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**THE AUSTRALIAN NATIONAL UNIVERSITY
CENTRE FOR INTERNATIONAL AND PUBLIC LAW
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CHANGE AND DECAY OR CHANGE AND RENEWAL?

The Hon Justice Michael Kirby AC CMG

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A LIFE IN THE LAW

A life in the law is full of change today. If one looks backwards on life, it seems to have a predictable symmetry. From law student to articled clerk. From articled clerk to junior solicitor. From there to partner in a law firm. Then on to the Bar. A judicial appointment. Perhaps a promotion in the hierarchy. And then farewell speeches followed by that equivalent of legal oblivion - articles for newspapers or letters to the editor.

* Justice of the High Court of Australia. President of the International Commission of Jurists.

My own case has followed this course. Only oblivion awaits. I wish to talk about some of the changes I have experienced in my latest translation - from President of the Court of Appeal of the Supreme Court of New South Wales to Justice of the High Court of Australia. I feel encouraged to talk about this move because, in recent days, I have climbed the ladder in the hierarchy of the High Court. I am no longer the most junior Justice who comes, always last, into the great courtroom in Canberra. Now it is Justice Hayne's privilege to shut the doors for the business meetings of the Justices. Freshly encouraged by this rapid promotion I begin, in a type of maturity, to look back on the translation which I experienced nearly two years ago when I moved from my position as number one in the Court of Appeal to the most junior Justice of the High Court of Australia.

There were some obvious differences in the two roles. The Court of Appeal is a court resident in Sydney. It never moves from its base. It has larger numbers of judges. Yet for all that, the fact that it normally sits in divisions of three judges means that virtually every day one was sitting with a different combination of colleagues. In the High Court, with only seven of us, there is not much combining that you can do. In effect, you are locked forever into professional daily relationships with the same six people. This removes the novelty and surprise of fresh faces at 10.15 a.m. It adds certain pressures to human relationships. But, equally, it makes it important that those relationships should be maintained at an optimum level of

friendliness or at least a minimum level of civility so as to ensure the success of the Court as an institution.

Perhaps because the Court of Appeal was not an itinerant court, and like the High Court had relatively rare changes in its personnel, there was a greater tendency to enjoy social occasions together. Luncheons and dinners were not confined to judicial retirements and rare visitors. They were regular, even weekly, events as I discovered soon after my appointment to the Court of Appeal. I found it, and I believe I left it, as a happy and convivial institution.

An important difference which I soon noticed after the move to Canberra related to the difficulty of the work. In saying this I do not mean to belittle in any way the complexity of the work performed by the Court of Appeal. Like its counterparts, the Courts of Appeal of Victoria, Queensland and the Northern Territory, and the Full Courts of the Federal Court, Family Court and of the other States, it performs work of the greatest of importance and often of great difficulty and complexity. But in my experience about a third of the work of the Court of Appeal and the Court of Criminal Appeal could be disposed of by *ex tempore* decisions given immediately following argument. This did not mean that the reasons were wholly inspired by what had transpired in court. Often, drafts would be prepared which could form the basis of *ex tempore* reasons or, at least, of a statement of the relevant facts and issues. Such drafts were always

subject to argument and from time to time had to be torn up with the process starting completely afresh. However, about a third of cases in the appeal, and most cases in the motions list could be despatched in this way. Another third could be quite readily disposed of within hours, or days, of the hearing. Preparing the reasons was relatively straight-forward. It was a task we shared. The remaining hard core of a third of cases represented the line of work which would sometimes find its way to the special leave applications of the High Court.

In the High Court there are really no light duties. Every problem, or virtually every one, is difficult. Either a complex issue of constitutional disputation must be resolved. Or an ambiguous statute (usually federal) unravelled. Or a difficult question of common law or equitable principle will be presented upon which judges in the courts below have differed and about which legitimate points of view vie for acceptance in the ultimate court. When it was thought that such considerations could be resolved by a mechanical application of a rule established in past decisions, the work of a judge might have been easier. Now that it is recognised that such controversies sometimes fall to be resolved by reference not only to judicial authority but also to legal policy and legal principle, the work of a judge (if he or she is to be honest) is more complex and demanding. Honesty and integrity require that it be so. Responding to the earnest arguments for the parties require it. Being worthy of the appointment to the highest court oblige it.

The still semi-itinerant nature of the High Court also adds to burdens which did not exist for me in the Court of Appeal. The movement of the Justices at the end of each week or of each sittings, back to their home bases, is accompanied by the sounds of packing, as suitcases are filled with papers and sticky tape is peeled off to seal them for their safe passage. One day, the High Court may be wholly resident in Canberra, permanently using the magnificent facilities of Barwick's great building. But for the moment the Court retains something of the air of impermanency that goes with every caravan. Regularly the tents are pulled up and the caravan moves on - whether to Perth, Adelaide, Brisbane or Hobart. Or, on some special leave days, to Melbourne and Sydney.

There are some further obvious differences which may be mentioned between the judicial life in the Court of Appeal and in the High Court. It has to be said that the facilities provided to the Justices are much more substantial. The chambers in Canberra, the library resources and research assistance far outstrip those which any State court can nowadays offer, even to its highest appointees. There is a minimal increase in salary and personal entitlements. Happily, the Justices are

"constitutionally protected" against any diminution in their remuneration whilst in office¹.

Working to a video-link, as is frequently done in special leave hearings from Brisbane, Darwin, Perth, Adelaide and Hobart demonstrates how much could potentially be done to reduce the costs of litigation and to bring justice to the people of Australia by means of new technology. Inevitably, the High Court, like every court in the land, is affected by considerations such as the availability of legal aid. The significant increase in the number of litigants in person is as much a feature of the work of the High Court as of every other court in Australia. Testing experiences over many years in the motions list of the Court of Appeal have prepared me better perhaps than some of my colleagues, for the inevitable frustrations and stresses of dealing with litigants in person from which no judicial officer in Australia is now immune.

I now wish to offer reflections on four particular problems which confront the High Court. In dealing with them I offer, of course, no more than my personal opinions. They might not be shared by my colleagues. Indeed I may be in lonely dissent in some of them - not an entirely novel experience for me to bear.

¹ Constitution, s 72 (iii).

But in tackling them we should invoke not only the time-honoured judicial virtues inherited from the past, but also the professional imagination, willingness to think boldly and readiness to embrace new technology that one sees in any hospital or scientific facility. A doctor or scientist of the last century who entered a facility of his or her discipline today would be astonished and overwhelmed with the change. A lawyer of the nineteenth century who entered a modern Australian courtroom would feel immediately at home. Perhaps that is not a good thing.

FOUR PROBLEMS

Economics of decision-making:

One feature of service in the highest court, which is soon brought home to any Justice, is the inevitable consequence of decisions in terms of economic implications not only to litigants but to a broader range of people affected by the decision. This may be the inescapable consequence of a judicial body which establishes legal principles that may apply as law throughout the country. Whereas the Parliament, and the Executive Government, would nowadays usually have a mass of economic data to assist them in their decisions, such data is ordinarily missing from the arguments of the parties in Australian courts of law.

It is obvious that decisions such as those of the Court in *Mabo*² and *Wik*³ have very large economic consequences. So have many constitutional decisions, such as that of the Court in *Ha v New South Wales*⁴. Quite apart from these large cases of the most obvious significance to the nation as a whole, even holdings in private litigation may sometimes have a substantial economic impact.

Take for example, the decision of the Court in relation to the claims to refugee status of persons fleeing China in response to that country's one-child policy⁵. Or take a more recent case where the issue concerned the obligation of a landlord for the removal of electrical faults from leased premises⁶. In a sense, every negligence action raises an economic question as to how far the law will impose upon persons in a relationship of proximity a duty of care to protect others from damage⁷. Each

2 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

3 *The Wik Peoples v Queensland* (1996) 187 CLR 1.

4 (1997) 71 ALJR 1080.

5 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 71 ALJR 381.

6 *Northern Sandblasting Pty Ltd v Harris* (1997) 71 ALJR 1428. See esp 1476.

7 See for example discussion in *Cekan v Haines* (1990) 21 NSWLR 296 (CA) at 306-307.

case may turn on its own facts, as we are wont to say. But I have recently suggested the need for a move candid consideration of the economic implications of decision-making in the courts, particularly the ultimate Court⁸.

To some extent, this issue is bound up in the question of procedural reform. Should courts, especially the ultimate Court, facilitate interventions or the provision of *amicus curiae* briefs to assist them in considering issues (including economic issues) which the parties may have no interest or knowledge to pursue⁹? Should a different rule be adopted in relation to the costs of public interest litigation than that applied to ordinary proceedings *inter partes*¹⁰? Of course, a court must always be focussed primarily on the resolution of the dispute of parties. To some extent, this is constitutionally required, in the case of the High Court, by the jurisdiction conferred upon it which is to hear and determine appeals from judgments, decrees, orders and sentences¹¹ and, in its original jurisdiction, to determine defined

8 M D Kirby, "Law and Economics. Is There Hope?" (1997) *Monash Uni L Rev* forthcoming.

9 See the differing views expressed in *Levy v Victoria* (1997) 71 ALJR 837 by Brennan CJ and by the author.

10 cf *Richmond River Council v Oshlack* (1996) 39 NSWLR 622 (CA), *SLG*, reserved, High Court of Australia.

11 Australian Constitution, s 73.

"matters"¹². Furthermore, even in the performance of establishing a rule in the particular case, courts should not allow their procedures to be converted into those appropriate to a parliamentary committee, lest the line be crossed between the judicial function and the functions of the other branches of government.

Nevertheless, alerting courts to the economic consequences of their decisions, may be a challenge for the future as the declaratory function of the judiciary is increasingly questioned and new principles are sought to guide and control judicial law-making in the limited, but real, areas where it remains legitimate.

Judicial methodology:

Another field in which I believe change may come concerns the methodology of the High Court.

In many cases the Justices prepare their own opinions, giving individual reasons for the orders which they propose. In

12 Australian Constitution s 75. See the *Waanyi* Case (1996) 185 CLR 595 at 612 per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, 643 per McHugh J and 665-668 per Kirby J.

this, I am no different from the others. When I arrived at the High Court, I was surprised to find the absence of an established methodology for securing the opinion of the Court. In the Court of Appeal, I inherited from my predecessor, Justice Moffitt, the President's privilege of assigning the obligation to write the first draft of a reserved decision or to give the first reasons in an *ex tempore* decision. It was the President's duty to share the work around. This was accepted by his colleagues. Interesting cases and boring ones. Routine cases and challenging ones. Cases where judges had expertise and cases where new insights might be valuable. Big cases and small ones. Cases involving equitable principles and criminal or other common law cases. The assignment system worked well. It was accepted by all of the judges. It tended to share the workload and to discourage needless repetition in reasons. Of course, any judge could write separately. But the system discouraged needless separate opinions. Where they came, they often accepted the statement of the facts given in the primary draft. They then went directly to the points of difference. To some extent, the sheer pressure of business in the Court of Appeal required this.

In the Supreme Court of the United States of America (and I believe Canada) a formal decision is taken after each week's arguments. If the Chief Justice is in the majority as then tentatively expressed, he has the privilege to assign the duty to write the opinion of the Court. If the Chief Justice is in the minority, this privilege falls to the senior Justice in the majority.

A duty to write for the Court has a tendency to reduce idiosyncratic writing. It tends to "grey the text" ie to produce an opinion which will express the consensus of all or most in the majority. I hope that in the future, the High Court of Australia will embrace some variant on these techniques. I hope so without necessarily endorsing everything said in the profession's repeated criticism of multiple judicial opinions. To some extent, the provision of differing opinions is the way by which the law develops, particularly in ultimate courts. Needless repetition, or restatement in different terms of the same facts and issues, could, I think, be reduced without undue risk to the development of the law. A new judicial methodology is needed to this end. I hope that it will come during my service on the High Court. I have much sympathy for those who have to struggle through the nuances of multiple decisions¹³. Perhaps whilst we are about the reform of judicial methodology, consideration might be given to the provision of court summaries which state the essence of the holding of the Court and of the principal points of dissent, where these exist.

13 *The Wik Peoples v Queensland* (1996) 187 CLR 1 and *Henderson's Case: Re Residential Tenancies Tribunal of NSW; ex parte Defence Housing Authority* (1997) 71 ALJR 1254 are notable recent examples.

In effect, the need for greater clarity in the statement of the rule established by a decision of the High Court of Australia is one consequence of a recognition of the Court's legitimate function in rule-making. It would be unthinkable that an Act of Parliament would be expressed in four, or possibly seven, different versions, each slightly differing from the other. Once it is accepted that the High Court of Australia has functions to express rules of law applicable throughout the nation, it becomes the duty of the Court, and of the Justices who make it up, to find a methodology which will establish clearly the rule that is laid down so that those who are bound by it are left in no doubt¹⁴.

Circulating draft judicial opinions:

There are numerous other issues of judicial administration which need to be resolved. For example, should oral hearings be continued in special leave applications? In the United States such decisions are made on the papers reputedly on the "advice" of law clerks, a procedure adopted because of their great

¹⁴ See eg *The Wik Peoples v Queensland* (1996) 187 CLR 1 at 132-133 where, in a "postscript" Toohey J, with the authority of Gaudron and Gummow JJ and myself expressed the essential common ground of the judges in the majority in that case.

number. Should academic opinions influence judicial decisions and, if they do, should they be acknowledged in the discussion of judicial policy¹⁵? Should the judicial hearing be redesigned so that it becomes an opportunity for the parties to criticise a draft opinion, perhaps prepared by a court secretariat for consideration by the Justices? Would such a radical alteration in current procedures go beyond the constitutional remit? Would it be a means of ensuring that more people have real access to the decision-making of their country's ultimate court by procedural reforms which would spare the judges of that court some of the tedious, but currently necessary, routine work, involved in the preparation of opinions?

When, at a legal convention nearly two decades ago, drawing on my experience with discussion papers in the Law Reform Commission, I proposed the circulation of draft judicial opinions for comment and criticism before finalisation, the idea was denounced as complete heresy. Now, under the pressure of the need to adapt judicial methodology to new times and heavier burdens, when such ideas are put forward they can no longer so

15 cf *Hunter v Canary Wharf Ltd* [1997] 2 WLR 684 (HL) at 697 where Lord Goff of Chieveley criticised the use of academic writings by Lord Cooke of Thorndon in support of his speech. cf D Cane, "What a Nuisance!" (1997) 113 LQR 515 at 518-519.

easily be dismissed. To the extent that the Constitution permits, we should be open-minded about reform of the judicial method. I have a feeling that, at the moment, it serves extremely well a comparatively tiny circle of initiates and reaches comparatively few of the people of this country whom the Court ultimately serves.

Attacks on the courts:

One of the most obvious issues, which has marked my translation from the Court of Appeal to the High Court, has been the increased vigour, the personal character and the sustained duration of attacks on the Court and its Justices¹⁶.

In a memorandum sent by the Permanent Secretary to the Lord Chancellor of England, the following was said:

"The deep and ... underlying truth seems to be that Judges, however subconsciously, desire to retain or obtain for the judiciary problems more fit for executive decisions ... In recent years ... it has been difficult for the State to obtain justice from the judges of the High Court. It is not too much to say that in recent years, the weight of prejudice against the State in the minds of many members of the Court of Appeal and the judges of the High Court

¹⁶ MD Kirby, "Attacks on Judges - a Universal Phenomenon" speech for American bar Association Conference, January 1998, forthcoming.

has been such as seriously to affect the Administration of Justice."

This was not a statement written in recent times. It was written in March 1929 by the first Lord Hailsham, Lord Chancellor in the first years of Stanley Baldwin's first administration¹⁷. It tends to show how attacks on the courts are not new. What is new is the public character and virulence of the attacks and the personal nature and terms of some of them. To be criticised by name by one Premier and to have reasons dehounced as "ranting and raving" or to be singled out by a senior federal Minister who declared that he is "underwhelmed" by my reasons, is a new development on the Australian judicial scene, certainly in relation to the High Court. Of course, political criticisms are not new. They have happened from time to time, including in relation to me¹⁸. Criticism of reasons is entirely legitimate, democratic and may be beneficial, even sometimes justifiable. But it is the element of personal and political attacks which represents a dangerous new development. It is one which, I hope, will be

17 R Stevens, "Judges, Politics, Politicians and the Confusing Role of the Judiciary", Chapter 11 in K Hawkins (ed) *The Human Face of Law*, Clarendon, Oxford, 1997 citing Sir Claud Schuster writing to the Lord Chancellor 25 March 1929 (LCO 2/1133).

18 For a note on the comments of the then Premier of New South Wales, Mr John Fahey, see M D Kirby, "Judiciary, Media and Government" (1993) 3 *J of Judicial Administration* 63.

changed by the exercise of appropriate restraint. Institutions are more easily damaged than rebuilt. What is needed is a fuller appreciation of the functions of the higher courts of Australia, particularly of the High Court. There is also a need for appropriate voices to be raised in defence of the Court when the going gets rough. At the moment, the understanding of the Court's function and role under the Constitution is sometimes missing. The defenders are all too often silent, leaving the Court open to largely unanswered and often ignorant criticism.

CHANGE AND RENEWAL

So these are some of the changes which I have seen in the past two years. Changes in my own life and in my experience of the judicial role. Changes in the public perception of the Court on which I now have the honour to serve. In a time of great social change, it is inevitable that the Court will also change. Change is part of life, especially life in the law. No one who knows anything of legal history - and no one who knows the history of the High Court of Australia, one of the oldest and most enduring of the constitutional courts of the world - would doubt that the Court will adapt. It will continue to serve the Constitution and the people of Australia and to uphold the rule of law in this much blessed country as it enters the second century of the Constitution and a new millennium. But will the current pace of change suffice?