HARVARD LAW SCHOOL

DECEMBER 2, 2006

TRANSNATIONAL JUDICIAL DIALOGUE: STRENGTHENING NETWORKS AND MECHANISMS FOR JUDICIAL CONSULTATION AND COOPERATION

TO JUDGE IS TO LEARN

The Hon Justice Michael Kirby AC CMG[*]

A GREAT TRUST

To be a judge is to enjoy a great trust. To judge others involves listening to their stories and applying the law to the essential facts to arrive at conclusions that conform to law but, where possible, also appear to be just.

Listening to the stories that unfold before us, in trial and appellate courts, we learn the details of our own legal systems. I have been a judge in Australia since 1975. I have therefore heard the stories of many cases, met many colleagues and learned many lessons about judging and its challenges.

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This Dialogue has come together at this famous University to exchange experiences and ideas and to facilitate the so-called "invisible college" of judges around the world. The problems presented to us in court are not always concerned with universal themes. Many have a purely local significance. They involve nothing more than the application of highly specific municipal law. Yet experience as a judge, and dialogue with judicial colleagues across borders, do teach the commonality of some problems and the universality of the quest to protect basic human dignity and human rights. This is an important lesson that judges have begun to learn everywhere. They can reinforce their attention to the universal values of human civilisation by occasionally meeting each other, exchanging stories and experience and strengthening their commitment to the high performance of their duties. Such a commitment requires them to address substantial things. Rules are important. They provide the foundations for the rule of law. But it is the substance of the law that should govern. Formalism, and a purely mechanical approach to the judicial function, undermines the true fulfilment of the judicial role.

In his remarks to this symposium, Justice Aharon Barak, until recently President of the Supreme Court of Israel, insisted that it is not enough for us simply to exchange stories about how we do things back home. Ultimately, that is a banal exercise - a kind of judicial geography lesson. Instead, he urged us to seek out the universal themes that occasionally arise from the way we do things. Picking up this

suggestion, I want to tell five stories in order to illustrate some of the lessons that we can learn from each other.

BANGALORE BOUGAINVILLEA

My first story in set in Bangalore, a beautiful cantonment city in the south of India. I was there in 1988. In the centre of the city is a great park, full of Bougainvillea. At one end there still stands a large bronze statue of Queen Victoria, a relic of colonial days. At the other are the bustling courthouses where the business of the law is done. India, the world's largest democracy, is a country of constitutionalism and law.

A group of judges had been collected in Bangalore by the Commonwealth Secretariat in London. They came from many countries of the Commonwealth of Nations. They shared the strong traditions of the common law. Most were judges or Chief Justices of final courts. I was there as President of the Court of Appeal of New South Wales, in Australia: the busiest appellate court in the country. Also there from an intermediate court was a non-Commonwealth judge, skilfully chosen by the organisers for her self-evident qualities. This was Judge Ruth Bader Ginsburg, then of the District of Columbia Circuit of the United States Court of Appeals. I have always thought that her presence, and my own, at this judicial conference, was to prove important for the

development of our thinking and the spread of ideas to our countries. This, indeed, was the invisible college in action[1].

The 1988 conference considered the extent to which it was legitimate, in discharging domestic judicial duties, for judges of national courts to have regard to international law, particularly the international law of human rights. Where a gap appeared in the common law, or an ambiguity in a local statute or national constitution, could a judge turn to this new source of basic legal principles in order to fill the gap or resolve the ambiguity? Led by Justice P N Bhagwati, then recently retired as Chief Justice of India, the group endorsed the *Bangalore Principles on the Judicial Application of International Human Rights Law*[2]. These principles embraced the idea that access to such sources was legitimate and could be helpful. It did not provide binding rules but afforded the judge a source of principles, a context for reasoning and a stimulus to conceptual thinking when universal values might be at stake.

Since their adoption, these *Bangalore Principles* have achieved increasing recognition and influence throughout the common law world.

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1 M D Kirby, "International Law - The Impact on National Constitutions" (7th Grotius Lecture), 21 *American University International Law Review* 327 at 335 (2006).

2 Report of Judicial Colloquium on the Domestic Application of International Human Rights Norms, Bangalore, India, reprinted 14 *Commonwealth Law Bulletin* 1196 (1988).

However, in some countries, including the United States of America[3] and Australia[4], they have proved controversial and even sensitive in some circles[5].

OUT OF A SILENT WORLD

Professor Jose Alvarez, President of the American Society of International Law, has asked when we first became acquainted with international law? In my case, it was at the Sydney Law School. In the 1950s-1960s and long before, international law was a compulsory subject there for study and examination. The law students were taught by Professor Julius Stone. He in turn had taught at Harvard Law School in the 1930s and was profoundly influenced by the realist jurisprudence of Dean Roscoe Pound.

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3 *Atkins v Virginia* 536 US 304 at 316 n 21 (2002); *Grutter v Bollinger* 539 US 306 at 344 (2003); *Lawrence v Texas* 539 US 558 at 576-577 (2003); *Roper v Simmons* 125 SCt 1183, 1200 (2005).

4 *Al-Kateb v Godwin* (2004) 219 CLR 562. See also *Newcrest Mining (WA) Ltd v Commonwealth of Australia* (1997) 190 CLR 513 at 657-658, 661; *Kartinyeri v Commonwealth of Australia* (1998) 195 CLR 337 at 417-418.

5 "The Relevance of foreign legal materials in US Constitutional Cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer", 3 *International Journal of Constitutional Law* 519 (2005); cf Justice Sandra Day O'Connor, Keynote Address, Proceedings of the Ninety-sixth Annual Meeting of the American Society of International Law, 96 *American Society of International Law Proceedings* 348 at 351 (2002).

Yet in the 1960s, and even much later, international law was still substantially seen as the concern of nation states and the international community - not relevant to individual legal rights and duties. The *Bangalore Principles* were designed to give international law a greater familiarity and relevance.

Fresh from my epiphany in Bangalore, I returned to my busy life as a judge, presiding in an appellate court comprised of judges of great ability and experience. It did not take long before I was presented with cases in which the *Bangalore Principles* seemed to speak directly to the way in which the issue at hand might be resolved.

On 4 November 1988, an urgent case was brought to my court. I was sitting with Justices Samuels and Clarke. The case was *Gradidge v Grace Bros Pty Ltd*[6]. It had begun as a claim for workers' compensation benefits in the State Compensation Court. But the case was unusual in one respect. The applicant worker was a deaf mute. She therefore had to give her evidence through an interpreter using signage. For this purpose an interpreter from the Government panel of interpreters was provided at the hearing for the applicant's evidence. During the course of that evidence an argument arose between the lawyers. The employer's lawyer objected to interpretation of the argument being given to the worker. The worker's lawyer immediately indicated that he did not

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[6] (1988) 93 FLR 414.

require such interpretation to be given. The trial judge directed the interpreter to desist from interpreting the matters argued. Later, however, the judge noticed that the interpreter was continuing to interpret the proceedings in court. According to the report of the case[7]:

> "The interpreter refused to desist and interpreted by means of sign language to the applicant his Honour's direction. The interpreter advised his Honour that she saw it as her function to interpret everything that took place in the Court to the applicant and she would not desist from this practice. Despite an adjournment the interpreter did not desist from interpreting all matters to the applicant whilst the applicant was giving evidence. [The judge] was not prepared for the matter to continue on that basis and it was adjourned".

The Court of Appeal was asked to rule whether the judge had erred in law in directing the interpreter to desist from communicating matters to the mute party whilst present in an open court.

When my colleagues and I adjourned to consider our decision, for it had to be given immediately after the hearing of argument, we could find no direct authority on the precise point. The Australian Constitution, conceived and written in the 1890s, contains very few statements of fundamental rights. There is no equality clause nor any express guarantee of due process. There were therefore no constitutional rules, federal or State, that could be invoked to resolve the issue[8]. Nor was

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[7] (1998) 93 FLR 414 at 416.

[8] Even the existence of the due process provisions of the United States Constitution did not persuade the Supreme Court of the United States that an accused person, almost totally deaf, who was

Footnote continues

there any State or federal legislation that provided a right to an interpreter to a person who could not otherwise understand the proceedings in which she was involved in open court. Surprising as it may be, the State Parliament had not enacted an *Interpreters (Rights of Deaf Mutes) Act*. The issue was therefore one to be resolved by the application of the common law.

So far as the common law was concerned, the cases emphasised the large discretion enjoyed by trial judges to determine whether a person giving evidence in court should have the benefit of an interpreter. Australia is a society with a population drawn from many lands and cultures. Every day, people give evidence in court through interpreters. However, the principles established by the common law are very general. In *Dairy Farmers Cooperative Milk Co v Acquilina*[9], the High Court of Australia had observed:

> "… There is no rule that a witness is entitled as of right to give evidence in his native tongue through an interpreter … It is a matter in the exercise of the discretion of the trial judge to determine … whether to allow the use of an interpreter and the exercise of this discretion should not be interfered with on appeal except for extremely cogent reasons".

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denied interpretation in a State court whilst on trial for murder, had suffered an infringement of the Fourteenth Amendment: *Felts v Warden* 201 US 122 at 128-129 (1906). The decision has been criticized and does not reflect modern practice: M La Vigne and McC Vernon, "An Interpreter Isn't Enough: Deafness, Language and Due Process", *Wisconsin Law Review* 843 at 887 (2003).

[9] (1963) 109 CLR 458 at 464.

In these circumstances, it might not have been surprising for the Court of Appeal to reject the challenge to the trial judge's ruling in the compensation case. In my reasons, I acknowledged the need for restraint in disturbing procedural rulings of such a kind[10]:

> "[A] large discretion [must] be allowed to a trial judge to conduct proceedings in a court and control those proceedings for the attainment of justice according to law. Appellate courts must respect the wide discretions which are reserved by the law to trial judges. They must do so for many reasons which are frequently stated. The questions which arise for decision in the course of the conduct of a trial are numberless. They are often peculiar to the case in hand. Judges do not have unlimited time to reflect upon the myriad of decisions which have to be made. Such decisions must be made quickly so that the trial can proceed with despatch and economy. If every interlocutory decision were reviewed on appeal, or even a substantial number of them, the business of the courts would effectively grind to a halt. Delays would be even greater than they are. Furthermore, on many decisions made in the course of a trial, there is no objectively correct answer. Minds may differ about how this or that contest may most effectively and fairly be disposed of. Costs would be increased and justice unacceptably delayed if appellate courts did not show restraint in substituting their opinions for those of the trial judge concerning the conduct of the trial. Moreover, respect for the judicial institution, upon which rests in part compliance with the law and the rule of law, would be damaged if trial judges could not make rulings concerning the conduct of business in their courts confident that appellate courts would leave them in that conduct a large zone of immunity from reversal".

All of us who are judges know the strong reasons for upholding procedural and practice decision of trial judges. Yet a nagging concern

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10 (1988) 93 FLR 414 at 415.

was presented by the case. Had the applicant worker not been a deaf mute, she would have been fully able to follow everything that was said in open court between the judge and the lawyers. Why should she suffer a peculiar disadvantage because of her disability? Why should she have to sit in the witness box unaware of what was going on around her? Did this not actually penalise her for her disability? Did it not discriminate in a way that was offensive to the basic purpose of a public trial and to respect for her human dignity?

In default of any specific constitutional, statutory or common law guidance, I did what the *Bangalore Principles* had suggested I should do in such an instance. I referred to the *International Covenant on Civil and Political Rights* (ICCPR) to which Australia is a State party[11]. I declared that, although that international treaty was not, as such, part of Australian domestic law, its provisions were "now part of customary international law"[12]. I expressed the opinion that it was desirable that the common law in Australia should, "so far as possible, be in harmony with such provisions". This therefore afforded the key to guide the court in the expression of the rule governing the case. International human rights law offered a starting point or a context, not binding but useful, for reasoning to a conclusion upon a novel legal problem:

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11 [1976] 999 UNTS 171, entered into force 23 March 1976. See Arts 14.1, 14.3(a) and 14.3(f).

12 (1988) 93 FLR 414 at 422.

> "It is not, in my opinion, the judge's province to deny that understanding [of the proceedings to a mute party] where an interpreter … quietly and unobtrusively proceeds to turn the silence of a deaf person into understanding. A judge should welcome the opportunity for understanding in the case of a deaf party. If for any reason the party should not have communication in a matter proceeding in open court, that party should be excluded from the court as any other party would be. That is the proper way to prevent the corruption of his or her evidence. It is not proper to have a person with a hearing disability sitting silent and uninformed about what is going on in a public courtroom about her … Into that silent world justice penetrates".

My judicial colleagues to left and right agreed in my conclusion. One of them pointed out that Article 14 of the ICCPR was now to be found in a schedule to Australian federal legislation and in the materials provided by the Judicial Commission of the State for the guidance of judicial officers[13]. That article states in par 1 that "All persons shall be equal before the courts and tribunals". In par 3(f) the ICCPR refers to a right to "have the free assistance of an interpreter if he cannot understand or speak the language used in court". These basic notions helped to guide us in that case to the requirements of the Australian common law applicable to the issue in hand. The case was therefore returned to the trial court with the finding that the judge had erred. So long as the proceedings were in open court, the applicant with a hearing disability was entitled by the common law to have the benefit of interpretation. This was a good illustration of the practical way in which the *Bangalore Principles* could assist in filling the gaps in the applicable law.

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13 (1988) 93 FLR 414 at 426 per Samuels JA.

NATIVE TITLE

At first, my repeated references to the utility of international human rights principles, to afford a context for elucidating problems of Australian law, was regarded in some circles as heretical[14]. Some Australian judges still consider it to be so[15]. Yet I persisted and still do to this day. The reconciliation of international and domestic law is one of the greatest challenges affecting contemporary judges and the future of municipal legal systems everywhere.

Sometimes I felt that, in expounding the *Bangalore Principles* in Australian cases, I was a lone voice. But I never had doubts that this was an approach to discovering basic principles suitable for the world of rapid international travel; of telecommunications and the internet; of global trade and global problems.

Three years after Bangalore, and before my appointment to the High Court of Australia, a case was taken to that Court which challenged

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14 M D Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View from the Antipodes" (1993) 16 *University of New South Wales Law Journal* 363 at 377-383; M D Kirby, "The Impact of International Human Rights Norms - A 'Law Undergoing Evolution'" 22 *Commonwealth Law Bulletin* 1183 at 1183-84, 1189-91 (1996).

15 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 580-591 [62]-[67] per McHugh J; cf at 626-630 [184]-[193].

the then orthodoxy concerning the enjoyment by the indigenous people of Australia of legal rights to their traditional lands if such rights could be traced to the times before the arrival of the European settlers. Longstanding legal authority in Australia had suggested that the indigenous people had lost whatever legal rights to land had pre-existed settlement when the British Crown acquired sovereignty over the Australian continent. If that settled rule of land law was to be disturbed, a key was needed to provide the judicial authorities with a legal basis to restate the common law of Australia

In *Mabo v Queensland [No 2]*[16] the High Court of Australia found that key. It reversed more than a hundred and fifty years of judicial understanding. The expression of the legal principle that authorised the Court, stated in the opinion of Justice F G Brennan in that case, was remarkably similar in its essence to the *Bangalore Principles*[17]:

> "Whatever justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the *International Covenant on Civil and Political Rights* bring to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily

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[16] (1992) 175 CLR 1.

[17] (1992) 175 CLR 1 at 42.

> conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. The common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional land".

In the course of reaching this conclusion, Justice Brennan referred to the "retreat from injustice"[18] which the law of Illinois and Virginia had reached in the United States in 1823 when, in *Johnson v Macintosh*[19], Marshall CJ accepted that, subject to the assertion of ultimate dominion by the State, the 'original inhabitants' should be recognised as having 'a legal as well as just claim' to retain the occupancy of their traditional lands. Nearly a hundred and seventy years later, Australian law reached a similar conclusion. And an important stimulus was provided by the universal principle of civilised nations opposing unjust discrimination against individuals on no better footing than the colour of their skin or their race or indigenous ethnic background.

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18 *Gerhardy v Brown* (1985) 159 CLR 70 at 149 per Deane J.

19 8 Wheat at 574; 21 US at 253 (1823).

THE TRANSVAAL BAR TABLE

But should judges be concerned with such universal values? Should they leave all such questions to the elected legislature and simply apply the legal formulas handed to them by judges of the past? Is that the mechanical function of the judiciary in today's age? Would the legislators have the time, the interest or the will to respond to all of the legal needs of society?

During this visit to the Harvard Law School, I had the privilege of participating in a class taught by one of my outstanding former clerks, Katie Young, now a member of the Faculty here. The class was addressed to issues concerning economic, social and cultural rights. At a certain point, one of the members of the class, who knew about my ruling in the case about the deaf mute, tackled me about the approach evident there. Was it not better, he asked, to preserve the variety of law, reflecting the unique historical traditions and civic values of different lands? Was it not preferable to stick to a strict rule of "hands-off" when a challenge was made to a procedural order, such as that made by the trial judge? Was a decision like *Gradidge* not an example of impermissible "judicial activism"[20]. Was it not better for judges to stick to the old ways and to leave it to legislators to address, where they choose, suggested infractions of fundamental human rights?

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[20] M D Kirby, *Judicial Activism* (Hamlyn Lectures, 2003) (2004).

These were serious and legitimate questions. They deserve an answer. The answer can be given by reference to the story of another case, this time from the Transvaal in South Africa, before the fall of apartheid.

In 1958, Godfrey Pitje was a young articled clerk who was sent by his legal firm to a magistrate's court to defend a client. Although a clerk, Mr Pitje was entitled to audience in the court. When he arrived, he went to the central Bar table which, at that time, was provided in the court for practitioners of European racial descent. The magistrate requested Mr Pitje, in an admittedly courteous manner, to take his place at a side table, being the Bar table reserved for non-Europeans. Mr Pitje was not of European descent. He did not comply with the request. He remained where he was, protesting and enquiring why he should sit at the side table.

In the words of the case "the magistrate informed him that it was his [the magistrate's] court, that he wanted him to sit there and that he was not prepared to argue with him about it. There followed an exchange about it"[21]. Mr Pitje protested and demanded an explanation. He was told that he would not be heard to address the court from the European table but only if he went to the side table. He continued to

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[21] *R v Pitje* 1960(4) SA 709 (AD) at 710-711.

protest and, after a warning was given, he was found guilty of contempt and fined £5 or five days imprisonment for contempt of court.

Mr Pitje appealed to the Transvaal Provincial Division of the Supreme Court. However, that court dismissed his appeal. He took a further appeal to the Appellate Division of South Africa. That was a court which, in the earlier days of the twentieth century, was respected throughout the common law world as a bench of great intellectual distinction. Especially so in matters of commercial law where the body of common law principles was enriched by the infusion of Roman Dutch law.

The case, it will be observed, bears some similarities to the *Gradidge* case. When I wrote my reasons in *Gradidge* I was unaware of the *Pitje* decision. But the judges of the Appellate Division faced much the same issues as I was later to face. Yet they unanimously came to the opposite conclusion. The decision was reserved for six days. It was delivered by Steyn CJ. The decision could have been written by any experienced appellate judge[22]:

> "A magistrate, like other judicial functionaries, is in control of his court-room and of the proceedings therein. Matters incidental to such proceedings, if they are not regulated by law, are largely within his discretion. The only ground on which the exercise of that discretion and the legal competence of the order might in this instance be called in

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[22] (1960)(4) SA 709 at 710.

> question, would be if it were unreasonable as arising from alleged inequality in the treatment of practitioners equally entitled to practise in the Magistrate's Court … But from the record it is clear that a practitioner would in every way be as well seated at the one table as at the other, and that he could not possibly have been hampered in the slightest in the conduct of his case by having to use a particular table. … [T]he distinction drawn by the provision of separate table in this Magistrate's Court, is of a nature sanctioned by the Legislature, and makes it more difficult to attack the validity of the magistrate's order on the ground of unreasonableness. The order was, I think, a competent order".

The constitutional statute of South Africa at the time was silent on the matter. The legislation did not require adherence to separate tables. Some apartheid legislation had been enacted in South Africa by 1958. But such as it was it did not oblige such separation and differentiation within a courtroom. The judges were ostensibly in charge of courtrooms. But they were influenced by the growing discrimination of their society and the culture that racial discrimination had engendered. The questioning attitude of the young articled clerk was treated as deliberate and premeditated provocation[23]:

> "It is true that the insulting statement which he intended to make, to the effect that the Magistrate would not give the accused a fair trial if defended by him, he did not make, but that does not alter the fact that, in spite of repeated warning, he wilfully disregarded the order [to move to the side table]. That was contempt of the court"

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[23] (1960) (4) SA 709 at 712.

None of the learned judges of the famous Appellate Division of South Africa dissented at that time. None of them expressed any reservations. None of them referred to the paramountcy of the judiciary in the control of the courtrooms. None of them referred to the principles of racial and other equality expressed in the *Universal Declaration of Human Rights* of 1948. None of them, apparently, found the insistence on the demeaning use of a side Bar table by non-European lawyers offensive to their sense of justice and equality and basic human dignity. Instead, the judges flew on automatic pilot. Their reasons were impeccable, at least so far as the formulas were concerned. All that was missing from them was the ingredient of universal justice and basic human equality and dignity with which judges of every land should be concerned.

A postscript can be added to the *Pitje* case. Godfrey Pitje became one of the contributors to the building of a new South Africa. And the legal firm that sent him to the Magistrate's Court in the Transvaal that March day in 1958 is noted in the report of his case. The appellant's attorneys are described as "Mandela and Tambo, Johannesburg"[24]. Nelson Mandela and Oliver Tambo had begun their struggle for equality and equal respect for all people, including all lawyers, irrespective of irrelevant differences.

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[24] (1960) (4) SA 709 at 712.

JOURNEY HOME

There is a special reason why Australians are alert to the message of Bangalore and to the brilliant diversity but essential unity of our world and our species. If ever they travel to another place, unless perhaps it is Antarctica, they ordinarily have a very long journey ahead of them. That journey provides Australians with a constant mental reinforcement of the nature of the world we live in and of the need for us all to live together in peace and mutual respect.

This day began for me in Cambridge, Massachusetts. At the end of this Dialogue, I will proceed to the Boston International Airport. The only way I can return to Australia in time for a sitting of my Court on Tuesday next is to travel on the way home through London.

So I will cross the stormy Atlantic and change planes in London. I will proceed past magical Paris, down through the former lands of Central and Eastern Europe. The plane will take me over the Arab countries and Afghanistan, reminding me of the conflicts and dangers that lie below. Then I will cross the mighty Himalayas and the Indian subcontinent and probably proceed directly over Bangalore, down past Malaysia to Singapore. After refuelling, the plane will take me across the huge Indonesian archipelago down into my own continental country. Ultimately, on Monday evening, 35 hours after setting out, I will arrive in Sydney. But then I must proceed immediately by car to Canberra, a further three hours away, so as to be fresh the next morning for a case

concerning the constitutional validity of anti-terrorism laws under challenge before my Court.

There, waiting at the Sydney airport when I arrive will be my partner. It has been the same these past 38 years. Faithful, prudent and supportive, my partner will drive me, without complaint, to the seat of my Court, so I can sleep well before the busy day ahead.

My partner, Johan, will just be there. Yet we know, especially from recent events, that there are many people who hate us and our relationship. It is a source of puzzlement to discover that this is still so. It flies in the face of modern scientific knowledge about the variety of human sexuality. Yet it is so. Sometimes the antipathy is actually expressed in the hurly-burly of politics and even of religion, for there are deep wells of prejudice that can be tapped there, often fuelled by ignorance. Sometimes such prejudice concerns differences of race, of gender, of religion, of disability. Sometimes it concerns sexuality.

Judges cannot solve all the problems of the world or of their own societies. They cannot cure all of the injustices. If the law is clear, the rule of law requires that a judge should give it effect to the law whatever his or her view may be of the wisdom and justice of the law in question[25]. This much is plain and undisputed.

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[25] *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at 424-426 [169]-[173].

Yet often the law is not unambiguous. The Constitution will often be uncertain, simply because it is written in brief language designed to endure indefinitely. The laws made by the legislature will often be ambiguous because they represent compromises or hasty drafting or ill-thought-out proposals. In common law countries, that body of law will often be silent on new questions, simply because those questions did not occur to our judicial predecessors, learned though they were. In such circumstances, the judge's role is by no means mechanical. It is not confined to the mouthing of formularies. Anyone can do that.

To be a judge, is to be concerned with something deeper, broader and more universal - the attainment of justice and the respect for values common to civilised people. When judges like us come together in transnational dialogue, we learn from each other. In some countries, a judge would not disclose the existence of a same-sex partner. Yet if the truth is suppressed, we will never learn about it. We will never learn about diversity. So it was when I was growing up in Australia. I rarely met Asian or Arab people. I was never conscious of meeting a follower of Islam. Aboriginals were often kept on settlements. Women were usually in the kitchen. Sexual minorities kept their secret to themselves.

Other branches of government, and other people, can sometimes march to a drum of prejudice. They can adhere to the infantile notion that everyone is the same and that difference is dangerous. But for judges, living and working in the real world of human diversity, things are

more difficult because their values are more universal and enduring. And they write and think about those values all the time.

The law books are littered with decisions like Godfrey Pitje's case. Yet it is the decisions like *Mabo* and, I suggest, *Gradidge*, that endure in our discipline as examples and encouragement for those who come after us. We cannot cure all of the world's ills and judges should not try. But neither should we be content with mechanical formulas or hostile to the growing wisdom that we can learn from judicial colleagues and others other lands. Occasionally, their wisdom will encourage us to pause and question past assumptions. Occasionally, it will help us to search for the new contours of justice that each generation of the judiciary discovers and reveals. That is why the transnational judicial Dialogue is precious. Those who make it possible contribute in a practical way to building a world and nations that are better, safer and more just for all people.

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