

LAW AND JUSTICE IN AUSTRALIA: DREAM OF IMPROVEMENT

Hon Justice Michael Kirby AC CMG

Best lawyers are those who question received wisdom. They are the ones who look beyond the words of texts; question the current legal orthodoxy; keep their minds open to new thoughts; perceive the growing expansion of law beyond local jurisdiction; and are always alert to law's abiding mission as an instrument of justice. When, at times, we become disheartened by this or that outcome of the law, it is important for us to remember the strengths of our discipline, for they are many. They include an independent judiciary, our traditions of legal education and law reform, and the willingness of members of the legal profession to work pro bono.

Doing things better

Like Dr Martin Luther King, who spoke about "the riches of freedom and the security of justice", I too have had a dream ... it was that I had awoken ten years before my appointment to the High Court of Australia in 1996 at a time when Chief Justice Mason presided. Justices Brennan, Deane, Toohey and Gaudron were there and it was a period in history when the Court was specially alert to serious injustices and awake to the traditional recuperative capacities of our law to right significant wrongs. It was the time of *Mabo*, *Dietrich*, *Theophanous*, *Kable* and all the other cases where doctrines of law and equity were clarified and modernised.

It was a happy dream to be a member of the High Court at such a time. A judicial life of concurrences and agreement is easier by far than a judicial life of dissent and disagreement. The personal burdens are lighter. Typically, the comradeship is easier. Those days will come again to the High Court in the inevitable cycles of the law. They will not come during my time. But of this we can be sure from our knowledge of the law and its rhythms - they will come again when the time is right.

Women in law

I have a dream that women will play their full and rightful place in the law. Women - not just a woman - will take their seat in the High Court. In August 2004 two women were appointed to the Supreme Court of Canada. This brings the numbers of women judges of that distinguished Court to four - four out of nine, including the Chief Justice. In the United States Supreme Court, it is two out of nine. In the High Court of Australia there are no women judges since the retirement of Justice Mary Gaudron.

In my dream, women will be there at every level of the law: on the Bench, at the Bar, in government and in legal partnerships. A woman brings a different life experience to a court as to any other institution. It is a legitimate and important experience to bring to influence the work of a final court. Women sometimes see aspects of legal problems to which men are blinded by their experiences.

Aboriginals and justice

I dream of a legal system that brings true justice to the indigenous people of Australia. Despite *Mabo* and the efforts of many parliaments, governments and of the courts, the law in Australia has often failed the Aboriginal people. To this day, the conditions of housing, health, education, employment and opportunities in life are much lower for indigenous people than for other Australians. The only legal statistic in which Aboriginal people come out on top, in *per capita* terms, is in their rates of arrest and imprisonment.

Dr King was surely right to say that the freedom of all of us, in the majority community, is inextricably bound up with Aboriginal freedom. I have a dream that the law is not barren. That it can sometimes still yield justice to indigenous Australians in their cases.

Prisoners' dignity

I have a dream that, under law, prisoners will be treated with full dignity as befits their status as human beings and (in most cases) citizens of the Commonwealth. So far, the decision of the High Court in *Dietrich* simply guarantees the rights of prisoners at trial. Prisoners are not assured of legal representation on appeal. In many States of Australia, when unrepresented, prisoners are not brought to a hearing in the High Court to speak to the Court, as all other litigants presently can do in support of an application special leave. The Court has denied requests for orders obliging custodial authorities to bring them to a place where they can be heard by the Court. It has said that prisoners have no such right, as they have not yet engaged the Court's appellate power. They are not yet a party to proceedings in the Court.

For me, such decisions constitute a serious departure from the principle of true equality before the law as envisaged by our Constitution. I have a dream that such unequal and discriminatory treatment will have no place in Australian courts of law in the future. Prisoners have lost their liberty while they are in prison. They have not lost their human dignity or their right to equality before the law.

Winston Churchill famously remarked that one can judge the civilisation of a community by the way it treats its prisoners. By that test, we in Australia, are sometimes found wanting. I dream that this will change, for we are assessed in such matters, both as lawyers and as citizens and as human beings.

Refugees and Law

I dream of fewer refugee cases in the High Court of Australia. We have accepted international obligations to receive and protect refugees. Yet often their path to acceptance is a very hard one.

I have a dream that I will not again have to explain to such people their need to demonstrate "jurisdictional error" - not least because I am not fully sure myself about exactly what that opaque notion means. It is an elusive legal will-o'-the-wisp. It is painful

I dream of an explanation for those for whom it is crucial and who assert that their lives and bodies are in danger if they are returned to their country of nationality.

I dream of fewer children in mandatory immigration detention in Australia under this country's laws. I also dream of true independence of the members of the migration tribunals who decide such cases, so that they will not be subject to any apparent pressure or short-term appointments to reach conclusions unfavourable to applicants for protection.

International Human Rights Law

I dream the day will come when the use of the basic principles of international human rights in the elucidation of Australian law will no longer be remarkable or even controversial. I look to a time when it will be accepted by judges everywhere in Australia that this is the context in which our national law now operates. When it will be realised that it is as relevant to us to look to the jurisprudence of universal rights today as it is to open the old books of English case law when we are searching for basic principles. I honour the wise and learned judges of the English courts in centuries gone by. They still have much to teach us in Australian law. But so have the wise and learned judges and contemporary writers in the field of universal human rights.

Sometimes the basic principles and all the scholarship cannot alter the clear requirements of Australian law. When that is so, our duty to the Australian Constitution and the law is clear. But in many cases that come to Australia's courts the law is uncertain. The Constitution is ambiguous. A statute is unclear. The common law has gaps. In such cases, it is the judicial obligation to make choices. Lawyers must help judges to make wise and lawful choices. I dream of the day when resolving the choices by reference to the principles of universal human rights, and international law more generally, will be a matter of course; a commonplace taken for granted because our law must operate in a world of growing legal and human inter-dependence.

Legal Education

I dream of legal education in Australia which will be strengthened by an appreciation that law is not just words or rules or statutes or regulations. That law has a deeper meaning and purpose. I dream that legal education in this country will always include the teaching of human rights, so that lawyers come to the profession equipped with an understanding of the contemporary moral under-pinnings of their vocation.

I dream of a restoration of legal history to its proper place in every law curriculum. In the understanding of history, we can perceive the broad streams of the law. We see how legal rules have been developed. In history, we can witness the fundamental concepts of justice that pass from generation to generation. These are the topics that must be taught not as occasional adjuncts to the words and rules. These topics, and jurisprudence (however named) help us, as lawyers, to reflect on what we are doing and why we are doing it.

Media Treatment of Law

How do we bring the message of law to the nation? It is not merely through the printed pages of the law reports. Equally it is not through the coverage of our work in the contemporary media. The modern press, radio and television, for the most part, are shamefully neglectful of the activities of law: the subjects of the third branch of government in Australia. They ignore its great controversies. They trivialise its serious messages. They personalise its disagreements. Sadly, media today often thrives on causing growing discord within our nation and ignoring the constructive ways in which the symphony of democracy operates, including in the courts.

Not long ago an important case was decided by the High Court and hardly noticed in the media. In it the Court divided 4:3. Chief Justice Gleeson, Justice Gummow and I dissented to the conclusion that the *Migration Act* could be interpreted to permit indefinite detention of a stateless person whom it had proved impossible to remove from Australia to a country of nationality despite his request. Constitutional considerations affecting the power of the Federal Parliament and the Executive Government to withdraw liberty from a person indefinitely were considered by the Court. The case was clearly important for individual freedom in Australia. The outcome was described by one of the majority (Justice McHugh) as "tragic". The law should repair tragedies, wherever possible; not just lament about them.

If "liberty" is one of the chief concerns of all governance, the decision in this case was objectively one of profound importance. Yet the coverage of the decision in the media was very limited. Instead, in the days that followed that decision, the media occupied itself with gusto over the travails of the then Governor of Tasmania. On any view, the significance of a decision about the power of the federal Government (without judicial authority) validly to detain people in Australia indefinitely was far more important than the largely media-created spectacle of a State Governor's departure from office.

I dream of an Australia that is aware of the large issues decided in its courts, and especially in the High Court: A country alert to the values and principles that are at stake and a media that communicates these issues to citizens. Even a media that occasionally lifts its eyes from self-generated entertainment. How can a country truly respect the law, and the rule of law, if it is ignorant of the serious issues that engage the courts? How can a true republican form of government operate in the service of the people of the Commonwealth, if the people are kept in woeful ignorance of the work of the judicial branch of government?

Pro Bono and Legal Aid

I dream also of better services for those who have genuine cases to bring to resolution. The decision in *Dietrich* has addressed the problem of serious criminal trials. But it has done so at the cost of legal aid in many other areas of the law, including family law and civil claims.

dream of a day when court procedures will be changed to make it easier for self-represented litigants. Our system of law is strong and independent when you can get to it with equality of arms. But without competent legal representation, our system of law is a minefield for the untrained, whatever may be the objective merits of their cases. Lawyers cannot wash their hands of the defects of the system that they help to create and operate. I dream of a legal profession that rejects shallow self-satisfaction and on the contrary, is self-critical and conscious of the needs for change: A profession that is always striving to make equality before the law a living truth, not just an empty boast.

Protecting all minorities

In Australia there are still those who thirst for freedom. There are still minorities who suffer unjust discrimination: who quest for equality before the law.

I have known these things for a long time. When I was growing up, my grandmother remarried. She married a communist. For our family, the *Communist Party Case* was not only a gigantic decision defensive of the rule of law under the Australian Constitution. It was a case that closely affected one of us, in his person, his dignity and rights. You do not forget the lessons that you learn at the age of 11.

And as a member of a sexual minority, I have tasted discrimination and irrational hatred. It is less visible today. Amongst young lawyers it has, for the most part, disappeared. But elsewhere it still exists. It still affects people's legal rights. These things make one sensitive to injustice. They stimulate dreams of days that will come where there is no inequality in things that should be the same.

Many of us are a member of some minority or other, or of some disadvantaged group. I dream that Australia's law, in keeping with the times, will be truly committed to equal justice for claims that are equal. Most particularly, it is my dream that young lawyers, who will soon take their place in the Australian legal profession, will have a real commitment to the principle of "equal protection under the law". I hope their eyes will be freed from the prejudices and attitudes of the past and vigilant to wrongs, wherever they appear in law's discipline.

Law's Aspiration

Law is a vocation committed to justice. It is fundamentally dedicated to the principles of human dignity and human rights. We cannot always deliver on the promissory note to that effect. Sometimes, indeed, the cheque of justice is dishonoured by Australian law. But as lawyers and citizens we have choices. And when it is possible and lawful to do so, we should take the path of justice and equality. Then we can say, with Martin Luther King:

When we let freedom ring, when we let it ring from every village and every hamlet, from every state and every city, we will be able to speed up that day when all God's children, black ... and white ... Jews and Gentiles, Protestants and Catholics, will be able to join

... and sing in the words of the old Negro spiritual, "Free at last! Free at last! Thank God Almighty, we are free at last!"

Such freedoms do not come from hoping for them. They do not arise solely from dreams and aspirations. They come about through growing social awareness and prudent action. Sometimes the law has a part today in encouraging greater freedoms. Usually that law will be made by Parliament. But sometimes it will be expressed by the courts. And then judges and lawyers have a vital part to play in building the dream and turning it to reality.