

THE UNIVERSITY OF NEW ENGLAND UNION

ARMIDALE 22 MAY 1998

SIR FRANK KITTO LECTURE

KITTO AND THE HIGH COURT OF AUSTRALIA -

CHANGE AND CONTINUITY

The Hon Justice Michael Kirby AC CMG

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TIMES OF TRANSITION

Today, in Canberra, Australia witnessed a ceremony symbolic of the change and continuity of its basic institutions. A new Chief Justice of Australia, the Honourable Murray Gleeson AC, was sworn, once again, to the oath of allegiance and the judicial oath¹. He is the eleventh Chief Justice of our country. The ceremony followed a settled order. As many of the surviving Justices of the High Court of Australia as could attend, in company with the Chief Justices of the

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

1 The Sir Frank Kitto Lecture 1998 was delivered at the University of New England, Armidale, on the day on which Gleeson CJ was sworn as Chief Justice of Australia.

other Australian courts federal and state, were there to witness a new Justice (and on this occasion a new Chief Justice) take his seat.

In the ceremonial courtroom, under the portraits of the three original Justices of the Court - Chief Justice Griffith and Justices Barton and O'Connor - one is reminded of the continuity of the High Court of Australia and of the law in this country. It is inevitable that one should think about the great spirits of the law who have gone before and of the blessings of our constitutional arrangements. Despite faults, those arrangements still secure to us, the citizens of Australia, basic advantages which are not enjoyed by most people in the world. I refer to a stable and written constitution; a legal system, inherited from England, which is generally defensive of freedom; and independent judges who cannot be told what to do by angry governments, powerful business or union interests, media barons or abusive mobs. At such a moment in our nation's history, it is right to re-dedicate ourselves to the improvement of our constitution and the institutions of Australian government. It is also right to reflect upon the relatively small number of people who have been privileged to serve on the country's highest Court: as guardians of the Constitution, expositors of the law and protectors of justice in Australia under the law.

Judicial biographies in Australia are as rare as hen's teeth². Even famous judges, who have led interesting and varied lives, pass without a proper record of their decisions and intellectual and personal struggles. So it is with the Right Honourable Sir Frank Kitto AC KBE, Justice of the High Court of Australia from 1950 to 1970. He is famous in this University as its Chancellor from 1970 until 1981. He settled in the Armidale District after his service on the High Court concluded. It is here that he retired with his wife Eleanor and, as he put it, devoted his time (apart from working a small grazing property) to "a mass of reading that I had had to put aside through the years of my professional life"³. He described this reading as ranging over subjects "from history and biography ... and philosophy to fiction, both light and classical". He even spoke of the enjoyment of selected programmes of television; although one suspects that his viewing was probably connected with his duties in late years as foundation Chairman of the Australian Press Council rather than a quest for enlightenment - generally elusive on the small screen⁴.

2 There are three recent biographical books on Justice Lionel Murphy. See for example J Hocking, *Lionel Murphy - A Political Biography* (1997) reviewed (1998) 72 ALJ 162. See also Chief Justice Barwick's autobiographical work *A Radical Tory* (1995).

3 Quoted in Australian Press Council News, August 1993 at 8.

4 *Ibid.*

Sir Frank Kitto died on 15 February 1994⁵. He wrote, in an oft-quoted essay⁶:

"We must look straight in the face the fact that in spite of all our care and all our toil our judgments are not likely to make our names in history. If we are read by posterity at all it will be only by the posterity of the near future. The reward of judicial work is not, except for the great, any degree of lasting fame; and you will agree, I am sure, that it ought not to be even a question in the judge's mind as he laboriously does his job".

Clearly, Kitto thought that this was the fate of all judges: even of his great and much admired Chief Justice, Sir Owen Dixon. Recording "some recollections of Sir Owen Dixon"⁸ in 1986, he said⁹:

"We can hardly expect that his fame, great among lawyers though I believe it will always be, will continue to be widely celebrated by generations of Australians who did not know him for the mighty man that he was".

With these thoughts in mind, and acknowledging the impermanence of fame and that it is inevitable that later generations

5 See R P Meagher, "Champion of Justice, Knowledge" - Obituary of Sir Frank Walters Kitto AC, KBE, *Australian*, 18 February 1994 at 13.

6 F W Kitto, "Why Write Judgments?" (1992) 66 ALJ 787.

7 *Ibid.* at 799.

8 (1986) 15 *Melbourne University L Rev* 577 at 578.

9 *Ibid.* at 578.

of lawyers will not have known Sir Frank Kitto nor read as often perhaps as they should his opinions in the High Court, it is fitting that we should pause and reflect on his life. On a day such as this, we should seek to put his life into the historical context of the High Court as an institution. We should also endeavour to derive from his life lessons for Australian lawyers and for the Australian judiciary today.

FRANK KITTO: LAWYER AND JUDGE

Frank Kitto was born in Melbourne on 30 July 1903. I do not know about his mother because, in the way of those times, it was common only to record in published information details about the father. His father, James W Kitto, rose to become the Deputy Director of Posts and Telegraphs in New South Wales and thus a federal office-holder of middle importance. For his service to the community, the father was made an Officer of the Order of the British Empire (OBE). The young Frank became a student at the North Sydney Boys' High School, one of the premier selective public schools in New South Wales. Whilst completing his studies at the University of Sydney in Arts and Law, he worked during the day at the New South Wales Crown Solicitor's Office. Part-time work did not prevent him from acquiring his Law degree with First Class Honours.

So prepared, the young Frank Kitto was admitted to the Bar of New South Wales in 1927. He embarked upon a legal practice which took him mainly into equity with, in due course, a large number

of taxation cases and some constitutional work. The year after his admission to the Bar, at the age of 25, he wrote the first published contribution of his which I could find expressing a legal opinion. It is an article "Are Mortgage Debts Immovables?" It is found in the *Australian Law Journal*¹⁰. The article reveals a deep interest in, and fascination for, land law which, from the start, has always been a central part of the English legal system from which ours is derived. The writing style of the young Kitto was unmistakable for those who, as lawyers and students of my generation, came to know Kitto's opinions in the High Court. It was brief, self-confident - with a sweep of English cases and a passing glance at decisions in New Zealand and Canada¹¹. There is even a mention of "the public policy of the *Mortmain Acts*"¹², although he was not to become much enamoured of needless examination of judicial policy.

Some might regard the subject of this first essay as dry as dust. But Kitto already knew, at the age of 25, that land law was the fulcrum of the law of any civilised country. Moreover, mastering it, and its intricacies, was essential for the arduous technical work which is the lot of a leading lawyer. Those who would rise high in the

¹⁰ (1928) 2 ALJ 85.

¹¹ He referred to *Re O'Neill* [1922] NZLR 468 and called Salmond J's judgment "characteristically lucid".

¹² (1928) 2 ALJ 85 at 87.

law must train and discipline their minds. They must command its black letters whilst at the same time understanding its wellsprings, its history, its authority and its broad directions.

Kitto became Challis Lecturer in Bankruptcy and Probate Law at the University of Sydney and held that post from 1930 to 1933. In his professional life and whilst still at the Junior Bar he appeared as Counsel for the New South Wales Attorney-General in *Trethowan's* case¹³. That litigation concerned the Bill introduced into the New South Wales Parliament by the Government of Premier Jack Lang to abolish the New South Wales Legislative Council. The case went through the High Court and took the young Kitto to the Privy Council in 1932¹⁴. His efforts were not rewarded with curial success. But as the young barrister looked around the Board room of the Privy Council in London, it is interesting to speculate whether it ever crossed his mind that in less than 30 years he would be sworn of the Privy Council as, in those days was commonly the case for Justices of the High Court of Australia.

Soon after taking Silk in 1942, Mr Kitto KC was briefed by the Trustees of the Art Gallery of New South Wales to defend a

¹³ *Attorney-General (NSW) v Trethowan* (1930) 31 SR (NSW) 183; (1931) 44 CLR 394.

¹⁴ (1932) 47 CLR 97 (PC).

challenge by the Attorney-General on the relation of two artists, Mary Edwards and Joseph Walinski. They contested the award of the 1943 Archibald prize to Mr William Dobell. The challengers were represented by Mr Garfield Barwick KC. They contended that the winning entry, depicting the artist Joshua Smith, was not a "portrait" (as John Feltham Archibald's will required) but a caricature which distorted, and did not portray the likeness of, the subject. The story of the case has recently been re-told by Chief Justice Phillips of Victoria¹⁵. It was a mighty tussle between two brilliant lawyers.

Kitto prepared the defence "with great care". Dobell described his successful performance as "brilliant"; but Dobell was shattered by the courtroom experience over his art. The challenge was dismissed. The relators were ordered to pay the Trustees' costs. Later Dobell's portrait of Joshua Smith, like so many others which he executed, came to be regarded as a masterpiece. Sadly, it was greatly damaged by a fire in 1959, although later submitted to a controversial restoration. In recent weeks it was sold at auction in Melbourne for \$222,500¹⁶. Kitto the advocate, had bested Barwick, the most fashionable Silk in the nation. He had also upheld artistic freedom against the orthodox who wished to stamp on portraiture a

¹⁵ J H Phillips, "Barwick v Kitto" (1997) 71 ALJ 832.

¹⁶ *Herald Sun* (Melb) 29 April 1998 at 5.

single concept which neither art, nor law, found congenial. Kitto - a man of generally orthodox legal and social persuasions - was later, in his most important decision on the High Court, to defend the politically unorthodox against those who attempted to bring on their heads the full weight of the law.

During the period that followed the Dobell case, Kitto became involved in some of the most important litigation of the time. In many of the cases he appeared against Barwick¹⁷. In some, he was led by Barwick¹⁸. In the important *Bank Nationalisation Case* in 1948-49, he once again went to the Privy Council, this time as a leading Silk and in the same cause as Barwick. They worked together in a constructive way and Barwick later paid tribute to Kitto's great contributions to the respondent banks' arguments¹⁹. Commentaries suggest that the success of the banks' position resulted, in no small way, from Kitto's "masterminding of content and strategy"²⁰. Such a success in defeating the prized legislative scheme of the Chifley

17 For example *Arthur Yates and Co Pty Ltd v Vegetable Seeds Committee* (1945) 72 CLR 37 at 50.

18 For example *Grace Bros Pty Ltd v The Commonwealth* (1946) 72 CLR 269.

19 *Bank of New South Wales v The Commonwealth (Bank Nationalisation Case)* (1948) 76 CLR 1; *The Commonwealth v Bank of New South Wales* (1949) 79 CLR 497 (PC) [1950] AC 227 (PC). See G E Barwick, *A Radical Tory*, 1995, 71.

20 People in Government, "The Right Hon Sir Frank Kitto KBE" (1968) (October) *Management Newsletter* at 6.

Labor Government could not have been better timed for Mr Kitto KC. In December 1949, at the federal election, the Labor Government was swept from office. A new Government under Mr Robert Menzies KC was returned to power with a large majority.

As sometimes happens, the return of the Menzies Government produced two long awaited judicial retirements from the High Court. On 31 January 1950 Sir Hayden Starke, who had served since 1920 resigned. This was but seven weeks after the election of Mr Menzies. Starke's seat was filled, in February 1950, by Mr Justice Wilfred Kelsham Fullagar, a Judge of the Supreme Court of Victoria. Fullagar was to become one of Kitto's most admired colleagues²¹. Kitto wrote of Fullagar's capacity to write with "limpid simplicity and classical clarity that conceals profundity". Then, on 3 May 1950, Sir George Rich, a Justice of the High Court from 1913 resigned. We will never again see a Justice who serves for 36 years, as Rich did. Kitto's hour had come. A week later he was appointed the eighteenth Justice of the High Court²². According to the contemporary notes in the *Australian Law Journal*, his appointment was "received with pleasure and satisfaction by the profession"²³. It must also have been something of a surprise for he

21 (1992) 66 ALJ 787 at 796. See also 792.

22 (1950) 24 ALJ 21.

23 *Ibid.*

was then aged only 47 years. Commentators observed that "no two judges could have been temperamentally more dissimilar" than Kitto and Rich.

At that time of Kitto's appointment, Justices of the High Court enjoyed life tenure. So the young Kitto had before him the potential of an extraordinarily long service as a judge of the nation's highest court. At his welcome in the courtroom at Darlinghurst, which then served as the Sydney seat of the High Court, he said²⁴:

"We are all in our several ways the servants of a great and fast growing nation. Its future will be influenced in no small degree by the quality of the work we do in upholding the rule of law and proving its worth and effectiveness in the development of a nation in whose righteousness must lie its greatness".

The first case in which Justice Kitto participated, which I can see in the published records, was an application for special leave to appeal heard on 8 June 1950²⁵. There may have been other earlier cases which were not reported in those more discerning times. The first reported decision in which his name appears as a Justice is *Thompson v Randwick Corporation*²⁶. That was a case involving

²⁴ (1950) 24 ALJ 45.

²⁵ *Collins v Hill*, unreported, McTiernan and Kitto JJ, 8 June 1950 noted (1950) 80 CLR 667.

²⁶ (1950) 81 CLR 87.

resumption powers of a local authority in New South Wales. It was heard in August and with swift efficiency decided a month later. The appeal was allowed. It had come from a single judge of the Supreme Court of New South Wales (Mr Justice Roper) before whom Kitto would often have appeared and undoubtedly would have admired). A joint judgment was published by the High Court²⁷ in which Kitto participated. He was later to write of his mistrust of joint judgments considering that "on balance, the writing of individual judgments tends to produce the better work"²⁸.

It did not take Kitto long to embark upon the judicial tasks that fell to him. Three volumes of the *Commonwealth Law Reports* after his appointment was announced²⁹, he was contributing his opinion to one of the most important cases ever to come before the High Court of Australia and probably the most important that Kitto was to decide during his service on the Court.

KITTO AND THE COMMUNIST PARTY CASE

²⁷ Williams, Webb and Kitto JJ.

²⁸ (1992) 66 ALJ 787 at 797.

²⁹ (1950) 80 CLR iv.

It is difficult for Australians today to appreciate the courage and integrity that lay behind the decision of the High Court on 9 March 1951 in *The Australian Communist Party and Ors v The Commonwealth*³⁰. . . In order to understand the *Communist Party Dissolution Act* 1950 (Cth), it is necessary to realise that the Menzies Government had won a popular mandate based upon genuine fear of many people in Australia about the perceived advance of communism. Recently, there was shown on Australian television a programme, which included interviews with Australian servicemen who survived the United Nations "police action" in Korea. The servicemen recalled the fears of communism, as did the contemporary and rather bellicose *Movietone News* reproduced in the programme. The fears were not entirely groundless. We were not then to know that the Soviet Union would collapse, the Berlin Wall, later erected, would fall and that the most enduring and novel political experiment of the 20th century would lie in ruins before the century was out. At the time of the Court's decision, the defeat of Fascism and of the Japanese invasion, the conquest of Central and Eastern Europe by the Soviets, the Berlin Blockage, the revolution in China and the invasion of Korea seemed to point to significant perils

³⁰ (1951) 83 CLR 1 at 271. For a description of the similar concerns of the British Labor Government at the time, see P Deery, "'A Very Present Menace'? Attlee, Communism and the Cold War" (1998) 44(1) *Australian Journal of Politics and History* 69.

for our own peaceful country, always a little fearful because of its White Australia policy, anxious about racial purity seen as constantly at risk from the populous North.

It is in this context that the Menzies Government's Act has to be understood. It purported to declare the Australian Communist Party unlawful and to dissolve it. It provided for "declarations" to be made, by an instrument published in the *Commonwealth Gazette*, in respect of persons who thereby suffered various significant civil disabilities³¹. It was a drastic piece of legislation. Unsurprisingly, the Australian Communist Party challenged the Act's constitutional validity in the High Court. There was no piece of legislation more important to the newly elected Government; nor any which it had a clearer mandate from the people for enactment by the Parliament. The Government relied upon the incidental power, the defence power and the power of the Executive Government under the Australian Constitution to sustain the law. It declared that the legislation was necessary "for the preservation of the Commonwealth and its institutions from internal attack and subversion". It sought to support the constitutionality of the Act by reliance on recitals in the Preamble to the Act. By these, the Parliament purported to describe the perilous circumstances which justified the enactment and to state

31 The terms of the Act are set out in a footnote on pp 1-8 of the report.

them as facts determined by the Parliament for the Court and everyone else concerned.

The legal team for the Commonwealth, upholding the Act, was led by Mr Barwick. It included two additional future Justices of the High Court (Taylor and Windeyer), as well as six junior counsel all of whom went on to high judicial office. The leading counsel to challenge the legislation was Dr H V Evatt KC, a past Justice of the High Court. He appeared for the Waterside Workers' Federation of Australia, the predecessor of the Maritime Union of Australia, and for the Federated Ironworkers' Association. It was one of those great constitutional cases which tests the fidelity of our national institutions and the strength of our Constitution. Kitto had not sat on the Court for even six months when the argument in the *Communist Party Case* began in Sydney in November 1950. Argument continued up to 19 December 1950 when the Court reserved its decision. The judgment, delivered in early March 1951, came as a tremendous shock to the Government and, probably, to the majority of the nation. Only Chief Justice Latham upheld the validity of the Act. Justices Dixon, McTiernan, Williams, Webb, Fullagar and Kitto struck it down.

Against the background of Kitto's career which I have briefly described, it may have been thought (although never said in those

more graceful days) that Justice Kitto was a "capital C conservative". His skills were in black letter law. He was known to be a "resolute opponent of ... rogue reformers who would lay impious hands on the ark of the law"³². He had just succeeded in a substantial brief for the banks in striking down the nationalisation scheme of the former Labor Government. Yet in less than a year, he performed his function as a judge of our highest Court, in accordance with his understanding of the law and the Constitution precisely and only as his learning and conscience dictated. Such actions present an important warning to those who try to stamp on judges the labels that are invented for politics and popular discourse where the rules are more fluid and where personal inclination generally reigns over abiding principle.

Kitto's judgment in the *Communist Party Case* is written in his characteristic style. No help whatever is provided to the reader by way of headings or layout. The text is dense (as was the common style at that time). The solution to the problem was to be found in an analysis of past decisions. Not for Kitto bold conceptions about the nature of the Australian polity which the Constitution established. Not for him the ultimate subservience of the Federal Parliament to

³² As he wrote in the foreword to the first edition of R P Meagher, W C M Gummow and J R F Leane, *Equity Doctrines and Remedies* (1975) at vi.

the people of the nation who made the Constitution³³. His judgment is silent on any limitations imposed by implied rights or the structure of the document. But Kitto, for one, was not going to surrender his judicial analysis of the facts to accept as fact a recital of them by the Parliament in the Preamble to the Act³⁴:

"Some facts relating to the Australian Communist Party are alleged in the recitals in the preamble to the Act, and others may be said to be implied by the word "communist" in the name of the Party. Such facts are in their nature controversial, and evidence which might be adduced with respect to them in the present litigation could not enable findings to be made which would necessarily be proper in other litigation challenging the validity of the Act. But facts of this kind, even if they could be conclusively established, do not go to the question of power but go only to the question whether this legislation would, in practical result, conduce to an end within power".

Unusually, Kitto proceeds to talk directly, and in the second person, to the reader of his reasons³⁵:

"Turn to facts concerning the character, objects, activities or propensities of an association, which is made the specific subject of a law, and you turn away from the relevant enquiry; you are looking no longer at

33 Cf *McGinty v Western Australia* (1996) 186 CLR 140 at 243 per McHugh J. Cf M D Kirby, "Deakin, Popular Sovereignty and the True Foundation of the Australian Constitution" (1996) 3(2) *Deakin L Rev* 129; H C A Wright, "Sovereignty of the People - A New Constitutional Grundnorm" (1998) 26 *Federal L Rev* 165.

34 (1951) 83 CLR at 277.

35 *Ibid*, at 278.

the legal operation of the law but at the practical results likely to follow in the train of its operation; you are concerning yourself, not with power, but with matters which provide a reason for a purported exercise of power".

When it came to the substantive provisions of the Act, Kitto was no more content to surrender judicial supervision to the Executive than he was to a recital in a Parliamentary Preamble³⁶:

"I find it impossible to attribute to the legislation any other intention than that the Governor-General may exercise his power with complete immunity from judicial interference".

This, and other statements in his opinion, indicate the insistence of Justice Kitto upon a principle fundamental to the rule of law in any country. No provision enacted by the Parliament under the Constitution could be unexaminable by the courts of this land. Even the great power of the Parliament and of Government had to submit, ultimately, to the test of legality. This decision was a ringing assertion of Thomas Fuller's cry three centuries earlier: "Be you ever so high, the law is above you"³⁷. The logic of Kitto's reasoning is compelling. One by one he demolishes the key provisions of the *Communist Party Dissolution Act*. And in the end, "the remaining

³⁶ *Ibid.* at 280.

³⁷ Quoted in *Gouriet v Union of Postal Workers* [1977] 1 QB 729 at 762 per Lord Denning MR.

sections of the Act cannot stand by themselves and are therefore invalid"³⁸. The essence of it is found in his aphorism³⁹:

"There is an essential difference between, on the one hand, a law providing for the dissolution of associations as to which specific facts exist and, on the other hand, a law providing specially for the dissolution of a particular association".

Kitto was thus saying that, in Australia and under its Constitution, people could be punished or disadvantaged by law, made within power, for doing things previously declared unlawful. But not for simply being, or joining, an association or holding opinions shared by other members of the association. Action and antisocial conduct could properly attract legal regulation. Thought and free association, as such, would not.

The vindication of this conception of the Australian Constitution was subsequently endorsed by the people of the nation when they voted on a proposal to amend the Constitution to overcome the High Court's decision⁴⁰. The total "yes" vote represented 48.75% of the

³⁸ *Communist Party Case* (1951) 83 CLR at 282.

³⁹ *Id.* at 278.

⁴⁰ The referendum was held on 22 September 1951. See A Blackshield, G Williams and B Fitzgerald, *Australian Constitutional Law, Theory, Commentary and Materials*, (1996) 970. G Henderson, *Menzies' Child - The Liberal Party of Australia*, 1998 (revised) 114ff.

electors voting. The total "no" vote was 49.85%, the balance being informal votes. The referendum was carried in Queensland (55.21%), Western Australia (53.98%) and at the last minute in Tasmania (49.28% yes as against 48.77% no). But it failed to secure the constitutional majority of electors throughout the nation and in a plurality of States⁴¹. The High Court of Australia before and since has had many, many important cases. More will come. But none could be more important than the decision in the *Communist Party Case*. There is a certain irony in the fact that legislation bearing some similarities to the Australian statute was upheld at about the same time by the Supreme Court of the United States of America⁴². This was so despite the ringing words of the Bill of Rights and the long tradition of judges in that country looking at the broad picture of power and liberty. In this particular, at a critical moment, a judge steeped in mortgage debts, adhering to the doctrine of strict legalism proved a more valiant, and certainly a more effective, guardian of liberal constitutionalism than his American counterparts. Kitto shared

41 Constitution, s 128.

42 *Dennis v United States* 341 US 494 (1951) Vinson CJ for the Court; Black and Douglass JJ dissenting. By a vote of 6 Justices to 2 the Supreme Court upheld the constitutional validity of the *Smith Act* (Title I of the *Alien Registration Act* 1940 (US)). The decision was later modified, but not expressly overruled, by *Yates v United States* 354 US 298 (1957). After *Yates* no further prosecutions were brought under the *Smith Act*.

at least this much of the philosophy of his professional rival Barwick who once said⁴³:

"The important thing is that liberty is not necessarily secured by verbal formulae, as in a Bill of Rights, however precise in their expression. Rather, it is an independent judiciary, by developing and applying the principles of the common law with its emphasis on the essential importance of the individual and the citizen's duty to his neighbours, its insistence on the observance of natural justice where the citizen is likely to be affected in person or property and the use of habeas corpus in relation to physical restraint and requiring the executive and legislative arms under their allotted limits, which will ensure that tyranny does not gain sway".

On this occasion Barwick, the advocate, succeeded in persuading only one of the seven Justices to uphold the Act. Kitto was true to the bias of the common law. He would have said that he merely construed the language of the Constitution and found no power that supported the federal Act. It was therefore null and void.

LAW AS SYLLOGISM

Sitting in the High Court, with cases read, and principles reminded, every day, it is common to have the opinions of the judges of the past paraded in support of the propositions advanced for the

43 G E Barwick, *The Radical Tory*, cited by Brennan CJ (1997) 187 CLR vii.

litigants of the present. Kitto's judgments are often read. Recently, in the *Hindmarsh Bridge Case*, both the majority and the dissenter⁴⁴ called in aid Justice Kitto's explanation of the way in which the operation and effect of a law define its constitutional character. In this way, legal ideas put on paper more than 30 years earlier contribute to the solution of contemporary legal problems. The insights of the past guide our way through the dilemmas of the present.

If one passage stands out as most frequently cited of all of Justice Kitto's opinions it is probably that in which he examined the "borderland in which judicial and administrative functions overlap"⁴⁵. It may seem a tedious question. Kitto admitted that it was impossible to "frame an exhaustive definition of judicial power"⁴⁶. But undaunted, he offered his own approach which is one frequently followed⁴⁷:

44 See *Kartinyeri v The Commonwealth* [1998] HCA 22 at 7 per Brennan CJ and McHugh J, and at 119 per Kirby J (dissenting). See also at 43 (fn 63) and 46 (fn 65) per Gaudron J referring to Kitto J's judgments in the *Communist Party Case* and *Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 205 at 225-6.

45 *Labour Relations Board of Saskatchewan v John East Ironworks Limited* [1949] AC 134 at 148.

46 *The Queen v Trade Practices Tribunal; Ex parte Tasmania Breweries Pty Ltd* (1970) 123 CLR 361 at 373.

47 *Ibid*, at 374.

"Thus a judicial power involves, as a general rule, decisions settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an enquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges persons between whom it intervenes, to observance of the rights and obligations of the application of law to facts as shown to exist".

This was Kitto's syllogistic view of law. It was a view in harmony with that of Chief Justice Dixon whose *dictum* about complete legalism was one that Kitto wholeheartedly endorsed. Judges were there to find facts. They were there to define the applicable law. The application of the law to the facts would produce a result that was clear and binding on those involved and on all persons in the society ruled by law.

For Kitto, law and the Constitution were not malleable. Not for him judicial scaleograms and theories about pragmatic influences on the psychology and sociology of the judge. His notion of federalism was one of balanced and cooperating forces living together in the

one polity. Arguments about inconvenience fell on deaf ears. In the *Airlines of New South Wales Case [No 2]*⁴⁸ he said:

"The Australian union is one of dual federalism, and until the Parliament and the people see fit to change it, a true federation it must remain. The Court is entrusted with the preservation of constitutional decisions and it both fails in its task and exceeds its authority if it discards them, however out of touch with practical considerations or with modern conceptions they may appear to be in some or all of their applications".

Denouncing malleability and the suggested influence of social forces was a recurring theme of Kitto's High Court opinions. Kitto was resistant to anything which he perceived as excessive judicial alteration of the law. Calling it "development" and referring to "changing times" did not make the alteration more palatable to him. In one case⁴⁹ he took pains to chastise a distinguished New South Wales judge, who later himself became a Justice of the High Court⁵⁰, for overstepping the mark. He said⁵¹:

48 *Airlines of NSW Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54 at 115.

49 *Rootes v Shelton* (1967) 116 CLR 383.

50 Jacobs JA in his reasons in *Rootes v Shelton* (1966) 86 WN (NSW) (Pt 1) at 101-102. Justice Jacobs became a Justice of the High Court in February 1974 and served until April 1979. Cf J J Doyle, "Judicial Law-Making - Is Honesty the Best Policy?" (1995) 17 *Adel L Rev* 161 at 203.

51 (1967) 116 CLR at 386-387.

"I think it is a mistake to suppose that the case is concerned with 'changing social needs' or with 'a proposed new field of liability in negligence', or that it is to be decided by 'designing' a rule. And if I may be pardoned for saying so, to discuss the case in terms of 'judicial policy' and 'social expediency' is to introduce deleterious foreign matter into the water of the common law - in which, after all, we have no more than riparian rights".

After he left the Court, Kitto wrote comparatively little for the public outside the work he performed in the Australian Press Council. But in his essay on the writing of judgments⁵², he took a last thrust at those who conceived of the judicial office as involving lawmaking:

"[The judge] ... is commissioned to apply the law as it is from time to time and not something that he thinks should be the law but knows is not. I hasten to add, lest it be misunderstood, that I would certainly include in the proper function of the Judge the right and duty to give effect as existing law to such developments of the case law as principles already enunciated by the courts imply or justify by reason of their inherent capacity for extension by logical processes, including in those processes not only inference and deduction but also analogy where analogy is sound. I am inclined to think that if you put it in some such way as that - limiting judicial development of the law to developments by applied logic from *within* principles already established, and therefore excluding as impermissible purported developments (they really ought to be called alterations) fastened onto existing law by the Judge who thinks that his God-given understanding of justice tells him infallibly what the law ought to be and that he needs no other justification for asserting that that is what the law is - you may find a reconciliation between the old-fashioned, over-terse proposition that the judge applies the law and does not make it and the proposition, nearer the truth but still not exact, that the judge has a

52 (1992) 66 ALJ 787 at 794.

law-making function. The reconciliation perhaps is that our legal system includes a law that principles judicially evolved contained within themselves 'their fair logical result' as Dicey called it, that is to say all that may fairly and logically be taken from them, by way of extending the evolutionary process that produced them, to deal with new factual situations so that the judge does not usurp the role of the legislator when he takes part in that process, but does usurp it when he superimposes upon the already declared law a new proposition which he gets from outside it. In the latter case the criticism of his action is not so much that he suffers from a difficulty in distinguishing between the deity and himself in the understanding of abstract justice as that he perverts the law. No Judge is entitled to do that, however strongly his ideas of justice may make him wish that he could. I take this to be elementary. It is rejected by some very able people, but so are the Ten Commandments".

There you have not only Kitto's writing style. You also have his essential judicial philosophy. By the standards of one of those "very able people" to whom he was obviously referring (Lord Denning) Kitto's sentences are complex. They are long. One sentence contains no fewer than 120 words. There are many sub-propositions contained within them. Not for him the punctured style of the evangelist. Not for him the urgent expression of short sentences and a generous sprinkling of fullstops. Here is a complex mind at work, seeing all the qualifications, limitations and permutations of a proposition. His high intellect demanded persistence by the reader. It required attention from those for whom he was writing. It was inherent in his view of the law that the work he performed was inescapably technical. It was the work of the temple. It was not incumbent on him to speak to ordinary citizens, any more than a neurosurgeon is bound to perform his operations in a way that ordinary folk will understand. The syllogism was the key to his world. It reflected Sir Owen Dixon's philosophy. Law was declared

from within the inherent logic of that which already existed. It was not made up by the judges. Whenever they indulged in making up, they exceeded the judicial function. If invention was all the law involved, it would, for Kitto, have lost its integrity and purpose. By definition, law was pre-ordained, although discovering it might take much concentration, study of past rules and sharp linear application of logical reasoning.

KITTO TODAY

Nowadays, many law students, and not a few judges, might regard Kitto's position as historically understandable but unbearably naive. His faith in the capacity of logic alone to produce solutions to entirely new problems would be doubted in an age when so many new problems compete for legal answers. His belief that past constitutional decisions, and the mere text of that terse document, yield the answers to every new constitutional problem might seem unworkable to some. The demise of the declaratory theory of the judicial function, under the dual assaults of academics and great judges⁵³ presents the risk that Kitto's opinions will be discarded as irrelevant to the role of the modern Australian judge on the edge of a new millennium. But Kitto, like every other leader of the Australian

⁵³ For example, Lord Reid, "The Judge as Law Maker" (1972) 12 *Journal of Public Teachers of Law* 22.

judiciary, has left a mark by his contribution. I want to suggest five matters, in particular, in which his contributions remain relevant.

1. Judicial independence:

Kitto demonstrated from the very start of his judicial service his robust judicial independence. His decision against the Menzies Government's legislation in the *Communist Party Case*, so soon after his arrival at the High Court, demonstrated his allegiance to no political side and no social philosophy - only to his view of the Constitution and the law. There have been many similar examples, before and since. But this was a particularly vivid one. It is a fundamental human right of everyone to have, in the determination of criminal or civil proceedings at law, a "fair and public hearing by a competent, independent and impartial tribunal"⁵⁴. It is a negation of the judicial role for a judge to enter a courtroom with a preconceived opinion that a case must be determined one way or the other. Every judge, like every citizen, has a personal philosophy based upon a complex of life's experiences. Psychologists who have studied the processes of decision-making tell us that we can never be entirely

⁵⁴ *International Covenant on Civil and Political Rights*, Article 14.1. See F F Martin and Ors. *International Human Rights Law and Practice* (1997) at 43.

free from our attitudes, moods and inclinations⁵⁵. Examination of the voting patterns of judges in the cases which they decide shows, over time, clusters of consistent decision-making which may be influenced (even unconsciously) by their social attitudes and inclinations⁵⁶. These attitudes and inclinations should be recognised by a judge. A conscious effort should be made to correct the mind against bias and prejudice of any kind. In the exercise of that conscious effort lies the protection of the fundamental human right to which I have referred and of the rule of law. Judges should never approach their professional tasks with a view to backing the "home side"⁵⁷, whatever that may be.

Kitto gave an early and dramatic illustration of his commitment to these basic principles. Doubtless, he would not have thought of them in terms of fundamental human rights. Certainly, he would not have expounded them in those terms. But his example stands before his successors, all of whom must strive to attain the same standards of neutrality and independence. The independence of all judges,

⁵⁵ cf J P Forgas (ed), *Emotion and Social Judgments* (1991) esp 76-78.

⁵⁶ A R Blackshield, "Quantitative Analysis: The High Court of Australia, 1964-1969" [1972] *Lawasia* 1.

⁵⁷ R Bader Ginsburg, "Judicial Independence", Address to the Hawaii Bar Association, January 1998 in (1998) 72 ALJ (forthcoming).

magistrates and tribunal members who decide disputed cases is vital. But, in Australia, nowhere is it more so than in the High Court which is the ultimate protector of the rule of law and the Constitution. From past decisions and judicial reasoning outsiders might think that they can predict how a High Court Justice will decide a case. They examine the lawbooks and scrutinise comments during argument as the Etruscan soothsayers studied the entrails of sacrificial offerings. But the spirit of an independent judicial mind, such as Justice Kitto's, demonstrates that prediction can be a chancy thing. Certainly, it is so if based upon supposed social or political alignment. There are few more vivid illustrations of this assertion than Justice Kitto's decision in the *Communist Party Case*.

2. Legal excellence:

Kitto's judgments in the High Court also illustrate the importance of legal excellence in the discharge of the duties of the Justices of that Court. The very few who are not up to the intellectual challenges are soon known, particularly amongst the watchful audience of the Australian legal profession. Unlike the Supreme Court of the United States of America, the High Court remains the final court for legal appeals from other courts throughout Australia deciding a huge variety of cases based on federal and state legislation, the common law and equitable principles. It is a court of general jurisdiction. It is not confined to constitutional or human rights decisions. It is one of the few final appellate courts in the common law world that does not have to grapple with the mysteries

of a general Bill of Rights. But the range and complexity of the work of the High Court imposes a taxing regime requiring disciplined thought. Kitto was an exemplar of disciplined thinking and writing. He was sharp in mind and sometimes his tongue in court would match⁵⁸. Grown men in silk gowns were known to faint and to fear a day in his demanding court.

Nowadays, the High Court takes no special delight in exposing brusquely the weakness of thinking and preparation that are sometimes evident in the arguments before it. One can see a hint in Kitto's writing that doing so was not exactly foreign to his nature⁵⁹. But his are judgments which can be examined in virtually any field of the law and there is always enlightenment. He shares with the great Chief Justice Griffith, a confident command of 19th century English jurisprudence. He shares with Chief Justice Isaacs a command of powerful language in the cause of persuasion. He shares with Chief Justice Dixon the philosophy of judicial restraint. Whilst he did not have Windeyer's inquisitive fascination for the policies that lay behind the common law principles of our legal history, he wrote in

⁵⁸ People in Government, above n 20, at 6.

⁵⁹ See (1992) 66 ALJ 787 ["In an after dinner speech ... a member of the Bar once urged the High Court to put more colour into its written work. (I think he regarded the spoken word as colourful enough)"].

every area of the law that he touched with brevity, accuracy and precision.

Now that there is less confidence that the past readily offers the legal answers for the present and the future, there is a greater tendency on the part of the Justices to explore authority with a view to discerning the legal principle and legal policy that lies behind it⁶⁰. Kitto was a master of the whole landscape of the law. In his twenty years of service on the High Court he set the high standards of technical skill that helped to win for the High Court of Australia its reputation as a Court of outstanding jurists. If the functions of judges have changed, and particularly in the High Court since the abolition of Privy Council appeals and the advent of special leave to appeal⁶¹, the need for excellent lawyering remains undiminished. It controls, in effect, the type of person who should be appointed to the Court. It needs as its members people who have double skills. Technical legal excellence. Combined with foresight, and the capacity to perceive the big picture in which the Constitution and the law take their place.

⁶⁰ *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 253 per Deane J.

⁶¹ *Judiciary Act* 1903 (Cth), ss 35, 35AA, 35A. See the remarks of Gleeson CJ on the occasion of his Swearing In as Chief Justice of Australia, 22 May 1998, concerning the effect of the abolition of Privy Council appeals and the introduction of special leave in all civil appeals on the character of the High Court and its work.

3. The judicial role:

Kitto did not hesitate to expound, as well as practise, his conception of the judicial role. It was obvious enough from his judgments. In the passage which I have quoted he expressed his favour for a very limited judicial lawmaking function. But he accepted that such a function existed. Where else did the common law, or that great additional stream, equity, derive from, if not from the judges of the past⁶²? He did not regard the present as offering the last word on judge-made law. In the field of equity, for example, he declared that "as it stands today, a structure that commands our admiration, [it is] ready to be made more admirable still"⁶³. Who could make it more admirable except the judges? Certainly not the legislature. Probably not common lawyers.

Looking at some of Kitto's expositions of the judicial role with today's eyes, we may think that they demonstrate a hankering after the "fairytale"⁶⁴ that modern judges, unlike their forebears, simply

62 F W Kitto, foreword to the First Edition of *Equity Doctrines and Remedies*, R P Meagher, W M C Gummow and J R F Leane (third ed, 1992) v.

63 Foreword to Meagher, Gummow and Leane, above n 32, at vii.

64 Lord Reid, above n 53.

find and declare the law and have little part to play in making it. But for all that, Kitto's exposition of judicial restraint stands as a warning to judges against over-confidence in their capacity, and legitimacy, to solve every problem brought before them.

If we look at the High Court historically, it is probably fair to say that there are times, as in legal history generally, in which there is a great burst of creativity and then times of consolidation and greater caution. If it may sometimes seem, to one generation, that the courts are unduly timorous, perhaps the judges of that time are merely reflecting the mood common to the citizenry of which they are members. A period of judicial caution of the kind which Kitto favoured is ordinarily followed by a period of creativity and judicial boldness. Anyone who believes otherwise is ignorant of Australian legal history and of the history of the laws of England which went before. In this respect, Kitto was a judge of his time. Perhaps his advocacy of restraint has lessons for this age. But if it does, they are lessons not only for the judiciary but also for the legislatures and for the Executive Government concerning their law-making responsibilities. Often, what is described as "judicial activism" is little more than the attempt by judges to remedy cases of serious injustice which the legislature and Executive have neglected. Isaacs, Evatt, Murphy, Deane and Mason may sometimes seem voices calling their successors back to the inventiveness of the confident judges of the past. But there is also a need for the voices of caution, restraint and judicial legitimacy. Kitto's is one of the clearest and most consistent of these.

4. Law and equity:

Kitto was a master of the law of equity: that detailed and developed system of law created to repair the gap "wherever the Common Law might seem to fall short of [the] ideal in either the rights it conceded or the remedies it gave"⁶⁵. In his home State, New South Wales, long after the separate administration of equity had been terminated in England⁶⁶ and in the other States of Australia, its detailed rules were applied in a separate part of the State Supreme Court, generally by a senior judge identified with the title "Chief Judge in Equity"⁶⁷. This was the part of the Supreme Court in which Kitto probably felt most at home.

Once appointed to the High Court, Kitto wrote on equity's principles with assurance, grounded in deep knowledge. The High Court of Australia has generally been able to count one or more

⁶⁵ Foreword to Meagher, Gummow and Lehane, above n 32, at v.

⁶⁶ *Judicature Act* 1873 (GB), s 24. See now *Supreme Court Act* 1981 (UK), s 49.

⁶⁷ Eventually, the New South Wales Parliament enacted the *Law Reform (Law and Equity) Act* 1972 (NSW). This Act contains provisions equivalent to ss 24 and 25 of the English Act of 1873. See Meagher, Gummow and Lehane, *Equity Doctrines and Remedies*, (3rd ed) 1992, at 44. Cf *Felton v Mulligan* (1971) 124 CLR 367 at 392; *O'Rourke v Hoeven* [1974] 1 NSWLR 622 at 626 per Glass JA.

Justices at any given time who are disciples of the law of equity and who command its intricate details. Kitto was such an expert. He brought to bear in his opinions the strong belief that equitable doctrine should be preserved as "the saving supplement and complement of the Common Law ... prevailing over the Common Law in cases of conflict but ensuring, by its persistence and by the very fact of its prevailing, the survival of the Common Law"⁶⁸.

It is important that the High Court should always have amongst its members Justices who are closely familiar with the rules of conscience and fidelity developed in the Chancery courts of England and extended by decisions of Australian courts and courts of other lands of our tradition. Australian courts have generally been resistant to dilution of the traditional principles of equity⁶⁹. They have sometimes rejected, as heretical, developments of that body of law made by courts of other jurisdictions⁷⁰. About the refinement and development of equitable principles there can be legitimate debate, including amongst the *cognoscenti*. But the need for *cognoscenti* cannot be denied.

⁶⁸ Kitto, Foreword, vii.

⁶⁹ See eg *Breen v Williams* (1996) 186 CLR 71.

⁷⁰ See eg *McInerney v MacDonald* [1992] 2 FCR 138 at 152; (1992) 93 DLR (4th) 415 at 424 which was not followed in *Breen v Williams*.

The assurance with which Kitto wrote in the area of equity may be illustrated by many cases. Take his exposition of the circumstances in which, as against a mortgagee and purchaser guilty of fraud, a mortgagor is entitled, by equitable doctrine, to have its contract and transfer set aside. In *Latec Investments Ltd v Hotel Terrigal Pty Ltd (In Liquidation)*⁷¹, he responded to submissions that fraud in the sense used in the *Real Property Act 1900 (NSW)*⁷² was special - limited to cases where there had been a fraudulent misrepresentation:

"The whole course of authority on this branch of the law is to the contrary. Moral turpitude there must be; but a designed cheating of a registered proprietor out of his rights by means of a collusive and colourable sale by a mortgagee company to a subsidiary is as clearly a fraud, as clearly a defrauding of the mortgagor, as a cheating by any other means ... There was pretence and collusion in the conscious misuse of a power. It may be that those concerned salved their consciences by telling themselves that the mortgagor company, being already in liquidation, was in so powerless a

71 (1965) 113 CLR 265 at 273-274.

72 ss 42 and 43. I am grateful to Lehane J of the Federal Court of Australia for the following further examples of Kitto J's style and method in this area: *Attorney-General (NSW) v Donnelly* (1958) 99 CLR 538 at 576 (charitable trusts - approved on appeal [1959] AC 457 (PC)); *Blomley v Ryan* (1956) 99 CLR 362 at 412 (dissenting) (unconscionable conduct); *Livingston v Commissioner of Stamp Duties (Q)* (1962) 107 CLR 411 at 448-452 (equity acts in personam); *Shepherd v Federal Commissioner of Taxation* (1965) 113 CLR 385 at 393 (assignment of future property); and *Olsson v Dyson* (1969) 120 CLR 365 at 374 (equitable assignment and estoppel).

financial condition that the course they were taking was unlikely in the long run to do anyone any harm. But it was a dishonest course nonetheless, and the proper name for it is fraud".

Lay observers of the legal scene may not always appreciate the importance of equitable doctrine for the integrated operation of our legal system. But Kitto knew. And he taught what he knew⁷³. In every generation we need such teachers.

5. Judge as citizen:

⁷³ Kitto was also a major figure in the Australian case law on intellectual property. I am indebted to Gummow J for suggesting the following cases as examples both of his style and substance: *In re Wolanski's Registered Design* (1953) 88 CLR 278; *Southern Cross Refrigerating Co v Toowoomba Foundry Pty Ltd* (1953) 91 CLR 592; *Mark Foy's Ltd v Davies Coop & Co Ltd* (1956) 95 CLR 190 at 205; *National Research Development Corporation v Commissioner of Patents* (1959) 102 CLR 252 at 260 - a joint judgment (with Dixon CJ and Windeyer J) but clearly bearing his imprint; *The Shell Co of Australia Ltd v Esso Standard Oil (Australia) Ltd* (1963) 109 CLR 407 at 420; *Bayer Pharma Pty Ltd v Farbenfabriken Bayer AG* (1965) 120 CLR 285 at 287; *Re Carl Zeiss Pty Ltd's Application* (1969) 122 CLR 1. He also made a notable contribution to the law of taxation in Australia. Hill J of the Federal Court of Australia has suggested the following cases: *Clowes v FCT* (1954) 91 CLR 209 (significant in explaining profit making schemes); *NSW Associated Blue-Metal Quarries Limited v FCT* (1956) 94 CLR 509 (important in looking at mining operations and the vexed question of the distinction between law and fact); *Shepherd v FCT* (1965) 113 CLR 385; *FCT v Western Suburbs Cinemas Ltd* (1952) 5 AITR 300 (still a pivotal authority on the problem of deductibility of repairs).

It should not be thought from what I have said, that Kitto was a judicial recluse, happy only when writing his opinions. On the contrary, this work he described as "sheer toil", a "soul-searing tedium"⁷⁴. And yet it is the privilege of judges constantly to be solving, and then explaining, intricate and important legal puzzles.

During his service on the High Court, Kitto began his long association with the University of New England - first as Deputy Chancellor and later as Chancellor. After his retirement from the Court he served the community as first Chairman of the Press Council. It was in that capacity that I really first came to know him. I had then been appointed to the Law Reform Commission. We were working on reform of the law of defamation and privacy. He held out, as Press Councils are wont to do, against any laws on privacy which would "unnecessarily hamper the press in presenting the news and comment which the public desires and should be free to receive"⁷⁵. Kitto was, for me, a living legend of the law. He engaged in a vigorous, even swashbuckling, debate with the Law Reform Commission, and before the community. He proved himself a doughty defender of the media's freedoms. A measure of his

⁷⁴ (1992) 66 ALJ 787 at 792.

⁷⁵ Press Council, Commentary on the Law Reform Commission's Discussion Paper noted "The Seventh Summer Judicial Conference 1978" (1978) 52 ALJ 113 at 115.

success can be found in the fact that, even to this day, we have not secured uniform laws on defamation and privacy in Australia. Except to the extent that the High Court has found implications in the Constitution which apply uniformly throughout the country⁷⁶, the statute books still contain no significant national defamation reforms and no laws for privacy protection in the context of the media.

Kitto put his enormous experience and refined capacity in communication and persuasion to the service of the community in the University and the Press Council. He realised that a judge, during service and after retirement, has functions to perform as a citizen and community leader. True, this can be overdone in ways that would certainly have offended Kitto's sense of modesty, propriety and judicial understatement. But I hope he would not have disapproved of this contribution by me, as a citizen and as a Justice, to remember him, his service to the Court and to our country. Drawing on his life as barrister, judge, University Chancellor and Press Council Chairman, we can still derive inspiration and instruction from what he did.

⁷⁶ *Theophanous v Herald and Weekly Times Limited* (1994) 182 CLR 192; *Lange v Australian Broadcasting Corporation* (1997) 71 ALJR 818.

EXAMPLE AND GUIDE

For those of us who follow him, Kitto remains an example and a guide. In one of the courtrooms in Canberra counsel will reach a point in their argument. "And now I wish to refer the Court to what Justice Kitto said". The case is cited. The tipstaves lay the books before the Justices. Leaping from the page are the words which Kitto crafted - just as one day, when we have departed, our words may perhaps be read. Whenever Kitto's name is mentioned, the youthful memories of law school come flooding back for me. He is a judge to be respected and a citizen to be honoured. And especially in this city and in autumn in this most beautiful part of our country. On such an historic day, of continuity and change in the High Court of Australia, it is right to look back and remember him. But it is also right to look forward.