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The Supreme Court of NSW, Tradition and Diversity - Supreme Court Judges' Dinner

SUPREME COURT OF NEW SOUTH WALES

SUPREME COURT JUDGES' DINNER

THURSDAY 12 FEBRUARY 2004

THE SUPREME COURT OF NEW SOUTH WALES

TRADITION AND DIVERSITY

The Hon Justice Michael Kirby AC CMG*

A HAPPY ENCOUNTER

The last thing that most judges want on an occasion such as this is a scholarly exposition. That does not necessarily stop a lot of speakers. Judges' dinners are mainly occasions for humour or nostalgia, depending on the speaker's skills. Chief Justice Herron had a book of jokes. He would carefully mark the occasions on which his jokes were delivered in order to avoid repetition to the same audience in shorter than intervals of ten years. A commitment to humour, so methodically pursued, tends to cast doubt on the genuine jocularity of the speaker. I have thrown away my own book of humour. Doubtless Sir Leslie's book was passed on with the dowry of the Chief Justices of New South Wales - which explains why they are both always smiling. At least they are always smiling when in Sydney. In the High Court in Canberra, Chief Justice Gleeson goes out onto his balcony every day at the same time for seven minutes. It is not to take in the vista of the national capital. His gaze appears to be fixed in the direction of where he takes Sydney to be.

The High Court has a dinner somewhat similar to this, held on the first day of Term each year. We have to sit through the attempts at humour of new and old Silks and of our colleagues. It is a gruesome experience, alternating between bad taste and impertinence on the part of the Silks and weary resignation on our own parts. At the latest such dinner, the leading speech pretended to humour by a lengthy exposition on why each of us deserved a knighthood. I looked around the Great Hall of the High Court at my colleagues. Never have I witnessed such stony faces. What the speaker did not realise was that this was no laughing matter. Each of us could think of a thousand reasons why we were entitled to the lost prenominals. On this, we did not need persuading. There were no dissents.

I am delighted that Justice Ruth McColl was honoured in the Australia Day List. The judiciary now finds it harder than a camel to pass through the eye of the Honours' needle. I hope that, in this regard at least, we will see the restoration of the former condition of things.

As far as I am concerned, nostalgia is a far safer bet for this occasion. As we are lawyers of the common law tradition, we live, every day, with legal history. As we are judges, we live with the personalities and strongly expressed opinions of our predecessors. As we are, or were, all members of the Supreme Court of New South Wales, we live within emotional walls of one of the great institutions of our country.

ASCENDING THE COURT'S STAIRCASES

Do you remember the first time you walked into the Supreme Court of New South Wales? For me, it happened in about January 1959. I had just begun my articles of clerkship in a small firm found for me by Barry O'Keefe. He was then a tutor in criminal law, most famous amongst the students for his

sibling connection. I congratulate him warmly on his judicial service and thank him for his help to me. Despite academic prowess, I had found it impossible to secure articles in any of the big firms. With his help, I discovered a small office whose chief merit was that it was exploding with litigation.

So it was that in February 1959, with Frank Marks (now a judge of the Industrial Commission of New South Wales), I climbed the marvellous staircase in the old Supreme Court building. I joined the queue in the filing office of the Common Law Division. I learned obsequious politeness to Jim Bagot and Vic Nevill, clerks to the Prothonotary, Mr Walker. On red letter days, I even ventured along the corridor at the back of the Banco Court. In those times of scant security, the doors behind the judges were usually flung open. I would tiptoe along the axminster carpet, with its pattern of little flowers. The voices of long lost advocates could be heard within, urging their causes. I climbed the farther staircase to the inner sanctum: the mysterious world of the judges. There, I left draft orders in a box that Chief Clerk Bagot had approved, for the sign manual of one of Her Majesty's judges. And the seal of this great Court.

After the retirement of Sir Kenneth Street all the forms for filing had to be overtyped with the name of the new Chief Justice, H V Evatt. He had added prenominals, "The Right Honourable". And as if to repair the lack of imperial postnominals, his "LL.D." was added. It made a mess of the blue court forms. But every law student knew of Evatt's distinction in his early years as a Justice of the High Court. I will say no more of Evatt lest I provoke Justice Meagher into a rodomontade that would spoil the evening. But I must not let the moment pass without paying a tribute to Meagher JA on his impending retirement. What a suitable post-retirement project he has chosen: a personal appreciation of the unpublished speeches of V I Lenin, with illustrations by me.

In due course, I sat in the well of those lovely courtrooms of the old Supreme Court building. In the quietness of the mind, I can still hear Eric Miller QC or Clive Evatt QC addressing a jury or fighting endlessly with Mr Justice Brereton, Mr Justice Manning or Mr Justice Else-Mitchell. My heart was beating furiously. I could not believe how a mortal barrister could endure such tensions. Just as well for me that my period of articles followed the effective abolition of the death penalty in New South Wales.

Those were days when Supreme Court judges were gods. There were few of them. Every one was known to us, the law students of that time. Some still came and gave lectures in the crumbling elegance of the old St James Hall or the old Law School. When they entered we stood in our places, out of respect for them and their offices. These were different times. Now, in a law school, a judge is liable to suffer grievous bodily harm in the rush or, even more hurtfully, to be totally ignored.

1962 was the year of my graduation in law, in company with Murray Gleeson and David Hodgson. There were twenty-four judges of the Supreme Court that year, including Evatt, who retired in October to be replaced by Herron. John Roscoe Nield went in April. David Selby came in June. Athol Moffitt, later to be a predecessor as President of the Court of Appeal, was appointed in October. Ken Asprey came two weeks later.

These were times before the Court of Appeal. If I mention the most senior judges who was beginning the legal journey at that time, each of us will remember the strong personalities that went with the name. Clancy, Sugerman, Kinsella, "Jock" McClemens, Charles McLelland, "Dooley" Brereton, Dovey, Maguire, Myers, Walsh. For most contemporary judges, these are names to conjure with. Clancy I came to know because, as President of the Sydney SRC, I would attend functions at the new University at Kensington where Clancy shortly was to become Chancellor. McClemens conducted trials, civil and criminal, with unwavering self-confidence and no Bench book. With him, I had one of those moments that, irrationally, will haunt me forever. In a motion list, with no other barrister at the Bar table, I sought his permission to withdraw so that I could rush to another court. The look of pain that came over his face is still with me. Muttering something about the decline of civilisation, he withdrew. Now it is not at all uncommon for the Full High Court on special leave days to face an empty table - no requests made as the barristers sweep away to richer pastures.

The motion for my admission to the Bar in 1967 was moved by Antony Larkins QC, with a dramatic drop of his monocle. In the years between 1962 and 1967 new judges came to the Court. They included Leycester Meares, whom I had briefed partly for the reward of the boiled lollies which he kept in a jar in his bottom drawer. For good or ill they do not make barristers like Larkins and Meares any more. Laurence Street had been appointed and also Jack Lee - with both of whom I was later to sit. Ray Reynolds, a tremendous advocate, had come to the Court. But in the interval so had the Court of Appeal. Over its creation the Court was bitterly divided. As I was to find, the continuance of the Court of Criminal Appeal helped to soften the blow and eventually to repair the fractured camaraderie of the

judges of the Supreme Court.

At the end of 1974, when I received my first judicial appointment, the High Court had just lost Sir Douglas Menzies. He died at the feet of Tom Hughes in the Bar Common Room just three people in front of me on the receiving line. Barwick, McTiernan, Menzies, Gibbs, Stephen and Mason were left. Kerr was Chief Justice of this Court, brimming over with new ideas. Hope, Reynolds, Hutley and Bowen were shortly to be joined in the Court of Appeal by Glass. Hal Wootton had just joined the Court after brilliantly establishing a Law School of a different model at the University of New South Wales. I took my oaths for the Arbitration Commission before my mentor Harold Glass and in the company of Sir John Moore. They were administered in a room immediately above this venue. If we had the gift of prophecy, and could foresee events thirty years on, it would surely be astonishing to us.

In 1984 I came back to this Court in its new building as President of the Court of Appeal. The third Chief Justice Street was then in office. None of the Judges of Appeal who were with me on that day are still here: Hope, Hutley, Glass, Samuels, Mahoney, Priestley and, soon after, McHugh - are all gone. Only David Hodgson and James Wood were on the Bench when I was welcomed that September morning. The ceremony and the morning tea were quickly over. Suddenly, I was disposing of motions at a rapid rate. To left and right were colleagues, watching closely. For me, it was a test of fire. Over the twelve years that followed, most of the present judges appeared before me - as did all Justices of the High Court except Kenneth Hayne.

REACHING THE GOLD STANDARD

A court is a wonderful institution - bigger by far than the judges, masters and other officers who make it up. Those who live by the rule of law do not fruitlessly contest the curious procedures of appointment that we follow in Australia, with their emphatic element of democratic selection. Bob Hope, who had every professional expectation of succeeding to the office of President of the Court of Appeal, was a marvellous colleague and teacher for me. I honour his memory. He became a true friend. I sat, watched and listened to him, Laurence Street, Harold Glass, Gordon Samuels and Dennis Mahoney, great judges, give ex tempore judgments. I tried to copy their skills. In time, with experience and confidence, it became easier: as it does for all of us.

I agree with something that Dyson Heydon said on his departure from the Court of Appeal. They were golden days when I arrived. I was very lucky to be appointed to this Court. When we were joined by Michael McHugh, R P Meagher QC was often heard to lament, on his way to court, that he was going to appear before "those three communists". Yet the strength of the Court of Appeal, as I found it, lay in the mixture of the judicial philosophies of its judges. I suppose one could put Hope, Priestley and myself, and occasionally McHugh, on the liberal side. Glass, Samuels and Mahoney were often conservative in matters of judicial technique. The mixture has continued. It exists throughout the Court, indeed every court. The diversity of judicial philosophies, combined with the differing professional and judicial experience, certainly created an appellate court that set the gold standard throughout the English-speaking world.

For an appellate court to reach such strengths there is a need for diversity amongst its members. If everyone has the same judicial philosophy, background and experience, a court is seriously weakened. Chief Justice John Bray of the Supreme Court of South Australia was correct to say that "diversity is the protectress of freedom". In courts, diversity is also a protector of intellectual rigour, as each judge measures his or her opinions against those colleagues who may approach judging in a slightly different way and sometimes come to different conclusions about the law's requirements and how to express them. To my mind, this is yet another of the great gifts of the English judiciary to the world, including to the courts in Australia, of which Chief Justice Spigelman spoke so movingly at his swearing in.

Most courts of the world do not permit dissenting opinions. Most, of the civil law tradition, do not allow discursive reasoning that reveals the variety of factors that illuminate the judge on the path to decision. Most legal systems are intolerant of heterodox views. They are frozen in a pretence that law is always clear, that words are unambiguous and that judges merely apply, and never make, the law. This is not our legal tradition. Nor should it be so. My years in the Court of Appeal taught me how important diversity of judicial philosophy, professional service and life's experience can be in building a great court - great by the world's standards.

Three weeks ago I was in Chicago at the famous law school that founded the law and economics

movement. I spent time with Richard Posner, a lively intellectual and a formidable federal judge. One of the professors, Cass Sunstein, gave me copy of his new book Why Societies Need Dissent. It is not specifically a book about law. It is a book about the critical importance of different voices, with different information, in politics, business and society. It tells the story of John Kennedy's error at the Bay of Pigs. Of Lyndon Johnson's nightmare in Vietnam. Of Richard Nixon's debacle at Watergate. Of the Ford Motor Company's mistake with the Edsel and many big and small mistakes. All because different voices were ignored or suppressed. It is a prolonged coda that explores the reasons that lay behind Chief Justice Bray's Australian defence of diversity, including in the law.

Professor Sunstein justifies the inefficiencies inherent in the American constitutional system (many of which we have followed in Australia) with a homely story from history[1]:

"[O]n his return from France, Thomas Jefferson called on George Washington to account at the breakfast table for having agreed to a second Chamber. 'Why', asked Washington, 'did you pour that coffee into your saucer? 'To cool it', quoth Jefferson. 'Even so' said Washington, ' we pour legislation into the Senatorial saucer to cool it'."

In courts too we allow for a second look at decisions. None of us is so proud that we are certain that we have the whole truth. By diversity, we seek to ensure that we "cool it" and, when required, that we heat it a little. Sunstein devotes a chapter of his book to judicial dissent. He asks: Are judges subject to conformity effects? Are such effects likely to cascade? Do like-minded judges, sitting together, tend to move to extremes? What is the effect of anticipated or actual dissents in a collegiate court?

By an analysis of the record of judges' decisions in the United States Circuit Courts, Sunstein concludes that the appointees of Republican Presidents are generally likely to vote more conservatively than the appointees of Democrats. That a judge's ideological tendency is likely to be dampened if he or she is sitting with two judges appointed by a President from a different political party. It will be amplified if sitting with two judges appointed by a President from the same political party. The survey was conducted over an extended period and with a large sample. It allows for personal exceptions and variations over particular issues. It acknowledges departures where the law is completely clear. But overall the results are consistent, indeed marked. Judges have coherent attitudes. They tend to have a world-view, just as Julius Stone taught us so long ago. Sunstein asks - does this come as a surprise?[2]

Accepting that judicial decisions in Australia are somewhat different because of the absence of a Bill of Rights, different modes of appointment and professional traditions, it still seems likely to me that some, at least, of Sunstein's conclusions may have relevance for the Australian judiciary. As if to respond to Australian self-assurance that we are different, Sunstein concludes[3]:

"Many people think that in the United States, there is no fundamental difference between judges appointed by Presidents of different political parties. Such people emphasise that once on the Bench, judges frequently surprise those who nominate them. This view is misleading and fundamentally wrong. To be sure, some judicial appointees do disappoint the Presidents who nominated them. ... But we should not be fooled into thinking that these examples are typical. Judges appointed by Republican Presidents are quite different from judges appointed by Democratic Presidents. ... The existence of diversity on a ... panel is likely to bring that fact to light and to move the panel's decision in the direction of what the law actually requires. The existence of potentially diverse judges, and of potential dissenter ... increases the chance that the law will be followed ... A decision is more likely to be right, and less likely to be political in a prerjorative sense, if it is supported by judges with different predilections".

Contrary to received but recent wisdom, the capacity of politicians, elected by the people, to influence over their time the composition of important courts in Australia, is not a weakness of our constitutional and judicial system. In my view, it is a strength and precisely how the Constitution is expected to work. I witnessed that strength in the Court of Appeal. I discovered, truly, that diversity of judicial outlook was a most precious commodity. That conceptions of invariable certainty about the law, or judicial outcomes, is an infantile belief. And that judges owe it to the people they serve to explain why this is so.

THE HIGH COURT CONNECTION

From the earliest days there has been a special link between the Supreme Court of New South Wales and the High Court. Of the forty-three Justices who have served on the High Court, eleven were

previously judges of this Court, including two of the Chief Justices. This far exceeds any other Australian court. The Federal Court provided four (Brennan, Toohey, Gummow and Deane shared in common); the Supreme Court of Victoria three and the Supreme Court of Queensland also three.

There are, of course, very strong arguments for greater diversity in the appointment of the Justices of the High Court in terms of geography, gender, judicial outlook, legal and other experience. Yet the appointments arise but rarely. Correctly, they are greatly prized by each government that makes them, never so much as today. The result is that governments of all political persuasions, try to know the track record of those whom they appoint. They want this as a hoped-for predictor for future judicial performance. Inevitably, this means a search amongst the entrails of earlier legal writing. Inevitably, this directs attention to the reasons of judges of the great courts of the nation. None is greater than the Supreme Court of New South Wales. Appointed, the judges are completely independent of the government that selected them. Some do indeed disappoint their appointers; and all do so from time to time. But the world view of most judges is part of the reality of our democratic constitutional arrangements. It is naïve to deny it. I do not see our system of judicial appointment changing in my lifetime.[4] I am not convinced that it should. But a realisation of the importance of diversity is an obligation of those who temporarily enjoy the privilege of selection.

There are other things to do with brief and precious life. To climb the Matterhorn. To study ancient Khmer. To enter a Trappist monastery. To master quantum physics. To improve a golfing handicap. Or just to lie on a beach and read the tragic poems of Euripides. We have chosen a different path. We are lucky to share a precious life's experience in the family of this Court. For me, the happiest time of my judicial years were spent on the Supreme Court of New South Wales. There are many reasons why that was so. But the chief of them lay not in traditions and history, still less in status, salary, colourful ceremonies or the fading little flower carpet behind the old Banco Court. It lay in the comradeship of colleagues, arrayed in all their robust diversity. May it always be so in our courts. Diversity is the protectress of freedom.

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The Hon Justice Michael Kirby AC CMG

*Justice of the High Court of Australia. One-time President of the New South Wales Court of Appeal and Judge of the Supreme Court of New South Wales, 1984-1996.

1 C Sunstein, Why Societies Need Dissent (Harvard, 2003), 153.
2 Ibid, 168.
3 Ibid, 184-186. A thought somewhat similar to the conclusion in this passage appears in M Beazley, "Women on the Bench" Reform (ALRC). Issue 33, 2003, 20 at 23.
4 Cf, R Smith, "Judicial Concerns" Counsel - Bar News (UK), October 2003, 22; contrast R Davis and G Williams, "Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia" (2003) 27 Melbourne University Law Review 819, 827.