Pride but not complacency

*By the Hon Justice Michael Kirby AC CMG**

I remember the first time I heard of the High Court of Australia. When I was a boy my grandmother remarried. Her new husband was a communist. A finer man I never met. In 1949 the Menzies Government promised to outlaw communism. The law was challenged in the High Court.

On the day the court struck the law down as unconstitutional, a great burden of fear lifted from our family. I was eleven. It was a curious feeling. Far away judges, without any help from a Bill of Rights, had held that the law on communists was incompatible with the Australian Constitution. At virtually the same time in the United States, the Supreme Court, by majority, had upheld similar legislation as valid.

Over the century since the first sitting of the High Court in October 1903, with few exceptions, when it has been faced with major challenges, it has generally come to the conclusion that advanced the interests of the nation and the rights of the Australian people.

Of course, it would be wrong to suggest that the High Court never made a mistake. The many dissenting opinions (including some of my own) indicate strongly held differences. In its early days, a number of the court's decisions reflected the attitudes of racial superiority that existed in Australia. Sometimes, as in its decisions over the freedom of interstate trade, excise duties and implications upholding the independence of the judiciary and free speech, the court took decades to reach a clear result. But given the extreme difficulty of amending the Australian Constitution by referendum, it is as well that the High Court has found the means to adapt that document to rapidly changing times. How else could our country have coped?

Although defending the Constitution is the most important function of the High Court, its role as a general court of appeal for the nation has profoundly affected its character. Above all, it is a court of law. It is the sole final court of Australia. Its decisions establish the law that applies from one side of the continent to the other. Having a single common law is a great advantage for Australia both in economic and social terms.

In my lifetime, I have witnessed great changes in the law that have enhanced freedom. Many of them have been stated or applied in decisions of the High Court. The rights of Aboriginal people, women, ethnic minorities, homosexuals and others are safer in Australia than in most other countries because of the existence of independent courts with constitutionally guaranteed links to the High Court. No-one doubts the independence of our judges. Whatever differences they may hold, all are dedicated to the rule of law.

Over the century since its establishment, the High Court has seen many innovations. The creation of its own building in Canberra in 1980 saw a great period of legal innovation during Sir Anthony Mason's time as chief justice. Old rules of law, found to be unclear or out of keeping with contemporary values, were re-expressed with clarity and confidence. It was a time of legal renewal. Sometimes, as now, such periods are followed by times of caution.

The High Court has embraced new technology in ways that lead the world. Suitably for a country of Australia's size, the judges in Canberra hear applications for leave to appeal conducted by videolink. Transcripts and decisions are immediately posted on the Internet. In future it seems inevitable that proceedings will be broadcast live. Maybe one of the judges will explain the decisions of the court in simple terms as they are handed down. Maybe some judges will relate more closely to the experiences of women and other minorities. Adaptation to new ways and values is part of the genius of our law, although some of its practitioners need to be dragged kicking and screaming to accomplish the changes.

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These reasons for pride do not warrant self-satisfaction. The large numbers of self-represented litigants illustrates an institutional failure in the way we organise legal services in Australia. Whilst legal aid in criminal trials has been improved since the High Court's decision in the *Dietrich* case in 1992, civil legal aid in family law, for refugees and representation in criminal appeals is by no means guaranteed. There are still people who miss out on their legal rights. The law is often needlessly complicated. There is still much injustice. Despite *The Castle*, the High Court is not able to solve every problem and cure every wrong.

Recent attacks on the court and on individual judges by people who should have known better undermine the rule of law. The lack of proper media coverage of the court's work, including informed criticism, is a depressing feature of the superficial world of infotainment. Yet it can still be said that the High Court has fulfilled its national role beyond the expectations of those who created it.

What do the next hundred years hold? Will some judicial decisions be made by intelligent machines? Will judges be spared the present routine so as to concentrate on more and better decisions? Will those decisions be expressed in a simpler, clearer way? Can we continue to get by without a Bill of Rights? Will international law and global courts come to supplement or replace our proud national institutions and if so at what cost?

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Looking backwards encourages us to look forwards. When the justices of the High Court filed into the Supreme Court in Melbourne for the centenary sittings inevitably their thoughts were with the judges of 100 years earlier. But when the speeches were over, today's judges returned to the busy work of upholding constitutionalism and law throughout this country. The future presents dangers but also opportunities to do better in the quest for justice under law for all people. Law in the end is not enough. Sometimes law can oppress - as it did my grandmother's new husband in 1951 and many Aboriginal people, women, immigrants, gays and others before and since. That is why we allowed but an hour for congratulations. When that hour was up, the challenges of the second century of the High Court of Australia began.