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A LIFE IN THE LAW

A MEMOIR BY NIMAL WIKRAMANAYAKE QC

FOREWORD

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The first part of this book is an extended snapshot of the privileged life that the author led within a notable legal family in post-colonial Ceylon. It tells the story of his decision [10] to pursue his higher education at Cambridge University in England; and his return to Colombo with a good degree but modest prospects. How he slowly but surely built up a busy and varied practice as a barrister, becoming ‘one of the leading junior counsel in the country’ [31]. How he suffered various slights because he had formed a happy and enduring marriage, not only out of his caste but out of his race (his wife being of Italian descent). And how “in a fit of insanity” [21] he decided to quit Sri Lanka, as his birthplace had by then been renamed, to migrate to Australia and to embark on the risky project of re-establishing his legal practice in Melbourne.

In part, his usual step of moving to Australia was a response to a change of government in his homeland and the commitment of the new government to switch the language of the courts from English to Sinhalese, in which he felt

* Justice of the High Court of Australia (1996-2009).

less competent. In part, it seems to have been a response to the hostility shown on racial grounds to his wife, an irony because of what was to follow. These early chapters of the book are like a black and white, or maybe sepia, film of days of inherited privilege that flowed because of his father, who had become one of the leading Queen's Counsel of the country. Right up to the time of his departure the young Nimal would rely on a servant to squeeze toothpaste on his morning toothbrush [55], a luxury I had formerly thought was reserved to the Prince of Wales.

The second, and major, part of the book recounts the story of a struggle, as the newly arrived advocate found that the tales of the success of those who had gone before were greatly exaggerated, if not downright false. For a short time, he worked in a large Melbourne solicitors' office where it was his misfortune to be bullied and disrespected, often apparently on the grounds of his race and skin colour [61]. He took the advice of the bullies who encouraged him with the news that an earlier employee, "similarly without brains", had gained admission to the Victorian Bar. He had taken up personal injury work and was doing surprisingly well, enjoying unmerited success which might also come his way at the independent Bar.

Fortunately, at this point, the author struck gold in the advice he was given by Peter Heerey [66]; the examples he observed in Brian Shaw QC, Neil McPhee QC and Jeffrey Sher QC [175] and particular friendships that were extended to him by leaders of the Bar, like Robert Brooking QC [173] and Louis Voumard QC [60]. The latter was the author of the classic Australian text on land law, recognised as one of the great legal textbooks written in Australia. After a short interval the author was to become a research

assistant for new editions updating the text and later assuming responsibility for its continuance in new editions. When he suffered bleak moments of self-doubt and hostility, he reminded himself of the distinctions of his father-hero; of his fine education in England; and of the engagement and respect he had won from Voumard and a few other doyens of the Bar in Melbourne.

Sadly, there were many grim moments throughout his long career as junior counsel in Victoria. The centerpiece of this part of the book is the story of his struggle to establish his professional credentials in the face of what he felt, and describes, as a consistent pattern of hostility, frequently served cold with clearly racist language against which he reacted with protest, complaints and resentment that remains to this day.

- * The magistrate who had asked him to spell his name (which he had shortened against the notorious difficulties that Anglophones often suffer with foreign words) but who repeatedly called him “Mr Nkrumah”, seemingly because he was dark-skinned like the then President of newly independent Ghana, Dr Nkrumah;
- * The leading counsel who refused to add him to his clerk’s list because he was sure it would not bring work to its members [107].
- * The foul-mouthed barrister who would greet him with the words “Hello Blackie!” [111];
- * The young upstart barrister, who (thinking it amusing) greeted him in company, blurting out “Hello Sambo. Down from your tree?” [112]. Or the County Court judge who called him “My jungle friend” [124];

- * The youthful unfamiliar barrister who found him inspecting new chambers dressed in jeans and demanded to know what *he* was doing there, as if he had no place in the hallowed halls of his betters [156];
- * The senior judge, who in answer to a protest, told him: “If you can’t take what I did to you, you should leave the Bar” [171]; and
- * Even a Melbourne tram driver was delayed momentarily by the author’s driving in traffic, shouted at him: “You fucking black bastard. Move your fucking black arse”.

These are but a few of the many events that have obviously left deep scars on the author. Yet, at an early stage, he was counselled by Dick McGarvie QC, already a leader of the Victorian Bar and later to be Governor of Victoria, who advised him: “Nimal, when you are in the right, always make waves” [91]. Others taught him by their example, like Jeffrey Sher QC [176] who gathered fame by answering judicial bullies with firm insistence: “I will not tolerate your rudeness” [176]. So when the author suffered intolerable overbearing conduct by public officials, he would, as his life progressed, take it up, complain, record the wrongdoing and insist on a response.

As he acknowledges, in many cases where he had been bullied in argument, the judge in question faithfully applied the law and he won the case [142]. Particular judges are singled out for their invariable courtesy. Some even progressed to personal friendship [157], [164], [166]. Occasionally, this was only because the author earned a way by performance into the judge’s esteem [100]. Sometimes, he acknowledges, those who once bullied him later became quite fond of him [154]. Still, we are left in doubt as to whether that feeling was reciprocated [143]. Sometimes, one suspects, he found the

earlier “dreadful times” that he experienced at the hands of judges, commonly attributed to racial hostility, just too hard to bear. And that explains why he has written this book with his selected memories, many of which are hurtful and painful, years after the exchanges that he recounts.

Because my own early judicial appointments were long ago and initially federal in nature, I came to know many Victorian judges and barristers, mostly senior people. Some of them became my friends. For me, there were none of the egregious instances of verbal violence and denigration recorded in the book, I have no way of judging the accuracy and completeness of the events recorded. Nor is that my function in writing this foreword. The manuscript that I have been given is, in parts, brutal and harsh. It names names. In at least three instances, the barristers singled out for racial hostility and inappropriate conduct were known to, and respected by, me [74], [94], [106]. Even where some of those named may now be dead, their families live on. Those concerned have no opportunity to put their side of the evidentiary recollections.

The author confronts this issue by acknowledging the problem. He admits the good times he sometimes experienced in the “unity of the Bar” [181]. He acknowledges the general integrity of the legal institutions. As an outsider, whose practice at the Bar was originally almost wholly in New South Wales, I find it difficult to believe that things would have been more confrontational and racist in Victoria than they were in the New South Wales of my youth. north of the Murray River, the Victorian Bar was considered more genteel and English (despite the much coveted Irish rosette worn by its silks).

The author accepts that, in writing this book, he was advised to avoid the naming of names [163]. He was warned that identifying claimed offenders would be seen by many as, in effect, “letting down the team”: washing the dirty linen of the legal profession in public. Essentially this point of view recognises the foibles of the human actors who invariably make up all branches of the legal profession, wherever it exists. It points to the inescapable stress and tension that most days in court involve for participants, including judges, barristers, instructing solicitors, clerks and let us not forget the clients.

The author acknowledges that there may be reasons for removing at least some names (particularly of the living). He may yet do this. However, he insists, in effect, that only by identifying bullies and racists will their misconduct be effectively extirpated from the law. By joining in the conspiracy of silence those who know the offenders and stay silent contribute to the persistence and survival of conduct that is wrong – sometimes evil.

In my own case, my recollections of racist actions and slurs at the Bar in New South Wales are few. But I was not walking in the author’s shoes. My recollections of hurt and humiliation relate mainly to sexuality. They extended throughout my career, right to the close of my service in the High Court of Australia. A sprinkling of these I have written up and publicly discussed, including the homophobic attack on me in the Senate of the Australian Parliament.¹ Others have related to early experiences received

¹ A.J. Brown, *Michael Kirby: Paradoxes/Principles* (Federation, Sydney 2011) 319ff. Daryl Dellora, *Michael Kirby: Law, Love, Life* (Penguin/Viking, Melbourne, 2012) 252ff.

at the hands of particular judges.² But for the most part, the daily slings and arrows have been forgotten. They have been drowned out by larger struggles, designed to confront the continuing wrongs to sexual and other minorities in global and usually in reformatory terms.³

Towards the end of the book, the author questions whether he ought, decades earlier, to have started a movement similar to that initiated to advance the rights of women at the Bar in Australia: in his case to advance the rights of racial minorities at the Bar. I had a similar thought five years ago when confronted by the under-representation in the higher echelons of the judiciary and legal profession of racial minorities, particularly those whose ethnicity derives from Asia. This was measured in terms of the shortfall (compared with more than 10% of the Australian population who acknowledge derivation from Asia in the national census) who are making it to the judiciary, to appointments as Queen's Counsel; to partnerships in top-tier and middle ranking law firms; and even to summer clerkships.⁴ My public questioning of these systemic failures helped to lead to the creation of the Asian/Australian Lawyers' Association. This is now a body active throughout the nation.⁵ There is some evidence that this initiative is at last having the

²M.D. Kirby, "My First Judges" (2018) 45 *Australian Bar Review* 215.

³ See e.g. Report of the Eminent Persons Group to the Commonwealth Heads of Government, *A Commonwealth of the People: Time for Urgent Reform* (Commonwealth Secretariat, Perth, October 2011) 101 at 102 (R60); UNAIDS, Report of the Global Commission on HIV and the Law (2011-12), New York, p 44; the work of the International Bar Association, Human Rights Institute, on sexual orientation and gender identity is also relevant

⁴ M.D. Kirby, "Australian Racism: The Story of Australia's First and Only Black Premier and Chief Justice – Sir Francis Villeneuve Smith" [2019] (Summer) *Bar News* 53. Cf. H. Irving (ed) *The Cambridge Companion to Australian Federation* (Cambridge, 1999) 355 and M. Lake, "Colonial Australia and the Asia Pacific Region" in *Cambridge History* 535 at 542-543. See also G.J. Evans, 2019, Asialink Sir Edward 'Weary' Dunlop Lecture, delivered on 13 March 2019: <http://gevans.org/speeches/speech684.html>. See also <http://gevans.org/speeches/Speech702.html>.

⁵ The website of Asian Australian Lawyers Association: <http://www.aala.org.au/>

kind of impact that the author yearns for.⁶ Perhaps we both should have done more, earlier.

This brings me to the third, and final, part of the book. It includes the closing period in the author's legal career, the death of his father, his belated appointment as senior counsel in Victoria and then as Queen's Counsel. A final dream then come true: a short appointment to serve on the Court of Appeal of Fiji at the age of 79. Clearly, he feels that judicial preferment and access to the silken robe were earlier denied or delayed for him unfairly. He suggests that the size and variety of his legal practice by the end merited more opportunities than came his way. His long service in editing Voumard's distinguished book haunts him with disappointments over opportunities lost. Many other lawyers probably feel such disappointments. Few express their feelings because this too is seen as an unseemly challenge to the majesty of the system. Once again, the author has made his own call on this. He was proud to receive his rosette as Queen's Counsel. It made him, with his father, the only (certainly a very rare) instance of senior counsel of our tradition, father and son appointed in different jurisdictions of the world. He is honest enough to admit that the heavy workload involved in writing his judicial opinions in the month in Fiji left him 'completely exhausted' [178]. If earlier that had been his lot in life, it would have had its down sides.

Some readers, in and outside the legal profession, will for differing reasons consider that the author should have kept his memoirs to the familiar self-congratulatory level that is usual in such biographies. Some will see a long

⁶ Sir Francis Villeneuve Smith. See J. Bennett and R. Solomon, *Sir Francis Villeneuve Smith* (Federation, Sydney, 2019).

catalogue of personal animosities as unbecoming to a senior member of a 'learned profession'. Some will feel embarrassed to read the stories of inner hurt that are usually kept to oneself.

On the other hand, this book presents the author's perspective of his life in the Australian legal profession over the last 50 years. Even if many of the suggested instances of racism and bullying can be put down to hypersensitivity or paranoia on the part of the author. The residue that remains is still shocking. Shockingly, his story usually has the ring of truth.

When the author left Sri Lanka to come to Australia, he was warned by many confrères that Australia was, and to some extent it still is, a land with a deep stain of racism [19], [23]. This is what has led him on occasion to call his transfer to his adopted home, 'an extremely hard time to endure' [19]. If he had but lightly researched the long history of anti-Asian attitudes in Australia [5]; not to say prejudice against brilliant migrants of dark skin colour [6]; and chilling prejudice against the Indigenous people [7] it would have alerted him to the risks he was running in moving to Melbourne.⁷ On the other hand, this "God forsaken country" [64] as he finally calls Australia eventually afforded the author notable opportunities. Perhaps he feels an obligation, before it is too late, to record 'the hard time' he suffered too long and too silently so that his fellow citizens in Australia can learn from his experiences. The huge demonstrations that have broken out in 2020 in the United States of America, insisting "Black Lives Matter", have had their counterparts in Australia. They are a sign that racial discrimination exists; is intolerable; and that the victims

⁷ *Mabo v Queensland [No.2]* (1992) 175 CLR 1 at 42.

are now standing up and gathering many friends and supporters. Enough is, at last, enough.

A few of the author's later expressed viewpoints, about women's advancement in the law [189]; and ideas like a return of flogging to deal with road rage [195] do not add luster to his thoughts. But his book is certainly readable. At times it is entertaining. Often it is a tale of hurt. But it is when people in minorities stand against the tide that they may help to change the world. To that extend, uncomfortable reading as it sometimes is, it is good that Nimal Wikramanayake has written his story. We can learn from it. We can extrapolate the lesson about racism to a larger focus. It also applies to discrimination against women, gays, disabled people and others. In a noble profession like law, such lessons need to be learned and remembered. That is why it is sometimes useful for the pain to be written down, so that it will not be repeated and not be forgotten.

A handwritten signature in black ink, appearing to read "Michael Kirby". The signature is fluid and cursive, with a prominent dot above the 'i' in "Kirby".

Sydney,
22 June 2020

Michael Kirby