Law Forum du Droit International*, 202, 203 – 204.

17 See, Francis A. Mann, 'Fusion of the Legal Profession?', (1977) 93 *The Law Quarterly Review*, 367.

18 Joseph Dainow, 'The Civil Law and the Common Law: Some Points of Comparison', (1967) 15 *American Journal of Comparative Law*, 419, 424.

19 Charles de S., Baron de Montesquieu, *The Spirit of the Laws* (2001), 180.

20 Urszula Jaremba, *National Judges as EU Law Judges: The Polish Civil Law System* (Martinus Nijhoff Publishers 2014), 197.

21 John H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (2nd edn, Stanford University Press 2007), 84.

22 Joseph Dainow, *supra* note 18, 426.

23 Bernard Rudden, 'Courts and Codes in England, France and Soviet Russia', (1973) 48 *Tulane Law Review*, 1010, 1011.

specific techniques when filling gaps.[24] On the other hand, the common law system finds its basis in judicial decisions and the role of the judge is to formulate the principles under which the case at hand should be decided. He has a creative function whenever a rule has not already been formulated in a previous decision.[25] Consequently, he is a more influential figure in the social and political life of the country and has even been labelled as 'cultural hero'.[26] In common law written law has different standing. Even in the presence of a legislative text, the judge seeks to restrict its scope of applicability.[27]

All in all, the difference between both systems can be summarised in the following terms,

> "[a] civil law system differs from a common law system much as rationalism differs from empiricism or deduction from induction. The civilian naturally reasons from principles to instances, the common lawyer from instances to principles. The civilian puts his faith in syllogisms, the common lawyer in precedents; the first silently asking himself as each new problem arises, "What should we do this time?" and the second asking aloud in the same situation, "What did que do last time?" The civilian thinks in terms of rights and duties, the common lawyer in terms of remedies. The civilian is chiefly concerned with the policy and rationale of a rule of law, the common lawyer with its pedigree. The instinct of the civilian is to systematize. The working rule of the common lawyer is *solvitur ambulando*."[28]

Notwithstanding the differences noted above, both systems of law share an aspect that lays at the heart of the very nature of the law, namely, its vagueness and incompleteness. This is moreover an aspect that is also present in international law, to a much greater extent than domestic law. Law is not able to regulate every single aspect in the public and private domain. Hence, in both systems (as was mentioned in the paragraph above) the law (either by means of a written law or a judicial decision) needs to be clarified or stated due to the existence of grey areas. In multi-member courts, and due to the fact that everybody thinks differently, it is sometimes impossible to obtain a unanimous decision when law itself is vague an open to various interpretations. In consequence, the fact that a judge may dissent from a

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24 Roberto G. MacLean, 'Judicial Discretion in the Civil Law', (1982) 43 *Louisiana Law Review* 45, 52 – 53.

25 Jean Georges Sauveplanne, *Codified and Judge Made Law: The Role of Courts and Legislators in Civil and Common Law Systems* (North-Holland Publishing 1982), 102.

26 Seon Bong Yu, 'The Role of the Judge in the Common Law and Civil Law Systems: The Cases of the United States and European Countries', (1999) 2 *International Area Studies Review*, 35, 37.

27 Joseph Dainow, 'The Constitutional and Judicial Organization of France and Germany and Some Comparisons of the Civil Law and Common Law Systems', (1961) 37 *Indiana Law Journal*, 1, 45.

28 Thomas Mackay Cooper, 'The Common and the Civil Law – A Scot's View", (1950) 63 *Harvard Law Review*, 468, 470 – 471.

judgment (and is sometimes entitled to express his disagreement, either by means of recording the fact of his dissent or expressing his views) is but a natural consequence of the concept of law itself and the role that the judge plays in this regard.

Since the aspects mentioned in the paragraph above, are not exclusive to one system of municipal law (*i.e.* either common or civil law), as they are related to systemic and foundational aspects of law in general, they are therefore aspects that are present in all systems of law. Hence, disagreement between judges is a common feature in both municipal and international law. This therefore also explains why it is not only the arguments in favour of dissenting opinions (*i.e.* the views asserted in the common law system) that are relevant for the research aim of this dissertation. The arguments from the continental system seeking to limit to the fullest extent possible the exercise of the right to dissent, also constitute an important indication of policy and principles for the conceptual framework on dissenting opinions that this Part will offer.

In sum, it is against this background and having in mind the differences between municipal and international law mentioned above (section 1.1), that the views on dissenting opinions asserted in municipal law, are relevant to the international adjudicatory system.

1.3 Origins of dissenting opinions in municipal law

The practice from judges to append individual opinions in general, is a right that has existed (in the case of the countries belonging to the common law system) since the establishment of multi-member judicial institutions.[29] Judges have always therefore been allowed to express their views, notwithstanding the decision adopted by the majority.

In the specific case of the right to append dissenting opinions, it should be pointed out that, the way in which this kind of opinions is nowadays known (*i.e.* as the opinion appended by a judge who has voted against the decision of the majority), is the result of the several variations that the right to append individual opinions has suffered, throughout the history in the common law system (mainly). Consequently, it is not possible to understand the structure and role and function of dissenting opinions, without an understanding as to how decisions were taken (*i.e.* how judges deliberate and the majority decision was drafted), before dissenting opinions as they are known today came to existence in the common law system.

The origins of dissenting opinions in this system of law can be traced back to two different times in history, both of them related to the implementation of a majority judgment, during the tenures of Lord Mansfield

29 Frederic Reynold, *Disagreement and Dissent in Judicial Decision-making* (Wildy, Simmonds & Hill Publishing 2013), xiv.

and Chief Justice Marshall in England and the United States, respectively in 1756 and 1801.

Before the tenures of Lord Mansfield and Chief Justice Marshall, the English and American multi-member courts delivered their decisions *seriatim*, *i.e.* by each judge expressing his individual views on the matter by means of an individual opinion irrespective of the fact that he was with the majority or not.[30] In this construction, there were no deliberations within the court. Each judge was entrusted to write his personal opinion as to how the case should be decided. In order to determine in favour of whom the court had decided, it was necessary to count the number of judges voting in favour of the applicant's or the respondent's case. The reasons from each of the judges were therefore irrelevant for taking the decision. No deliberations at all took place and therefore no collegial responsibility existed for the judges with regard to the decision of the case at hand.

While the roots of this practice remain unclear,[31] claims have been made as regards its function, namely,

> "[the] delivery [of opinions] by each individual judge may be a more accountable method of deciding cases than decisions made in seclusion, because judgments made in the open and without explicit caucus among judges may be less likely to be (or appear to be) infected by corruption or collusion or [in the case of England] the influence of the monarch."[32]

Thus, it was from the outset a consecrated right for judges in the common law system to express their views in an individual opinion to the public.[33] Some authors have even noted that, in the first case decided by the Supreme Court of the United States, namely, *State of Georgia v. Brailsfrod*, the opinion

30 Rory K. Little, 'Reading Justice Brennan: Is There a "Right" to Dissent?', (1999) 50 *Hastings Law Journal*, 683, 688.

31 Andrew Lynch, 'What Makes a Dissent 'Great'?', in Andrew Lynch (ed.) *Great Australian Dissents* (Cambridge University Press 2016), 1, 2. Nonetheless, it has been suggested that the practice of delivering opinions *seriatim* is similar to the law of citations in Roman law. Consequently, it can be said that the former derives from the latter, as well as it has been pointed out that the possibility for a judge to express her or his views has been advanced as the possible basis of this practice of delivering opinions *seriatim*. *Cf.* Joshua M. Austin, 'The Law of Citations and Seriatim Opinions: Were the Ancient Romans and the Early Supreme Court on the Right Track?', (2010) 31 *Northern Illinois University Law Review*, 19, 35 – 36.

32 M. Tood Henderson, 'From Seriatim to Consensus and Back Again: A Theory of Dissent', (2007) *Supreme Court Review*, 283, 290. Additionally, it must be noted that "a difference existed, however, in the practice of seriatim between English and American courts. While in the former it was followed in all but self-evident cases, in the latter all cases were decided following the said practice." *Cf.* Michael Mello, 'Adhering to Our Views: Justices Brennan and Marshall and the Relentless Dissent to Death as a Punishment', (1995) 22 *Florida State University Law Review*, 591, 609.

33 Bernard Schwartz, *A History of the Supreme Court* (Oxford University Press 1993), 20.

of the first of the justices was a dissent.[34] Nevertheless, by reason of the manner in which decisions were taken, it is not accurate to speak of the existence of a right for judges to append dissenting opinions (as they are known today). This is so, since the determining factor for establishing the decision of the court was the count of heads in favour of the position of the parties. This might lead to the situation in which the reasons of a judge for voting in favour of one of the parties, could be completely different (and even contradictory) from those of his colleagues also voting in favour of the position of the same party. One could not therefore speak of a decision of a majority, if all of the judges have taken different positions. Without a decision in which the majority speaks in one voice, it is not possible to properly speak of a dissenting opinion. Judges were used to write their opinions without paying due regard to the views expressed by the rest of their colleagues. In consequence, they only got to know that their position (and not their reasons) was not part of the "majority" during the reading of the opinions in open court, and even when the rest of their colleagues were not in disagreement with the reasons therein.

This long tradition for courts to deliver their decisions *seriatim* was, however, broken in England and the United States in 1756 and 1801, respectively. In these years Lord Mansfield and Justice Marshall were appointed, in the King's Bench in England and as Chief Justice of the Supreme Court of the United States, respectively. They decided to implement caucus opinions and to prevent those judges not within the "majority" (*i.e.* plain dissenters as well as those that, although agreeing with the majority, did so for different reasons) from appending their reasons for not supporting the court's opinion.[35] In other words, both Lord Mansfield and Justice Marshall decided to stop with the *seriatim* practice and implement a single judgment that must be accepted (without exception) by all members of the court.[36] An important reason existed in both countries for these two judges to introduce deliberations within the courtroom and promote a single judgment that prevented judges from writing separately.

With regard to the change introduced by Lord Mansfield in England, it is believed that the reason behind his decision lies in the exponential growing that trade and commerce were experimenting throughout Europe by that time. It was envisaged that this phenomenon would inescapably lead to disputes between traders and other commercial men. As a

34 *State of Georgia v. Brailsford*, 2 Dall. 402 (1792). *Cf.* Karl M. ZoBell, 'L'Espressione di Giudizi Separati nella Suprema Corte: Storia della Scissione della Decisione Giudiziaria', in Costantino Mortati (ed.) *Le Opinioni Dissenzienti del Giudici Costituzionali ed Internazionali* (Giuffrè 1964), 61, 71.

35 G. Edward White, *The Marshall Court and Cultural Change: 1815 – 1835* (Oxford University Press 1991), 187.

36 Jed Handelsman Shugerman, 'A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court', (2003) 37 *Georgia Law Review*, 893, 911 – 912.

consequence, it was expected that resort to courts would become more frequent to settle all disputes arising from transactions regarding trade and commerce. Nonetheless, in the case of England, a fear existed as to the lack of benefits that this phenomenon would bring to its courts and the subsequent expansionist plans of the English Empire, by virtue of the practice from English courts to deliver their decisions *seriatim*. In fact, some years before being appointed in the King's Bench, Lord Mansfield noted in the *Vallejo v. Wheeler* case that,

> "in all mercantile transactions the great object should be certainty. And therefore it is of more consequence that a rule should be certain than whether the rule is established one way or the other: because speculators in trade then know which ground to go upon. But it is not easy to collect with certainty from a general verdict, or from notes taken at *nisi prius*, what was the true ground of decision; therefore in this, as in all doubtful cases, I wished a case to be made for the opinion of the Court."[37]

Hence, the fact that every judge was entitled to express his opinion entailed a problem. The existence of diverse and sometimes diverse contradictory reasons adduced by each of the judges would render it difficult to build a specific rule or principle for similar cases. The lack of certainty and clarity, as to how certain types of cases would be decided, would therefore make English courts less attractive and less likely to be chosen by businessmen to settle their disputes. In consequence, Lord Mansfield made English courts shift from *seriatim* opinions to the delivery of a single opinion, with a view of providing the certainty and stability needed for commercial transactions.[38]

As for John Marshall, the practice of the Supreme Court of the United States was, before his appointment as Chief Justice, to also deliver its decisions *seriatim*. As it was the case in England, this practice created substantial uncertainty and instability in the law,[39] and it had the concomitant effect of weakening the Supreme Court's authority.[40] In fact, at the time the judiciary was considered as the weakest of the three branches of government.[41] Marshall therefore considered it necessary to turn the judicial branch into a much more powerful institution. The prevailing interpretation of

37 *Cf.* Francis Hildyard, *A Treatise on the Principles of the Law of Marine Insurance* (William Benning 1845), 323 – 324.

38 James Oldham, 'Review: From Blackstone to Bentham: Common Law versus Legislation in Eighteenth-Century Britain', (1991) *Michigan Law Review*, 1637, 1645.

39 David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years 1789 – 1888* (University of Chicago Press 1985), 14.

40 Ibid, 55; Alexander Hamilton *et al*, *The Federalist* (Liberty Fund 1961), 491.

41 Thomas G. Walker, 'Seriatim Opinions', in Kermit L. Hall *et al* (eds.) *The Oxford Companion to the Supreme Court of the United States* (2nd edn, Oxford University Press 2005), 911.

the United States constitution centralized the majority of the power in the federal government. Marshall was against this interpretation and he consequently sought to change it during his tenure.[42] This led Marshall to attempt to follow Lord Mansfield's proposal of having a court unified in its decisions, with a view of increasing the authority of the Supreme Court.[43] For Marshall, this change would increase its authority, since the practice of deciding *seriatim* discouraged confidence and trust in the judiciary.[44]

Nevertheless, the attempts from Lord Mansfield and Justice Marshall of making courts speak in one voice, did not last long. In England, right after Lord Mansfield retired in 1788, Lord Kenyon returned to the practice of deciding cases *seriatim*. This practice still exists nowadays (though law lords' opinions show a gradual shift towards a greater use of the equivalent of an opinion of the court).[45] Lord Kenyon preferred to decide cases on an *ad hoc* basis, rather than, as Lord Mansfield sought, to announce broad legal rules.[46] He believed that each case presented its own particularities and it was therefore difficult to set a general rule for cases of the same nature.

Likewise, the attempt from the Chief Justice Marshall of making the Supreme Court speak with one voice (amply criticised by President Thomas Jefferson)[47] lasted only six years.[48] Justice Johnson broke unanimity by appending a dissenting opinion in *Ex Parte Bollman and Ex Parte Swartwout*.[49]

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42 Russell Smyth & Paresh Kumar Narayan, 'Multiple Regime Shifts in Concurring and Dissenting Opinions on the U.S. Supreme Court', (2006) 3 *Journal of Empirical Legal Studies*, 79, 92.

43 Compared to Lord Mansfield attempt, Marshall's decision to make the court speak with one voice was not strictly followed during his tenure as Chief Justice. Some of the decisions were taken seriatim, though they were an exception that moreover took place when Marshall was either absent or had recused himself of certain cases. *Cf.* John P. Kelsh, 'The Opinion Delivery Practices of the United States Supreme Court1970 – 1945', (1999) 77 *Washington University Law Quarterly*, 137, 144.

44 Note, 'From Consensus to Collegiality: The Origins of the 'Respectful' Dissent', (2011) 124 *Harvard Law Review* 1308 – 1310.

45 William D. Popkin, *Evolution of the Judicial Opinion: Institutional and Individual Styles* (New York University Press 2007), 31.

46 M. Tood Henderson, *supra* note 32, 303.

47 See, Andrew J. Levin, 'Mr. Justice William Johnson, Creative Dissenter', (1944) 43 *Michigan Law Review*, 497, 513 – 519. Jefferson expected to prevent the court from gaining the strength that the abolition of *seriatim* opinions would entail. *Cf.* Gary D. Rowe, 'The Sound of Silence: United States v. Hudson & Goodwin, the Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes', (1992) 101 *Yale Law Journal*, 919, 929.

48 Actually, Marshall's attempt could have lasted less time. As a state judge, Justice Johnson was accustomed to the practice of *seriatim* opinions. His colleagues in the Supreme Court, however, dissuaded him not to append dissents, since it might be seen as indecent cutting at other justices. Cf. Charles F. Hobson, 'Defining the Office: John Marshall as Chief Justice', (2006) 154 *University of Pennsylvania Law Review*, 1421, 1444.

49 *Ex Parte Bollman and Ex Parte Swartwout*, 4 Cranch 75 (1807).

From that moment on,[50] Johnson and his colleagues decided to regularly append separate and dissenting opinions.[51] A return, however, to the *seriatim* practice as it was known before John Marshall did not occur. The Supreme Court kept rendering its decisions by a single decision made by the majority of its members. This moment was thus constitutive for the concept of dissenting opinions.

The practice of appending dissents has significantly increased since then, to the extent that it is nowadays a commonplace.[52] The proliferation of dissents has even led some scholars to believe that the said increase in the number of separate and dissenting opinions amounts to a return to the *seriatim* practice,[53] even though some others argue that it only amounts to a quasi-*seriatim* approach, since there is an opinion from the majority.[54]

All in all, it can be said that the roots of the practice (as it is known today) of allowing dissenting judges, to express the reasons for their disagreement from decision taken by majority, lies in the United States practice created by justice Johnson's break away from unanimity in 1807. Nonetheless, the said practice could not have existed if it were not for the previous practice of having decisions *seriatim*. Hence, the practice of appending individual opinions to a majority decision represents but a natural consequence of the *seriatim* practice employed in the common law system since the early ages.[55] It has moreover (when compared to the instances where courts were forced to speak in one voice) reflected a shift in the courts' understanding of the nature of law, namely, from a grid of

50 It must also be noted, that another attempt to eradicate dissenting opinions was made some years after Marshall's retirement. Chief Justice Taft made that attempt, as for him "in many cases where I differ from the majority it is more important to stand by the Court and give its judgment weight than merely to record my individual dissent where it is better to have the law certain than to have it settled either way… most dissents elaborated, are a form of egoism. They don't do any good and only weaken the prestige of the Court. It is much more important what the Court thinks than what anyone thinks." *Cf*. Robert Post, 'The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decision-making in the Taft Court', (2001) 85 *Minnesota Law Review*, 1267, 1311.

51 Donald G. Morgan, 'The Origin of Supreme Court Dissent', (1953) 10 *William and Mary Quarterly*, 353, 367.

52 Only one additional instance, on the prohibition of dissenting opinions, has been reported in the history of the Supreme Court of the United States. Chief Justice Taft (1921 – 1930), did not approve dissents in the believe that, it is more important to stand by the court, avoiding to weaken its prestige and have the law certain. *Cf*. Sandra Day O'Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice* (Random House 2003), 116.

53 M. Tood Henderson, *supra* note 32.

54 Peter Bozzo, Shimmy Edwards and April A. Christine, 'Many Voices, One Court: The Origins and the Role of Dissents in the Supreme Court', (2011) 36 *Journal of Supreme Court History* 193, 210.

55 Andrew Lynch, 'Is Judicial Dissent Constitutionally Protected?', (2004) 4 *Macquarie Law Journal*, 81, 84.

fixed and certain principles design for the settlement of disputes, to the site of ongoing processes of adjustment and statesmanship designed to achieve social purposes.[56]

Remarkably, it should also be noted that the attempt from Lord Mansfield and Chief Justice Marshall of making common law courts deliver a single opinion, is based on the manner that civil law courts make their decisions, *i.e.* through a single majority opinion. In this sense, the practice of dissenting opinions as it is known today is a curious fulcrum between civil and old-English practice.[57] One can therefore argue that (although indirectly and perhaps to a limited extent) the origins of dissenting opinions can also be found in the civil law system. In that sense, they can be seen as a middle ground between both systems of law.[58]

1.4 Arguments in favour and against dissenting opinions in municipal law

As the origins of dissenting opinions have shown, two opposite (and markedly different) positions have taken place in the common law system with regard to the possibility of allowing *vel non* dissenting opinions. A somewhat similar situation has also occurred in the civil or continental law system. This is despite the fact that the latter has historically been known for opposing to dissenting opinions. In fact, in the past decades a shift has taken place in this regard. An important number of states belonging to this system of law have opted for allowing judges to append dissenting opinions,[59] considering that the arguments advanced against dissenting opinions are unconvincing.[60] Karl Kelemen has for instance noted that in Europe, some of the countries where the publication of individual opinions

56 Robert Post, *supra* note 50, 1274.

57 Arthur J. Jacobson, 'Publishing Dissent', 62 *Washington and Lee Law Review*, 1607.

58 Elisabeth Zoller, 'La Practique de l'opinion dissidente aux Etats-Unis', in Michel Ameller *et al* (eds.) *La République : Mélanges en l'honneur de Pierre Avril* (L.G.D.F. 2001), 609, 610.

59 Juha Raitio, *The Principle of Legal Certainty in EC Law* (Springer 2003); Christian Walter, 'La Practique des opinions dissidentes en Allemagne', (2000) 8 *Les Cahiers du Conseil Constitutionnel*, 1; Teresa Freixes, 'La Practique des opinions dissidentes en Espagne', (2000), 8 *Les Cahiers du Conseil Constitutionnel*, 50; Edward J. Cohn, 'Dissenting Opinions in German Law', (1957) 6 *International and Comparative Law Quarterly*, 540; Philip H. Amram, 'The Dissenting Opinion come to the German Courts', (1957) 6 *American Journal of Comparative Law*, 108; Due to this fact, the majority of states that, though following a civil law approach allow for dissenting opinions, can be considered as mixed jurisdictions, i.e. legal systems where the Romano-Germanic tradition has been suffused by the common law tradition. *Cf.* Frederick Parker Walton, *The Scope and Interpretation of the Civil Code of Lower Canada* (Butterworths 1980), 1.

60 Rousseau, Dominique, 'La Transposition des opinions dissidentes en France est-elle souhaitable? "Pour": Une opinion dissidente en faveur des opinions dissidentes', (2000) 8 *Les Cahiers du Conseil Constitutionnel*, 1

is not allowed are Austria, Belgium, France, Italy and Luxemburg.[61] In view of this situation, arguments in favour of dissenting opinions also exist in the civil or continental law system. A reference therefore to the arguments in favour of dissenting opinions is not circumscribed to the common law system, just as a reference to the arguments against them is not limited to the continental or civil law system. In turn, the arguments in favour and against dissenting opinions in both systems of law will be identified and explained, in order to subsequently analyse whether they are relevant for international law.

At the outset and before addressing the arguments in municipal law, two issues must be highlighted. On the one hand, as indicated by Paul Martens, that the arguments invoked by either those in favour or against dissenting opinions are the same. The difference lies in the fact that opposite effects are given to each of the principles or aspects that constitute the basis of the arguments.[62] In other words, whereas those in favour argue that the said principles or aspects are not at stake, for those against dissenting opinions they are contrary to the said principles. The arguments in favour and against dissenting opinions therefore constitute the two sides of the same coin.

On the other hand, and in connection with the issue mentioned above, the discussion and arguments advanced in favour and against dissenting opinions do not centre on the question whether a right exists for judges to express their disagreement with a majority judgment. It is claimed that the existence of such a right is out of question since it forms an integral part of the judicial process[63]. In that sense, the said discussion mainly centres on the question whether reasons exist that allow for the limitation of the right to dissent, with a view of protecting the principles that enshrine the exercise of the judicial function. The reference to the concept of "arguments against" therefore relates to the arguments that seek to limit the exercise of the right to dissent. Similarly, the reference to the concept "arguments in favour" refers to the arguments supporting an unrestrictive exercise of the right to dissent.

The first of the principles referred by those advocating in favour and against dissenting opinions, is the secrecy of deliberations. This is considered as one of the most important principles enshrining the exercise of the

61 Karl Kelemen, 'Dissenting Opinions in Constitutional Courts', (2013) 14 *German Law Journal*, 1345. Reference is also made of other countries in Europe such as Malta and The Netherlands. *Cf.* Marieta Safta, 'The Role of Dissenting and Concurring Opinions in the Constitutional Jurisdiction', (2016) 5 *Society of Juridical and Administrative Sciences*, 207, 208.

62 Paul Martens, 'La Pratique du Délibéré Collégial' in Jacques Englebert (ed.) *Questions de Droit Judiciaire Inspirées de L'affaire Fortis* (Larcier 2011), 9, 17.

63 Rory K. Little, *supra* note 30, 691; Michael A. Musmanno, 'Dissenting Opinions', (1956) 60 *Dickinson Law Review*, 139 ; Hunter Smith, 'Personal and Official Authority: Turn-of-the-Century Lawyers and the Dissenting Opinion', (2012) 24 *Yale Journal of Law & the Humanities*, 507.

judicial function[64] that moreover constitutes the basis (and cause) of the recourse to this means for the settlement of disputes.[65] Hence, it is considered indispensable for the effective functioning of a court of law,[66] as an absolute necessity for insulating the judiciary is required for the preservation and strength of the court as an institution.[67] In a few words, by virtue of this principle the independence and impartiality of the judges is to be preserved. This is why the application of this principle requires judges to deliberate outside the presence of the public, and it also prohibits the disclosure of any information whatsoever as to how the judges have voted.[68] In consequence, it is believed that, due to its great importance, allowing for dissenting opinions would seriously undermine the principle regarding secrecy of deliberations.[69] Should the judge be allowed to append a dissent, she or he would likely be subjected to pressures from outside the court. Similarly, depending on the content of her or his opinion, the judge (or her or his colleagues') independence and impartiality might be at stake,[70] since reference to the manner in which deliberations were held can (either directly or indirectly) be found therein. With a view of preserving this principle the content and scope of dissenting opinions should be therefore limited.

For its part, those who have considered that dissenting opinions should be allowed argue that the principle on the secrecy of deliberations should not be subjected to such a stringent interpretation;[71] they thus call for a more liberal interpretation.[72] In this regard, it has been argued that the principle only imposes the duty not to reveal the position adopted by the rest of her or his colleagues, whose views will remain secret.[73] In fact, Philip Amram has noted that, following a more liberal interpretation of the principle, the Supreme Court of Bremen, Germany, considered that the right to append dissenting opinions does not violate the principle on the secrecy of deliberations.[74] In its analysis on the provision that indicates that in advi-

64 Conseil d'Etat, *Sieurs Legillon*. 17 November 1922, *Rec.*, p. 849.

65 Jean-Paul Béraudo, 'La Confidentalité et le Délibéré', in José Rosell (co-ord.) *Les Arbitres Internationaux: Colloque du 4 février* (Société de Législation Comparée 2005), 101.

66 Felix Frankfurter, 'Mr. Justice Robert', (1955) 104 *University of Pennsylvania Law Review*, 311, 313.

67 Peter G. Fish, 'Secrecy and the Supreme Court: Judicial Indiscretion and Reconstruction Politics', (1967) 8 *William and Mary Law Review*, 225.

68 René Chapus, *Droit du Contentieux Administratif* (Montchrestien-Lextenso 2001), 932.

69 Patrick. Daillier & Alain Pellet, *Droit International Public* (9th edn, L.G.D.J. 2001), 883.

70 Edward J. Cohn, *supra* note 59, 540.

71 Bart Nelissen has noted that some countries belonging to the civil law system, have religiously applied the principle of the secrecy of deliberations, to the extent that they consider an indication in a judgment as to how the decision was taken, either unanimously or by majority, a violation of the principle. *Cf.* Bart Nelissen, 'Judicial Loyalty Through Dissent or Why the Timing is Perfect for Belgium to Embrace Separate Opinions', (2011) 15 *Electronic Journal of Comparative Law*, 1, 4.

72 Paul Martens, 'Sur les Louyatés Démocratiques du Juge', in Jean Verhoeven (ed.), *La Louyaté: Mélanges offerts à Étienne Cerexhe* (Larcier 1997), 249, 268.

73 Yannick Lécuyer, *supra* note 1, 215.

74 Philip H. Amram, *supra* note 59, 110.

sory opinions any judge may request that his dissenting opinion be filed, the court concluded that this provision does not contradict the obligation for judges to maintain secrecy over their deliberations and their voting.[75]

The second principle addressed in the discussions on dissenting opinions is the collegiality of decisions. The origins of this principle can be traced back to the continental or civil law system and has subsequently entered into the common law system.[76] Its basis is to be found in the fact that judges should "have a common interest, as members of the judiciary, in getting the law right."[77] Hence, through a single judgment the court can issue an authoritative statement as to how a rule should be applied[78] and therefore provide legal certainty with respect to some of the aspects addressed in the judgment.[79] Moreover, a judgment that results from a compromise among judges protects them from outside pressures and allows them to express their views freely within the courtroom.[80] Consequently, through this principle their independence and impartiality is also secured, since it would be the institution as a whole (instead of one of its members) that would be questioned for the views expressed in the judgment.

Dissenting opinions are considered contrary to this principle, as they will excuse some members of the court from the collegial responsibility in the making of the judgment.[81] Dissenters will therefore focus on providing their reasons and personal views in the matter, acting more in their personal capacity than in the name of the institution that they represent. Having dissents would also discourage collegiality in the sense that it amounts to having several courts of one judge each.[82] This would moreover create confusion as to what the law is,[83] which is in total contradiction with the goal that collegiality pursues. On the other hand, those advocating in favour of dissenting opinions have argued that the principle on the collegiality of decisions is not at stake. In a collegial environment divergent views are discussed during the deliberative process and contribute to the mutual aim

75 Id.

76 Roderick Munday, 'Judicial Configurations: Permutations of the Court and Properties of Judgment', (2002) 61 *Cambridge Law Journal*, 612.

77 Harry T. Edwards, 'The Effects of Collegiality on Judicial Decision Making', (2003) 151 *University of Pennsylvania Law Review*, 1639, 1645.

78 Roderick Munday, '"All for One and One for All" The Rise to Prominence of Composite Judgment within the Civil Division of the Court of Appeal', (2002) 61 *Cambridge Law Journal*, 321, 331.

79 Ibid, 348.

80 Vittoria Barsotti *et al*, *Italian Constitutional Justice in Global Context* (Oxford University Press 2015), 134.

81 *Cf.* David Edward, 'How the Court of Justice Works', (1995) 20 *European Law Review*, 539, 556.

82 Editor, 'Courts and Decisions', (1870) 1 *Albany Law Journal*, 405; Charles A. Hereschoff Barlett, 'Dissenting Opinions', (1906) 32 *Law Magazine & Review: A Quarterly Review of Jurisprudence*, 46, 55.

83 Ruth Bader Ginsburg, 'Remarks on Writing Separately', (1990) 65 *Washington Law Review*, 133, 148.

of the judges of applying the law and finding the right answer.[84] Collegiality therefore allows judges to disagree freely and use that disagreement to improve and refine the majority judgment.[85] In addition, even if a judge makes know the reasons of her or his dissent whenever is necessary,[86] this does not mean that she or he should express them in every decision that she or he disagrees with the majority.[87]

A third principle also mentioned in the discussion is the *res judicata* authority (and as a consequence of it the credibility and effectiveness) of the decisions from courts.[88] It is believed that the binding force of a judgment that derives from the *res judicata* principle and the consequences that it entails, are at stake by the publication of dissenting opinions.[89] The interested parties in the judgment (as well as any other person) may pay due regard to the particular views of a judge in the case at hand, especially if she or he has dissented. It may therefore occur that the losing party (and the public in general) is sympathetic to the reasons stated in the dissenting opinion, as they may consider that it contains a stronger legal argument. Dissenting opinions can as a consequence create uncertainty and may also undermine the authority of the decision in question.[90] The principle of *res judicata* and subsequent obligations for the parties (especially the losing party) to comply with the judgment of the court will therefore be at stake. Any of the parties might decide not to comply with it, since the reasons provided by the majority therein, might appear unconvincing. In addition, the credibility of the judges might be at stake in the believe

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84 Harry T. Edwards, *supra* note 77, 1646

85 Id.

86 Alpheus Thomas Mason, *William Howard Taft: Chief Justice* (Simon & Schuster 1965), 201.

87 *Cf*. Roscoe Pound, 'Cacoethes Dissentiendi: The Heated Judicial Dissent', (1953) 39 *American Bar Association Journal*, 794, 795; Matthew P. Bergman, 'Dissent in the Judicial Process: Discord in Service of Harmony', (1991) 68 *Denver University Law Review*, 79; Ruth Bader Ginsburg, 'The Role of Dissenting Opinions', (2010) 95 *Minnesota Law Review*, 1, 7.

88 François Luchaire, 'La Transposition des opinions dissidentes en France est-elle souhaitable? "Contre": Le point de veux de deux anciens membres du Conseil constitutionnel', (2000) 8 *Les Cahiers du Conseil Constitutionnel*, 1.

89 This is in fact the reason that explains why two current exceptions exist in the common law system with regard to the right for judges to append dissenting opinions: the Privy Council of the United Kingdom and decisions in criminal cases. Concerning the Privy Council, its function is to give advice to the Crown and serve as court of last resort, in situations regarding the United Kingdom overseas territories and countries of the Common wealth. The existence of dissenting opinions would go against the need to preserve intact the power of the United Kingdom over its colonies and dominions. A single pronouncement is therefore more advisable. *Cf*. Alex Simpson, *supra* note 26, 207; Louis Blom-Cooper & G. Drewry, *Final Appeal: A Story of the House of Lords in its Judicial Capacity* (Oxford University Press 1972), 82. As for criminal cases, the discomfiture of an unsuccessful appellant should not be aggravated by an over division among judges, especially when the disagreement is related to aspects concerning the assessment of facts or evidence. *Cf*. Ruth Bader Ginsburg, *supra* note 87, 135.

90 Rupert Cross, 'The Ratio Decidendi and a Plurality of Speeches in the House of Lords', (1977) 93 *Law Quarterly Review*, 378; Omar Chessa, *I Giudici del Diritto: Problemi Teorici della Giustizia Constituzionale* (FrancoAngeli 2014), 372.

that other reasons were taken into account when taking the decision;[91] this could therefore result in a lack of effectiveness with regard to the function entrusted to a court on the settlement of the disputes submitted to it.

Those who defend the use of dissenting opinions consider that they do not compromise (in any form whatsoever) the decision taken by the majority of the members of a court.[92] Whereas from the viewpoint of the authority of a decision, unanimity is always to be preferred; it should not, however, be obtained at any cost. Accordingly, only when unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence. But when it is merely formal (*i.e.* recorded as such in the judgment despite conflicting views among judges), it is not desirable; whatever may be the effect upon public opinion.[93] Hence, the legitimacy of the judicial process and the authority of courts' decisions should not rest upon illusions.[94] In fact, it is only by means of a dissenting opinion that the legitimacy of the judicial process and the authority of a majority decision can be assessed. Consequently, when a rule of law stated by a majority can withstand the criticism of a dissent, the legitimacy and authority can be measured.[95] It thus argued that the elimination of dissenting opinions would not necessarily move courts to the direction of a better state of discourse.[96]

Further, an additional principle to which a great number of scholars tend to refer is the independence and impartiality of the judiciary.[97] The majority of scholars believes that dissenting opinions contribute to rather than diminish the realization of this principle. It is therefore in this context that dissents have been defined, as "one of the great and cherished freedoms that we enjoy."[98] Consequently, independence and impartiality can only be secured if each judge expresses his view as to how a case should be

91 François Luchaire, *supra* note 88.

92 See, *e.g.*, Vittorio Denti, 'Per Il Ritorno al Voto di Scissura nelle Decisioni Giudiziarie', in Costantino Mortati (ed.) *Le Opinioni Dissenzienti del Giudici Costituzionali ed Internazionali* (Dott. A. Giuffré 1964), 1, 12.

93 Kurt H. Nadelmann, 'The Judicial Dissent: Publication v. Secrecy', (1959) 8 *American Journal of Comparative Law*, 415, 431.

94 Stanly H. Fuld, 'The Voices of Dissent', (1962) 62 *Columbia Law Review*, 923, 928; Robert H. Jackson, 'Advocacy before the Supreme Court: Suggestions for Effective Case Presentation', (1951) 37 *American Bar Association Journal*, 861, 863; See also, Karl M. ZoBell, 'Division of Opinion in the Supreme Court: A History of Judicial Desintegration', (1959) 44 *Cornell Law Quarterly*, 186, 213.

95 Robert G. Simmons, 'The Use and Abuse of Dissenting Opinions', (1956) 16 *Louisiana Law Review*, 497, 498; Lee Epstein, William M. Landes and Richard A. Posner, 'Why (and When) Judges Dissent: A Theoretical and Empirical Analysis', (2011) 3 *Journal of Legal Analysis*, 101, 104.

96 M. Tood Henderson, *supra* note 32, 293.

97 See, *e.g.*, Michael D. Kirby, *supra* note 2, 40; William. D. Popkin, 'A Common Lawyer on the Supreme Court: The Opinions of Justice Stevens', (1989) *Duke Law Journal*, 1087, 1090;

98 William J. Brennan, 'In Defense of Dissents', (1986) 37 *The Hastings Law Journal*, 427, 438.

decided.[99] Thus, it constitutes the only manner in which they can demonstrate to have acted in a fair and conscientious manner.[100] It is therefore incompatible with the individual independence and impartiality of the judges (expressed through their individual opinions),[101] when they are restrained from expressing their personal views, bearing in mind that law is not an exact science,[102] nor is it immutable,[103] and that different views might therefore exist when assessing a legal matter in multi-member courts, especially when the said matter refers to incommensurable values.[104] Judges' opinions therefore contribute to the marketplace of competing ideas.[105] For its part, others consider that a dissenting opinion puts the independence and impartiality of a judge at risk. If she or he freely expresses her or his views on the matter, they are put to public scrutiny and may affect her or his judicial career.[106] In order to prevent that a judge is questioned for her or his views, dissents should not be made public.

Besides these principles that are invoked by both, those in favour or against dissenting opinions, there are additional aspects that have been mentioned and that have moreover been amply dedicated to an analysis as to whether dissenting opinions serve a real purpose and perform a worthwhile function.[107]

This question as to the usefulness of dissenting opinions has been principally assessed from the standpoint of how dissenting opinions contribute to the development of the law.[108] In consequence, the main reason behind accepting this institution is its contribution in this regard. One of the most

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99 William O. Douglas, 'The Dissent: A Safeguard of Democracy', (1948) 32 *Journal of the American Judicature Society*, 104, 106.

100 Matthew P. Bergman, *supra* note 87. In fact, it is suggested that "an independent judge is more likely to write separate opinions, rather than simply join colleagues without expressing a distinct point of view." *Cf.* William. D. Popkin, *supra* note 97.

101 Claire L'Heureux-Dube, 'The Dissenting Opinion: Voice of the Future?', (2000) 38 *Osgoode Hall Law Journal*, 495, 503.

102 Evan A. Evans, 'The Dissenting Opinion – Its Use and Abuse', (1938) 3 *Modern Law Review*, 120, 128; Robert G. Simmons, *supra* note 95; Joe W. Sanders, 'The Role of Dissenting Opinions in Louisiana', (1963) 23 *Louisiana Law Review* 673.

103 Israel Bloch, 'The Value of Dissent', (1930) 3 *Law Society Journal*, 7, 8.

104 John. Alder, 'Dissents in Courts of Last Resort: Tragic Choice?', (2000) 20 *Oxford Journal of Legal Studies*, 221, 227 – 233.

105 William. J. Brennan, 'In Defense of Dissents', (1986) 37 *Hastings Law Journal*, 427, 435.

106 Julia Laffranque, 'Dissenting Opinion and Judicial Independence', (2003) 8 *Juridica International*, 162, 168.

107 Stanly H. Fuld, *supra* note 94, 926.

108 See, *e.g.*, Alan Barth, *Prophets with Honor: Great Dissents and Great Dissenters in the Supreme Court* (Knopf 1975); J. Louis Campbell III, *supra* note 23, 312; Robert G. Flanders Jr., 'The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents are Valuable', (1999) 4 *Roger Williams University Law Review*, 401, 410 – 411; Randal T. Shepard, 'What Can Dissents Teach Us?', (2005) 68 *Albany Law Review*, 337, 342 – 344; Alex Kozinski & James Burnham, 'I Say Dissental, You Say Concurral', (2012) 121 *Yale Law Journal Online* 601; Melvin L. Urofsky, *Dissent and the Supreme Court: Its Role in the Court's History and the Nation's Constitutional Dialogue* (Pantheon Books 2015), 7.

famous and often quoted words (even from international judges when appending their dissents),[109] as to the contribution of dissenting opinions to the development of the law can be found in one of the works of the former Chief Justice of the Supreme Court of the United States (and also a judge of the Permanent Court), Charles Evan Hughes. He noted that,

> "[a] dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day when a later decision may possibly correct the error into which the dissenting justice believes the court have been betrayed"[110]

In this sense, through her or his dissenting opinion the judge may therefore be laying the logical groundwork for future cases[111] and giving room to new developments in subsequent cases.[112] Some examples have been provided in the academic literature, in support of this proposition. One of the most cited and illustrative examples is the dissenting opinion appended by justice John Marshall Harlan, to the Supreme Court's decision in *Plessy v. Ferguson*. Having voted against the majority decision, justice Harlan indicated in his dissent that the United States Constitution is color-blind and therefore neither knows nor tolerates classes among citizens. It is noted that his dissenting in this case constitutes the basis of the Supreme Court's subsequent decision in *Brown v. Board of Education* and *Romer v. Evans*.[113] Nonetheless, it has also been suggested that the contribution to the development of the law, is not a function of dissenting opinions themselves. If a dissenting opinion becomes later the decision of a court, it is but a

109 *Cf. South-West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment of 18 July 1966, [1966] ICJ Rep. 6, (Dissenting Opinion, Judge Jessup), p. 325; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14, (Dissenting Opinion, Judge Schwebel), p. 26, para 4.

110 Charles Evans Hughes, *The Supreme Court of the United States: Its Foundation, Method and Achievements* (Columbia University Press 1928), 68. In the context of English law, the most famous and often cited words in this regard, are the views of the retired Lord Nicholls of Birkenhead, who noted that "[d]issenting judgments do more than attract passing interest. They are an important aspect of judicial freedom. They have no legal effect on cases in which they are given, but they can have a practical effect. At best a dissenting opinion judgment may be so obviously right that the courts or Parliament soon steer the law along a better path." *Cf.* Neal Geach & Christopher Monagham (eds.), *Dissenting Judgments in the Law* (Wildy, Simmons and Hill Publishing 2012), 4.

111 Vanessa Baird & Tonja Jacobi, 'How the Dissent becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court', (2009) 59 *Duke Law* Journal, 183, 186.

112 See, *e.g.*, Jeffrey A. Segal & Harold J. Spaeth, 'The Influence of *Stare Decisis* on the votes of United States Supreme Court Justices', (1996) 40 *American Journal of Political Science*, 971, 977.

113 Daniel Mangis, 'Dissent as Prophecy: Justice John Marshall Harlan's Dissent in *Plessy v. Ferguson* as the Religious Rethoric of Law', in Clarke Rountree (ed.) *Brown v. Board of Education at Fifty: A Rhetorical Perspective* (Lexington Books 2005), 23, 41.

product of the court's normative approval.[114] Moreover, the redemption of dissenting opinions occurs far less often, than it is believed.[115] Be that as it may, the contribution of dissenting opinions to the development of the law is out of question, as one of the arguments in favour of their permissibility.

Lastly, a dissenting opinion is important since it serves a warning role, *i.e.* it must be considered as a sign that a legal doctrine must not be pressed too far.[116] This role and function for a dissenting opinion can only be understood, in light of the *stare decisis* doctrine that permeates the common law system.[117] In this vein, a dissenting opinion may be a helpful tool for the determination of the rule set forth by the majority in its decision and (more important) if it can be considered as a strong precedent.[118] In other words, it might be seen as a sign that indicates which are the limits of a decision, either in terms of its *ratio decidendi* or the factual circumstances to which it applies.[119] A dissenting opinion thus narrows the scope of the decision and may therefore lead to consider a decision as a statement showing evidence of an underlying principle that is open to constant re-examination.[120]

Finally, a more systemic argument related to the nature of law itself, as well as to the nature of the common law system, has been advanced in defence of dissenting opinions. It has been noted that both, depublication and unpublication[121] of dissents is a threat to the integrity of common law.[122] This is so, since

> "common law judges take moral and political responsibility for the positions they shoulder in the conflict of visions, just as the parties whose disputes they resolve assume responsibility for their positions. Rather than oracles of the law bearing legal truth to a feckless mass, common law judges are participants with citizens in an ongoing struggle over plural visions of justice."[123]

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114 *Cf.* Richard A. Primus, 'Canon, Anti-canon, and Judicial Dissent', (1998) 48 *Duke Law Journal*, 243, 247 – 248.

115 Andrew Lynch, 'The Intelligence of a Future Day: The Vindication of Constitutional Dissent in the High Court Australia – 1981-2003', (2007) 29 *Sydney Law Review*, 195, 228.

116 Joe. W. Sanders, 'The Role of Dissenting Opinions in Louisiana', (1963) 23 *Louisiana Law Review*, 673, 675.

117 Rupert Cross, *Precedent in English Law* (Clarendon Press 1977), 17.

118 M. Tood Henderson, *supra* note 32, 341. See, also, Roscoe Pound, *supra* note 87, 795.

119 Maurice Kelman, 'The Forked Path of Dissent', (1985) *Supreme Court Review*, 227, 242 – 257; Diane P. Wood, 'When to Hold, When to Fold, and When to Reshuffle: The Art of Decision making on a Multi-Member Court', (2012) 100 *California Law Review* 1445.

120 John Alder, 'Dissenting Opinions in Courts of Last Resort: Tragic Choices?', (2000) 20 *Oxford Journal of Legal Studies*, 186, 234.

121 Depublish (verb) is defined as "remove from an official record." Unpublish (verb) is defined as "make (content that has previously been published online) unavailable to the public." Cf. Oxford English Dictionary, 'Unpublish' and 'Depublish', available at http://en.oxforddictionaries.com/definition/unpublish and http://en.oxforddictionaries.com/definition/depublish (accessed 16 January 2019).

122 Arthur J. Jacobson, *supra* note 57, 1607.

123 Ibid, 1632.

In that sense, a dissenting opinion is but a reflection of the competing understanding of views that exist in society. It therefore fosters the democratic nature of the entire legal process.[124]

1.5 The relevance of the municipal law debate on dissenting opinions for international law

The subsection above has presented the arguments in favour and against dissenting opinions, in municipal law. From the said discussion, three main arguments can be identified as the main against dissents, namely, (i) that they are contrary to the secrecy of deliberations and undermine the need to preserve the independence and impartiality of judges; (ii) that they break the collegiality principle; and, (iii) that they undermine the authority of the majority decision as such. For its part, the two main arguments in favour of dissenting opinions are (i) that they constitute a sign that warns which are the limits of a majority decision; and, (ii) that they contribute to the development of the law.

By the same token, the presentation of these arguments confirms the view that judges are entitled to express their disagreement in multi-member courts. In this sense, it is recognized that dissenting opinions play an important role in the adjudication process in general. This also includes the civil law system, notwithstanding its opposition to the permissibility for judges to append dissenting opinions. In fact, the reason for the said opposition is based on the conviction, that it is necessary to give more weight to the need to preserve some of the principles that enshrine the exercise of the judicial function.

Against this background and taking into account the research question that this chapter attempts to answer, it is necessary to address what elements from the discussion at the domestic level are relevant for the framework on dissenting opinions at the international level. These elements that will be considered are the arguments in favour and against dissenting opinions, as well as their roles and functions. To put it another way, and in line with the research question of this chapter, it will be addressed how and to what extent the arguments on the secrecy of deliberations, collegiality in the decision-making, authority of decisions, independence and impartiality of the judiciary and the development of the law that have been advanced at the domestic level, can be transposed to the international level.

At first sight, it would be possible to argue that, because of the different structure between domestic and international law, the arguments against and in favour of dissenting opinions at the former may play out slightly differently. Nonetheless, following Campbell McLachlan, the boundary

124 Lucia Corso, 'Dissenting Opinion, Judicial Review and Democracy', (2010) 14 *Mediterranean Journal of Human Rights*, 159, 183.

between domestic and international law is porous in nature;[125] some aspects from one level might therefore be transposed to the other. In addition, it should also be taken into account that the arguments (with the exception of the development of the law) whose extent of transposition is analysed, are part of the essence of any judicial institution.[126]

Yet, the differences between domestic and international law are numerous. As regard the arguments concerning the collegiality in the decision-making, the diversity in the composition of some international courts and tribunals is an important factor to be noted. In international courts judges come from various legal systems and traditions of the world and this certainly constitutes an important aspect that differentiates adjudication at the domestic and international level.[127] In the case of the independence and impartiality of the judiciary, an important difference is the presence of a national element within some international courts and tribunals. Further, also important is the lack of a centralised structure that results in a disintegrated judicial system.[128] In that sense, the relation among international courts and tribunals is horizontal and not vertical[129] and each international court operates in a relative vacuum. Similarly, also important is the fact that the doctrine of *stare decisis* has not been adopted by most international courts and tribunals is noteworthy.[130] Both differences are important with respect to the arguments regarding the authority of decisions and development of the law.

Having highlighted these differences in the abstract, the following sections will further contextualise how the debates on dissenting opinions at the domestic level had been transposed to the international level.

125 Campbell McLachlan, *Lis Pendens in International Litigation* (Martinus Nijhoff Publishers 2009), 299.

126 Chester Brown has for instance noted that this is in fact an important aspect in order to explain the emerging common law of international adjudication, despite differences among international courts and tribunals. *Cf*. Chester Brown, *A Common Law of International Adjudication* (Oxford University Press 2007), 230.

127 *Cf*. Silvia Fernández de Gurmendi, 'Judges: Selection, Competence, Collegiality', (2018) 112 *American Journal of International Law Unbound*, 163, 166.

128 *Prosecutor v. Dusko Tadic*. Decision on the defence motion for Interlocutory Appeal on Jurisdiction. Decision of 2 October 1995, para. 11.

129 Campbell Mclachlan, *supra* note 125, 305.

130 Michael P. van Alstine, 'Stare Decisis and Foreign Affairs', (2012) 61 *Duke Law Journal*, 941.