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THE UNIVERSITY OF SYDNEY
FACULTY OF LAW
CONSTITUTIONAL LAW CLASS
FRIDAY 23 MAY 1997

WHAT IS IT *REALLY* LIKE TO BE A JUSTICE OF THE HIGH
COURT OF AUSTRALIA? - LAW STUDENTS IN CONVERSATION
WITH JUSTICE KIRBY

The Honourable Justice Michael Kirby AC CMG

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A profession concerned with justice

You are citizens of a free country living under a Constitution which upholds the rule of law and of which the High Court of Australia is the guardian. In that country lawyers play a vital part to ensure that we live under the protection of the law. Your mission is justice under the law. It is a very important

* Justice of the High Court of Australia. President of the International Commission of Jurists. Text of an address at the University of Sydney, Faculty of Law on 23 May 1997. The text has been corrected.

mission. You should never forget it. It is quite as honourable as the mission of the healthcare professions. It is a wonderful vocation that you will enter. You should always be optimistic and idealistic about our profession. It is a profession of helping people. A profession about being concerned with justice. A very important mission. You are not in this profession just to make a lot of money. You have been called to the colours of the law because our work is the doing of justice.

Forty Justices of the High Court

I am the fortieth Justice of the High Court of Australia. Forty in the space of nearly a century is not really very many if you think about it. The Court was established by the Constitution. The first appointees were made in 1903. Here we are, nearly a century later, and there have only been 40 of us. Therefore, although any one of you in this room may one day end up sitting on the High Court, the probabilities are slightly against it. You should not, as it were, hold your breath waiting for it to come along. There are many slips 'twixt the cup and the hopeful judicial lip.

When the Court was first established, there were three Justices: Chief Justice Sir Samuel Griffith whose mighty portrait hangs in the No 1 Court in Canberra. Justice Sir Edmund Barton who had been the first Prime Minister. And Justice Richard O'Connor, who was one of the leaders of the Constitutional

Conventions. Of the three, two of them were from New South Wales. That hegemony has continued ever since. At the moment, of the seven Justices of the Court four come from New South Wales: Justice Gaudron, Justice McHugh, Justice Gummow and myself. So New South Wales has four of the seven. There are constant rumblings about that fact in the other States. But they may have their revenge because there are soon appointments to be made. The appointment of the replacement for Sir Daryl Dawson who retires in August 1997 will surely be from somewhere other than New South Wales. The vacancy is out of New South Wales because Justice Dawson comes from Victoria. Similarly Chief Justice Brennan retires in exactly a year yesterday. He was an appointee from Queensland, ie out of New South Wales. Not much room to redress the State balance there.

The Court remained at three Justices until about 10 years after its foundation. It was then increased to five and then up to seven. It remained at seven until the Depression when it was reduced to six. During the wartime it returned to a total of seven. It has remained that ever since. There has been talk from time to time about increasing the Court to nine Justices; but that has not occurred.

Appointment to the Court

I want to tell you how it came about that I was appointed. I was sitting in a conference on the 13th level of the Supreme Court building in Sydney. We were working out how we could become more user-friendly in the New South Wales Court of Appeal. Being a user-friendly sort of a person, I was very anxious to make the Court more responsive to the legal profession and the community. As I was sitting there my Associate, Nicholas James, graduate of the Melbourne Law School, came in with a little yellow sticker. It had a note on it. "Please phone Mr La Vache". He thought it was a French name. In fact it was the Federal Attorney General, the Honourable Michael Lavarch MP.

Earlier in the day, at about 8.30 that morning, I had been asked where I would be at 6 p.m. that night. I replied: "I will be in the meeting of the committee working away on the improvement of the consumer relations for the Court of Appeal". I knew, because I was a pretty experienced old-timer by that stage, that something was up. I knew that the Federal Cabinet was meeting that day. So when the little yellow sticker was handed to me at this meeting on 12th December 1995 at 5.50 pm, "Please ring Mr La Vache", I knew that my life had changed. From the President of the Court of Appeal of New South Wales I was to become a Justice of the High Court.

Facilities for the Justices

The Justices of the High Court work principally in the Court's building in Canberra. When the sittings of the Canberra sessions of the Court are not taking place they eventually tend to scatter to the different areas of the countries from which they come. The four of us who come from Sydney have Chambers in the Law Courts Building on Level 19. So I have moved from Level 12 where I was as the President of the Court of Appeal in a huge and magnificent room to my somewhat more humble and more modest accommodation on Level 19 where I spend some of my time. The other Justices with Chambers there are Justice Gaudron, Justice McHugh and Justice Gummow. The Chief Justice also has rooms there.

After I was given the appointment I drove down to Canberra to take my seat. It's a lovely drive in February. Quite an easy drive nowadays. I found my way across Lake Burley Griffin. I saw this building that I had seen so often from afar, glimmering in the Lake. I had previously thought that the time for my appointment to the Court had passed. It shows you that in life you should never say never. You should always be optimistic. Always contemplate that things might happen. You never know in life. Uncertainty is one of life's blessings. The car drove up to the Court. I went in for the first time as a soon-to-be Justice. I had not yet been sworn in. I was shown up to Level 9 which is the level right up the top of the building. I was

shown to the room which was to be mine. That room had originally been the room of Sir Keith Aickin. Then it became the room of Sir Ninian Stephen. Then it became the room of Sir William Deane. Now it is my room. One day it will pass to my successor. It is mine. But only temporarily.

I ask you to note that my two predecessors went on to become the Governor-General of Australia. Indeed I traced my judicial lineage back to the beginning. The first Justice in, as it were, my root of title, was Sir Isaac Isaacs. He also became Governor-General. Now these are just coincidences, ladies and gentlemen. You should not put any money on the succession continuing. A figment of the imagination. A flight of fancy.

After a while there, and after I had been sworn in and the formalities concluded, I reached over to the little console beside my desk. I thought I had better do a bit of work. The console had in it a number of cassette tapes. I picked a tape. I put it on. Being a cautious type I thought I had better just listen to this and make sure. I always check because once I erased a tape and you never do that twice in your life. I heard this voice coming over the tape. I recognised the accents but could not recognise the voice. I listened carefully. I heard that the case being

discussed concerned the law of standing to sue. It was a question of the principles of the law of standing. I thought: I know that case. That's *Onus*¹. And so the tape droned on and on. I looked for *Onus*. I picked it up. I looked through the judgments. There it was. It was the voice of the long dead Sir Keith Aickin. It was his voice speaking from the past. His dictated judgment in *Onus v Alcoa*².

The moral of that story is that we are all passing spirits. You are a passing spirit in the law. Your time will come. You will flourish. Perhaps you will be important. And then you will pass. And so it will be with me. One day somebody will come into that room which I now occupy. They will reach for a tape. They will listen and will hear a fruity voice. They will say, "I know that voice". They will then wonder who on earth that was. That's the nature of the 700 year old tradition that we inherit. We are but temporary guardians.

1 *Onus v Alcoa of Australia Limited* (1981) 149 CLR 27.

2 *Ibid*, at 46-58.

Work methods

The High Court of Australia works somewhat differently to the Supreme Courts in Canada and the United States of America. In the United States it's really quite formal. I suppose that is because their Court is more than 200 years old. They have certain very fixed traditions. One of these is that they always shake hands before they go into court to sit. That is a symbol of the fact that, even though you can disagree about the issues that will be debated, nonetheless you are colleagues on the Court. We don't do that. We occasionally disagree, as you have possibly read. But we haven't felt the need to have such a formality to affirm our professional friendships.

Another technique of the US Supreme Court, which I think is a very good technique, is that they have the system of case assignment. At the end of the week, after they have heard the cases, they meet to talk about the cases. They do this in a very formal and structured way. They normally go through them much as the Privy Council did with the junior judge speaking first. They work their way up from junior to senior, presumably so that the junior judge will not be intimidated by the senior judge. Somehow I don't think Justice Mary Gaudron, even when she was the newest Justice on the High Court, would have been intimidated by anybody. In fact, the people who tend to get appointed to the High Court of Australia don't tend to be easily intimidable. But that was the tradition of the Privy Council.

Perhaps for that reason it was followed up in the Supreme Court of the United States. In fact, that Court derived other things from the Privy Council tradition, including the famous case of *Marbury v Madison*³ which was based on the Privy Council principle that invalid legislation in the colonies could be struck down by the judges in a way that English statutes could not. That principle is now the cornerstone of constitutional review in Australia.

Court and separate opinions

In the United States, after they have had their discussion, if the Chief Justice is in the majority he assigns the Justice of the Court who will write the opinion of the Court (including, sometimes, himself). If the Chief Justice is not in the majority, the senior of the Associate Justices (as they call them) has the power of assignment. He or she assigns the judge who will write the "opinion of the Court". Generally, the dissentients will agree amongst themselves as to who will write the main dissenting opinion. There are more concurrences under that system than we tend to have. We don't have anything like that

3 1 Cranch (5 US) 137 (1803).

system in the High Court of Australia. I hope that something like that will come in time.

When I was President of the Court of Appeal I tried to persuade the judges to adopt a system like that. I fondly thought that it might be easier in a Court of three than it is in a Court of seven or a Court sitting five judges. But that could not be agreed. In part, the resistance in Australia is because of our different traditions. In part, it's because of notions of judicial independence. Judges here are fiercely independent. Many consider that they should state their own opinions. In part it is simply habit. In part, I think our present system may even involve a tiny element of judicial ego: that judges like to see their own opinions published. I suppose I am as guilty of that sin as others. Whatever the reasons, we do not have the American system of assignment. I hope one day we will.

Original jurisdiction

In the work of the High Court there is the original jurisdiction and the appellate jurisdiction. The original jurisdiction is now really quite small. Once, when I was young, it was quite big because then there was no Federal Court. The High Court used to have to do a lot of tax cases, intellectual property cases, industrial matters and other cases. Such cases now go to the Federal Court of Australia or to other courts. If you look back in the old volumes of the *Commonwealth Law Reports* you will see

that the original jurisdiction of the Court was quite a large business in those days. Now the appellate work of the Court is so great that the original jurisdiction has virtually gone. If anything comes in the original jurisdiction, the Court has the power to remit it to another appropriate court. Usually we do so. However there is still some work. In Melbourne, on Tuesday, I was sitting in a case concerning a claim by an Aboriginal Australian for declarations of legal right⁴. The basis of the claim was, amongst other things, one of alleged genocide on the part of Australia for which he was contending that the Commonwealth of Australia was liable in law. His process was the subject of an application by the Commonwealth to strike out his writ and statement of claim. The summons was filed on the basis that the proceedings did not disclose a cause of action known to the law, that it did not involve a matter within the Constitution, that it was not a justiciable issue, that the plaintiff did not have standing to bring the case, that the case was frivolous and vexatious, that the pleading was embarrassing, and that it should be struck out or stayed. That is the sort of case that a single judge does. We take it in turns to deal with such practice matters. This week it was my turn.

⁴ *Thorpe v The Commonwealth of Australia [No 3]*, unreported, 12 June 1997.

I was speaking recently to a writer for *The Bulletin* magazine about the future of courtrooms. Of how our courtrooms in the future will be very much geared up to information technology. I believe that this will come. Our laws will be written in the future in a way that makes many issues susceptible to resolution by artificial intelligence. Basically, this will be because our profession - your profession, mine, the law - has really just priced itself out of availability to most ordinary citizens. That can't be a good thing. Yet as I sat there during the case this week, I wondered what push-button court is ever going to be able ever to resolve a matter as complicated and inter-related with history and principle and with rights and claims and with anger and frustration? What push-button judge will ever be able to resolve a matter like that? It will never be done in your lifetime or mine. This is because what is important in such cases, what is at the heart of our mission for justice, is the *will* to do justice according to law. No machine can yet be programmed which takes our place in that respect. It is unlikely that a machine will ever have that capacity and inclination.

Appellate jurisdiction

So far as the High Court's appellate work is concerned, it now comes to the Court only by special leave. I have spoken to people who were Associates to Justices of the Court decades ago. They tell me of what the High Court was like back in the 1960s. Basically, it was like the Court of Appeal of New South

Wales now is. It was run off its feet. Absolutely overwhelmed with work which it could not rebuff or deflect. It was desperately busy just getting the decisions out.

In the last year of my service as President of the Court of Appeal I wrote 389 opinions. In the High Court of Australia last year I wrote, I think, about 60 opinions. So the workload changes. It's not as much so far as quantity is concerned. But everything is hard. In the High Court of Australia, with very few exceptions, all of the cases are difficult.

As a judge there is a certain satisfaction in throughput. To be able to hear a case and to give an immediate *ex tempore* judgment when you have got all the facts and detail in your mind and the law is simple and clear. You dictate the decision, as it were, in Court, in the presence of the parties, immediately having heard it. That's a very satisfying thing. You get better at *ex tempore* decisions the longer you do them. There's an essay by me in the *Australian Bar Review* on this subject⁵. I commend it to you, just in case you might ever have the opportunity and the need.

⁵ M D Kirby, "Ex tempore Reasons", (1992) *Australian Bar Review* 93.

However, in virtually all cases in the High Court in appellate matters, judgment is reserved. It's very rare to give an *ex tempore* judgment in the Full Court. This is because the Justices know that they are not only solving the problems of the parties. They are expressing principles which will become part of the law of our country for the whole nation⁶. Therefore, it behoves us to be rather careful about it. That's why, normally, the decisions in the Full High Court are reserved.

Generally, the Full Court comprises five Justices. There's a reason for that. With the special leave system virtually everything heard is on appeal, either from a Court of Appeal or from a Full Court, either Federal or State. Therefore the Justices may be reversing three judges of the court below. For that reason the theory is that you should ordinarily have five High Court Justices to shoulder that responsibility. Where there is a constitutional issue, the *Judiciary Act* 1903 (Cth) contemplates that the Court will comprise all seven Justices⁷. Except where a Justice has retired or died in office or is about to retire (as Justice Dawson is) if the matter before the Court includes a constitutional question it is normal to have the entire seven

⁶ Cf McHugh J in *Pfennig v The Queen* (1995) 182 CLR 461 at 519.

⁷ *Ibid*, s 23(1).

Justices participate. The notion is that the people of Australia are entitled to have the opinion of the whole Court upon such matters. That's what normally happens.

During the last year we have heard a number of important cases where the entire Court participated, such as in the *Waanyi*⁸ claim which was preliminary to the pastoral leases issue. Such as the *Wik Case*⁹ where the Court sat seven. We have now, standing for judgment, a number of constitutional questions where the Court sat seven Justices. For example, the *Ha Case* (which was the case on section 90 of the Constitution concerning excise duty) will have to be delivered before Justice Dawson retires. The decision will have to come down before 15 August 1977. I'm not giving any secrets away here. It's just a matter of logic given the impending retirement of Justice Dawson. There's also the *Levy* and *Lange* cases which seek to reopen the principles of the *Theophanous Case*¹⁰. That case also included Justice Dawson. So it too has to be decided before 15th August. There are a number of other such cases which

8 *Re North Ganalanja Corporation; Ex parte Queensland* (1996) 71 ALJR 344.

9 *Wik Peoples v Queensland* (1996) 71 ALJR 173.

10 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104.

wait in the wings. I am sure that you will understand that the Court is very busy at the moment, striving to ensure that it gets finished all of the cases in which Justice Dawson sat as well as the other cases that have been heard or are being heard in the meantime.

Work and personal staff

My normal day is work. My life is work. My life for the last 23 years, since I was first appointed to judicial office, has virtually always involved working 7 days a week. I have heard it said that, when Chief Justice Dixon retired, he became rather disillusioned. That great jurist, Dixon - possibly Australia's greatest judge - became very dissatisfied at the end. He was discouraged that he had spent, effectively, the entirety of his life working in a small annex to his home in Melbourne - writing judgments. The High Court was then mainly based in Melbourne. The great Dixon worked relentlessly in this annex to his home. Every week. Every weekend. Every day. Well into the night. It's said of Dixon that at the end of his life, he thought he had wasted his life. You will have to admit that a working life of such intensity is not a very civilised way to spend precious time. I am now facing the same quandary. To be a Justice of the High Court of Australia, where all the problems are difficult and most of the cases are important for your fellow citizens, you have to work very hard. This is the price for the

honour and glory of being the fortieth of the forty Justices in the history of the Court.

In performing my work I have the assistance of a secretary who is based in Sydney, and two Associates. I believe that I am the only judge who advertises for my Associates. Others take the view that if you've got the intelligence, wherewithal and intellect to be an Associate to a Justice of the High Court of Australia, you will take your own initiative and apply. Perhaps because I came from Concord, New South Wales, and because in my youth most appointments of this kind were decided by the Old Boys' Network, I have always taken the view that, as a matter of principle, you should advertise. This act signals that this is an equal opportunity position. Everybody who has the capacity is entitled to apply. The result of these high Polonian principles is that I get more than 100 applicants. I then have to go through the process of elimination. It is quite wrenching in many ways. You get to the last 15 or 20 of the applicants and any of them could do the job. I always take one male and one female Associate. At the moment I'm about to change my personal staff. Mid-year I change one and he or she goes off and the new one comes in.

My Associates don't write my judgments. I've never had staff write my judgments. I gather that does happen a lot in the United States, if you can believe *The Brethren*¹¹. I'm far too egocentric and idiosyncratic to allow anybody to write my peerless prose. So I do it myself. My Associates are kept very busy just keeping up with my output. This includes not just the judgments but, as I am sure you are all aware, countless articles in law reviews, Bar Association journals and book reviews, speeches and the like for the illumination of all who read. The Associates are an indispensable part of the Justice's team. You get very close to and work very closely with them. They learn a lot during the course of a year. They see a very busy professional person at work at close quarters.

The materials that you get as a Justice are not only the oral submissions of counsel, presented in their argument in court, but increasingly large amounts of written material. The High Court changed its practice in this regard in the last few months. Now we are getting the parties to summarise the factual issues and to put somewhat more detail in their respective factual and legal submissions. Sir Harry Gibbs introduced a skeleton outline technique. He took this course on the basis that such an outline

¹¹ Bob Woodward and S Armstrong, *The Brethren - Inside the Supreme Court*, Simon and Schuster, New York (1979).

was the most efficient way to get what people were *really* saying. However, we've now gone a little way down the track towards the practice of the United States Supreme Court. We are now getting more detailed written briefs. In constitutional cases the written materials could be several metres high. The Justices receive an enormous amount of material. The skill then is sifting and getting through it - going quickly to the essence of it.

The publication of judgments

The preparation of the judgments is a major enterprise. Once the first draft is typed it is revised and reconsidered by me four or five times. The draft is then worked on by the staff. All the footnotes and quotes are checked. Then the work of my staff is scrutinised by Court officers who are there to check the text for absolute accuracy. Not just the citations are checked - but the accuracy of the references to transcript. This is to make sure that the Justice has not misunderstood a fact or mis-stated a summary of the evidence or a case citation. All of that is very carefully checked in a way that in the Court of Appeal we just didn't have the resources to do. In the High Court it's done with exquisite care. Finally, the penultimate draft comes around. After the seventh or eighth proof you read it for the last time. Then the Chief Justice sends around a note. It says: "It is proposed that such and such a case will be handed down on such and such a day". The page proofs of the pamphlet come

around. That's the end of the internal process. On the given day, in open court, the reasons are published and the orders are made. The parties have reached the end of the judicial line in Australia. It is often a serious moment, given the importance of the questions decided.

That's what it's really like being a Justice of the High Court of Australia. It's a life of hard work. But it is an extremely interesting life. I hope that in your professional lives all of you will have an opportunity to see the High Court in action. Perhaps you will have the chance to appear before the Court. I also hope, above all, that you will have a fulfilling life as a lawyer, as a citizen and as a civilised human being.

QUESTIONS

Question: You come from a less privileged background than many judges in the past. Do you feel that this is an advantage? Do you believe that the Court should reflect, in the future, more than it has in the past, the variety of Australia's population so that it is less monochrome and therefore more readily able to reach decisions that will be accepted fully by the people of Australia?

Answer: I don't want to mis-state my position. My parents on my mother's side had University degrees. They were painters, botanists and archaeologists in Ireland, Northern Ireland. My

father's family was very well read and interested in ideas and social reform. I was blessed with very intelligent and loving parents and a happy family. That's a wonderful thing to have in your life. Many people now talk about "family values". I know that society has changed. The concept of "family" is changing. But if you have a happy family upbringing, it's a wonderful start in life. I went to an Opportunity School in the public school system and then to Fort Street High School. Now, Fort Street has produced four of the Justices of the High Court¹². Four out of the 40. Ten percent. So it's scarcely a deprived background.

However, I think I can say to you that, because I came from an ordinary suburban middle to lower middle class Australian family, I don't feel myself more important than anybody else. I feel myself somewhat in touch with the values and aspirations of ordinary Australians. I think that those values involve something of integrity and wisdom that we the judges should never forget. It's very easy in the law, particularly if you're in a court, to get out of touch with ordinary fellow citizens. I used to find this very offensive when I was a barrister. A lot of chitter chatter amongst the lawyers. Laughing and joking in the presence of clients. Much of it for the purpose

12 Barton J, Evatt J, Barwick CJ and Kirby J.

of relieving the stress of the case. Yet with complete indifference to the clients. They were often undergoing a most dreadful ordeal. I could never forget that, for the rest of their lives, I would be their barrister: "Mr Kirby, my barrister". I think that's something which you should try to remember when you go out ultimately to practise law or to exercise whatever vocation you choose. Around their dinner table clients and other citizens will talk about you as "my barrister", "my solicitor", "my adviser". It's a very important that you remember that.

Now you do get people appointed to the Court who have come from great legal families. Sir William Owen immediately springs to mind. Sir Victor Windeyer is another. I digress to say that some of my distinguished predecessors were fashionable once. Yet now they are rarely, if ever, read. However, Sir Victor Windeyer is read all the time. Now why is that? Certainly, he was from an important legal family. I think he was a grandson of one of the first magistrates in New South Wales. His uncle was a judge of the Supreme Court of New South Wales. So it is a great legal family. His son is now a judge of the Supreme Court of New South Wales. But his family is not the reason. Sir Victor Windeyer had a capacity to conceptualise issues. He was extremely interested in legal history. He therefore understood that our legal system, the unique system the common law, is very much dependent on legal history. He was a great judge. It doesn't really matter where you come from - your family or forbears. What matters in the judiciary is

who you are, how you work and what values and learning you reflect in your legal decisions. Clearly it is vital not to be too full of your own importance. As Sir William Deane once said - pulling himself down a peg or two with becoming modesty - you should remember that even being a judge on the highest court of a country like Australia, in the Southern Hemisphere, Pacific, in a world, in a mighty universe, is (objectively speaking) no big deal.

So my answer to your question is there's a place for everybody in the High Court, so long as they have the legal talent, integrity and devotion to duty. Or, at least, there's a place for as many as there are seats amongst the seven whenever the vacancies come up. Alas, that means that there is little room, for the children of the great legal families or the children of the poor. In this respect they are equal.

The Federal Attorney-General gave an interesting address at Monash University recently¹³. It received some coverage in the media. In it, Mr Williams analysed the 40 Justices. Twenty-six were appointed by non-Labor governments and 14 by Labor governments. The average term of the Chief Justices was about 9 years and of the other Justices was about 17 years. He

¹³ D Williams, "Judicial Independence and the High Court", Address, Monash University, 1 May 1997.

pointed out that since the change to the Australian Constitution which requires the Justices to retire at aged 70¹⁴, that pattern is going to change. Sir Edward McTiernan sat on the Court for 45 years. Sir George Rich for a period of 37 years. That just won't happen any more. Judges will be appointed at about the same age as I was appointed (57). They will serve for about 10 or 12 or 15 years. That's not such a bad thing. With such a system there will be a change - with more people being appointed. I certainly hope that there will be more women appointed. I also hope that the people who are appointed, male or female, will be conscious of the fact that we are not now a monochrome society, if ever we were. Australian society is made up of myriads of minorities. It's important as a judge and as a lawyer to understand - or at least to appreciate - what it is to be in a minority. It is important to reflect that understanding in your sense of justice and in your search for justice according to law.

Question: Do you think that, given the great power entrusted to the Justices of the High Court, there should be a more formal process for selecting them? Should there be closer scrutiny of their attitudes and opinions? Is this the price of accepting that our judges do make law?

¹⁴ *Australian Constitution*, s 72, introduced by the *Constitution Alteration (Retirement of Judges)* 1977.

Answer: I had to face that question recently when the Attorney-General came to see me. He is consulting everybody about the new appointments to the Court. That is, he is consulting everybody who is anybody! He is consulting all the Justices of the High Court. I told him that I didn't think it was appropriate for me to express any opinion. I know that this is perhaps an eccentric, certainly an unusual, point of view. It's not the commonly held view. My own feeling is that a Judicial Commission or some more formalised system of appointing judges - especially of the High Court of Australia - would be likely to end up involving judges appointing judges. I'm against that. Or it would produce a system that is like that of the United States. There, nominees have to be submitted to a Senate confirmation hearing. This makes much more politicised the process of judicial appointment. It would tend, as it did with Judge Bork in the United States, to grossly over-simplify complex points of view. Bork may have had his faults. But he was a brilliant man and a well-respected judge. He didn't deserve to be rejected because of twenty second advertisements designed to promote a political head of steam against him concerning his suggested views on abortion, race relations or anything else. The process was seriously flawed.

My own somewhat idiosyncratic opinion is that our system of Executive appointment, like so many things we have inherited from England, because it evolved over a long time is (like the jury

for example) not without its distinct strengths. Although the judges of our system are not elected, they are appointed directly by elected people. Those people hope against hope that the persons they appoint as judges will, in a general way, reflect their philosophy of society and its laws. It is *Realpolitik* of which I speak. It's in that way that differing governments appointing judges hope that they can secure a reflection, over time, of the kind of philosophy that the people who have elected them have generally adhered to. Of course, there can be shattering disappointments for governments of all persuasions. For example, Sir Anthony Mason and Sir William Deane, the suggested "radicals" of the High Court in recent times, were both appointed by Coalition governments. In the case of Sir Anthony Mason it was the McMahon government. In the case of Sir William Deane it was the Fraser Government. Both of those governments probably expected that they would be (if I can coin a phrase) "capital C Conservatives". So you can just never tell how judges, who are people of integrity, will develop on the Bench or will react to particular problems. Yet in a strange and general way, the fact that you get this accountability to the people through the sorts of candidates who are appointed as Justices by governments or different political persuasion has tended, over time, to bring light and shade to our judiciary - including in the High Court. My doubt about a Judicial Commission, or a more formal involvement of judges in the selection process would be that it would be likely to result in an awful lot of shade. It could tend to involve judges replicating,

perhaps clone-like, people who were like themselves. I'm against that.

Question: Do you believe that the Federal Government is cutting back on the High Court's budget and introducing high fees for proceedings in the Court because of the anger with the Court's Wik decision? Are you aware that this is widely rumoured? Do you believe this to be the case?

Answer: I haven't heard that rumour. It is true that there have been effective cuts to the Court's budget. However, I understand that those cuts are not confined to the Court but are common to a lot of other federal authorities. They are related to the so-called efficiency dividend. Perhaps in the case of the High Court they fail to take into account the special constitutional position and obligations of the Court which cannot be avoided or deflected. That is a matter which is the subject of discussion between the Court and the Government. I don't think anything else need be said at the moment.

The one good thing that has happened in recent years is that the Court has secured its own budget. It has a one line entry in the national Budget. Therefore the Court, in a sense, runs itself. That imposes a duty on the Court to be economical, to be efficient, to be prudent in the use of public resources, to share the pain of the rest of the community when economic

requirements necessitate that. However, the Court must always fulfil its constitutional function. That the Court will always do.

Question: Did you hear that the Queensland Premier singled you out for personal criticism for your judgment in the Wik Case? He described it as "ranting and raving". How do you respond to such criticism? How can judges answer back and explain what they have decided when nobody bothers to read their reasons but feels free to criticise them just the same?

Answer: If you think I keep a little black book in which I write down everybody who said a nasty thing about me, I do not. I have to tell you that in my life, not just as a judge, but in my whole life, I've had a lot of nasty things said about me. The black book would be very full. But it would really be pointless to keep such a book. You should never carry bitterness. Sometimes the personal comments of one's critics can be hurtful. Hurtful not only to you as an individual but to the institution you honour. There was a thoughtful article by Alan Ramsay in the *Sydney Morning Herald* recently. My brother brought it to my attention. It pointed out that when the High Court delivered its equally controversial decisions in the Bank

Nationalisation case¹⁵ adverse to the Government and in the Communist Party case¹⁶, adverse to the succeeding Government, the judicial umpire's decision was simply accepted. The Governments got on with the business of politics. There were certainly no personal attacks on the Justices of the High Court. It seems that we now live in an angrier time. The problem from a judge's point of view, whether a Justice of the High Court or a Judge of a Federal Court or the Supreme Court of a State, is that you can't answer back. The convention is that you don't. I think it is a wise convention. Too many exchanges would be destructive of respect of the judicial institution. On the other hand, you can sometimes get appropriate occasions such as conferences, academic meetings or graduation ceremonies where you can express, in a seemly way, a point of view that helps to set the record straight. Graduations particularly are always good for a timely thrust of a judicial point of view. Because of the course of my professional life has taken, I seem to get a lot of such occasions. Within well known limits, you can indicate on such occasions a point of view which is personal or a point of view of the Court.

15 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1.

16 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

The pastoral leases question was bound to involve a very controversial decision, whichever way it had been decided. A judge should not feel so sensitive that he or she believes that no one can criticise a decision, however honestly and carefully arrived at. In the *Wik* case, the High Court divided 4:3. The issues were in many ways quite novel. The decision is one which affects a lot of people. It concerns people's land. On such matters, in every society, not just ours, people feel very keenly. Country people, in difficult times of economic transition, feel very keenly. The Aboriginal people feel very keenly. So we shouldn't be too surprised that tempers rise. But as for the Justices of the High Court, we simply get on with our work. The institution goes on. It will continue to do so.

Question: Don't you think that some of the criticism may be because of a public perception that the judges, particularly of the High Court, are developing new law rather than applying the law already made?

Answer: I didn't think I'd get that question in a law school class. The judges of the common law have been making the law for 700 years. As Sir Anthony Mason asked in a foreword to

Professor Parkinson's book recently¹⁷, where else do you think the volumes of *Halsbury* came from? I mean, where did the common law come from if not from the judges? This is the very genius of our system. In your families and in your community you must try to explain that. It's actually a wonderful thing because there's never a gap in our law. The common law is constantly being developed - by the judges. In the field of Aboriginal and indigenous people's legal rights, Australia is not alone in this. Other societies which were settler societies: the United States, Canada, Australia, New Zealand, South Africa, Zimbabwe, all of them are going through an adjustment period. We in Australia are going through an adjustment period. It's still progressing: our parliaments and our courts are reconsidering old laws as they affect the Aboriginal and Torres Strait Islander peoples of our country. We can now see, almost with the eyes of the 21st century, that some of the rules which were laid down in earlier times are not appropriate as rules of the common law for Australia today. Of course, there's always a question of where you draw the line. Where you stop in judicial law-making. Where you say: well this is a matter for parliament and not for the courts. That's always a question on which every judge will think very carefully. But the one thing a judge can't do, except

17 P Parkinson, *The Principles of Equity*, LBC, Sydney, 1996, v at vi.

on issues of non-justiciability, is to say I won't answer the question. The judge is duty-bound to give an answer in the matter before the court. That's the one thing people can expect from a court. So you should not fall for the idea that judges merely apply the law and do nothing else. Some of my predecessors in the High Court occasionally suggested that. That the Justices never make the law. It would be a negation of the judicial function, Sir Owen Dixon said, for the judges to make up the law¹⁸. But the reality is that, then as now, they were doing what we do. They were looking into the past for the principles established by legal authority for its application in their time. They were looking closely at that authority. They were deriving from the authority and from the legal policy and legal principles the law needed for the new case to meet new situations¹⁹. How else would we adapt the law from rules laid down for rural village England to Australia in a world of cyberspace, of inter-planetary flight and of all the other features of our modern technological age? Its creativity is the very genius of our legal system. We shouldn't be ashamed of it. On

18 (1952) 85 CLR xi at xiv. See also *Rootes v Shelton* (1967) 116 CLR 383 at 386 per Kitto J. Cf M D Kirby, "Judicial Activism?" in (1997) *Uni of WA Law Rev* forthcoming.

19 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 252.

the contrary, we should cherish its capacity to adapt and change.

Question: *Do you believe that television cameras should be allowed in the courts?*

Answer: I myself have no problem with television in court. When I sat in the Court practice list recently I saw that there was a woman with an object with a little red light on. This meant that she was recording. I said to her, as is the case, that I really had no personal objection to her recording the proceedings. But it can't be done without the authority of the Court. My own view is that courts are open and the way people nowadays get most of their information about courts is through radio and television. So I consider that courts shouldn't stay back forever in the age of the quill pen. The fear is that television in court would debase the issues and trivialise them. That we could become part of the entertainment industry which is what, to a large extent, the electronic media is today. These are matters which have to be decided on a collegial basis. My own feeling is that it is inevitable that television cameras will come into the court room. So long as you don't have people wandering around and pushing you around (as you get in conferences) so long as they're discreet, it's no different from people being able to come into the court and stay a day or to go after 20 seconds. It's basically just a matter of open justice. And that is a hallmark of

our judicial system. But it has clear implications for the new technology of information.

Question: Do you see yourself as the radical judge on the High Court of Australia? Does that sometimes involve you in conflict with you colleagues?

Answer: I think it's for other people to put me into boxes and neat slots. Of course, I sometimes read the published estimates of me and of others. In some things I would say I am radical. I tried to express that idea when I was sworn in. My remarks are recorded in the *Australian Law Journal*²⁰. I endeavoured to counteract the large serving of self-satisfaction and self-praise that tends to occur on such occasions when a new judge is sworn in. I said that we could be proud of the law and of our institutions of justice. But that the law in Australia has not always been such a wonderful thing. Not always so splendid if you were a woman. Not always so wonderful if you were an Aboriginal Australian or Torres Strait Islander. Not always so great if you were an Asian Australian in the time of the White Australia policy. No so marvellous if you couldn't speak English in courts of law. Not so splendid if you happened to be a

20 (1996) 70 ALJ 269.

homosexual Australian or bisexual. Australian law has not always been sensitive to everyone's human rights. I have had a chance, through the experiences of my life, to see the law through the prism of human rights and international human rights law. I suppose that I have had more experience, in that regard, than any other Australian lawyer. I see things slightly differently for that reason. But I believe that the international dimension of Australian law is the way of the future. That all lawyers of your age will come to see Australian law through the prism of international human rights and international law generally.

On the other hand, in some things, I'm really quite cautious. Reassuringly so for the conservatives amongst you. For example, I'm not very enthusiastic about a change in the constitutional monarchy which is provided for in our Constitution. I think in a peculiar way, rather as the jury evolved and the way judges are appointed, the system enshrined in the Constitution, with an absent head of state, has a lot going for it. If you look around the world and you see the problems that heads of state often cause, there's a certain genius in our system in having an absent head of state. Constitutional monarchies also tend to be temperate polities. Anyway it's my point of view as a citizen.

So please don't put me in a box. Human emotions and thought and mind and philosophy are very complicated things. On some matters I could be radical. On some other matters I

could be quite conservative. Justice McHugh considers me irretrievably conservative in contract law. Where I go on your spectrum, or on Professor Blackshield's scaleograms, is for others to say.

Question: Don't you think that one of the problems of Australian law is that it is too concerned with property rather than with individual rights. The law's conception of itself is as a protector of private property rather than human dignity and liberty. Criminal law falls more heavily on the poor and the disadvantaged. Do you agree?

Answer: We are not alone in Australian society in providing for offences against property as well as offences against the person. People tend to be rather respectful of their person and to insist that they be protected by the law. But they also tend to be very possessive of their property. It's true that there are some crimes which fall more heavily on some groups in our society. I've made no secret, for example, that I think our current approach to drug laws is not always very rational. I'm hopeful that the recommendations in Justice Woods' recent Royal Commission report will at least receive a fair hearing from our political leaders and consideration by our society. Otherwise, we may just go on debasing our legal system with the involvement of lots of people in the criminal justice system who are either drug dependent persons or occasional recreational drug users. That's a large

human rights issue for the future. It is one for you to think about as lawyers and as citizens.

What we've got to consider in the criminal law is the redefinition of what it is that is so anti-social that we will punish it with the deprivation of liberty or the imposition of large fines and so on. These are issues which lawyers of today should certainly be concentrating on. Where appropriate, you should lift our voices. You have great advantages. You have skills and training. You have capacities of explanation and exposition. You can't just keep quiet where basic rights are involved. If you think that something is unjust and you feel strongly about it, and if it affects the human dignity of another person, you should lift your voice. That's your civic obligation and privilege. Drug law reform is one area in which I hope that you will interest yourself. But there are many more. Think freshly. Don't just think with the blinkers of the past on your mind. Alas, the law tends to produce people who are all too readily locked, unquestioningly, into the past.

The great challenge for us as lawyers entering a new millennium is to cherish our past and to respect legal authority and ancient principle. But also to keep our minds open to the possibility that either what was done by the law in the past was unjust then or that it's wrong now. If that is so, it is our civic duty by argument and persuasion, to move for the law's improvement. Sometimes, as lawyers, we can contribute at the

margin to such improvement. We can do so in our professional work. It's our vocation. Justice according to law. According to law. But justice too. That's our mission. It is the banner to which you, as young lawyers, have been called.