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JUDICIAL CONFERENCE OF AUSTRALIA

THIRD ANNUAL COLLOQUIUM

GOLD COAST, QUEENSLAND

SATURDAY, 7 NOVEMBER 1998

THE FUTURE OF COURTS - DO THEY HAVE ONE?

The Hon Justice Michael Kirby AC CMG

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TAKING THE LONG VIEW

Boasting goes against my grain. But the facts do not lie. With the recent retirement of Justice John Cahill, Vice-President of the Industrial Relations Commission of New South Wales, I am now the longest serving judge in New South Wales. With the retirement of Justice Ray Northrop, I am also the longest serving federal judicial officer. I am not sure, but I think that only Justice Bill Pidgeon, and (fifty seconds later) Justice Des Heenan who helped establish the District Court of Western Australia in 1970 and who now grace the

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

Supreme Court of that State, and Justice Alan Demack now of the Supreme Court of Queensland, have been in the judicial harness longer than I.

I was originally welcomed to the Arbitration Commission in December 1974. That body then included Justice Mary Gaudron, like me a Deputy President. However, prior to her appointment to the High Court, she interrupted judicial life by a return to the pleasures of the Bar, including as Solicitor-General for New South Wales. So it is very generous of young judges to invite an old-timer into their midst to contribute to this colloquium. Especially as the theme is "The Courts and the Future". It is a subject that requires optimism and rashness, given the perils of futurology¹ and the breathtaking speed with which changes are likely to happen².

Not long after I was appointed and moved to the Australian Law Reform Commission, a young advocate, spending a few years in the Scottish Law Commission, came to visit me in the Commission in Sydney. It must have been 1975 or 1976. Embarrassingly, he

1 F G Brennan, "Key Issues in Judicial Administration" (1996) 6 *Journal of Judicial Administration* 138; T Eichelbaum, "Key Issues in Australian and New Zealand Administration" (1996) 6 *Journal of Judicial Administration* at 147.

2 R Widdison, "Electronic Law Practice: An Exercise in Legal Futurology" (1997) 60 *Mod L Rev* 143 at 144.

has recently recorded the encounter³. He says that he asked me then about the future of the courts. He asserts that I responded with a question: "What makes you think they have one?" This is the kind of exchange you might expect between brash and naive law reformers. Looking back over a quarter of a century since I asked that question of the future Lord Mackay of Clashfern, Lord Chancellor of Great Britain, I can certainly say that the 1975 rumours of the impending early demise of the courts were greatly exaggerated.

The Australian Constitution, in its establishment of the federal Judicature, stands remarkably unchanged in the interval. All that has been altered in the text of Chapter III is the insertion in 1977 of provision for the retirement of federal judges⁴. Ray Northrop was the last life-appointment serving on the Federal Court. There are still a few "lifers" on the Family Court of Australia. None remain on the High Court⁵. But the most important developments, affecting the

3 Lord Mackay of Clashfern, "Do the courts have a future?" (1998) 10 *Amicus Curiae* 4 (Journal of the Institute of Advanced Legal Studies).

4 *Constitution Alteration (Retirement of Judges) 1977* (Cth) effecting an alteration to s 72 of the Australian Constitution.

5 The last serving Justice who had enjoyed life tenure was Sir Anthony Mason (1972) whose commission as a Justice merged in that of Chief Justice in 1987 and was then subject to the new retirement provision. The last Justice with life tenure to retire in office as such was Sir Ronald Wilson (1979-1989).

constitutional position of the courts in recent times have been in the decisions emphasising the essential independence of State courts as proper receptacles for federal jurisdiction⁶ and about the lingering controversy as to whether, with the consent of the Federal Parliament, State Parliaments can confer State jurisdiction on federal courts as in the cross-vesting legislation⁷. The heightened vigilance of the High Court to the requirements imposed on federal judges by Chapter III has been another theme⁸.

The really serious challenges to judicial independence in Australia in the past quarter century, have arisen from outside the constitutional and statutory texts. They have arisen from (1) the abolition of courts and tribunals and the non-reappointment to the new body of all members of the former body⁹; (2) the growing practice of some States of appointing acting and part-time judges

6 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

7 *Gould v Brown* (1998) 72 ALJR 375; 151 ALR 393.

8 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1. See also *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 612, 642, 666 (advisory opinions).

9 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1; cf. M D Kirby, "Abolition of Courts and Tribunals and Non-Reappointment of Members" (1995) 12 *Aust Bar Rev* 181.

instead of supplementing the permanent tenured judiciary¹⁰; and (3) the unprecedented, public and personal attacks on the courts and on individual judges, emanating from the Executive Government, the media and others who should know better¹¹.

Yet if you looked at the constitutional text and the day to day operation of the courts, you could be forgiven for saying that not a lot has changed in a quarter century, indeed much longer. Come ten o'clock, judges around the nation enter their courtrooms; everyone stands; and in a few minutes business goes on much as it did when I asked my impertinent question of James Mackay. Perhaps because of the increasing public, judicial and professional outcry, the abolition of courts and tribunals has abated somewhat. Attorneys-General have promised that acting and part-time judges are strictly a temporary expedient. Political calumny of individual judges seems to have receded lately. So would it be safe, looking into the future, to suggest that in the next quarter century everything will be much the same? Business as usual?

¹⁰ M D Kirby, "Acting Judges - A Non-Theoretical Danger", Address to Young Lawyers Conference, Sydney, 21 September 1998 to be published in (1998) 7 *Journal of Judicial Administration* (forthcoming).

¹¹ M D Kirby, "Attacks on Judges - A Universal Phenomenon" (1998) 72 ALJ 599. See also R Bader Ginsburg, "Judicial Independence" (1998) 72 ALJ 611.

A lawyer from Dickens' time, walking out of *Bleak House* into a modern Australian court on an ordinary day, would see relatively few changes. Same wigs and robes¹². Same elevated Bench and sitting times. Very similar basic procedures of calling evidence and presenting argument. Longer judgments: but still the same structure of facts, law and conclusion. Contrast, if you will, the astonishment of a physician from Guy's Hospital in London, from the middle of the last century, wandering into the electronic world of beepers and monitors, of CAT scans, genomic tests and automated diagnosis of a modern Australian hospital. We have made progress in the law and in the courts, including the past twenty-five years. But not as much as other professions. Will it stay this way?

RESISTANCE AND PROBLEMS

The picture I have painted is a little exaggerated. Electronic technology has arrived in Australian courts. It has brought in its train a number of changes. An engaging recent photograph in the *West Australian*¹³ showed the Full Court, with Chief Justice Malcolm and

¹² In the High Court of Australia wigs were discarded by the Justices and robes modified in 1990. The Federal Court of Australia has more recently abandoned the wearing of wigs. Wiglessness seems to be catching on in some other Australian jurisdictions.

¹³ 6 June 1998 at 5.

Justices Owen and Steytler presiding, in an appeal concerning a negligence claim against a major accounting firm. All the judges and barristers are pictured: robed and wigged in the traditional way. But all are engrossed in video-screens controlled by keyboards and laptops that would have astonished Dickens, the articulated clerk of earlier times.

Of all the Australian courts, the High Court of Australia has been foremost in its embrace of the new information technology. Witness the success of the video links for special leave and other hearings¹⁴; the instant availability of decisions on the Internet once delivered; the provision of copious electronic data about the Court and its cases through the Home Page on the World Wide Web of the Internet¹⁵.

A week ago I was duty judge between sittings of the Court. At 3 p.m., on a Friday afternoon, an urgent call from the Melbourne Registry indicated a proposed application for an injunction to restrain the Minister for Immigration and Multicultural Affairs from removing

¹⁴ The innovations arose out of G C Shannon, "Report on Visit to Supreme Courts of Canada and the United States by the Clerk of the High Court" (Sep/Oct 1986).

¹⁵ M D Kirby, "Change and Decay or Change and Renewal?" (1998) 7 *Journal of Judicial Administration* 189 at 192. The High Court's Home Page can be found at www.hcourt.gov.au

from Australia the next day a person who claimed refugee status. Ordinarily, video links are not established by the High Court between Sydney, where I was working, and Melbourne, where the applicant was in migration detention. But within half an hour, a Federal Court courtroom was available. The hearing began at four o'clock by video-link. By 5.20 p.m., the order was made¹⁶. Courts, high and low, are adapting their procedures to the new facilities.

Yet every writer in this field remarks upon the notorious inclination of lawyers to adhere to their old ways¹⁷; the cultural resistance of the legal profession to changes of things considered fundamental¹⁸; the psychological barrier which must be breached to raise the awareness of judges and lawyers of the technological engines of change¹⁹ and the imperative necessity to begin the process in law schools where new generations must learn the discipline of law with their hands on keyboards and their minds

16 *SE v Minister for Immigration and Multicultural Affairs*, unreported, High Court, 30 October 1998.

17 Widdison, above n 2, at 151.

18 Lord Justice Brooke, "IT and the English Courts" (1998) 9(2) *Computers and Law* 11 at 18.

19 F Lederer, "Technology Comes to the Courtroom and ..." 43 *Emory LJ* 1095 at 1096 (1994).

engaged with concepts of law and justice and not just a mass of data²⁰.

Even those who recognise the tremendous changes which information technology, in particular, will bring to the law and the courts voice concerns that the onrush to accept new technology should occur in a way harmonious with the basic mission of the law and the courts. This is the achievement, so far as possible, of just outcomes according to law by procedures which are manifestly fair²¹. Whilst automated information systems, in the next quarter century, will doubtless improve vastly the access of lawyer and layman alike to basic legal information²², legal training will be essential to finding the needles of relevancy in the haystack of the Internet. For the foreseeable future, judges and lawyers will remain the trained needle detectors²³.

20 H H Perritt, "Changing Litigation with Science and Technology - Video Depositions, Transcripts and Trials" 43 *Emory LJ* 1071 at 1088 (1994).

21 cf C Walker, "Fundamental Rights, Fair Trials and the New Audio-Visual Sector" (1996) 59 *Mod L Rev* 517 at 519.

22 P Samuelson, "The Quest for Enabling Metaphors for Law and Lawyering in the Informative Age" 94 *Michigan Law Rev* 2029 at 2054 (1996).

23 *Ibid*, at 2051.

Whilst welcoming the increasing use of evidence in electronic form, particularly in civil trials, more cautious observers insist upon the continuing role of the courts as a venue for the *public* resolution of serious conflicts - serious enough to have escaped diversion to the many systems of alternative and additional dispute resolution now availed of. The right to see in public a judicial decision-maker struggling conscientiously with the detail of a case is a feature of the court system which cannot be discarded, at least without risk to the acceptance by the people of courts as part of their form of governance²⁴.

It is one of the fundamental human rights mentioned in the *International Covenant on Civil and Political Rights*²⁵ that all persons, in the determination of any criminal charge against them or of their rights and obligations at a suit at law, "shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". Publicity is an inherent and essential feature of a court system conforming to such fundamental rights and freedoms. This principle has obvious implications for the right to

²⁴ A similar point was made by Chief Justice Gleeson in his address to the dinner of the Law Society of Western Australia, Perth, 21 October 1998.

²⁵ Art 14.1.

confront not only the judicial decision-maker but also witnesses and opponents²⁶.

In the High Court, we have noticed that advocacy in special leave hearings, conducted by video link, is generally briefer than that conducted in the physical presence of the Court. Statistical analysis denies that there is any advantage in the physical over electronic presence of the advocate. Yet technology will not, in the foreseeable future, replace advocacy. Some hope that it will never do so²⁷.

The growing tide of electronic data has had a significant effect in Australian courts. Recent studies suggest that some court users already regard courts as hostile, unfriendly, unintelligible and inaudible places; unpleasant to the lay consumer and to the public alike²⁸. Such studies warn us of the need for care in the introduction of new technology which may sometimes enhance the sense of remoteness of the court and the impersonal, disembodied and non-human features of a trial.

²⁶ Lederer, above n 19, at 1119.

²⁷ Brennan, above n 1, at 144.

²⁸ S Parker, "Courts and the Public", *AJJA* (1998). For commentary see "People 'treated like cattle' in hostile courts", *Sydney Morning Herald*, 5 September 1998 at 5. cf "Judges defend 'friendly' courts", *The Australian*, 7 September 1998 at 2.

Much of the pressure for the introduction of electronic media in the courts comes from the necessity to solve the concurrent increase in the volume of litigation occurring at the same time as there has been a real decrease in the funds expended on the courts and the business before them²⁹. Not only should judges be alert to the potential of technology to enhance throughput, monitor log jams and reduce inefficiencies. They also need to be aware that, unlike hospitals, courts are not dealing mainly with objective empirical phenomena. They are commonly dealing with issues of fairness, justice and ethics. They are judged not only by what they do but how they do it.

PREDICTIONS: THE ONGOING ELECTRONIC REVOLUTION

These cautionary words said, it seems safe to predict that many of the ways by which courts perform their functions in Australia will be changed quite radically in the next 25 years. Predictions of the paperless legal office have been made for so long, with no immediate success, that suggestions that courts of the future will be wholly paperless tend to be shrugged off³⁰. Yet informed observers

29 Perritt, above n 20, at 1083.

30 Widdison, above n 2, at 155.

watching the ever increasing rise of electronic filings in courts all over the world³¹ and the growing use of wired courtrooms as the norm, not the exception³², now suggest that in twenty-five years, "paper, like parchment today, will only be used for documents of special significance - and by hobbyists"³³. The paperless world will, unlike Godot, finally arrive. The High Court of Australia is already engaged on a project which, when security issues have been resolved, will permit lawyers (and indeed members of the public) to access online the public records about cases that are, or were, before the Court. As the shift to electronic filing in, and communications with, the courts increases, it seems inevitable that access of this kind will also increase³⁴.

The submissions made in cases have changed during my judicial lifetime. Non-oral submissions have evolved from virtually nothing to bare skeletal outlines and now to substantial text. This tends to shift the time of trials, and appeals, from open court hearings to the judges' private rooms where they can read five times more quickly written text that would otherwise take hours for oral

31 Brooke, above n 18, at 11. See also A Stanfield, "Cyber Courts" (1997) 17 *The Queensland Lawyer* 126 at 130.

32 Lederer, above n 19, at 1100.

33 Widdison, above n 2, at 155.

34 Brooke, above n 18, at 16.

presentation³⁵. But it is interesting to consider the future ways in which parties' submissions are likely themselves to adapt to the new media. Instead of plain text, it is probable that argument will increasingly use accessible side references to the evidence. The judge, reading argument, will not only have citation of a page of transcript as at present but, at his or her command, immediate access to the video record of the relevant witness giving the relevant testimony³⁶. Similarly, submissions to legal principle will provide optional access varying from references to constitutional or statutory provisions or fundamental rules through to more remote analogies and academic writing. Already in the United States the use of computer graphics at trials, to aid argument before juries³⁷, is commonly permitted. The use of computer aided simulation in support of the arguments of advocates is likewise common. It will become more so³⁸.

35 Perritt, above n 20, at 1087.

36 cf Brooke, above n 18, at 17-18.

37 Lederer, above n 19, at 1116-1117.

38 M Borelli, "The Computer as Advocate: An Approach to Computer-Generated Displays in the Courtroom" 71 *Indiana LJ* 439 at 452-454 (1996). cf E Goldstein, "Video-Technology in the Criminal Courts of the United Kingdom and Canada" (1989) 53(2) *Journal of Criminal Law* 215 at 231.

I have illustrated the way in which, in the High Court, video technology is used for special leave and interlocutory hearings. The big question in the coming quarter century is where the line will be drawn for such use. It is not at all uncommon nowadays for video recorded evidence to be admitted and used in Australian courts³⁹. Such testimony is by no means confined to the likes of President Clinton or Bill Gates. After much initial resistance, police now increasingly use video recorded interviews of suspects and complainants⁴⁰. Justice Estey of the Supreme Court of Canada has declared that the courtrooms of tomorrow will increasingly harness audio and video recordings in the efficient discharge of their functions⁴¹. But will this procedure, of recorded video film and live video links stop at case management hearings⁴²? At bail hearings, transmitted directly from the prison in which the applicant is held⁴³? In interlocutory conferences and tribunal hearings⁴⁴? In civil but not

39 See eg *Evidence Act* 1995 (Cth), s 48(1)(b). cf Perritt above n 20, at 1092.

40 Goldstein, above n 38, at 216.

41 D Williams, "Use of Video Recordings and Video Links by Courts and Tribunals" (1987) 17(2) *University of Western Australia Law Rev* 257 at 260.

42 Widdison, above n 2, at 160.

43 See eg *Supreme Court Act* 1970 (NSW), s 110A. Standfield above n 31, at 135.

44 Williams, above n 41, at 260.

criminal cases? Or, perhaps, in criminal cases carrying non-custodial or short custodial sentences⁴⁵? The great utility of such video-hearings cannot be doubted. It was demonstrated to me last week. Its demonstration is repeated every day in courtrooms in this continental nation⁴⁶. But where is the line ultimately to be drawn between the necessities of a trial which is truly public and one which is fragmented, disjointed, taken in bits and pieces by electronic recordings and then mulled over in private by the judge who may never have seen, or be seen by, the parties and may never have seen, or been seen by, the witnesses?

In these developments, we are witnessing, once again, the triumph of the notions of equity over the notions of the common law⁴⁷. Whereas the common law insisted on the continuous oral trial held before a jury in public with no appeal, equity permitted fragmented hearings and ultimately was the first to embrace appeals. With the growing abolition of juries in Australia, the judge of the common law, with his limited function to instruct the jury on legal matters, has given way to the judge of the Chancery type:

45 Perritt, above n 20, at 1083.

46 Perritt, *loc cit* refers to the particular use of this medium in asbestos cases where urgency is often required in the gathering of evidence.

47 Perritt, above n 20, at 1085.

sitting alone without a jury, dealing with affidavits now to be in electronic form; and adopting a much more proactive role both with witnesses and lawyers. Equity's procedural triumph continues to gather pace. It continues to take the procedures of common law countries into a mode more similar to that of the countries of the civil law (for equity was always closer to that tradition). Yet there was a certain genius in the common law's insistence on the continuous public trial. It had a social and political utility. As we pursue the abandonment of that tradition, we must at least be aware of what we are doing.

MACHINES AS JUDGES

There is no chance that in a quarter century's time, judges either of trial or of appeal, will have been replaced by thinking machines: artificial legal intelligence⁴⁸. Yet it seems unlikely that the courts will be left completely unaffected by this development which has been called "perhaps the most intellectually stimulating issue to have arisen from the advent of computer technology"⁴⁹. Certainly, intelligent systems have been developed which are in common use

48 R Susskind, "Expert Systems in Law: A Jurisprudential Approach to Artificial Intelligence and Legal Reasoning" (1986) 49 *Mod L Rev* 168, 170.

49 *Ibid*, at 170.

in other professions. For example, it is quite common for medical practitioners to feed into computers data of various kinds and then to procure detailed advice on diagnosis and therapy⁵⁰. Highly developed programmes exist for the diagnosis of glaucoma and other tricky conditions. When made available to a general practitioner, these systems enhance his or her skill to that of an expert in the field. Similarly, intelligent systems have been devised to offer advice on the location of ore deposits based on geological data fed to a computer⁵¹. This system is now in common use throughout the world. It has discovered fields worth hundreds of millions of dollars. Is it impossible to think that courts, and lawyers more generally, could enhance the accuracy and precision of their decision-making by intelligent systems fed by appropriate experts with the relevant data? Rudimentary forms of legal reasoning in corporate tax law were developed as long ago as 1972⁵². Systems have also been developed which operate on the German Civil Code, the British *Nationality Act*, welfare law and so on⁵³. Richard Susskind, of Balliol College Oxford observes⁵⁴:

50 *Id*, at 174 referring to CADUCEUS and CASNET.

51 The PROSPECTOR system.

52 TAXMAN Project. See L J McCarty, "Reflections on TAXMAN: An Experiment in Artificial Intelligence and Legal Reasoning" 90 *Harvard L Rev* 837 (1977).

53 Susskind, above n 48, at 180.

54 *Ibid*, at 181.

"Of fundamental importance for workers in this field (despite out present optimism) is the fact that, for almost fifteen years now, enquiries into the possibility of knowledge-based computer assisted legal reasoning have been undertaken and yet have yielded far fewer positive results than comparable efforts in other disciplines. It might seem intuitively obvious that this lack of success stems from the differences between the nature of legal reasoning and the nature of other enterprises such as diagnostic illnesses, mineral prospecting and inferring chemical structures".

Yet Susskind remains optimistic⁵⁵:

"There can be little doubt ... that the successful construction of expert sytems in law will be of profound theoretical and practical importance to all of those whose concern is the law".

Pending the adaptation of legal and judicial decision-making to intelligent systems, there are steps on the way that are obvious and just around the corner. The advance of voice recognition continues apace. Within a decade, it seems safe to predict, judges and lawyers will have sophisticated information systems which respond to their voice commands. "Tell me the latest Australian decisions on causation in the law of negligence. Follow this up with recent English and Canadian decisions?" The computer voice will respond at once with the then equivalent to *Chappel v Hart*. Other case law will roll out whilst the judge or lawyer takes notes or does other

⁵⁵ *Id*, at 194.

things. This is not futurology. It is almost with us. Shops in the United States sell rudimentary voice command toys. Those children, when they become lawyers, will expect nothing less.

Against the backdrop of the breathtaking developments of technology which we have seen, advancing at a galloping pace in the last twenty-five years, it would be a bold observer who would deny the possibility of artificial intelligence enhanced lawyering and judicial decision-making in the new millennium. The dematerialisation, omnipresence and malleability of data in electronic form - including legal data⁵⁶ - make it virtually certain, as it seems to me, that courts of the future will embrace, and themselves in turn be affected by, artificial intelligence. How, when and where this will happen is, as yet, unrevealed. There is no computer (and none is on the drawing boards) which can be programmed with the *will* to do justice and the capacity to respond to the infinite variety of differential facts which make the mechanical application of legal rules to human situations ordinarily objectionable⁵⁷. A lawyer's role is not simply that of delivering an outcome. It includes the old-fashioned function of helping another human being, including in

⁵⁶ Widdison, above n 2, at 144.

⁵⁷ D Hunter, A Tyree and J Zeleznikow, "There is Less to This Argument Than Meets the Eye" (1993) 4 *J Law and Info Science* 46 at 56-58.

situations of great anxiety, distress and inconvenience⁵⁸. Courts also partake of that role. Their functions are not limited solely to efficient throughput or diversion of ever increasing caseloads. Their tasks extend to the public display of the ultimate commitment of an essential institution of government in our form of society to the dual objectives of ordered lawfulness tempered by human notions of justice and fairness.

One of the most important books which gives those who operate in the courts today a glimpse of the future is written by Richard Susskind. It is titled *The Future of Law*⁵⁹. He begins the book with a metaphor which has lessons for judges and their courts.

At a colloquium of the worlds leading manufacturers of electronic power tools, an image of the latest version of a gleaming electric drill is thrown on the screen. The executives are asked whether this is what their companies sell. They nod wisely. But then they are shown a photograph of a hole, neatly drilled in the wall. The colloquium leader corrects the audience. "That is what we sell". Few indeed are the hardware customers who are passionate about a drill. They are concerned with what drills can do.

58 Widdison, above n 2, at 150.

59 Clarendon, Oxford, 1996 (paperback, 1998).

We in the courts must also learn this lesson. Cocooned in the robes and books and traditions of centuries, it is easy for us to become infatuated with our equivalent of the gleaming drill. It is natural for this to happen at a time when we are experimenting with shining new addictions: case management, ADR, video conferencing and electronic data. But in the end, we must keep our eyes fixed on our equivalent of the hole in the wall. Some at least of the countries which are foremost in the embrace of electronic courtrooms, have left themselves open to criticism of subservience to governments which pay huge judicial salaries and decorate the courtrooms with multimedia electronics. In the end, the abiding judicial dedication to the fundamental rationale of courts in a civilised society must be our guide. To be competent, independent and impartial. And to be performing functions in manifestly fair and public hearings⁶⁰.

Lawyering will change. Technology will advance. Our successors will know the future which we can but see as through a glass darkly. They will see it face to face. But I trust that the abiding principles will continue to govern our courts. And that Australia's judges and lawyers will never lose sight of the hole in the wall.

60 ICCPR Art 14.1