THE MODERN LAW REVIEW
Modern Law Review
DOI: 10.1111/1468-2230.12786

A Performative Theory of Judicial Dissent

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This article introduces a ritual theory of judicial dissent. Conventional accounts of the functions of judicial dissent, whether in the context of domestic or international judicial systems, can be grouped into three thematic categories: 'dissent as transparency', 'dissent as opposition' and 'dissent as conscience'. Leaving aside the disagreement over whether judicial dissent should be institutionalised at all, these accounts of the institutional functions of dissent are generally accepted with little dispute. Yet, while these conventional accounts may be normatively unproblematic, they fail to fully or coherently capture the mechanics by which judicial dissent operates upon institutional authority in practice. Irrespective of judicial dissent's capacity to function, or be seen to function, in the ways envisaged by doctrine, this article considers how a ritual theory analysis of dissent – with its focus on form – may supplement conventional accounts of judicial dissent.

INTRODUCTION

Judicial dissent – the practice by judges of issuing dissenting and separate opinions – is a familiar aspect of the jurisprudential landscape. Although the right to engage in judicial dissent (dissent) and the practice of judges when exercising that right is typically associated with the common law tradition, dissent by judges is a feature seen in domestic systems associated with all traditions, and the right has been recognised and reproduced across most international courts and tribunals. At the same time, the culture of dissent differs across systems and institutions, reflecting the degree to which dissent by judges has been institutionalised within the normative regime in question.[1] This article is part of a larger project aimed towards the construction of a descriptive theory of the institutionalisation of dissent; one that addresses the ubiquity of dissent across

*Associate Professor in Law, University of Nottingham. The author thanks the three anonymous reviewers for their thorough engagement with the article and their careful and constructive feedback. Additionally, the author thanks participants at the lunchtime talk at the Amsterdam Centre of International Law, University of Amsterdam (8 April 2019), the lunchtime talk at the Lauterpacht Centre for International Law, University of Cambridge (28 February 2020), and participants of the Eighth Junior Faculty Forum, National University of Singapore (12-14 August 2019) for their constructive comments on earlier versions on this article. In particular, she wishes to thank Damian Chalmers, discussant of this paper at the Junior Faculty Forum, Cosmin Cercel, Dino Kritsiotis, Barrie Sander, Ingo Venzke, and Joseph Weiler for their feedback on earlier drafts. All URLs last visited 20 December 2022.

1 For an account of the influence of cultural norms privileging consensus-based decision-making, leading to a culture of restraint when exercising the right to dissent within the Appellate Body of the World Trade Organization, see Meredith Kolsky Lewis, 'The Lack of Dissent in WTO Dispute Settlement' (2006) 9 JIEL 895.

legal systems, notwithstanding the apparently strong and often fundamental disagreement as to the effect of dissent upon institutional authority.[2] The theory of dissent introduced in this article speaks to the essential character, functions, and functioning of dissent as a form of judicial action. Therefore, although the focus of this wider project is upon the institutionalisation of dissent in international law, and although this article is framed in international law and adjudication, the significance of this article extends to all legal systems in which dissent by judges is permitted.[3]

In this article I explore how insights from anthropological theory, specifically ritual theory, might valuably supplement the conventional understanding of the institutional effects of dissent. The idea that official (judicial) power may be legitimised through ritual practices should not be a wholly unfamiliar one.[4] Viewing judicial dissent through the lens of performative theories of ritual allows us to see aspects of dissent's operation in the world that cannot be seen – or can be seen but their significance underappreciated – when it is viewed through the lens of doctrine alone.

The conventional account of the institutional functions of judicial dissent, whether in the context of domestic or international judicial systems, can be organised into three categories: 'dissent as transparency', 'dissent as opposition' and 'dissent as conscience'. These categories, summarised in the third section below, tend to be both descriptive and normative. Leaving aside the disagreement over whether dissent should be institutionalised at all, these accounts of the institutional functions of dissent are generally accepted with little dispute. Yet, while this conventional account may be normatively unproblematic, it fails to fully or coherently capture the mechanics by which dissent operates upon institutional authority in practice. The fourth section introduces a performative theory of dissent, which is offered as a corrective and supplement to the conventional account and its limitations. A ritual analysis of dissent, with its greater focus upon form over content, adds to the conventional accounts of dissent by demonstrating the significance of the simple *act* of dissent.

The need for greater attention to form can be appreciated once it is observed that, within the conventional account, the effective functioning of dissent is contingent upon close interpretive engagement with the substantive content of dissent by those appraising institutional legitimacy. Such engagement requires in particular a contextually contingent doctrinal grounding in the systemic and institutional nature and authority of dissent within the particular legal system

2 Jorge Contesse, 'Autoridad y disenso en la Corte Interamericana de Derechos Humanos' (2021) 19 I-CON, 1254. Jeffrey L. Dunoff and Mark. A. Pollack, 'The Road Not Taken: Comparative International Judicial Dissent' (2022) 116 AJIL 341. These findings are consistent with the theoretical framework introduced in Hemi Mistry, 'The Paradox of Dissent: Judicial Dissent and the Project of International Criminal Justice' (2015) 13 JICJ 449, 449 and developed in Hemi Mistry, 'The Different Sets of Ideas at the Backs of Our Heads: Dissent and Authority at the International Court of Justice' (2019) 32 LJIL 293.

3 Indeed, it should invite reflection on its implications for those systems in which judicial dissent is not permitted and/or practised.

4 Julie Stone Peters, 'Legal Performance Good and Bad' (2008) 4 *Law, Culture and the Humanities* 179.

in which that dissent is produced and performed.[5] Yet, for most appraisers of institutional legitimacy, *if* the fact of dissent is registered at all, few beyond those experts with a specific interest in the opinion will engage with its substantive content. For most, the simple fact of the act of dissent will be the beginning and end of their engagement with dissent. With this in mind, substance-oriented accounts of the institutional functioning of dissent that do not address, or do not address at length, the significance of dissent as an act might lead to the conclusion that the institutionalisation of dissent is ineffective, and the practice of dissent – with its personal and institutional costs – an inefficient use of scarce resources. A performative theory of dissent, which foregrounds form, allows us to address the ubiquity of dissent that conventional, doctrinal, accounts overlook.

JUDICIAL DISSENT

'Judicial dissent' can be taken to refer to any of the acts undertaken by an individual in a judicial or quasi-judicial capacity (for example a judge, an arbitrator, a panel-member of the World Trade Organization Appellate Body) that expresses that individual's disagreement with the decision of the decision-making body of which they are a member, as determined by the majority. This may be simply the act of casting a negative vote against a court's decision, but it may also be the act of issuing an additional opinion, the focus of this article.[6] The effect of the expression of this disagreement is said to weaken, or hold the potential to weaken, the authority claimed by the institution, whether manifested specifically in the decision with which disagreement is expressed or more generally, by undermining the decisional legitimacy afforded by unanimity or – at least – the *appearance* of unanimity.[7] Where there is disagreement about the desirability of dissent, that disagreement is not over the fact of dissent's impact upon authority, but rather the desirability of that impact.

Additional opinions are those written texts[8] appended to the decision of a multi-member court or tribunal which express the individual views of one or more judges that participated in the case.[9] Additional opinions are the views

5 For example in the context of the English common law, see recently Neil Duxbury, *The Intricacies of Dicta and Dissent'* (Oxford: OUP, 2021) 125.

6 Providing a compelling account of why external communication, or publicity, of dissent is not integral to judicial dissent, see *ibid*, 136.

7 Dunoff and Pollack, n 2 above, 348; Kolsky Lewis, n 1 above; Cass Sunstein, 'Unanimity and Disagreement on the Supreme Court' 21 July 2014 at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2466057 [https://perma.cc/8FQY-NDL5].

8 On the particular historical significance of the written word and the dissemination of the 'heretical' Enlightenment ideas that heralded the modern Western legal systems, see Carla Hesse, 'Printing Culture in the Enlightenment' in Martin Fitzpatrick et al (eds), *The Enlightenment World* (Abingdon: Routledge, 2004).

9 It therefore excludes opinions of individual judges when the judgment of the court takes the *seriatim* form, namely where the individual opinions of each of the court's members together and in full comprise the judgment of the court, that – historically – characterised the form of judgments of, most notably, the UK House of Lords. See Brenda Hale, 'Judgment Writing in the Supreme Court' First Anniversary Seminar, 30 September 2010 at https://www.supremecourt.uk/docs/speech_100930.pdf [https://perma.cc/EN8F-4QHL] and, in the US context, Todd

which are subject to publication – that is, they are made public.[10] Additional opinions may be familiar under a variety of guises: dissenting opinions, separate opinions, minority opinions, individual opinions, declarations, and permutations thereof. Some of these labels (for example dissenting opinions and separate opinions) are familiar across institutions, while others (for example 'declarations') are particular to institutions. 'Dissenting opinions' typically denote opinions that contain some degree of dispositive disagreement (ie that the judge disagrees either in full or in part with the Court's disposition in the decision at hand) whereas 'separate opinions' relate to any other kind of disagreement short of dispositive disagreement. Beyond that, however, these labels have limited descriptive reliability or utility, owing to the fact they lack the descriptive nuance to accurately capture the substantive nature, content, and jurisprudential significance of additional opinions.[11] As such, while the labels attached to opinions certainly have some normative significance,[12] it is unhelpful to think of the labels as reflecting a taxonomy of conceptually and substantively distinct 'instruments of expression'.[13]

Within national legal systems, a distinction has traditionally been drawn between common law and civil law jurisdictions: while the former are typically associated with a permissive attitude towards dissent, the latter are associated with a prohibitive approach.[14] The difference in approach is typically associated with the nature and historical construction of judicial authority within each tradition.[15] In reality, while the culture of exercising the right or prerogative of dissent may differ significantly across legal systems and institutions, few domestic legal systems maintain an absolute formal prohibition on dissent.[16] Indeed, some traditionally 'civilian' systems not only permit dissent, at least in the context of certain types of decisions, but impose a duty on judges to issue a reasoned

Henderson, 'From *Seriatim* to Consensus and Back Again: A Theory of Dissent' (2008) *Chic John M. Ohlin Law and Economics Working Paper* 1.

10 Thus it excludes 'secret dissents' at the Permanent Court of International Justice (see Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (Cambridge: CUP, 2005) 212-213) or the system of 'sealed dissents' in Italy, introduced by Article 16 of Law No 117 of 13 April 1988, 'Indemnification of Damages Caused in the Exercise of Judicial Functions and Civil Liability of Judges'. For discussion of this Statute and the system of sealed reports, see Michele Graziadei and Ugo Mattei, 'Judicial Responsibility in Italy: A New Statute' (1990) 38 AJCL 103, 110-113.

11 Indeed, reflecting upon the lack of boundary between *dicta* and *dissent*, see Duxbury, n 5 above, xxi-xxii.

12 See the fourth section below.

13 Goran Sluiter, 'Unity and Division in Decision Making – The Law and Practice on Individual Opinions at the ICTY' in Bert Swart, Goran Sluiter and Alexander Zahar (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: OUP, 2011) 208.

14 Rather than common law versus civil law, Mirjan Damaška distinguishes between hierarchical and coordinate models of authority, with civil law jurisdictions tending towards the hierarchical model and common law jurisdictions tending towards the coordinate model. See Mirjan Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven, CT: Yale University Press, 1986) 19 and 24.

15 Mitchel De S-O-L'É-Lasser, *Judicial Deliberations: A Comparative Analysi of Transparency and Legitimacy* (Oxford: OUP, 2009).

16 Rosa Raffaelli, 'Dissenting Opinions in the Supreme Courts of the Member States' (2012) European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs – Legal Affairs, PE 462.470; Duxbury, n 5 above, 135-136.

opinion if they disagree with the decision as determined by the majority.[17] Similarly, in the context of international adjudication, despite the ostensibly intractable disagreement as to the desirability of dissent in principle,[18] the formal right to dissent has been reproduced across most international courts and tribunals.

Whether we look at the International Court of Justice (ICJ),[19] the regional human rights courts,[20] the International Criminal Court (ICC) and the ad hoc and hybrid international criminal tribunals,[21] the International Tribunal of the Law of the Sea (ITLOS),[22] the Appellate Body of the World Trade Organization (WTO AB),[23] international arbitral tribunals,[24] and even regional tribunals,[25] the right to dissent has been formally acknowledged and developed through practice by judges. In some instances, such as the ICC, the scope of the right as interpreted by judges extends far beyond that which was the explicit intent of the institution's architects, who sought to curtail the ability of judges in the minority to publicly express their views.[26] Within other institutions, though formally a discretionary right, judges are under a conventional or cultural *expectation* to exercise that right and to issue an additional opinion that discloses the fact of, and/or reasons for, their negative votes cast against the Court's decision.[27] In these instances, the informal obligation to dissent is viewed less as

17 For example Greek Constitution 1975, following the votes of 27 May 2008 of the 7th Reform of the Hellenic Parliament, Art 93(3).

18 See Mistry, n 2 above.

19 Statute of the International Court of Justice, Art 57, based upon Statute of the Permanent Court of International Justice, Art 57.

20 European Convention on Human Rights, Arts 45(2) and 49(2); American Convention on Human Rights, Art 66(2) and Statute of the Inter-American Court on Human Rights, Art 24(3); Protocol to the African Charter on Human and Peoples Rights on the Establishment of An African Court, Art 28(7).

21 Statute on the International Criminal Tribunal for the Former Yugoslavia, Art 23(2); Statute on the International Criminal Tribunal for Rwanda, Art 22(2); Statute on the Special Court for Sierra Leone, Art 18; Statute on the Kosovo Specialist Chambers Art 43(2); Rome Statute of the International Criminal Court, Arts 74(5) and 83(4); Extraordinary Chambers in the Courts of Cambodia Law, Art 14(2) and Extraordinary Chambers in the Courts of Cambodia Rules of Court, Rule 101.

22 Statute of the International Tribunal of the Law of the Sea, Art 30(3).

23 Albeit a qualified right, since any additional opinion must be anonymous. Understanding on Rules and Procedures Governing the Settlement of Disputes of the World Trade Organizations, Arts 14 and 17(11).

24 Patricia Jimenez Kwast, 'Prohibitions on Dissenting Opinions in International Arbitration' in Cedric Ryngaert, Erik Molenaar and Sarah Nouwen (eds), *What's Wrong With International Law?: Liber Amicorum A.H.A. Soons* (The Hague: Brill Nijhoff, 2015) 141.

25 Statute of the East African Community Court of Justice, Art 35(2); Statute of the Central American Court of Justice, Art 36.

26 Frank Terrier, 'The Procedure before the Trial Chamber' in Antonio Cassese, Paola Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary Volume II* (Oxford: OUP, 2002) 1314; Judith Vaihle, 'Les Opinions Individuelles des Juges Devant les Tribunaux Internationales' in Mireille Delmas-Marty, Emanuela Fronza and Elisabeth Lambert-Abdelgawad (eds), *Les Sources du Droit International Pénal: L'Experience des Tribunaux Pénaux Internationaux et le Statut de la Cour Pénale Internationale* (Paris: Legis Comparee, 2004) 444; Otto Triffterer, 'Article 74: Requirements for the Decision' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article* (Oxford: OUP, 2nd ed, 2008) 1398.

27 Robin White and Iris Boussiakou, 'Separate Opinions in the European Court of Human Rights' (2019) 9 HRLR 37, 39.

a check upon the exercise of institutional authority, but rather as a corollary to the duty of give reasons imposed upon the Court. On this view, the expectation that judges justify their negative dispositive votes by writing a dissenting or separate opinion is a means by which the exercise of the individual authority of the judge is held to account. Contrast this against the number of institutions where dissent is prohibited, who count among their number the Court of Justice of the European Union, the Andean Tribunal of Justice, the Benelux Tribunal of Justice, the COMESA Court of Justice and the ECOWAS Court of Justice.

This is not the say that the tensions between the competing understandings of the nature of the relationship between dissent and institutional authority are absent within all those regimes where the right of judges to dissent has been recognised. Rather, these tensions interact with other normative and pragmatic imperatives and attributes to shape the institutional culture of dissent – the formal and informal rules, practices, conventions and attitudes – that defines the scope of the right to dissent within each institution.[28] For instance, it is differences in this institutional culture that explain the differences in judicial practice at the ICJ and the ECtHR, where the formal articulation of the right is identical.[29] Similarly, what is considered an acceptable – or, indeed, expected – use of the right to dissent will differ within legal systems over time.[30]

THE CONVENTIONAL ACCOUNT

Associating 'dissent' with judicial behaviour stands at odds with the law's image of dispassionate reason,[31] objectivity and discipline.[32] It may even stand at odds with one vision of the nature of law itself, which requires conformity with its rules, and can punish those who violate its norms, with little regard to the subjective motive behind the conduct.[33] Why would judicial institutions institutionalise dissent: the act of challenging and undermining official authority? Justifications for the institutionalisation of dissent across judicial systems, national and international, can be grouped into three categories: 'dissent as opposition', 'dissent as conscience' and 'dissent as transparency'. The precise ways that judicial dissent operates to each of these ends depends upon the procedural and normative characteristics of institutions and systems. As such, it is beyond the scope of this or any article to provide a summary account of all the ways dissent is conventionally understood to function within every regime in which dissent has been institutionalised. Nevertheless, this section offers a sketch of each of the three justificatory themes to familiarise readers with the contours of the conventional understanding of judicial dissent to facilitate appreciation of the significance of the ritual theory of dissent introduced in the next section.

28 Mosche Hirsche, *An Invitation to the Sociology of International Law* (Oxford: OUP, 2015) 6.
29 State of the International Court of Justice, Art 57; European Convention on Human Rights, Art 45(2).
30 Henderson, n 9 above.
31 Gerald B. Wetlaufer, 'Rhetoric and its Denial in Legal Discourse' (1990) 76 VLR 1555.
32 Marie-Claire Belleau, Rebecca Johnson and Valérie Bouchard, 'Faces of Judicial Anger: Answering the Call' (2007) 1 EJLS 1, 1.
33 Henderson, n 9 above, 4-5.

Dissent as opposition

'Dissent as opposition' concerns a broad range of justifications for dissent's institutionalisation, and echoes John Stuart Mill's conceptualisation of the epistemic value of dissent within society.[34] It encapsulates the idea that dissent empowers not only judges as dissentients but also other actors, in the pursuit of truth or correctness or attainment of normative ideals. These other parties may be the parties to the specific dispute or other members of and participants in law-making and interpreting communities. On this view, dissent assists stakeholders in a court's decisions to determine the substantive correctness and desirability of a decision (for the purposes of dispute resolution) or articulations of law (for the purposes of normative clarification and development).

Most obviously, within systems with provision for appellate review of decisions, dissent in lower courts can assist those who seek to challenge the instance decision by furnishing those parties with arguments that while unsuccessful in the instance chamber or court may have greater resonance with a higher chamber or court. Similarly, this can operate across cases, chambers, and courts at the same level of proceeding where the same issue is under litigation.[35] More generally, dissent as opposition encompasses those arguments that view dissent in a complementary (rather than oppositional as such) manner. By offering a foil to the Court's reasoning dissent can enhance understanding of the Court's decision,[36] 'restore the conceptual richness' of the Court's pronouncement[37] by contextualising particular points in the Court's decision, in turn aiding fuller understanding of the decision and how and why it is as it is,[38] or provide alternative or additional bases upon which the Court's decision can be justified and thus accepted by the parties.[39] In these ways, dissent's oppositional force can, ultimately, reinforce the authority of the decision.

Beyond the immediate parties, and looking to the significance of judicial decisions from the perspective of normative clarification and development, dissent's oppositional potential becomes even more obvious. Not only does dissent

34 John S. Mill, *On Liberty and Other Essays* (Oxford: OUP, Reissue 2008).

35 For example Judge Kaul's dissenting opinion in *Situation in the Republic of Kenya* (PTC II) 31 March 2010 (ICC 01/09 11 Corr) was considered (albeit not endorsed) by the PTC in *Situation in the Republic of Côte d'Ivoire* (PTC III) 03 October 2011 (ICC 02/11 14) para 99 and in *Prosecutor* v *Katanga*, 'Judgment Pursuant to Article 74 of the Statute' (TC II) 07 March 2014 (ICC 01/04 01/07 3436 tENG) para 1118 and informed Judge Kovács' dissenting opinion in *Situation in the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia* (PTC I) 16 July 2015 (ICC 01/13 34) Dissenting Opinion of Judge Kovács at [19] (fn 25).

36 Mistry, n 2 above.

37 Robert Kolb, *The International Court of Justice* (Oxford: Hart, 2013) 1014. For a particularly vivid analogy, see Sture Petrén, 'Forms of Expression of Judicial Activity' in Leo Gross (ed), *The Future of the International Court of Justice* vol II (Dobbs Ferry, NY: Oceana Publications 1976).

38 *ibid*. Ian Brownlie, *Principles of Public International Law* (Oxford: OUP, 7th ed, 2008) 24-25. For examples of close readings of ICJ judgments that deconstruct the Court's judgment and the additional opinions to construct a fuller understanding of the Court's judgment and particular features, see Jorge Kammerhofer, 'Oil's Well That Ends Well? Critical Comments on the Merits Judgement in the *Oil Platforms* Case' (2004) 17 LJIL 695, and Niccolo Ridi, 'Precarious Finality? Reflections on *Res Judicata* and the *Question of the Delimitation of the Continental Shelf* Case' (2018) 31 LJIL 383.

39 Andreas Paulus, 'International Adjudication' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford: OUP, 2010) 219-220.

inform the evaluation of the correctness of a court's articulation of the law by participants in the law-interpreting community, thereby potentially thwarting the absorption of problematic articulations of law into the legal bloodstream, but they can also signal the direction of future normative development.[40] This vision of dissent is encapsulated by the familiar, albeit somewhat 'romantic',[41] view of the systematic value of dissent expressed by Charles Evan Hughes, former Chief Justice of the US Supreme Court, that '[a] dissent in the 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 to have been betrayed'.[42] A dissent of today may support, inspire or accelerate development in the law by participants in the law-making and norm developing process – both judicial and non-judicial,[43] in the same judicial forum[44] or other fora.[45]

On this view, the institutionalisation of dissent is one way that legal systems mediate between the imperatives of stability and change.[46] Rather than being antithetical to a conservative conceptualisation of the law as an institution – one which views law as an agent of stability and conformity, with its modalities of authority being characterised by a 'conservatism of consensus [which] relies

40 On judicial dissent being an impediment to legal change, see Duxbury, n 5 above, 166.

41 Catherine Langford, 'Appealing to the Brooding Spirit of the Law: Good and Evil in Landmark Judicial Dissents' (2008) 44 *Argumentation and Advocacy* 119, 119.

42 Charles E. Hughes, *The Supreme Court of the United States* (New York, NY: Columbia University Press, 1936) 68.

43 For example the influence of Judge Weeramantry's dissenting opinion in *Gabčikovo Nagymaros* upon the development of the principle of sustainable development in international environmental law (*Gabčikovo Nagymaros Project* (Hungary/Slovakia) [1997] ICJ Rep 7, Separate Opinion of Judge Weeramantry) and the influence of the Joint Dissenting Opinion of Judges Guerrero, McNair, Read and Hsu Mo in the ICJ's *Genocide Convention* Advisory Opinion (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15) upon the ILC's work on the Law of Treaties (see Rainer Hofmann and Tilmann Laubner, 'Article 57' in Andreas Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford: OUP, 2nd ed, 2012) 1398)).

44 For example in the ICTY, Judge Li's dissenting opinion in the Appeals Chamber judgment in *Prosecutor* v *Erdemović* 07 October 1997 IT-96-22-A, Separate and Dissenting Opinion of Judge Li, influenced, first, an individual judge in the Trial Chamber in *Prosecutor* v *Tadić* 11 November 1999 IT-94-1-Tbis-R117, Separate Opinion of Judge Robinson, 3 *et seq*, and subsequently the Appeals Chamber in that case, *Prosecutor* v *Tadić* 26 January 2000 IT-94-1-A and IT-94-1-Abis at [65].

45 For example additional opinions issued by ICJ judges were relied upon heavily by Chambers of the ICTY when addressing questions concerning judicial competence within the UN system. See *Prosecutor* v *Tadić* 'Decision on the Defence Motion on Jurisdiction' (TC) 10/08/1995 (IT-94-1) at [12] and [24], citing *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Provisional Measures Order of 14 April) (Libya v. US) [1992] ICJ Rep 114, Dissenting Opinion of Judge Weeramantry at[[176] and *Prosecutor* v *Tadić* 'Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction' (AC) 02/11/1995 (IT-94-1),at [18], citing *Judgments of the Administrative Tribunal of the ILO Upon Complaints Made Against UNESCO Advisory Opinion* [1956] ICJ Rep 77, Dissenting Opinion of Judge Cordova,163.

46 'Law must be stable and yet cannot stand still. Hence, all thinking about law has struggled to reconcile the conflicting demands of the need of stability and the need of change', Roscoe Pound, *Interpretations of Legal History* (Cambridge: CUP, 1923) 1, cited in Juttee Brunneé and Stephen J. Toope, 'International Law and the Practice of Legality: Stability and Change' (2018) 49 *Victoria University Law Review* 429, 429.

upon what appears to have been already established and accepted'[47] – dissent is, instead, an embodiment of the law's inherent dynamism.[48]

Finally, the oppositional potential of dissent can also take effect at the systemic level. Here, dissent not only operates as a platform for the expression of disagreement with, or criticism of, the manner in which institutional authority is exercised, but also as a platform from which disagreement with the regime of authority, and the politics that it embodies, advances and perpetuates can be expressed.[49] In the same way that institutionalised dissent empowers stakeholders to participate in the process by which the legitimacy of exercises of official power is determined, dissent as opposition empowers stakeholders in the political project embodied by regimes of law and judicial institutions to challenge and critique those political projects that the extant regime of authority is complicit in.[50]

Dissent as conscience

'Dissent as conscience' refers to the idea that dissent concerns the expression of – and respect for – the personal responsibility that individual judges bear for institutional decision-making in which they participate. It rests on the notion that the act of judging – and its consequences – is a matter of personal conscience and integrity, which is inextricably linked to the professional function.[51] This idea is embodied in the personal assent of judges to the Court's judgment (signified by the signature signed by a judge to a court decision): a judge who signs their name to a judgment takes personal responsibility for that judgment, which becomes a matter of their personal-professional reputation, integrity, self-respect and conscience.[52] UK judges, when justifying dissent, have written of how individual judges are expected to bear full responsibility for a decision and to not 'slip stream' with the majority,[53] with some going so far as saying that the 'fact that a judge is constrained by no more than his or her own conscience in deciding how he should adjudicate is as fundamental

47 Judith N. Shklar, *Legalism: Law, Morals and Political Trials* (Cambridge, MA: Harvard University Press, 1964) 10.
48 Duxbury, n 5 above, 154-165.
49 In the context of international law, these are often referred to as 'radical' or 'fundamental' dissents. See Mistry, n 2 above, and Neha Jain, 'Radical Dissents in International Criminal Trials' (2018) 28 EJIL 1163; Elizabeth Kopelman, 'Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial' (1990 1991) 23 NYUJILP 373; Ashis Nandy, 'The Other Within: The Strange Case of Radhabinod Pal's Judgment on Culpability' (1992) 23 NLH 45; Nancy Combs, 'The Impact of Separate Opinions on International Criminal Law (2021) 62 VJIL 1.
50 *ibid*. On judicial dissent providing leverage to out of court actors, see Lani Guinier, 'Demosprudence Through Dissent' (2008) 122 HLR 4, and Karen Alter, *The New Terrain of International Law* (Princeton, NJ: Princeton University Press, 2014) 19; Robert Ivie, 'Enabling Democratic Dissent' (2015) 101 QJS 46.
51 Damaška, n 14 above, 24.
52 Claire L'Heureux Dubé, 'The Dissenting Opinion: Voice of the Future?' (2000) OHLJ 495, 513; Duncan Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (1986) JLE 518, 528-530.
53 Hale, n 9 above, 2.

to the health of our system of justice as it is possible to imagine'.[54] Similarly, within other legal systems, this notion is embodied by the principle of intimate conviction, the governing principle for individual judicial decision-making.[55] Where official decision-making is held accountable to the personal conscience of the individual judges, such that judicial *assent* to a decision is taken to symbolise a personal guarantee for the integrity of the decision, the right of judges to express their personal disagreement is a necessary and logical corollary if that guarantee is to have any value.[56] In the context of international law not only did we see this view expressed in during the Hague Peace Conferences in 1899 and 1907 – where the availability of the right to dissent was first discussed – and in the records of the negotiating history of the Statute for the Permanent Court of International Justice,[57] but today we often see this idea expressed in the motivations offered by judges for their opinions, where for example, judges refer to their sense of personal 'obligation' to set forth their views,[58] or when they appeal to 'the mandate of our conscience'[59] when justifying their opinions.

Dissent as transparency

The quality of transparency (to 'have the capacity of being seen without distortion') is the attribute of being 'open and available for examination and scrutiny'.[60] The emergence of the norm of transparency coincided with the rise of Enlightenment era thinking and its appeal to rationality, such that today the attribute of transparency has become a distinctive characteristic of rational modernity; the watchword of good governance, democracy, information and knowledge,[61] a 'fundamentally distinctive trait of contemporary Western culture'.[62] Transparency is increasingly assumed to be a legitimising attribute for

54 See Brian Kerr, 'Dissenting Judgments – Self Indulgence or Self Sacrifice?' 8 October 2012 The Birkenhead Lecture, 21 at https://www.supremecourt.uk/docs/speech-121008.pdf [https://perma.cc/5KGK-75MZ]. Similarly, see L'Heureux Dubé, n 52 above, 513.

55 See *Prosecutor* v *Germain Katanga* (22/07/14) ICC 01/04 01/07 3504 Anx at [50]-[51].

56 Hughes, n 42 above, 67-68.

57 The position of Max Huber, as expressed at Committee of Jurists on the Statute of the PCIJ (PCIJ Committee of Jurists), *Minutes* (May 1929) 50. See also the commentary to the ILC Drafts on the Draft Statute of the Permanent International Criminal Court in both 1993 (ILC, 'Report of the International Law Commission on the Work of its Forty Fifth Session' 3 May 1993 to 23 July 1993 UN Doc A/48/10, 127 (ILC *Draft Statute* (1993)) and 1994 (ILC, 'Report of the International Law Commission on the Work of its Forty Sixth Session' 2 May 1994 to 22 June 1994 UN Doc A/49/10 at 122 (ILC *Draft Statute* (1994)).

58 For example at the ICJ, see *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019], Separate Opinion of Judge Cançado Trindade. See also *Barcelona Traction, Light and Power Company, Limited* (Second Phase) (Belgium v Spain) [1970] ICJ Rep 3 Separate Opinion of Judge Tanaka,115.

59 *Prosecutor* v *Omar Al Bashir* 6 May 2019 ICC 02/05 01/09 397 Anx2, Joint Dissenting Opinion of Judge Luz Del Carmen Ibáñez Carranza and Judge Solomy Balungi Bossa, 4.

60 Frederick Schauer, 'Transparency in Three Dimensions' (2011) UILR 1339, 1343.

61 Anoeska Buijze, 'The Six Faces of Transparency' (2013) 9 ULR 3, 3, 4; Andrea Bianchi, 'On Power and Illusion: The Concept of Transparency in International Law' in Andrea Bianchi and Anne Peters (eds), *Transparency and International Law* (Cambridge: CUP, 2013) 7.

62 Bianchi, *ibid*, 1.

the exercise of power,[63] the absence or presence of which distinguishes the exercise of power from the exercise of authority. The rise of transparency coincides with and reflects what Adam Seligman, Robert Weller and Michael Puett have described as the emergence of sincerity as the dominant ideal type for framing experience and action in modernist culture, with its preoccupation with authenticity and privileging of intent over action.[64]

Transparency is said to be manifested in a number of ways throughout the judicial process, such as the public availability of and access to oral hearings and written pleadings,[65] the duty to give reasons (in the form of a reasoned judgment or award),[66] the public disclosure of the outcome of the vote upon which the Court's decision was reached,[67] or through recognition of the right of judges to engage in dissent and the practice by judges when issuing additional opinions.[68] It can also be through efforts by judges to explain the process of post-hearing deliberation and judgment drafting within the tribunal, which Lord Neuberger, former President of the UK Supreme Court, conceived as a means of ensuring that justice is done in public, something he characterised as a 'fundamental principle of the rule of law'.[69] Transparency through each of these 'metaphorical windows',[70] it is assumed, enables stakeholders in adjudication to 'see' and to 'see more clearly' attributes of the Court's processes and the substantive outputs of those processes that inform those stakeholders' appraisal of institutional legitimacy. These outputs may be the decision resolving the dispute at hand or they may be the pronouncements of law articulated in the course of doing so. While, ideally, what transparency allows to be seen validates claims to institutional legitimacy, the possibility that transparency might reveal delegitimising matters is what gives transparency its legitimatory force. Irrespective of the precise mechanics by which dissent is said to operate as transparency, the simple adoption of procedural modalities such as dissent associated with transparency has legitimising effect, as an expression of an institution's commitment to the values and norms connoted by the idea of transparency and its willingness to open itself to scrutiny.[71] Thus, whereas 'dissent as conscience' is concerned with the manifestation of the judge's subjective truth, 'dissent as transparency' conceives dissent as an instrument by which objective reality can be revealed.

To understand transparency and its emergence as a governing norm of international judicial authority, it must be understood against the backdrop of the competing, or contrasting, norm of secrecy. Disagreements between those

63 *ibid*, 8.
64 Adam Seligman et al, *Ritual and its Consequences: An Essay on the Limits of Sincerity* (Oxford: OUP, 2008) 106.
65 Thore Neumann and Bruno Simma, 'Transparency in International Adjudication' in Bianchi and Peters (eds), n 61 above.
66 *ibid*. See also, Anne Peters, 'Towards Transparency as a Global Norm' in Bianchi and Peters, n 61 above, 556-557.
67 *ibid*.
68 *ibid*.
69 David Neuberger, 'Sausages and the Judicial Process: the Limits of Transparency' Annual Conference of the Supreme Court of New South Wales, Sydney 1 August 2014, para 5 at https://www.supremecourt.uk/docs/speech140801.pdf [https://perma.cc/4JRR-PZ6G].
70 Bianchi, n 61 above, 9.
71 Neuberger, n 69 above, para 5.

responsible for designing the institutional structures and processes of international courts and tribunals are characterised by a tension between two ideal types of authority: the traditional, characterised by secrecy, and the modern, characterised by transparency. Of course, secrecy as a means by which to protect and promote independence and impartiality continues to find expression today in, for example, observation of the principle of the secrecy of deliberations,[72] or in the anonymity of dissenting opinions by Panel Members of the WTO AB.[73] However, whereas transparency embodies appeals to post-Enlightenment ideals of truth and rationality and sincere modes of action, secrecy embodies the very ideals and modes of action against which Enlightenment ideals developed in opposition.[74] Secrecy, in its fullest extent, was associated with the cultivation of a particular aura of mystery around decision-making and decision, consolidating the charismatic authority of 'the law' as an institution.[75] While advocates and critics of dissent disagree upon the desirability of its institutionalisation, both anchor their respective arguments upon the understanding that dissent operates as a window into the internal deliberative process. For critics, this window is undesirable: it shatters the illusion of the monolithic and monologic institution and the illusion of unanimity (ie the notion that a Court is 'la bouche de la loi').[76] Further, it violates the secrecy of deliberations by revealing the content of deliberations – what was discussed, by whom, and the positions of individual participants – and in doing so poses a threat to the independence and impartiality of the decision-making process. From this perspective, dissent is a mechanism by which either judges reveal their personal opinions,[77] partiality or lack of independence, or are a means by which appointing states can

72 For example UN Basic Principles on the Independence of the Judiciary (1985) endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Art 15.

73 n 23 above; Joost Pauwelyn and Krzysztof Pelc, 'WTO Rulings and the Veil of Anonymity' (2022) 33 EJIL 527.

74 Georg Simmel, 'The Sociology of Secrecy and of Secret Societies' (1906) 11 AJS 441. For an account of the adoption of secrecy and the suppression of dissent by judges within civilian systems that traces secrecy back to Roman law and pre-Roman law conceptions of judicial authority, through to the Catholic Church, see Arthur Jacobson, 'Publishing Dissent' (2005) 62 *Washington and Lee Law Review* 1607, 1610.

75 Peters, n 66 above, 556.

76 Baron de Montesqueiu, *L'Esprit des Lois* (1749) Book XI, Ch 6.

77 For example the opinions of Judge Dedov, the Russian judge sitting at the European Court of Human Rights. In his opinions in, *inter alia*, *Bayev* v *Russia* [2017] ECHR 572, *Trabajo Rueda* v *Spain* [2017] ECHR 487, *Z.A. and Others* v *Russia* [2017] ECHR 293, Judge Dedov expressed grossly 'homophobic, xenophobic, sexist or otherwise discriminatory' views, leading commentators to question whether Judge Dedov bears the 'high moral character' required for judicial office at the Court. See for example Laurens Lavrysen, 'Bayev and Others v Russia: On Judge Dedov's Outrageously Homophobic Dissent' 13 July 2017 *Strasbourg Observers* at https://strasbourgobservers.com/2017/07/13/bayevandothersvrussiaonjudgededovsoutrageouslyhomophobicdissent/ [https://perma.cc/2KLH-EB9R] , Gabriel Armas Cardona, 'The Dissent in Bayev and Others v Russia: A Window into an Illiberal World View' 7 July 2017 *EJIL:Talk!* at https://www.ejiltalk.org/thedissentinbayevandothersvrussiaawindowintoanilliberalworldview/ [https://perma.cc/3VG5-BNPW] and Paul Johnson, 'Homophobia in the European Court of Human Rights' 13 July 2017 *ECHR Sexual Orientation Blog* at http://echrso.blogspot.com/2017/07/homophobiaineuropeancourtofhuman.html [https://perma.cc/R44D-9ZLP].

'[monitor] the discursive behaviour of individual judges, [and seek] to influence them by indirectly "disciplining" their discursive "inputs" and by using information from the deliberations to thwart a judge's re-election'.[78]

Advocates of dissent, by contrast, argue the transparency afforded dissent is an antidote to, and a prophylactic for, threats to institutional and individual judicial independence and impartiality;[79] a 'guarantor against any subconscious political considerations'.[80] Not only are mechanisms of transparency viewed as instruments of oversight (or, rather, insight) and accountability, but they are also viewed as a means by which the institution can express its legitimising attributes: whether that be the fact of the independence and impartiality of its judges (both vis-à-vis external actors and vis-à-vis their colleagues on the Court), the fact of the diversity of the judges responsible for decision-making in cases, or whether that be by demonstrating that comprehensiveness of the deliberative process and the rigour of the Court's legal analysis.[81] The logic of transparency is also evident in the argument that dissent can offer moral vindication to parties otherwise disappointed with the Court's judgment, or other stakeholders in the judgment beyond the immediate parties to the case or dispute. Referred to as the 'psychological advantage' of additional opinions,[82] this justification for the right to dissent is premised upon the belief that dissent may offer some consolation to disappointed parties, by demonstrating that those parties had convinced some of the judges on the Court of the merits of their case, and in doing so vindicate their view that they had a reasonable case to answer.[83] The assumed good of transparency and the assumed functioning of dissent to the end of transparency is perhaps encapsulated in the justification for dissent and argument in favour of the expansion of the scope of the right to dissent by Judge Pinto de Albuquerque in the ECtHR, where he proclaimed '[s]eparate opinions are a major but as yet underestimated tool in guaranteeing the Court's transparency and promoting the development of its caselaw … The judges who form the majority and minority in decisions should be identified, in order to clarify the position of each individual judge'.[84]

Questioning Transparency and Secrecy

Although 'dissent as transparency' poses few problems at the normative level, its descriptive accuracy is more problematic. The difficulty with 'dissent as transparency' as a descriptive proposition lies in the distinction between what the

78 Neumann and Simma, n 65 above, 457. At the WTO, it has been hypothesised that the practice of (anonymous) dissents can be driven by a panel member's desire to appeal to their appointing state with a view to securing their re-election. See Evan Kim and Petros Mavroidis, 'Dissenting Opinions in the WTO Appellate Body: Drivers of Their Issuance and Implications for the Institutional Jurisprudence' (2018) *Robert Schuman Centre for Advanced Studies*, Research Paper No RSCAS 2018/51.

79 ILC *Draft Statute* (1993) n 57 above and ILC *Draft Statute* (1994) 122.

80 PCIJ Committee of Jurists *Minutes* (May 1929) n 57 above, 50, *per* Max Huber.

81 For example Mistry, n 2 above.

82 Edward Dumbauld, 'Dissenting Opinions in International Adjudication' (1942) 90 UPLR 929, 938; Hofmann and Laubner, n 43 above, 1397.

83 Dumbauld, *ibid*, 398. PCIJ Committee of Jurists *Minutes* (May 1929) n 57 above, 51-52.

84 *Garbuz* v *Ukraine* [2019] ECHR 155, Concurring Opinion of Judge Pinto de Albuquerque, 12.

term has become associated with and the expectations that these associations generate, and what is possible in reality. We think of transparency as a 'clean window' which provides an unobstructed and undistorted view of what occurs and has occurred in the course of an institution's internal functioning.[85] This conception of transparency finds manifestation both in the argument that dissent violates the secrecy of deliberations and the argument that dissent reveals the rigour and impartiality of the courts' deliberative process. However, as Bianchi explains, this assumed conception of transparency fails to acknowledge how, like any windowpane, tools of transparency distort the perception of what is seen through that window, depending upon the nature and attributes of both the window and the actor looking through it.[86] The notion that dissent can provide access to unprocessed data about how decisions were reached and the substantive content of deliberations is immediately weakened when we consider some of the fundamental attributes of the right to dissent. Not only is the *exercise* of the right to dissent (formally) discretionary but so is the content and scope of any opinion. While the discretion over scope and content, and even whether the right should be exercised at all, is regulated by institutional culture within each regime, these factors should correct any misassumption that dissent is a 'clean window'. As 'dissent as conscience' reminds us, dissent (just like the reasoned decision of the Court) is the product of choices and the product of perspective: what is seen through dissent and through reasoned opinions is what the authors chose to reveal, consciously or unconsciously, and what the viewer is capable of perceiving.[87]

This acknowledgement of the opaque and illusory nature of transparency casts the arguments in favour of transparency over and against secrecy in a new light. If advocates of the adherence to secrecy are charged with pinning authority upon a charade of smoke and mirrors – the suppression of information to create an aura of mystical charismatic authority – then, despite their claims to be rooted in rational modernity, the same can be said of those who justify the institutionalisation of dissent upon an appeal to transparency. In short, as Bianchi cautions, '[w]hat secrecy does overtly, transparency may do surreptitiously'.[88]

Indeed, while secrecy may be more overt in its machinations, the extent to which secrecy is actually manifested and preserved, and the normative justifications for recourse to secrecy, can be as fictional as the claims made of and for transparency, and are more widely accepted as such. Indeed, in a recent article[89] demonstrating the potential for new research methods to reveal information about the identity of the authors of a) WTO Appellate Body reports, and b) dissenting opinions by Appellate Body panel members which are, formally speaking, shrouded in secrecy, the authors of the article – Joost Pauwelyn and Krzysztof Pelc – describe the information that these methods

85 *ibid*.
86 *ibid*, 10.
87 Simmel, n 74 above, 441. Andrea Bianchi, 'Reflexive Butterfly Catching: Insights from a Situated Catcher' in Joost Pauwelyn et al (eds), *Informal International Lawmaking* (Oxford: OUP, 2012).
88 Bianchi, n 61 above, 19.
89 Pauwelyn and Pelc, n 73 above, 530.

expose as 'open secrets' and instances of 'collective denial'.[90] As they explain, this information may already be known to 'insiders' and, in the case of the authorship of dissenting opinions, they concede that 'all the relevant actors may have a good sense of who wrote what dissent' and that there has long been acknowledgement of the thinness of the veil of anonymity.[91] Despite these observations, they nevertheless speculate that the insights provided by the research methods deployed in their project may undermine the legitimacy and authority of institutional decision-making. Similar open secrets, specifically regarding the hand that judicial clerks or officers may play in the drafting both of court decisions and the opinions of individual judges, are familiar across courts and tribunals, domestic and international.

Thus, whether we speak of transparency or of secrecy, we find ourselves speaking about fictions. It might be tempting to argue that the fictional nature of 'dissent as transparency', or in the case of the WTO AB 'anonymous dissents' as being in furtherance of secrecy, is unproblematic. After all, while the notion of legal fiction' may have pejorative connotations for an institution ostensibly committed to a justice based on 'truth',[92] the law – whether domestic or international – is replete with legal fictions.[93] Dissent as transparency may be a metaphor; never intended to be taken literally, but rather a mental construction that helps us to understand juridical phenomena through analogies with which we are familiar,[94] or to 'aid the erection of the edifice of accurate knowledge'.[95] Nevertheless, once we acknowledge the fictional nature of dissent as transparency, specifically, we run into a fundamental problem. The legitimising quality of invocations of transparency lies precisely in the fact of its ostensible rationality and in its *opposition to* the mysticism of secrecy. Transparency is preferred over secrecy because it is claimed to be more honest, more authentic, and more sincere.[96] It is this weakness of 'dissent as transparency' on its own terms that renders it most problematic: when we talk about transparency at the

90 Tommaso Soave, 'The Politics of Invisibility: Why Are International Judicial Bureaucrats Obscured from View?' in Freya Baetens (ed), *Legitimacy of Unseen Actors in International Adjudication* (Cambridge: Cambridge University Press, 2019) 327, cited in Pauwelyn and Pelc, *ibid*, 528.

91 Pauwelyn and Pelc, *ibid*, 528.

92 Frederick Shauer, 'Legal Fictions Revisited' in Maksymilian Del Mar and William Twining (eds), *Legal Fictions in Theory and Practice* (Cham: Springer, 2015) 113, 114; and Douglas Lind, 'The Pragmatic Value of Legal Fictions' in Del Mar and Twining (eds), *ibid*, 84.

93 Del Mar and Twining (eds), *ibid*; Maksymilian Del Mar, 'Legal Fictions and Legal Change' (2013) 9 IJLC 442; Annemarieke Vermeer Künzli, 'As If: The Legal Fiction in Diplomatic Protection' (2007) 18 EJIL 37, 41-43; Jean Salmon, 'The Device of Fiction in Public International Law' (1974) 4 GJICL 251; Reece Lewis, *Legal Fictions in International Law* (Cheltenham: Edward Elgar, 2021).

94 Jonas Ebbesson, 'Law, Power and Language: Beware of Metaphors' (2008) 53 *Scandinavian Studies in Law* 259, 260.

95 Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: OUP, 2011) 444.

96 On the preference for openness and transparency over secrecy in the context of the PCIJ, see Letter from Judge Huber to Judge Moore 21 October 1921, reproduced in Spiermann, n 10 above, 147; PCIJ Committee of Jurists *Minutes* (May 1929) n 57 above, 51, Dumbauld n 82 above, 938; 'Report of the Informal Inter Allied Committee on the Future of the Permanent Court of International Justice' (10 February 1944) (1945) 39 AJILS 1, para 81(b).

descriptive level, what would otherwise be a harmless fiction becomes a more problematic fraud.

It might be argued that this critique of 'dissent as transparency' is based upon an over-literal interpretation of the concept of transparency. Perhaps those who justify the institutionalisation of dissent on the basis of transparency do so in the knowledge that both they and their interlocutors know that when they speak of transparency they are not really speaking of transparency in the descriptive sense. Should 'dissent as transparency' be limited to the normative level, such that when 'transparency' is spoken of, it is as a metonymy for the normative ideals associated with the concept (for example good governance, accountability, openness to scrutiny)? Similarly, from the perspective of dissent as opposition, is the institutionalisation of dissent an expression of the regime's acceptance of the fallibility of, not only, institutional judgment, but also collective or majoritarian authority.[97]

In the following section, I argue that 'dissent as transparency' or, indeed, 'dissent as conscience' or 'dissent as opposition', need not be confined to the normative level. I argue that a ritual theory of dissent adds to our understanding of the functions and functioning of dissent by providing a more coherent, and honest, descriptive explanation of the institutional functions of dissent. After introducing ritual theory, I will first consider how a ritual analysis of dissent can enrich our understanding of how institutional dissent operates as 'opposition' and as 'conscience', before going on to demonstrate how a ritual analysis can act as a corrective to the problematic aspects of dissent as 'transparency'.

A RITUAL THEORY OF JUDICIAL DISSENT

Ritual is 'both a central sociological concept and a universal category of social life'.[98] Rituals may be defined as 'episodes of repeated and simplified cultural communications in which the direct partners to a social interaction, and those observing it, share a mutual belief in the descriptive and prescriptive validity of the communication's symbolic contents and accept the authenticity of one another's intentions.'[99]

Although often associated with religious or traditional modes of action, ritual and ceremony permeate modern, secular social life,[100] 'dramatiz[ing] social/moral imperatives' and 'lend[ing] authority and legitimacy to the positions of particular persons, organizations, occasions, moral values, [and] views of the world'.[101] Almost all conceivable forms of social phenomena can be conceived in terms of ritual: whether that be 'the enactment of civility between

97 Mill, n 34 above, 22.
98 Christine Bell, *Ritual Theory, Ritual Practice* (Oxford: OUP, 1992) 23.
99 Jeff Alexander, 'Cultural Pragmatics: Social Performance Between Ritual and Strategy' in Jeff Alexander, Bernard Giesen and Jason Mast (eds), *Social Performance, Cultural Pragmatics and Ritual* (Cambridge: CUP 2006) 29.
100 Sally Moore and Barbara Myerhoff (eds), *Secular Ritual* (Assen-Amsterdam: Van Gorcum, 1977), Bell, n 98 above, Seligman et al, n 64 above.
101 Moore and Myerhoff, *ibid*, 3.

strangers',[102] voting in a safe seat in a presidential election,[103] the act of wishing someone with a terminal illness a long life,[104] through to the more arcane and familiarly ritualistic practices we see in parliaments or legislatures across the globe.[105] Ritual actions perform a variety of constitutive and expressive functions within the social order they operate in, and social theorists have offered different theories of their functioning which may be mapped onto aspects of judicial practice. For example, some rituals are adopted to 'afford[s] a sense of continuity with the past and to experience tradition as fixed.[106] As Christine Bell continues to explain, '[i]n the fixity of ritual's structure lies the prestige of tradition and in this prestige lies its power.'[107]

This is illustrated quite clearly in international law, where not only have the institutions found within domestic socio-political orders (ie courts and tribunals) been reproduced,[108] but also the domestic ritual courtroom practices and modes of judicial behaviour (such as, say, the right to dissent) associated with those orders as recognisable symbols or expressions of official power and authority. Through this reproduction, the architects of international justice institutions sought to invoke the prestige of traditional, familiar, authorities and to connect that to the new and fragile international justice institutions.[109] In this way, writing in the context of international law, Thomas Franck has written of how 'symbolic validation, ritual, and pedigree' provide the 'cultural and anthropological dimension' to law's capacity to 'exert a pull to voluntary compliance'.[110] Rituals, he explains, are 'communication cues' which 'signal its validity by authenticating it symbolically'.[111]

More broadly, as Anthony Good, Daniele Berti and Gilles Tarabot explain, there are at least four dimensions to law's relationship with ritual.[112] First, these two areas are 'rule bound, in that both rituals and legal proceedings risk being invalidated if improperly performed'; second, 'both are commonly employed in processes of dispute settlement'; third, 'in both contexts language itself has power, either intrinsically or by virtue of the authority held by or delegated to the speaker', and finally, 'law itself is ritualized, in its actions, costumes and

102 Seligman et al, n 64 above, 8.
103 *ibid*, 11.
104 Emily Ahern, 'The Problem with Efficacy: Strong and Weak Illocutionary Acts' (1979) 14 *Man* 1, 10.
105 Benjamin Authers, Hilary Charlesworth, Marie-Bénédicte Dembour and Emma Larking, 'Introduction' (2018) 9 *Humanity*63, 64.
106 Bell, n 98 above, 120.
107 *ibid*
108 Lauterpacht, n 95 above, 432-440.
109 See Judith Resnik and Dennis Curtis, *Representing Justice: Invention, Controversy, and Rights in City States and Democratic Courtrooms* (New Haven, CT: Yale University Press, 2011) Ch 12.
110 Thomas Franck, *The Power of Legitimacy Among Nations* (Oxford: OUP, 1990) 91.
111 *ibid*.
112 Anthony Good, Daniela Berti and Gilles Tarabout, 'Technologies of Doubt in Law and Ritual' in Daniela Berti, Anthony Good and Gilles Tarabout (eds), *Of Doubt and Proof: Ritual and Legal Practices of Judgment* (Farnham: Ashgate, 2015) 5.

language'.[113] Mastery of the rituals of law is a sign of one's socialisation into the legal profession.[114]

Judicial dissent as ritual

So, the idea that judicial power may be legitimised through ritual practice should not be an unfamiliar one. As lawyers thinking about law and ritual, our first thoughts may be of the courtroom, where visual and material ritual constitutes judicial authority.[115] In the past, these rituals constituted judicial authority in a particular place and moment in time. However, as judicial proceedings – courtroom proceedings and other judicial ceremonies – are increasingly livestreamed and recorded, meaning they can be viewed and shared globally over the internet and over time, the rituals performed within those courtrooms and the authority they constitute are also reproduced. The reproduction of juridical rituals through new technologies facilitates a wider observation of and participation in those rituals, providing continuity in authority even in the most turbulent of times.[116]

Yet, still, it is the written texts in law reports in law libraries and in pdfs on court websites, disseminated via links on online social media platforms, that both travel the furthest and endure the longest.[117] Here too, in these written forms – in the judgments and decisions, and the additional opinions – we also see authority-constituting ritual at play.[118] This may be the signing of the judicial signature or it may be in the particular rhetorical style, form and structure

113 *ibid*.

114 Jean D'Aspremont, 'Professionalisation of International Law' in Jean D'Aspremont *et al* (eds), *International Law as a Profession* (Cambridge: Cambridge University Press, 2017) 33.

115 Leif Dahlberg, 'Introduction: Visualizing Law and Authority' in Leif Dahlberg (eds), *Visualizing Law and Authority: Essays on Legal Aesthetics* (Berlin/Boston: De Gruyter, 2012) 4.

116 Not only does ritual provide continuity in authority, but through ritual, authority provides continuity. See the dissemination of images of swearing in ceremonies for UK Supreme Court Justices during the different phases of social distancing during the COVID-19 Pandemic. For example, photographs of swearing in of Lord Stephens on 1 October 2020, tweet dated 2 October 2020, by @UKSupremeCourt at https://twitter.com/UKSupremeCourt/status/1312020453112918017 [https://perma.cc/X4LX-GLBL]; video of socially distanced swearing in of Lord Stephens, tweet dated 1 October 2020, by @UKSupremeCourt at https://twitter.com/UKSupremeCourt/status/1311638863941701633 [https://perma.cc/2EVN-VC2Z]; video of swearing in of Lord Burrows, tweet dated 5 June 2020, by @UKSupremeCourt at https://twitter.com/UKSupremeCourt/status/1268921222387175425 [https://perma.cc/SUT6-VND5]; images of swearing in of Lord Burrows, tweet dated 2 October 2020, by @SupremeCourt at https://twitter.com/UKSupremeCourt/status/1267814818876026880 [https://perma.cc/G86W-Y7A7].

117 Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (London: MacMillan, 1987) 126. On the materialities of juridical documentation, and the differences between digital forms and platforms for hosting and disseminating such documents, see Emilie Cloatre and Dave Cowan, 'Legalities and Materialities' in Andreas Philippopoulos Mihalopoulos (ed), *Routledge Handbook of Law and Theory* (Abingdon: Routledge, 2019) 437; Hyo Y. Kang and Sara Kendall, 'Legal Materiality' in Simon Stern, Maksymilian Del Mar, and Bernadette Meyler (eds), *The Oxford Handbook of Law and Humanities* (Oxford: OUP, 2020) 36.

118 For other text-based authority-constituting rituals, see Antoine Vauchez, 'Keeping the Dream Alive: The European Court of Justice and the Transnational Fabric of Integrationist Jurisprudence' (2012) 4 *European Political Science Review* 51.

of a court's reasoning and its citation practices of previous caselaw unique to individual institutions,[119] aimed towards inserting the decision within the oeuvre of the institution's jurisprudence and injecting it with the inevitability of legal judgement.[120] Or, and as I argue here, it may be the production and publication of additional opinions as an expression of dissent.

The idea that dissent might also be a form of judicial ritual may be less intuitive than some of the more familiar examples previously described. Indeed, judges may resile from any characterisation of their dissentient practice as ritual, in light of the negative connotations associated with the notion of 'ritual'. Ritual can be associated with thought*less* behaviour yet,[121] dissent is the expression of the thoughts of judges: they are by their nature thought*ful*. Furthermore, owing to its discretionary nature, dissent appears to lack one of the fundamental characteristics of ritual behaviour: regularity and invariance.[122] Although ritual theorists observe that ritual behaviour can manifest in a single performance where otherwise that performance conforms with the other characteristics of ritual (ie being highly formalised and stylised),[123] the irregularity of dissent makes it difficult to think of dissent in the same breath as more familiar judicial rituals, such as all rising when the judges enter the courtroom, or the signing of the judicial signature at the end of every decision.

However, if we shift our thinking away from the substance of dissent – the focus of conventional interpretive accounts of dissent – and focus instead upon the act or form of dissent itself, the conception of dissent as ritual begins to take clearer shape. It is a formalised, repetitive form of behaviour, a self-conscious and stylised act (even if in the Austinian sense of a 'speech act'), intended to produce an attentive state of mind.[124] While judges may (or may not) be motivated to write by the normative conceptions of the purposes of dissent – transparency, opposition and conscience – their performance of dissent is undertaken with no certainty as to what effect it will have, if any. While the precise rhetorical style of dissent will differ depending upon the mores of the individual author and the norms shaping the specific institutional culture, dissent bears certain inherent rhetorical traits that mirror and subvert those of the institutional decision.[125]

Ritual and 'dissent as opposition'

The potential of a ritual theory analysis of judicial dissent may become more obvious if we explore the parallels between 'dissent as opposition' and one of the principal social functions attributed to ritual. As Christine Bell explains in her seminal account of ritual theory, all ritual denotes 'a type of critical juncture

119 Lyndel Prott, 'The Style of Judgment in the International Court of Justice' (1970-1973) 5 AYIL 75; Liane Boer, '"The Greater Part of Jurisconsults": On Consensus Claims and Their Footnotes in Legal Scholarship' (2016) 29 LJIL 1021.
120 Wetlaufer, n 31 above.
121 Bell, n 98 above, 19.
122 Christine Bell, *Ritual: Perspectives and Dimensions* (Oxford: OUP, 2009) 150.
123 Bell, n 98 above, 90.
124 Moore and Myerhoff, n 100 above.
125 Langford, n 41 above.

wherein some pair of opposing social or cultural forces comes together. Examples include the ritual integration of belief and behaviour, tradition or change, order and chaos, the individual and the group, subjectivity and objectivity, nature and culture, the real and the imaginative ideal.'[126]

Ritual creates a space in which these conflicting imperatives can co-exist, the space Seligman et al have described as the 'subjunctive, "as if" or "could be", universe'.[127] The creation of this space, they argue, makes 'our shared social world possible. Creating a shared subjunctive … recognizes the inherent ambiguity built into social life and its relationships … The formality, reiteration, and constraint of ritual are … all necessary aspects of this shared creation'.[128] Thus, as Bell explains, rituals are a 'means of socio-cultural integration, appropriation, or transformation'.[129] Moreover, as Sally Moore and Barbara Myerhoff summarise, '[r]itual not only belongs to the more structured side of social behaviour, it can be construed as an attempt to structure the way people *think* about social life'.[130] Thus, we can see how ritual's power extends beyond symbolising authority and, even, beyond constructing authority, to constructing the social worlds within which that authority is claimed and asserted.

The institutionalisation of dissent also serves these social constructivist functions. Conventional accounts of the institutionalisation of dissent already point towards how dissent is both a mechanism of institutionalised opposition and the site upon which a number of oppositional forces are integrated: it is the site upon which the position of the individual judge within and against the institution (group) is located; the space within which the battle between normative stability – conformity with the status quo – and normative change is fought, and the location upon which the conceit of law's professed objectivity can be laid bare through representation of the subjective individual judges. However, by viewing the institutionalisation of dissent as creating a shared subjunctive 'as if' world, it becomes a platform upon which those same tensions within the social order can be reconciled, if not resolved. Recalling the consolatory or 'psychological' functions of dissent associated with dissent as opposition and dissent as transparency, by placing on permanent public judicial record the losing party's case, or at least parts thereof, dissent creates a world in which both parties' cases will continue to exist and be recognised beyond the courtroom. Thus, dissent is not merely an expression of the pluralism of the international legal system, as Andreas Paulus had described,[131] but is a site of social construction: it facilitates the creation of a social order which accommodates – even within the formal processes of dispute resolution – disagreement and conflict.

Viewed through the lens of ritual, dissent looks like what Max Glückman described as 'rituals of rebellion', the open expression of social tension 'within an established and sacred traditional system, in which there is a dispute about

126 Bell, n 98 above, 16.
127 Seligman et al, n 64 above.
128 *ibid*, 7.
129 Bell, n 98 above, 16.
130 Sally Moore and Barbara Myerhoff, 'Introduction: Secular Ritual – Forms and Meanings' in Moore and Myerhoff, n 100 above, 4.
131 Paulus, n 39 above.

particular distributions of power'.[132] As Myerhoff explained, the rigidity and formality of ritual allows ritual to 'take on dangerous matters'.[133] Thus, rituals of rebellion such as dissent ultimately 'renew the unity of the system'.[134] This may be through the playing out of social conflict within the shared 'as if' world created by ritual as a means of catharsis or 'social drama',[135] but it may also operate in parallel to the formal mode of conflict resolution offered through the judicial process, creating space for the acknowledgement and accommodation of disagreement within the extant system in a way the formal resolution of the dispute cannot, by definition.[136] Dissent supplements the formal process and outcome of dispute-resolution by creating a space within which social conflict can be expressed, acknowledged and accepted in a way that does not disrupt or threaten the existing order. Turning to those legal and political systems such as the CJEU that have eschewed the ritual of institutionalised dissent through its prohibition, we might then ask how and where these social integrative functions are performed in the absence of the ritual of dissent.

A ritual explanation of how dissent takes effect

The foregoing illustrates how ritual theory may enrich and extend our account of the conventional functions of dissent as opposition, and in doing so highlights aspects of dissent's social functions conventionally overlooked. However, the greatest contribution of ritual theory to our understanding of judicial dissent is its insights into *how* rituals (and, in turn, dissent as ritual) discharges those functions. Social theorists and anthropologists have advanced different theories of how ritual produces effects in the world.[137] Stanley Tambiah's performative theory of ritual has gained particular purchase in the context of law and (and as) ritual.[138] Performative theories of ritual developed out of a dissatisfaction with traditional theories of ritual that prioritised the significance of the 'thought'

132 'Rituals of Rebellion in South East Africa' in Max Glückman, *Order and Rebellion in Tribal Africa: Collected Essays* (Psychology Press, 2004) 179.

133 B. Myerhoff, 'We Don't Wrap Herring in a Printed Page: Fusion, Fictions and Continuity in Secular Ritual' in Moore and Myerhoff, n 100 above, 199.

134 Myerhoff, *ibid*, 179, on the distinction between regime legitimating rebellion and regime challenging revolution. Similarly, see Ashis Nandy, 'Shamans, Savages and the Wilderness: On the Audibility of Dissent and Future Civilizations' (1989) XIV *Alternatives* 263 See also Mark Osiel, *Mass Atrocity, Collective Memory and the Law* (New Brunswick, NJ: Transaction Publishers, 1999) where Osiel discusses how criminal courts produce social solidarity not through the production of a unifying truth but rather through the civilised antagonism or 'civil dissensus' of the trial process. For a performative account of war crimes trials, see Kate Leader, 'The Trial's the Thing: Performance and Legitimacy in International Criminal Trials' (2018) 24 *Theoretical Criminology* 241.

135 Myerhoff, n 133 above, 200. See also, Victor Turner, *The Ritual Process: Structure and Anti Structure* (New Brunswick, NJ: Transaction Publishers, 1995).

136 Leader, n 134 above, 244.

137 For an overview, see Bell, n 98 above.

138 For example Authers, Charlesworth and Dembour n 105 above; Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge: Cambridge University Press, 2015). Although popular, it has not gone uncriticised – see Bell, n 98 above, 39 *et seq* for critique of performative theories of ritual.

element of rituals and, in doing so, overlooked – even relegated – the significance of the action element.[139] Focusing upon the act, performative theories of ritual address the communicative effect of the ritual act itself. Tambiah's performative theory of ritual offers an explanation of the 'illocutionary effect' of ritual practices.[140] Here, Tambiah draws upon and extends the work of John Austin and John Searle on the notion of 'speech acts'.[141] At the heart of speech act theory is the observation that words and acts do not merely describe or express the world 'as is', but are rather constative. Speech acts take effect in the world in various ways, that are described as 'illocutionary' and 'perlocutionary'. Illocutionary speech acts are those that by being uttered bring into being the state to which they refer.[142] Examples from the sphere of judicial speech would be dispositive statements by a court or chamber: a statement by the Court that a defendant party is guilty or liable for a breach of a legal obligation has – by the fact of it being uttered – made the defendant party guilty or liable in that way. These are distinguished from perlocutionary speech acts, those which achieve – or which seek to achieve – an effect upon and within the world, but the achievement of that outcome is extrinsic to the speech itself, for example, through responses to the speech act by other parties.[143] Thus, the pronouncement by the Court that 'the defendant is found guilty' may have the illocutionary effect of establishing the guilty state of the defendant.[144] But that statement also has perlocutionary effects: for example, the various legal, penal, personal, economic, social and political consequences that may flow from that determination. It is with these modalities of effect in mind that Belleau and Johnson observe the truth-constituting functioning of legal judgment. They explain a judgment of a Court

> does not merely describe the world that is, or indeed a world that would be desirable. A judge has the power and ability to make that world real. Even those who are not persuaded – who do not believe in the images and categories described in judicial decisions – will be made subject to them; they are required to live as *if* those images and categories are real.[145]

By contrast, a statement by a dissenting judge that 'the defendant is not guilty' can only be perlocutionary in that the dissenting judge can only seek to persuade their audience of the merits of their view. If that statement has any effect in bringing about that outcome it pronounces, or the kinds of oppositional effects outlined in the third section above, those effects are dependent upon the reaction to that statement by external actors.

139 Bell, n 98 above, 37-46.
140 Stanley Tambiah, 'A Performative Approach to Ritual' (1979) 65 *Proceedings of the British Academy* 13.
141 *ibid*, 127. Summarised in Good, Berti and Tarabout, n 112 above, 3 *et seq*.
142 *ibid*.
143 *ibid*.
144 H.L. Ho, 'What Does a Verdict Do? A Speech Act Analysis of Giving a Verdict' (2006) 4 *International Commentary on Evidence* 1.
145 Marie-Claire Belleau and Rebecca Johnson, 'I Beg to Differ: Interdisciplinary Questions About Law, Language and Dissent' in Logan Atkinson and Diana Majury (eds), *Law, Mystery and the Humanities: Collected Essays* (Toronto: University of Toronto, 2008) 174.

Emily Ahern elaborates upon how illocutionary acts may take direct effect in the world, by distinguishing between two ways (or both): 1) directly in the way intended and apparently; and 2) in a way not envisaged or intended by the actor, specifically, by affecting the performer and/or observer's experience of the world.[146] In this latter way, the indirect illocutionary effect of certain ritual practices is to affect social realities and perceptions of those realities, which in turn can led to further perlocutionary effects. For example, we might take the familiar ritual of the swearing of the judicial oath. The completion of that act and the uttering of the words of the oath by a judge has the following effects:

- The direct illocutionary effect of rendering them bound by the oath and initiated into office;
- The indirect illocutionary effect of affecting the perception of the judge as being bound by the oath;
- The perlocutionary effect of affecting the behaviour of the judge, making them act in compliance with the oath, and leading observers to perceive the judge as being bound by the oath and judging the judge's behaviour in accordance with the oath.

A performative account of judicial dissent

The concepts and categories provided by this performative theory of ritual can help us unpick how the ritual performance of dissent can have illocutionary and perlocutionary effects upon the world, quite apart from the substantive content of the opinion expressed. By conceiving dissent as performative ritual, we can begin to imagine different ways that dissent takes effect in the world, either pursuant to the purported functions of opposition, conscience, and transparency or in additional ways. Rather than looking to the substantive content of the opinions, the constative effects of judicial dissent lie in the act of dissent itself, and acts such as the labelling of an opinion (for example as 'dissenting' rather than 'separate' or 'declaration'), and the act of invoking the conventional justifications for judicial dissent. On this view, the continued disagreement between those in favour and against dissent and the repetition of the arguments on either side is itself performative and each act reinforces the performative effect of the other. Some of these constative effects are illocutionary – and thus take effect irrespective of the engagement with the practice by other actors – and others are perlocutionary.

In the simplest form, the simple act of saying 'I dissent' (in writing or through the act of delivering an additional opinion) has the same kind of illocutionary effect as the act of stating 'I promise'.[147] By the simple act of performing dissent (however labelled) the effect of dissent – that is, the undermining of, or challenge to, official authority – is manifested, irrespective of its substantive

146 Ahern, n 104 above, 2.

147 John Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge: Cambridge University Press, 1969) 57; John Austin, *Philosophical Papers* (Oxford: OUP, 3rd ed, 1979) 98.

content. Thus, although it was argued in the second section above that the labels affixed to additional opinions are of limited descriptive utility to signify the substantive content of additional opinions and distinguishing that content from other types of opinions, they nevertheless have an important communicative and performative functions. Importantly, 'dissent's' full illocutionary effect may differ from what is understood by the term in the 'internal' or doctrinal sense understood – and perhaps, even, intended – within the regime in question.[148]

More significantly, this performative theory can help us to better rationalise why and how the institutionalisation of dissent has a legitimatory effect upon official authority. As Tambiah explained, '[a]ll ritual, whatever the idiom, is addressed to the human participants and uses a technique which attempts to restructure and integrate the minds and emotions of the actors'.[149] In this latter sense, in the sense Ahern categorised as the indirect illocutionary effect of ritual, ritual takes effect in the world by affecting social realities and perceptions of those realities,[150] which in turn can lead to further perlocutionary effects. In the remainder of this section I argue that the institutionalisation of dissent affects the perception and experience of reality of participants in the judicial process, creating subjunctive 'as if' worlds through which 'dissent as conscience', 'dissent as opposition' and 'dissent as transparency' operates.

We do not have to depart too far from the conventional account of 'dissent as conscience' to appreciate how dissent does not simply constitute an outlet for the expression of an individual judge's conscience. It also has indirect illocutionary effect, by affecting the mind of the ritual participants by reinforcing the sense of personal responsibility for the Court's judgment and its consequences. Turning to 'dissent as transparency', dissent cannot provide a 'clean window' into the internal workings of the Court is an inherent fiction, and therefore the illocutionary effect of dissent (and perhaps, even, the perlocutionary effect of dissent) lies not in any ability to reveal truth through its simple performance. Instead, the illocutionary effect of institutional dissent lies in how it alters the state of mind of those both participating in and observing the ritual, that is, the dissenting judges, those who justify dissent on the basis of transparency, and those who interpret dissentient practice as a mechanism of transparency, thus changing their personal experience of the judicial process. It alters their state of mind by fostering the perception that 'dissent as transparency' operates as if it were a 'clean window'. While this – the altering of mind – is the illocutionary effect of dissent, perlocutionary effects may flow from this altered state of mind. For judges, this may be to induce their conformity with legitimising procedural behaviour or to use dissent to 'reveal' aspects of the Court's process, and for external appraisers this may be to induce their acceptance of the legitimising

148 Robert Jennings, The Internal Judicial Practice of the International Court of Justice (1988) 59 BYIL 32, 46 and Gilbert Guillaume, 'Les Declarations Jointes aux Decisions de la Cour Internationale de Justice' in José Ruda and Calixto Armas Barea (eds), *Liber Amicorum "In Memoriam" of Judge José Maríe Ruda* (The Hague: Brill Nijhoff, 2000) para 27.

149 Stanley Tambiah. *The Magical Power of Words* (1968) 3 *Man* 175, 202, cited in Ahern, n 104 above, 2.

150 Bell, n 98 above, 43.

attributes of the Court's activities, by removing doubt as to the integrity of the decision-making process by making them believe that what they 'see' through dissent is an actual representation of the process that occurred. Whether dissent as transparency provides information that removes doubt, or can do so, is less important. By recasting 'dissent as transparency' in terms of ritual, we can reconcile the illusory nature of transparency with the legitimising quality of 'dissent as transparency'. The perpetuation of the shared belief that reasoned opinions and institutional dissent are windows into the decision-making process, even if they cannot really offer an undistorted window, does not simply act to legitimise the institution by symbolising its commitment to the normative ideals imbedded within the notion of transparency, but it constructs a common subjunctive 'as if' world where dissent operates in the way envisaged. By affecting the minds of judges (as ritual participants) and external stakeholders (as ritual observers) the act of dissent has the effect of promulgating compliance with those normative ideals and securing acceptance of institutional legitimacy while avoiding the conceit of sincerity.

Finally, paying attention to the performative dimensions of dissent can enhance our understanding of the implications for authority when other related fictions or 'open secrets' or instances of 'collective denial'[151] are exposed as such. Returning to the example of the fictional anonymity of WTO dissent, the formal or *de jure* anonymity provided by the governing texts of the dispute settlement regime and the widespread repetition and reproduction of the justifications for anonymity – even if that anonymity is not 'real' – allows the regime to take on 'dangerous matters'.[152] The creation and maintenance of an as if world in which the anonymity of WTO dissent is real, invites justification of that policy of anonymity. In turn, this allows members of the relevant epistemic community to speak openly about the risks that anonymity is claimed to guard against (ie the imposition of political pressure upon panel members by states that may undermine their capacity to act with independence and impartiality, or the courting of states by panel members by writing dissents designed to win them political favour with those states) without explicit and politically insensitive acknowledgement that such practices *do* occur, have occurred, and by whom.

CONCLUSION

This article has observed how, while they may be unproblematic at the normative level, conventional theories of the institutional and systemic function of dissent fall short of providing an adequate or coherent descriptive explanation of the mechanics of dissent's operation to those ends. It has introduced a ritual theory of dissent that brings into relief those aspects of dissent's operation in

151 Tommasso Soave, 'The Politics of Invisibility: Why Are International Judicial Bureaucrats Obscured from View?' in Freya Baetens (ed), *Legitimacy of Unseen Actors in International Adjudication* (Oxford: OUP, 2019) 327, cited in Pauwelyn and Pelc, n 73 above.

152 Myerhoff, n 133 above.

the world that are downplayed or obscured by conventional, doctrinal, accounts. In particular, the attention to form – in contrast to the typical focus upon the substance of opinions – prompted an enquiry into the performative quality of dissent and the development of an understanding of how dissent's functions are not 'merely' expressive or symbolic, as valuable as those functions are, but are constative.

This article has required us to question some of our existing beliefs about the nature of official authority and to look at practice we are familiar with in a different, and sometimes counter-intuitive, light. The turn to non-doctrinal understandings of the constitution of official authority is particularly apposite when we think about the relationship between dissent and institutional authority. While, certainly, doctrinal theories and conceptualisations of dissent certainly inform how lawyers or others 'in the know' give meaning and effect to dissent, we need to look beyond doctrine if we wish to understand how dissent influences lay perceptions of official authority.

Performative theories of ritual, with their focus upon the communicative effect of ritual acts encourage us to focus upon the act of dissent, rather than the substantive content of those opinions. By doing so, a ritual theory of dissent helps us to think about the effect of dissent among those circles who do not have the interest or expertise to engage with the substance of dissent in the ways that conventional, doctrinal, accounts of dissent foresee. The attention to the act and form of dissent – the physical printed texts, digital pdfs, oral speeches, livestreams and recordings – prompts a legal materialist enquiry into the material forms of dissent and how they form part of the apparatus through which 'law acts and is enacted',[153] In turn, this leads us to think about how dissent operates independently of its operation through the conscious or deliberate engagement with its substantive content. From this perspective, a performative theory of dissent opens up a wider enquiry into how dissent, with all its theatricality, operates not only in a counter-hegemonic fashion (offering windows into what 'could be') but also to consolidate and enact hegemonic legal authority.[154] Ritual theory can help us to draw together ideas about the social functions of the ritual of dissent beyond the institutional context within which it occurs. Contrary to popular conceptions of judicial dissent as a solitary act – a manifestation of the individual judicial ego that sits in opposition to the 'group' that is the court – the ritual conceptualisation of dissent brings into sharper relief the inherently social and relational nature of dissent. A fuller understanding of the ways that dissent acts in the world opens the possibility of more creative engagement with dissent, both by judges and by other participants in the law making and law interpreting community and communities.

Finally, one purpose of this article has been to highlight the value in looking beyond doctrinal accounts of dissent as the epistemological frame for understanding dissent, and to demonstrate the potential contribution that insights from the humanities can make to our understanding of dissent as a form of

153 Kang and Kendall, n 117 above, 24.
154 Stone Peters, n 4 above, 190-191.

human action. Further, amidst the turn to empiricism,[155] this article introduces the contribution that insights from the humanities can make to constructing a more complete and accurate understanding of the world that empirical methods may describe but cannot adequately explain. As seen throughout this article– whether in its brief discussion of the judicial oath, or policies on anonymity – we can see how the significance of this attention to ritual and to form extends beyond dissent and can help us appreciate the social force of other formal judicial acts. With this in mind, therefore, this paper not only introduces ritual interpretation of dissent, but also stands as an invitation to greater engagement with the humanities when interpreting judicial practice.

155 Gregory Schaffer and Thomas Ginsburg, 'The Empirical Turn in International Legal Scholarship' (2012) 106 AJIL 1; Jakob V.H. Holtermann and Mikael Rask Madsen, 'Toleration, Synthesis or Replacement? The "Empirical Turn" and its Consequences for the Science of International Law' (2016) 29 LJIL 1001.