REMEMBRANCE OF TIMES PAST: TIMES MISSED AND TIMES NOT MISSED[*]

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ABSTRACT

In this Mayo Lecture 2018, the author reviews his recollections of the years (1996-2009) in which he served as a Justice of the High Court of Australia. His recollections begin with cataloguing the special features of the Court in terms of its role; work variety; facilities; accommodation; administration; circuits; chambers events; and international engagements.

He then categorises some unmissed features including decisional deadlines; timing of his appointment; changed composition; political attacks; case assignments; growing disagreement; record keeping; and lost opportunities. The lecture concludes with an appreciation of the opportunity service on the High Court.

FORTIETH JUSTICE

I was appointed a Justice of the High Court of Australia from 6 February 1996. I served in that office until my resignation on 2 February 2009, shortly before the constitutional age of seventy years[1]. If Justice Piddington, who never took his seat on the Court, is included, I was the fortieth person appointed to office on Australia's 'Federal Supreme Court'.[2]

The years after the conclusion of my judicial service have been full of new and interesting tasks, some of which are continuing. I do not doubt that many judges who served on the High Court and who were obliged to retire at the age of 70, regretted their enforced departure. Several of them spoke critically of the mandatory retirement age introduced for Justices of the High Court appointed after 1977. I never did. Mandatory retirement deprived the High Court of some judges of great ability who wished to continue their service. However, service on the Court is a special privilege which imports special requirements. Prior to the constitutional change in 1977, Justices of the High Court who survived decided their own date of retirement and enjoyed life tenure.[3] Australian judges in State and Territory courts have long faced mandatory retiring ages (mostly reaching 70 years) and some have lately enjoyed significant increases in their ages of mandatory retirement.[4] Yet many reasons argue for mandatory retirement in the case of the Justices of the High Court of Australia:

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[*] Text for Mayo Lecture delivered in Townsville, Queensland, 20 October 2018 hosted jointly by James Cook University, the North Queensland Bar Association and the Law Society of Queensland (Townsville Branch). Mayo Lecture 2018, a lecture given in the presence of Mr John Mayo, widower of Marylyn Mayo, one of the founders of the JCU Law School.

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[1] *Australian Constitution*, s 72.

[2] Ibid, s 71.

[3] *New South Wales v The Commonwealth ('Wheat Case')* (1915) 20 CLR 54.

[4] For example, the compulsory retiring age for senior judges in New South Wales was increased to 72 years with provision for reappointment to 75, later 76 years. In 2018, the NSW Government announced

- The particular desirability of regular change in the Court's personnel so as to reflect greater diversity and rapidly changing values in society;
- The availability of other suitable appointees who could make distinctive contributions to the nation's highest court;
- The desirability of affording governments of differing political complexion the opportunity of making appointments to the High Court, thereby potentially contributing to changing judicial values over time; and
- The particular undesirability of life tenure, and especially in the highest court, and the common experience that persons filling offices of significant public power may not always know the time that is right for relinquishing their hold on it.[5]

Before my appointment to the High Court of Australia, I had served 12 years in the office of President of the New South Wales Court of Appeal.[6] I had therefore already experienced an intensive experience as an appellate judge. Prior to my service on the Court of Appeal, I had served for over 10 years as a presidential member of the Australian Conciliation and Arbitration Commission;[7] judge of the Federal Court of Australia;[8] and as Chairman (as the office was then styled) of the Australian Law Reform Commission.[9] By the time of my retirement from the High Court I had served a total of 34 years in judicial offices in Australia and concurrently three years as President of the Court of Appeal of Solomon Islands.[10] I count myself fortunate to have enjoyed such a long and varied legal career. This came on top of my years as a solicitor in New South Wales[11] and as a member of the NSW Bar.[12]

The foregoing, and the passage of a further decade, have given me the distance and necessary space to reflect on the main features on my service on the High Court of Australia. But, in addition, to consider the memorable and less memorable incidents of that judicial service. There were some features that I have missed and some that I have not missed. Necessarily, I must deal with the latter with greater circumspection. Recounting the experiences that are less memorable requires circumspection.

TIMES MISSED

1. *Final national court*:

Being a member of a final national court is a great privilege, even for an already privileged judicial appointee. Many aspects of the service on such a court are similar to those of other judicial offices in other courts. The formalities. The process of reaching conclusions. The mutual courtesies. The routines of work. The power and responsibility of decision-making. Politeness to colleagues, to the legal profession and to litigants themselves. If a judge works hard enough at it, he or she will be respected and feel good

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its intention to increase the age of compulsory retirement to 75 years, with the power of reappointment as an Acting Judge to age 78.

[5] A Leigh, 'Tenure' in A J Blackshield, M. Coper and G. Williams, *The Oxford Companion to the High Court of Australia* (Oxford, OUP, 2001) 664 (hereafter *Oxford Companion*).

[6] A J Brown, *Michael Kirby, Paradoxes/Principles,* Federation Press, Sydney, 2013 (hereafter A J Brown) 171-76.

[7] Ibid 103-104.

[8] Ibid 178.

[9] Ibid 106-29.

[10] Ibid 259-260, 268-69

[11] Ibid 52-72.

[12] Ibid 78.

about the professional opportunities that have come their way. All of these are common elements.

Serving on the High Court however, is the pinnacle judicial achievement that it is possible to attain in Australia, in terms of the judicial role in senior Federal, State and Territory appellate courts. There is much that is in common with other courts. However, in Australia not all jurisdictions, have permanent and separate appellate courts.[13] Inevitably, where they do, such appellate courts will give appointees a larger opportunity, and incentive, involving daily engagement with the same small number of judicial companions and many of the same experienced advocates.

Some Justices of the High Court have emphasised the speciality of that court, and the impermissibility of judges in lower courts questioning defined observations on the law.[14] I often expressed, and followed, the view that the appellate intermediate courts of Australia shared with the High Court the responsibility of developing areas of the law, at least where the High Court had not expressed a binding decision on the law in question. To this extent, I was willing to regard intermediate courts as contingently final courts of appeal for Australia.[15] It was my view that such courts were effectively also final, subject to a grant of special leave to appeal against judgments and orders in which they may have embarked on some new legal development, later disapproved by the High Court.

Whatever view is finally taken on this subject, the fact remains that the High Court, of its constitutional position, has a special relationship with all other courts, tribunals and public institutions in Australia. If a matter comes within the jurisdiction of the High Court and is necessary to its reasoning, the courts subject to its authority are bound by any considered expositions by it of the law and the Constitution. The High Court's rulings on the law are now final for Australia. This is so subject, in constitutional matters, to a formal amendment to the Constitution[16] or subject to the High Court later changing its mind. Which it can always do.

The avenue of appeal to the Judicial Committee of the Privy Council has now been terminated. This fact substantially coincided with amendments to the *Judiciary Act*, affording the High Court the power of control over its own caseload.[17] Now, in effect, the Court decides whether or not to hear any case that is submitted to it.[18] That power has significantly changed the nature of the cases that come before the High Court. It has contributed to the shift from cases involving the review of judge-made law to cases mostly involving federal, Territory and State statute law. Cases on wills, contracts, torts,

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[13] Permanent and separate intermediate appellate courts have been successively established in Australia in NSW; Victoria; Queensland; Western Australia and the Northern Territory of Australia. Separate appeal divisions has been created for the Family Court of Australia but not for the Federal Court of Australia. Nor for State Supreme Courts in South Australia or Tasmania. The ACT is a hybrid.

[14] *Garcia v National Australia Bank Limited* (1998) 194 CLR 395 at 403 [16] per Gaudron, McHugh, Gummonw and Hayne JJ [16]-[17]; cf at 417-418 [56]-[59] per Kirby J. *Farah Constructions Pty Ltd v Say Dee Pty Ltd* (2007) 230 CLR 89 at 148 at 149 [130]-[149] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ ('grave error').

[15] *Garcia*, ibid at 418 [58]-[59] per Kirby J.

[16] Under *Australian Constitution* s 128.

[17] *Judiciary Act 1903* (Cth) s 35(2) and s 35AA(2). See also s 35A.

[18] See the trilogy of *Al-Kateb v Godwin* (2004) 219 CLR 562; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664; and *Vehrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486. Cf George Williams, Sean Brennan and Andrew Lynch, *Australian Constitutional Law and Theory* (Federation Press, Sydney, 6th ed., 2014) 567 [13.39] (hereafter 'Williams et al'); *Australian Constitution*, s 44.

trusts and other equities have given way to a substantial diet of contested statutory points, particularly over federal statutes. This is a big shift in the nature of the work of the High Court and it is unlikely to be reversed.

This means that the High Court is constantly addressing statutory legal puzzles. They afford quandaries upon which different decision-makers can reasonably differ. The majority will determine the legally correct and binding interpretation that states the law at the time of their decision. The resolution of such puzzles is an inescapable feature of the work of courts, especially appellate courts and particularly the High Court of Australia. Often in resolving the puzzles, a judge will be influenced by perceptions of the apparent justice of competing interpretations. This mixture requires both technical ability and moral sensibility. Those who do not enjoy such work, need to look for a different vocation.

2. *Work variety*:

Variety is a feature of contemporary legal practice. Necessarily, judging reflects the growing specialisation of legal practice before courts and tribunals. Specialisation in jurisdiction has clear advantages for clients and litigants. However, it can sometimes add to the pressure on performers. If the cases are inescapably stressful and unpleasant, it can add pressure for those involved. If the cases are routine and unchallenging, this can reduce the intellectual stimulation necessary for high performance. All judicial appointments involve a mixture of these elements. Magistrates must get through huge numbers of cases, most of them decided immediately, without time for much reflection. Many District and County Court judges in Australia today face weeks or months engaged in trials of child sexual abuse accusations. The large number of personal injury cases decided by the NSW Court of Appeal in my time added an element of tedium; but this was offset by cases of great complexity and challenge, many of which proceeded to the High Court. Relatively little of the work of the High Court of Australia can be described as entirely routine. This is because of the character of the court and its substantial power of selection of the cases that come before it.

In recent times, it is possible that the large number of cases appearing at the one time concerning the application of section 44 of the Constitution may have eventually seemed routine, after the Court had expressed its agreed approach about the section.[19] During my service on the High Court, a large number of immigration cases came to present similar problems. [20] However, the high importance for the lives of the persons involved in such matters meant that few were actually routine. At least this was true of those cases that secured a grant of special leave to appeal and an oral hearing. Many presented difficult and interesting points of law.[21] Constitutional decisions are invariably significant to some degree.[22] Not many appointments in the legal profession involve such a sustained level of interest and legal significance.

3. *Court chambers:*

[19] See eg *Re Canavan* (2017) 91 ALJR 1209 (dual nationality).
[20] See especially *BehroozvDimia* (2004) 219 CLR 486; *Al Kateb v Godwin* (2004) 219 CLR 562 .
[21] M D Kirby, Foreword in T Prince and P Herzfeld, *Statutory Interpretation Principles* (Laws of Australia) LawBook Co, Sydney, 2014, v.
[22] A.J. Blackshield and F. Dominello, 'Seat of Court' in Blackshield and Ors, *Oxford Companion*, above n 5, 614.

The facilities provided to a Justice of the High Court by Australian standards are exceptional. The seat of the High Court is now in the constitutional triangle in Canberra.[23] The High Court building is an outstanding environment for those working within it. The new building had been planned and developed during the time I successively served in the Australian Law Reform Commission and the NSW Court of Appeal. Accordingly, the only occasions on which I had visited the court, prior to my own appointment, were usually ceremonial events. My first extended visit to where the private chambers of the Justices are situated was in December 1995, soon after my appointment was announced and before I was sworn to the office of a Justice.
On arrival, I was shown up by security to the level of the judicial chambers (9th floor), across the space occupied by the chambers library collection. For the first time I entered the rooms that had just been vacated by Justice Deane, upon his appointment as Governor-General. It was that appointment that had created the vacancy to which I was appointed. The first impression of my new chambers was entirely pleasing.[24] The wood used in the seven chambers reflects different varieties derived from the different sub-national parts of the Commonwealth. My chambers had earlier been occupied only by Justices Aickin and Deane. The wood derived from Tasmania and was fashioned from pale golden ash trees of that State. In my economics course at Sydney University I learned that much effort had been expended by management experts to discover the colour most advantageous to customer satisfaction in supermarkets. That colour was yellow. Some of the other chambers on the floor (especially those of the Chief Justice and of Justice Dawson (later Hayne)) were of dark wood, traditional to most legal chambers at the Bar. However, mine were agreeable and light. I thought they were a true reflection of my personality.

Most of the chambers in the High Court run along the eastern side of the building, facing the direction of the airport where a number of the occupants longed to be. My chambers were on the southern side facing Old Parliament House, New Parliament House the Administrative Building, St Andrew's Church, the Brindabellas in the distance and trees all around. Each set of chambers had large rooms, for respectively, the senior associate and personal assistant and a junior associate. There was also a room for a kitchen. Each Justice was supplied with a basic library of the *Commonwealth Law Reports*, State reports, Federal Court Reports, statute books, *English Reports* and basic text books. Each Justice's room contain a large desk, also fashioned in wood matching the colour of the wall timber, in my case, golden ash. Also in the room were lounge chairs and a table for conferences, luncheons and similar uses. Some Justices chose modern art for wall decorations. I brought with me two large photographs in black and white. One was a photograph of the delegates (all male) at the Adelaide session of the Australasian Federal Convention of 1897, which resolved many of the contentious issues over the Constitution. The other was a photograph of the first sitting of the High Court in Melbourne in October 1903. Although sombre, each of these images emphasised the continuity of the Constitution. And the duties that descended on the relatively few decision-makers who had served on its highest court.

In addition to the court chambers in Canberra, each Justice was provided with chambers in his or her home State. On my appointment in 1996, these chambers were on level 19 (later level 23) of the Law Courts Building in Queen's Square, Sydney. At the time, Chief Justice Brennan, Justice Gummow, Justice Gaudron, Justice McHugh and I had

[23] M D Kirby, 'Chambers' in A J Blackshield and Ors, *Oxford Companion*, above n 5, 87-88.
[24] A J Brown, above n 6, 71

chambers in Sydney. These were adjacent facilities for our personal assistants who elected to work in Sydney rather than Canberra. The Chief Justice had an additional personal assistant and two associates in Canberra. The home facilities were truly working chambers, where the Justices performed most of their work, writing their reasons for judgment. The facilities in both cities were outstanding. All of the judges worked long hours. Each had been known to me for decades: Justices Gaudron and Gummow from university days; Justice McHugh from the Bar; Chief Justice Brennan from our time at the Bar and together in the Australian Law Reform Commission; and Justices Dawson and Toohey from my time on the NSW Court of Appeal. Spoiled by such outstanding facilities, it is unsurprising that when I lost them I missed them.

4. *Home accommodation:*

Each Justice who did not live in Canberra was entitled to an allowance to cover the provision of additional accommodation in that city. [25] Upon my retirement as President of the Court of Appeal of NSW, the Government of that State paid the equivalent of long leave entitlements that had accumulated during my service in that office. From the accumulated entitlements were deducted days during which I had attended United Nations and other events overseas, with leave granted by the agreement of the State Chief Justice. This still left a significant entitlement owing to me. That was paid and used to purchase an apartment in Kingston, about 2kms from the court. The apartment was in one of the high-rise buildings in Kingston, in which coincidently, Justice Deane's apartment had earlier been found. By this time, he was housed in greater luxury at Government House, discharging his duties as Governor-General. Chief Justice Brennan was the only continuing Justice whose sole residence was initially in Canberra.

It became my habit to walk to work in Canberra each day when the court was sitting in that city. Walking beside the lake and reflecting on the problems of the day was one of the privileges of appointment to Canberra. Sometimes, if my partner Johan were not present, I would also walk home from the court. A typical day's work was from 6am to 7pm. For a sitting week in Canberra, I would arrive on the Sunday evening and depart Canberra with the other Justices at the end of business, usually on the Friday.

The sights from my Canberra chambers and also along the edge of Lake Burley Griffin afforded vivid reminders of nature's changing course during the year. My partner drove to Canberra every week when I was sitting there. He and I came to like Canberra. Usually we ate in our apartment. After dinner we would walk under the stars which are specially bright and clear in Canberra because of the lack of pollution. It was my impression that Johan was the partner most frequently present in Canberra, except for Lady Brennan and Mrs Loma Toohey. She and Justice Toohey usually remained in Canberra for 2 weeks to avoid repeated flights to Perth. Most Justices purchase an apartment in Canberra. However, Chief Justice Gleeson, Justice Callinan and Justice Heydon resided during sittings at the Commonwealth Club, reportedly eating breakfast at separate tables.

5. *Associates*:

One of the greatest advantages of judicial appointment in Australia is the acquisition of an associate (law clerk).[26] This is now generally a young law graduate who is engaged for a year partly to assist the judge and partly to secure for themselves experience in

[25] G. Winterton, "Remuneration of Justices" in A.J. Blackshield et al, above n.5, 596-8.
[26] A Leigh, 'Associates' in A J Blackshield et al, *Oxford Companion*, above n 5, 34-35 and A Leigh, 'Behind the Bench: Associates in the High Court of Australia' (2000) 25 *Alternative Law Journal* 295.

legal practice. Senior judges are entitled to two associates. Thus, on my original appointment as a Deputy President of the Australian Conciliation and Arbitration Commission I secured one associate, an arrangement maintained during my secondment to the Australian Law Reform Commission. On my appointment as President of the Court of Appeal and as a Justice of the High Court, I appointed two associates each year, one in January and the other in July.

Observing what was then the ordinary practice, my associates at first were, like all the judges of the appellate courts in Australia, entirely male. However, after Justice Gaudron was appointed to the High court in 1986 things began to change. Like her I dropped the 'Mr' from my title and became simply 'Justice Kirby'. This was a source of irritation to some judges at the time. But eventually it became the standard and was ultimately reflected in the language used in judicial commissions.

From the time of my appointment to the Court of Appeal I advertised for associates and conducted interviews prior to the appointment. At one such interview a female applicant thanked me for the privilege of the interview, whilst acknowledging what she described as my practice of appointing only male associates. Her comment was well targeted. I duly appointed her as one of my associates. Thereafter, both in the Court of Appeal and the High Court, I invariably chose one male and one female associate. That appointee was Sarah McNaughton. She went on to a distinguished career at the Bar and is now the Commonwealth Director of Public Prosecutions.

A number of my associates have become judges, both federal and State. Several have become Senior Counsel, barristers and lawyers. Many have been appointed professors and academics, both in Australia and overseas. Some have gone into the public service, commercial life, Parliament, the Ministry and other public vocations.

In the case of my chambers, the associates were chosen by a rigorous selection procedure. I have kept in touch with most of them. Losing the assistance and friendship of close young collaborators in the intensive work of the courts is one of the biggest losses that follows the termination of judicial service. During that service, especially in Canberra, it was common to enjoy dinner together with one's associates at a Kingston restaurant during each sitting of the court and once a year with all of the associates, at a dinner that they hosted. For my chambers occasions I would also invite the court research officer, who worked in the Library of the High Court, to join my associates and commonly Johan. Since my judicial retirement, I have attempted to maintain a similar tradition of mentorship with outstanding young graduates selected, one each year, by the Law School of University of Technology, Sydney. Apart from everything else, the talent of young lawyers in researching materials on the internet inevitably surpasses the skills of those trained in the legal profession before this technological development arrived.

6. *Administrative arrangements:*

Most of the administrative arrangements for my chambers were handled during the Court of Appeal and High Court years by my personal assistant, Janet Saleh. She was an outstanding colleague with a huge output and matchless efficiency and accuracy. She retired when I resigned from the High Court and has been replaced now by the equally outstanding personal assistant, Sarah Conquest.

During my High Court years, the annual circuits of the Court in Brisbane, Adelaide, Perth (and most years) Hobart, together with regular special leave sittings in Melbourne and Sydney, required substantial administrative arrangements to be made for travel, accommodation and work purposes. In that time, I undertook many national and international travel arrangements in addition to those for the Court. These had to be arranged with precision so as to complement, and not to clash with, the obligations of the Court. Such administrative support disappears upon termination of most public offices. Over the years, because of the long working hours, I came to know many of the Comcar drivers and respected them all. In 2001, an incident occurred affecting me, allegedly as a result of wrongdoing by one such driver, that was raised in the Australian Senate. That incident did not diminish my respect and appreciation for the services of the officials who support people who are appointed to serve as State and Federal judges in Australia.

In the High Court, the officials included the outstanding officers of the court itself; the librarians at the Court House in Canberra and in the library of the joint law courts in Sydney; the cleaners and security staff who worked hours as long as those of the Justices themselves; and the occasional associates from other chambers who have kept in touch during the years that followed. Without exception, in my experience, all of the employees at the High Court worked with devotion and fidelity. Each of them can likewise tell a story about the support they received from others during that service.

7. *Circuits and special leaves*:

In the High Court the duties regularly included proceeding on circuit to State capital cities, observing a work routine that had been established from the earliest days of the High Court when circuit travel was generally accomplished by sea.[27] The ordinary pattern during my service, was to proceed interstate on the Sunday on the week of the circuit and to remain there until the Thursday or Friday, depending on business.

Local appeals would be listed for hearing on circuit in a continuous list, followed by other appeals sometimes brought from interstate. Finally, there were special leave applications pending from that city, whether it was Adelaide, Brisbane, Hobart or Perth. The annual roster of the court calendar was published towards the end of each year, identifying the weeks assigned for Canberra and circuit hearings. Advantage was taken of the circuit to accomplish a number of professional events coinciding with court sittings. These generally included a dinner with the local judges from of the State Supreme Court and locally based judges of the Federal Court of Australia and their partners; dinners with the local Bar and Law Society; and receptions offered by the profession. Occasionally, there were events hosted by universities which I always gladly attended.

Not all Justices enjoyed these circuits. However, I did and sometimes my partner attended as did other judicial partners of other High Court Justices. Invitations were sometimes received from State Government House where the wines were famous, particularly in Adelaide. The value of sending judges around the country was recognised in England from the reign of Henry II. I understand that, circuit travel has been reduced since my retirement from the High Court. In my opinion this is a mistake. As Queen Elizabeth II has said of her own office: 'One has to be seen to be believed'.

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[27] G Del Villar and T Simpson, 'Circuit System' in A J Blackshield et al *Oxford Companion*, above n 5, 96-97

The value of the circuits which had lasted more than a century, are not to be assessed only in terms of immediate cost and supposed efficiency.

8. *Chambers events:*

A special advantage of my time in the High Court was participating in lunches in my chambers, both in Canberra and Sydney. The stimulus and privilege of inviting various office-holders, academics, religious personalities, administrators, retired and serving judges, as well as personal friends cannot be overstated. By the time I reached the High Court my associates had the organisation of such lunches down to a fine art. A salad was easily and economically assembled. Wine might be offered to the guests and mysteriously the residue was always consumed. So many such events were arranged that one enterprising associate persuaded the court administration to install a dishwashing machine in my Canberra chambers. Other Justices regularly joined me at lunch with visiting judges from overseas, visiting and local academics of interest. Although there is an area of the High Court building in Canberra designed as a restaurant for the Justices, it is rarely used. The privilege of visiting the judicial level of the High Court and participating in a luncheon in chambers is plain. It always surprised me that this was something other chambers tended to offer rarely. I know from reports shared with me after my retirement that these luncheons were at least as much appreciated by the guests as by the host. Canberra in particular has a regular flow of interesting visitors, particularly academics. Being able to invite many of them to the High Court was a special pleasure of those years.

9. *International legal principles:*

During my service on the Court of Appeal of NSW, I undertook a number of international activities that opened my eyes to the growing role of international law in most municipal legal systems. This was a legacy from my service with the ALRC that enhanced my understanding of the growing role of international human rights law. That had been a consideration specifically called to attention by the statute establishing the Law Reform Commission.[28]

During my time on the Court of Appeal I had participated in Bangalore India, in a conference organised by Chief Justice P.N. Bhagwati in 1988. He had served as a Justice, later Chief Justice, of the Supreme Court of India. The conference concerned the domestic application of international human rights norms. Amongst the notable judges attending the Bangalore Conference was Judge Ruth Bader Ginsberg. Like me, she was later to be elevated to the highest court. The *Bangalore Principles* adopted at the 1988 meeting,[29] were accepted by all of the experienced judges attending. They accepted that international law was not, as such, part of municipal law. However, international law principles could be brought into municipal law by legislative provisions and also by appropriate decisions and reasoning of municipal judges. Where the law was ambiguous, or where a gap appeared, judges of high authority could draw upon international law to resolve the ambiguity or fill the gap. The *Bangalore Principles* were discussed in a series of meetings with senior judges, mostly from Commonwealth countries in conferences held in various cities including Harare,

[28] *Law Reform Commission Act* 1973 (Cth) s 7.
[29] M D Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Law' (1988) 62 *Australian Law Journal* 514, where the *Bangalore Principles* are set out at 531-2.

Bloemfontein, Banjul, and Baliol.[30] In a number of my judicial decisions in the Court of Appeal of NSW, occasions arose where the use of analogous reasoning derived from international legal principles was found to be helpful.[31] Without referring to the *Bangalore Principles* as such, the reasoning of Justice Brennan in *Mabo v Queensland [No.2]*[32] bore similarities to the principle that international human rights norms could sometimes assist in the elaboration by judges of Australia's municipal law.

Finding a reconciliation between the Australian domestic legal system and the growing body of international law, including human rights law, was a significant and exciting intellectual challenge confronting the Australian legal system during my service on the High Court. The issue was not without controversy.[33] However, upon important questions, it is inevitable that a final court will have special responsibilities of legal reform and leadership.

10. *International legal conferences:*

One of the particular privileges of service on the High Court was the invitation that was extended to attend national and international conferences with other judges and leaders of the legal academy. Outstanding amongst these was the annual conference on constitutionalism established by the Yale Law School. In the years after 1996 until my retirement from the High Court, Yale conferences took place in September each year. Scheduling took pains to avoid clashes with the sitting obligations of the judges who participated. Participating judges included Justices Kennedy and Breyer of the Supreme Court of the United States; Justices Iacobucci and later Rosalie Abella of the Supreme Court of Canada; Lord Chief Justice Woolf and later Baroness Brenda Hale of the United Kingdom; Justice Sian Elias (New Zealand); Chief Justice Aharon Barak (Israel); Judge Dieter Grimm (Germany); Chief Justice Andrew Li (Hong Kong); and Judges from other final courts in France, Japan, India, Argentina, Poland, the European Court of Human Rights and other countries.

A great lesson from my participation in the Yale conferences was how similar were the issues arising before final national and regional courts at roughly the same time. And how useful it was for judges to look at the conceptual reasoning concerning notions of justice and human rights norms, so as to derive ideas for the elaboration and explanation of their own reasoning and identification of basic legal principles. At the very least, the exchange of views at the Yale Constitutionalism Conference was a cherished privilege for the judicial and academic participants alike. When a judicial participant ceased to be a member of his or her court, the invitations ceased to arrive. This was a recognition of the reciprocal value of such meetings, as they supported the judges of final courts in the discharge of their unique responsibilities.

Although during my 13 years on the High Court I enjoyed many privileges, the opportunity to spend time with experienced judges and scholars, in a private dialogue about problems and issues. This was an enriching intellectual opportunity at once

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[30] M D Kirby, 'The Australian Use of International Human Rights Norms: From Bangalore to Baliol — A View from the Antipodes' (1990) 16(2) *UNSW Law Journal* 363.
[31] See eg *Gradidge v Grace Brothers Pty Ltd* (1988) 93 FLR 414. See also M D Kirby 'International Law — the Impact on National Constitutions' (Grotius Lecture 2005) 21 *American University International Law Review* 327 (2006).
[32] (1992) 175 CLR 1 at 42 per Brennan J (with whom Mason CJ and McHugh J concurred).
[33] *Al-Kateb v Godwin* (2006) 19 CLR 562 at 586 [50] ff per McHugh J.; cf at 617 [152] ff per Kirby J. Also see *Roach v Electoral Commission* (2007) 233 CLR 162 at 224-226 [181]-[182] per Heydon J; cf at 178 [16] per Gleeson CJ.

pleasurable and mind-stretching. In the last year in which I participated in the Yale seminar, a dinner was arranged in New Haven at which the judges were afforded an opportunity to meet with a new dining group who were in town for what appeared to be a similar meeting of national law officers from a smaller circle of countries. One of those law officers present on that occasion was Mr Stephen Gageler SC, Solicitor General of Australia, since appointed a Justice of the High Court. The participation of one invited Justice of the High Court of Australia to take part in the Yale Seminar continued with Justice Crennan but then ceased. The repeated recent hostility in High Court reasoning towards international law, and especially human rights law, may have led the organisers to conclude that such an invitation might be unwelcome or of little use. Especially in a court and country often isolated from outside influences, participation in such meetings was in my view precious and valuable. Hopefully it will be revived.

TIMES NOT MISSED

1. *Decisional deadlines:*

Even now, 10 years after the conclusion of my service on the High Court, I sometimes wake from a nightmare. It always has the same elements. I am about the retire from judicial office. And I do not have all my reserved decisions ready for delivery. This is one of the special conscious, and subconscious, features of judicial life. Timeliness in the delivery of judicial opinions, pronouncing the orders that the judge favours, is properly a matter of public attention and comment.[34] If a judge is not worried about the timely production of his or her reasons for a reserved decision, that judge is not really suited for judicial office, particularly in a final court where, by definition, the decisions are often important not only for the parties but for society.

I was always efficient in the completion of my reasons for judgment. From my times as an articled clerk or young solicitor, I regularly reviewed my outstanding responsibilities and kept them at the front of my mind. I was also well organised in the performance of my duties. During my service on the High Court, it was often a competition as to who would deliver their draft opinion first. It is not giving too many secrets away to say that it would generally be either Justice Gummow, Justice Hayne or me.

In my own case, the efficiency derived from the fact that I had earlier served 11 years in a very similar life when I was President of the Court of Appeal of NSW. Sitting in that court, often beside Justice Dennis Mahoney, I noted that he was constantly writing. I learned that his notes involved outlines for his reasons for judgment for the case at hand. He warned me, early in my life on that court, that I was not there to enjoy myself, listening to the fascinating arguments on both sides of the issue. I was there for my decision. All intellectual endeavour had therefore to be directed to that objective.

With this in mind, I approached decision-making methodically and with careful planning. By the use of 'tree diagrams' of points for decision, I would analyse the issues that demanded my attention and points relevant for that purpose. Especially with good counsel, it is easy to succumb to the seductive pleasures of the argumentation. Self-control is necessary. It is always possible, until the delivery of judgment, to change

[34] J D Heydon delivered a lecture referring to the "mentality of [judicial] procrastination and delay". See (2018) 92 *Australian Law Journal* 855.

one's mind. Fortunately, I did not have difficulties in reaching a conclusion. And sometimes changing it because, on reflection, the earlier conclusion 'would not fit'.[35]

Although I could make and unmake my decision, it is clear from my recurring nightmare that the responsibility of prompt decision-making troubled me in ways that I would not always admit or even perhaps realise. I have known judges who have difficulty in making up their minds. Doing so requires concentration and addressing the central issues as quickly as possible. I still make and record decisions in other tasks. But none of them tends to be as pressing and public as the decisions in the High Court that still obviously trouble my dreams.

2. *Timing:*

Timing in judicial (or other public) appointments is important. It affects the issues that arise for decision and the persons with whom the decisions will be made. Life, action and achievement are relational phenomena. They depend on time and other players. Mostly, I have been fortunate with my timing in life. However, for present purposes, I will concentrate on my mistiming.

My biggest professional mistiming was one over which (as is often the case) I had no say: my failure to be appointed to the High Court during the years of the court presided over by Chief Justice Mason. I refer not only to the important decision concerning the recognition of the land rights of Australia's Indigenous citizens.[36] I also refer to those many decisions that re-expressed important constitutional principles, including the implied right of free expression;[37] a sensible approach to 'absolutely free' trade in the Constitution, section 92[38] and the many other constitutional rules that were considered afresh.[39] Apart from constitutional norms, there were also the many statements of common law principle that were re-expressed with bold conceptual clarity.[40]

From my perspective, this would have been an ideal time to have served as a member of the court. With the possible exception of the intervals that followed the ascendancy of Justice Isaacs in the 1920s and Justice Mason in the 1980s,[41] the High Court has, by and large, been a cautious, perhaps over cautious, daughter of the Privy Council. In most of its decisions until 1986, it was subject to the judgments and orders of the Privy Council. Whilst that situation prevailed, it was rarely inclined to strike out on its own path. When it was released by successive steps from the control of the Privy Council, the court under Chief Justice Mason found its own footing. The Mason era did not last long after Chief Justice Mason's departure. What was achieved was not undone. But

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[35] As was the case in *Minister for Immigration and Ethnic Affairs v B* (2004) 219 CLR 365 at 410 [121], 426-427 [174]-[178] per Kirby J.

[36] Especially *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

[37] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 69 per Deane and Toohey JJ; *ACT Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 133, 137 per Mason CJ. See also *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 122 per Mason CJ, Toohey and Gaudron JJ and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 per the Court.

[38] *Cole v Whitfield* (1988) 165 CLR at 407 per the Court. This view was severely criticised by Sir Garfield Barwick as 'tosh'. See Williams et al, above n 18, 1214 [27.44].

[39] See eg *Coco v The Queen* (1994) 179 CLR 427 at 436 per Mason, Brennan, Gaudron and McHugh JJ (abrogation or curtailment of fundamental rights).

[40] See eg *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7*; Rogers v Whittaker* (1992) 175 CLR 479 and *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

[41] M D Kirby, Sir Anthony Mason Lecture: A F Mason — From *Trigwell* to *Teoh* (1996) 20 *Melbourne University Law Review* 1087.

the approach that had heralded a new and less formalistic direction, did not continue, certainly to the same degree. That was when, in 1996, my appointment occurred.

It would be a mistake to place all the laurels for the golden age on the brow of Chief Justice Mason. They belong as well to Justice Deane and at times to Justices Brennan, Gaudron, Toohey and McHugh. It needed a peculiar mixture of personalities, opportunities and inclinations. Even to have perfect gentlemen to ring the critic's bell: Justices Wilson and Dawson. Had things worked out differently, my service might have overlapped Chief Justice Mason. I have been told reliably that every time my name was raised in cabinet, Bob Hawke then in his ascendancy as Australia's Prime Minister, made it clear that he would not appoint a homosexual to the High Court. The surprise was thus that my appointment eventually proceeded at all. It happened when Paul Keating proposed Sir William Deane as Governor-General.

Because of the timing, the relationships in the High Court changed with its membership. I was not, by some curmudgeonly inclination, a dissenter by nature. In the ALRC, I think I only dissented once from a majority and that was over a particular issue in the proposed human transplantation law.[42] Over more than a decade in the ALRC there were thousands of decisions. Virtually no dissents.

In the Court of Appeal of NSW there were, of course, dissents. But mine were by no means remarkable. Overall, I think my rate was about 15%, which was a level reached at times by Justice Gageler after his appointment to the High Court. Certainly, this would be high by the current record of unanimity in that court.[43] But certainly not exceptional in a final national court.

In the Court of Appeal of Solomon Islands there was not a single dissent. And after my service on the High Court of Australia, in my work for the United Nations and other international bodies, there have been many opportunities for dissent. However, there was no dissent in the report of the future of the Commonwealth of Nations by the Eminent Persons Group;[44] nor in the report of the Global Commission of HIV and the Law[45] dealing with a wide range of controversial medico-legal questions; nor the High-Level Panel of the Secretary-General on Access to Medicines.[46] There were dissents in the last-mentioned report; many of them. But not from me.

In the recent report of the Commission of Inquiry of the United Nations Human Rights Council on North Korea,[47] which I chaired, dealing with existential dangers and crimes against humanity, there was no dissent. In my present work as co-Chair of the International Bar Association's Human Rights Institute, there are numbers of

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[42] Australian Law Reform Commission, *Human Tissue Transplants* (ALRC 7, Canberra,.
[43] Susan Kiefel, 'The Individual Judge' (2014) 88 *Australian Law Journal* 554.
[44] Commonwealth of Nations, Report of the Eminent Persons Group, *A Commonwealth of the People: Time for Urgent Reform*, (Perth, WA, October 2011). See especially recommendation 60 concerning 'Laws that Impede the Effective Response of Commonwealth Countries to the HIV/AIDS Epidemic', a reference to criminal laws against LGBT citizens.
[45] United Nations Development Programme, Global Commission on HIV and the Law (2012); (supplement 2018) *Rights and Risks and Health.*
[46] United Nations, High Level Panel of the Secretary-General on *Access to Medicines: Promoting Innovation and Access to Health Technologies*, New York, 2016. Detailed dissenting and commentaries were set out in Annex 1 (pages 53-63). The writer did not file any such separate opinions.
[47] United Nations, Commission of Inquiry of Human Rights Council, report on Human Rights Violations in the Democratic People's Republic of Korea (A/HRC/25/CRP.1, 7 February 2014). There was no dissent recorded in that report.

contentious decisions. No dissents. Dissent is a relational phenomenon. It all depends upon whom one is dissenting from. Had I been appointed to the Mason High Court and seen out my High Court days in such an environment, I would never have warranted the title of 'the Great Dissenter'.

3. *Capital 'C' conservatives*:

A test arrived at the close of my first year on the High Court concerning the extension of the principle expressed during the Mason court in *Mabo*. I refer to *Wik Peoples v Queensland.*[48] There was room for differing conclusions in that case, as demonstrated by the dissenting opinions of Chief Justice Brennan and Justices Dawson and McHugh. Two of them had been in the majority in *Mabo.* But so upset were some politicians and media commentators by the majority decision in *Wik*, in which I was one of the majority, that the High Court Justices faced unprecedented attacks.

The Deputy Prime Minister at the time, Mr Tim Fischer, declared that the Government should henceforth fill vacancies in the High Court with 'capital "C" conservatives'. The Queensland Premier, Mr Borbidge, suggested that the High Court had been taken over by 'basket weavers'.[49] Unsurprisingly perhaps, the subsequent appointees to the court were lawyers who would probably have described themselves as legally and socially 'conservative'. Under our constitutional system, the executive government appoints the judges. Far from this being a misuse of power, it is within the contemplation of the constitutional power that the executive will appoint as judges persons whom they hope will generally reflect the philosophical inclination of values desired by the government of the day.

The shift in direction in the High Court may have been uncomfortable for me, but I never complained. I understood the system and the *locus* of the power of appointment. This does not make judicial appointees political lackeys of the government in power. All of my colleagues on the High Court were independent of government, uncorrupted, highly qualified, hard-working and judges of integrity. They just happened to be, as Tim Fischer had demanded, 'conservative' in outlook. This had the consequence that, as time went by, the High Court became markedly more conservative in terms of legal doctrine and less like the Mason Court. It changed the professional environment within which I had to work. I do not believe that informed observers would disagree with that assessment.

4. *Political attack:*

Whereas I understood the likelihood, indeed inevitability, of this change, I did not expect an attack made upon me in the Australian Senate by Senator W. Heffernan on 12 March 2002. I regarded it as a political attack, almost unprecedented in the history of the High Court.[50] It occurred when the High Court was beginning to hear a case on the law of negligence concerned with liability for effluent. I had to endure a week, shocking to myself, my partner and family. The factual falsity of the foundation of the attack was quickly demonstrated. There were apologies, formal motions of the Senate's regret and even the suicide of a Comcar driver who had got caught up in the saga and who had provided the false document allegedly in response to the senator's insistent

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[48] *Wik Peoples v Queensland* (1996) 187 CLR 1.
[49] A J Brown, above n 6, 283; cf E Neumann, *The High Court of Australia: A Collective Portrait 1903-1972* (2nd ed 1973), 105-6.
[50] Cf M D Kirby, 'Attacks on Judges – A Universal Phenomenon' (1998) 72 *Australian Law Journal* 599.

demands. However, it was a serious instance of a breakdown in civility in governance in Australia. During the week of the attack, only one Justice (Justice Gaudron) walked across the 9th level of the High Court building in Canberra to enquire how my partner and I were faring. It was a grim time.

5. *Unsatisfactory assignments:*

Every appellate court has its own system for handling the reasons for judgment that determine the decisions in the appeals before it. In the Supreme Court of the United States, the Chief Justice assigns the writing of the opinion of the Court. But if the Chief Justice is in the minority for the outcome, that responsibility passes to the senior justice who favours the winning conclusion.

In the Court of Appeal of NSW, I inherited from my predecessor, Justice Moffitt, a different system. As President, I would allocate, in advance, the primary responsibility for giving the reasons of the court when, about six weeks before the hearing, I distributed the roster for the sitting duties within the court. For each rostered appeal assignments were fixed by the President, either a single or a double asterisk. The single asterisk indicated that the judge identified had the responsibility to prepare to deliver the primary reasons for disposing of the appeal considered probably suitable for immediate delivery of *ex tempore* judgment. For other appeals involving more complex issues, lengthier appeal papers or matters of special public importance, double asterisks were assigned to a judge having the primary responsibility to prepare the first draft. In those cases the decision was expected to be reserved. Of course, if, after hearing argument, the judge with the single asterisk desired that the matter be reserved, that course would follow. If the judge with a double asterisk felt able, with the concurrence of colleagues, to proceed immediately to deliver *ex tempore* reasons for judgment, this could be done.

In assigning the obligations in this way, I took into account the fair distribution of work within the court; the expertise of available judges in the area of law primarily in question; (sometimes) the non-expertise that might be appropriate to a novel point; the size and length of the cases assigned during the month in question; and the interests of the judges in the type of point raised for decision. In this way, every endeavour was made to balance fairly the burdens upon the several Judges of Appeal and the interest of the court in the maintenance of a steady flow of decisions, pronounced without undue delay. The system described worked well under Justice Moffitt and, I believe, during my time and subsequently. There were no complaints. The system was equitable. It was respectful of all judges and the role of each within the Court.

In the High Court of Australia, there was no equivalent system during my service. Chief Justice Barwick had reportedly attempted to impose a system of his own when the court moved to Canberra. However, this did not prove acceptable to the Justices who were unused to it. Chief Justice Brennan later attempted to establish a different system; but it was very informal. When Chief Justice Gleeson arrived in 1988, it was my hope that he would institute a system similar to that to with which we had both become used in the NSW Court of Appeal. He did have greater success in securing discussions about the preparation of opinions. However, it never became one that was equitable and transparent.

On one occasion only in the time we sat together in the High Court, he suggested to me that I should ‘have a go’ to draft reasons for consideration by the other Justices sitting

on the case. [51] When, immediately after that request, I went to extract the relevant books from the library shelves, I found them all missing. Another Justice had got in first. He was preparing his own draft reasons without waiting for mine. He delivered them only a few days before mine were produced. He had not waited to see if mine would be satisfactory. In the outcome, our two drafts came to the same conclusion and for much the same reasons. In writing mine, I endeavoured to 'grey' the text so as to reduce the personal identifiers as to the author. But it did not matter. The other Justices quickly sent around their concurrences. They agreed with the other Justice. I regarded this as a very disrespectful approach to an orderly procedure writing joint opinions which should be transparent and collegiate. These are the qualities required even when differences of view are common and occasionally deeply held. Despite disagreements, the court must continue to operate as a collegiate institution, as far as is possible. So much is required by professionalism and by a basic shared respect for the offices of all the appointees.

6. *Dissent/concurrence:*

At present a view has been propounded concerning concurrent opinions in the High Court and the value of differing judicial opinions. Justices who have expressed themselves in favour of separate concurring opinions suggest that the obligation to draft individual reasons for judgment brings out the best work of the individual judges. It ensures the sharpest concentration upon the case in hand. [52] Justice Heydon, after his retirement from the High Court, expressed himself strongly opposed to what he saw as the hegemony of particular Justices and their influence upon others. In the recent practice of the High Court.

The opinion of the present Chief Justice of the High Court (Chief Justice Kiefel) opposing separate concurring reasons has been explained as reflecting the impact of the disagreements she found when she was appointed to the court during the last year of my service.[53] Her reaction appears to have been reinforced by the opinion earlier expressed by Justice Heydon.[54]

My own view on these matters is part way between the encouragement of single opinions and the discouragement of needless concurrences and a recognition that single opinions may sometimes be highly desirable but at other times may concentrate unduly upon the *outcome* of the case and the provision of a limited rule for the profession on the one hand, rather than the development of the law; the exposure of perceived defects; the discussion and resolution of conceptual challenges; and the reflection or consideration of academic and other writing. Certainly, I always disapproved of needless repetition of facts and legal texts that are the background to all judicial opinions. Invariably, I would delete any treatment of the facts and legal background from my reasons, if it were possible to reduce the length of my judicial opinion. I would simply cross refer to other reasons where the facts, circumstances and relevant constitutional or statutory provisions were adequately presented in the reasons of others. There are disadvantages in taking that course. These include the significance of the statement of the facts for virtually all decisions on the law. They also include the consequence that the decision, as written, will not then be freestanding. It cannot then

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[51] This incident is described in A J Brown, above n 6, 400. See also D Dellora, *Michael Kirby: Law, Love & Life*, Viking Press (2012) Sydney, 321.

[52] F W Kitto, 'Why Write Judgments?' (1992) 66 *Australian Law Journal* 787 at 797.

[53] Susan Kiefel, above n 43; M. Pelly, "Collective Judgment", *Australian Financial Review*, 10 August 2018, 36..

[54] J D Heydon, 'Threats to Judicial Independence: The Enemy Within' in J. Sackar and T. Prince (eds) *Heydon: Selected Speeches and Papers*, Federation Press, Sydney, 2018 (Ch.23).

be read on its own, with its own force and overall persuasiveness. However, as my reasons were often distributed first and were later followed up by others who repeated the same material, I took pity on law students and busy lawyers, so far as I could. I drew a line through all the material. I included that detail by references noted in the footnotes.

Where a judge comes to a different conclusion, and proposes different orders, in his or her opinion, there is no alternative. The judge is then bound to write separately and to provide reasons for this different conclusion.[55] This issue of allegedly unnecessary concurrences arises where a judge agrees in the outcome expressed by others but wishes to state separately the reasons for doing so.

Some judges and commentators consider that, even where they have completed reasons, judges can withdraw their differing views and accept the majority reasons in deference to the group wisdom of the court. That is not, in my opinion, the role of a judge in our legal tradition. Litigants trust our system because they know that judges are independent, including independent from each other. To litigants, and their counsel, who lose the argument, the fact that at least some of the judges may have seen the case in their way can be a salutary vindication of our judicial system. That system is not a polite version of political decision-making. Judge should not exchange a favourable vote in one case in the hope of securing a favourable vote in another future case. That may work in politics. But it is not the way in which our judiciary should operate. The only possible justification for withdrawing contrary reasoning may be, in a collegiate court, where this is necessary to secure a binding order from reasons from which otherwise no majority order or holding will emerge.

7. *Failures of persuasion:*

It would be easy to say that, I regret my failure to persuade my colleagues in the High Court of Australia to change their conclusions in particular cases. However, if I insisted upon respect for my opinions, I was obliged to offer respect for different approaches and conclusions in exchange. This or that decision is generally unmemorable to the busy judge. No sleep is generally lost as a consequence of disagreement. However, one issue upon which I made no significant progress in the High Court concerned the *Bangalore Principles.* This is the use of international law, and especially international human rights law, in the resolution of ambiguous legislation or for the filling of gaps in the judge-made common law. Least of all did I make progress in persuading the majority in the High Court to change their view that the Australian Constitution was unaffected by the huge developments in international law that have taken place, as contextual considerations, since the Constitution was adopted in 1901.

Context is generally an important consideration in ascertaining the meaning of legal language. Generally, that language is not to be understood and interpreted in isolation. Context will cast light on what is said or written. A most significant context in the contemporary world is that of internationalism and specifically of the international law expressing human rights law. It is a pity that more High Court Justices could not attend conferences such as the Yale Constitutionalism Conference where the explanation for taking a global perspective into account were cogently demonstrated. The Australian judicial system and to some extent that of the United States are substantially cut off from the rest of the international judicial community by an insular and often hostile judicial approach that persists. I regret that, during my service, I did not have more

[55] J McIntyre, 'In Defence of Judicial Dissent' (2016) 37 *Adelaide Law Review,* 431.

success in persuading my colleagues to see these truths.[56] But I remain optimistic that time, in the law as elsewhere, globalism as a contextual force for reasoning will be appreciated and given effect.

8. *Work life balance:*

Throughout my judicial service, the work component of my life has been overwhelming. The same has remained true for the international activities in which I have been engaged since my judicial retirement. I view this admission as one of failure rather than one of pride. Justice O.W. Holmes Jr lamented on his retirement (and he remained in judicial office much longer than I did) that what had been achieved was little more than a few shelves of law reports (or now a tiny moment in cyberspace). For that contribution there has been the sacrifice of personal life, musical concerts, visits to galleries, travel abroad, time with philosophers and scientists. Enjoyment, even that of listening to the pleasure of good advocacy, must be postponed to push away the nightmares of uncompleted judgments and their more recent equivalents.

9. *Diaries and drafts:*

It was never my habit to keep a personal diary. I have retained professional diaries, beginning with the time when I was a young solicitor in the 1960s. Such diaries have been deposited in the National Archives of Australia. Together with signatures in consecutive chambers' visitors' books, photographs incorporated in albums; and filed correspondence, there are orderly records of my life going back for decades. I once spoke to a meeting of archivists. I revealed a frustrated ambition to be an archivist. I inherited this from my father. He kept the most detailed records on his children's lives and education. These were rescued and redistributed after his death in 2011.

On my appointment to the High Court, Gareth Evans urged me to take two initiatives. The first was to write a monograph on the values that were important in my life and to illustrate this by reference to the decisions in which I participated in the High Court. It was an original suggestion, and a good one. The second was to keep a diary to record the day by day events serving on the High Court. At the time, I did not know that, whilst a Minister in the Hawke Government (including during the painful crisis that faced Justice Lionel Murphy) Evans had maintained a diary of his daily activities and thoughts. That diary has now been published.[57] Whilst I embraced the idea and sought to fulfil it partially, I did not venture upon such a monograph. Contemporary records and written materials are a much more reliable foundation for reconstructing the truth than reliance on faulty human memories or the appearance of testimony years after the events in question.[58]

Sir Owen Dixon kept detailed personal diaries.[59] These are deposited in the archives of the High Court of Australia. They contain many telling, and some embarrassing, extracts about his opinions on issues, on the law and on his colleagues. Diaries also exist from other Justices. In the case of those High Court Justices who had been parliamentarians, they could always find access to their parliamentary speeches, as a

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[56] Although a willingness to refer to some developments was evident in *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 178 [16] per Gleeson CJ; contrast at 20 [163] per Hayne J and 224-225 [161]-[182], per Heydon..

[57] G.J. Evans, *Inside the Hawke/Keating Government – A Cabinet Diary*, Melbourne University Press, 2014. The Author explains the reasons for the diary at pp viii-xv.

[58] *Fox v Percy* (2003) 214 CLR 118. See also *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306

[59] P Ayres, 'Dixon Diaries' in A J Blackshield and Ors, n 5 above, 222.

source of contemporary records of actions and opinions. In my case, the continuous record of my institutional life appears in the recorded public speeches, articles, orations and writings going back to my early days in the Australian Law Reform Commission starting 1975. Many of these speeches are available online on my website.[60] A bibliography also appears in the website.[61] Likewise bound collections exist of my reasons for judgment in the New South Wales Court of Appeal and in the High Court of Australia.[62] However, self-evidently these public records fall far short of recording of the events in the courts, tribunals, committees, arbitral bodies, commissions and United Nations agencies in which I have taken an active part over 40 years.

My failure to follow Gareth Evans' advice derived, in part, from a sense of restraint about keeping detailed records without notice to those affected. And, in part, out of the sheer burden of work that preoccupied me every day. Looking back, it remains a matter of regret that I did not maintain a diary, at least for the most important events, happenings and discussions in my career. It would have been a useful historical record, not only from my time in the courts but also from my engagement with the law reform bodies, courts and institutions on which I have served; the UN bodies addressing the HIV epidemic, the bodies dealing with international bioethics; the human genome project; the global institutions of human rights; the global engagements with sexual minorities (LGBTI); the International Commission of Jurists; the International Bar Association and other like organisations of lawyers, national and international.

When Professor A J Brown commenced work on a biography[63] he gave me a further suggestion. I gave him access to all my papers. These included my draft reasons, some of them in decisions not then published. This was done under conditions of confidentiality until they were published. He asked about earlier drafts. I pointed out that these were uniformly destroyed as the final draft emerged. He argued that this was not a universal judicial practice. Drafts were available in the archives of Justices of the Supreme Court of the United States. They were often analysed to explain the emergence of important legal principles. They revealed the evolution of law in a final court. Professor Brown suggested that, to destroy prior drafts, was a manifestation of the illusion that judicial opinions emerged fully formed and did not evolve in the particular case or in cases over time. Because Julius Stone and other teachers had demonstrated the falsity of the positivists' mythology, I did not feel bound by it. Indeed, I had criticised it on many occasions.[64] I was persuaded by Professor Brown's suggestion and thereafter retained my drafts. Out of deference to the differing views to my colleagues, I did not preserve their earlier drafts. Mine would sometimes give possible clues to the evolution of the reasoning of others. Nevertheless, in retrospect, I regret my failure to retain prior drafts of judicial opinions in which I was involved.

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[60] https://www.michaelkirby.com.au/speeches

[61] https://www.michaelkirby.com.au/content/bibliography-0.

[62] The reasons for judgment of the NSW Court of Appeal and Court of Criminal Appeal appear in 68 volumes arranged by year, commencing 1984 and concluding February 1996. The opinions in the High Court of Australia are published in the *Commonwealth Law Reports*; *Australian Law Journal Reports; Australian Law Reports* and specialised series. Reports in the CLR series commencing with Volume 187 and conclude with Volume 240 where, out of order a decision of 2002 containing a dissenting opinion is published: *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2009) 240 CLR 45. Volume 239 also records short notes on unreported appeals applications involving the author up to December 2008.

[63] A J Brown, above n 6, 393 and 395-396.

[64] See eg M D Kirby *The Judges*, ABC Boyer Lectures (1983), 33 at 37-43; M D Kirby *Judicial Activism* (Hamlyn Lectures, 2004), Sweet & Maxwell, London, 6-12.

The emergence of law in appellate courts is part of the reality of the work of the judges which is a public activity. The analysis of drafts can add to an appreciation of the choices that appellate judges face and of the way in which they make those choices. Professor Brown's biography on my life explained and illustrated the evolution of thinking on many topics; and the failure or refusal to do so on others.[65] I regret that it took me so long to come to my conclusion on keeping old drafts. Appellate courts, especially a final national constitutional court, are inescapably part of the government of the country. To the greatest extent possible, it is in my view desirable that their activities, including internal activities, should be transparent. They should also be available for research and scrutiny.

10. *Lost opportunities*:

Young people commonly ask a person like me to name the 'judgment of which you are most proud'. I suspect that this is a question more common in the present age that in earlier times I would not have asked such a question of the judges of my youth. I believe that they would have answered, as I commonly do: 'Proud of them all'. It would be like favouring one child over others to single out a single judgment when all others are pushed aside and downgraded.

But are there judgments that I regret? Certainly. Cases where I endeavoured towards the end of my service on the High Court to 'grey the text' and to 'write for the court' as I would have done often if it had been fruitful.[66] As things transpired these efforts constituted a waste of time. I should not have pursued that forlorn objective. There were some cases where, looking back, (even at the price of another dissent) I should have given greater weight to the path of principle, over pragmatism. Pragmatists usually prevail in the law – especially in the system of the common law. It is after all, a pragmatic and intensely practical discipline. However, there is something eternal about legal principles. Especially where the principle speaks in the language of global values. Particularly where it beckons the mind of the judge, and those who read the judge's reasons, to gain insight from the language of Eleanor Roosevelt and her colleagues in the *Universal Declaration of Human Rights*, for 70 years an inspiration to the United Nations and the world, including the judicial world.

CONCLUSION: FINDING THE BALANCE

There have been failures and missed opportunities in my judicial life. There are regrets and occasional lamentations. Still, on the whole, the concluding remarks in this article must be about the gratitude I feel for opportunities to serve, and for the fact that my service occurred in a country that still generally respects the independence of its judges and whose citizens generally hold those judges in high regard for their qualities of honesty, diligence, independence, impartiality and professionalism. Even where some of them seem needlessly conservative — a common trait amongst most lawyers.

The times in my judicial life that I do not miss are less memorable than the happy memories of those years. In 1948, my school teacher presented me and the other

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[65] See eg Plate 28.2 in *Paradoxes/Principles* in A J Brown, above n 5, after 388, by reference to amended reasons in *Thomas v Mowbray* (2007) 233 CLR 307 at 442-443 [385] ff.

[66] An example is *Nudd v The Queen* (2006) 80 ALJR 614, a case of seriously incompetent legal representation of an accused facing extended imprisonment if convicted. At 637 [110], in addressing the appellant 'serving his long sentence' and what he would say in reaction to the court's opinion, I reveal my internal conflict. And at 637 [109] I admit that the case was 'at the border line'. Another illustration was *K-Generation v Liquor Licencing Court* (2009) 237 CLR 501 at 580 [258].

students in our class with the text of the *Universal Declaration of Human Rights.* It was to leave a powerful impression on my mind. Another authority figure, in the local scout cubs, the Akela, looked at the small group of boy scout cubs and urged us to learn what we had to do in life. We responded: 'We'll do our best'. Lessons from so long ago. They still resonate. They still make sense. They still apply to those who follow. No doubt these conclusions reveal the conservative and traditionalist elements in my values.[67] If so, those values provided me with a link to the values of most Australians; certainly most lawyers, against which my personal instincts to achieve change and reform have been constantly struggling.

[67] A J Brown, above n 6, 3-4.