

0951

JUSTICE OF



THE PEACE

Michael Fullilove speaks to law reformer the Hon Justice Michael Kirby about rights, remembering and the Republic.

How would you summarise the state of human rights protection in Australia?

We lack some of the formal instruments that are available in a number of countries of like tradition and economy. We have no constitutional bill of rights, we have no regional human rights treaty as they have in Europe to discipline the law and the courts, we have no tradition of formal human rights in the same sense of the bill of rights in the United States. But as a result, we have the common law, which is founded on basic rights, many of which are reflected in international instruments. We have the Bill of Rights of 1968, which contains a number of important rights, which is interpreted as part of our law. We have independent courts which will construe statutes and interpret the common law in a way which is protective of basic rights. We now recently have the subscription of Australia to the First Optional Protocol to the International Covenant on Civil and Political Rights, which submits our country to the discipline of the Human Rights Committee of the United Nations. So although we lack the mechanisms that are available in countries like ours, we have lots of protection, and we shouldn't despair. We also have a tradition which is more respectful of basic rights, and courts which will enforce basic rights, which many of the countries with a beautiful constitution do not observe.

Is the common law enough? Don't we need a bill of rights?

Well, that depends on the judges. If lawyers want to make it enough, it will be enough. If they don't, if they lack the imagination to make arguments that urge points on courts, and if courts lack the imagination and courage to give effect to those points, then it won't be enough. But I think there is more to the principles of the common law than many lawyers and some judges recognise. Therefore I don't despair about the lack of a bill of rights, or constitutional provision. I say that there's plenty there in the common law, and we should get on with utilising the common law, and we shouldn't forget the Bill of Rights of 1968, because there are a number of principles in that which tend to be overlooked. We shouldn't forget the principle that you interpret Acts of Parliament in a way which is

respectful and protective of basic rights, and courts do that every day. So I think there's plenty of room for optimism. As to whether there should be a Bill of Rights, I am ambivalent on that subject, I haven't reached a final conclusion on the matter, but because I think it's very unlikely, given the history of our constitutional referenda that we will incorporate a Bill of Rights in the Australian Constitution, I don't lose much sleep over the issue.

What about the infringement of human rights in the international arena?

Since at least Hiroshima, I think that all people should be concerned about the state of human rights, because the whole world is bound together in human destiny. That's why I think it's important for lawyers and other citizens to be involved in bodies such as Amnesty International, Asia Alert, or the International Commission of Jurists, and to be concerned about human rights, because without basic human rights being protected, the stability, peacefulness and justice of other societies is dubious. I think one thing we should be doing in Australia is tailoring our foreign policy objectives and our foreign aid, such as it is, to promoting human rights, particularly in our region. I think the present federal government has done that admirably. I believe that Senator Evans has a deep personal commitment, and I think the Government has a commitment, to basic human rights. I think it's basically an Australian concern to be concerned about basic rights. Something we could do in our region is to give greater emphasis to the need for a regional Bill of Rights, that is to say, a basic human rights convention for the region, such as has been achieved in the European Convention on Human Rights, with the European Court of Human Rights, which is a very beneficial influence in Europe. Or the American Convention on Rights, which is policed by the Inter-American Court of Human Rights, or in Africa, where they've got the African Charter of Human Rights. We don't have anything in the Asia-Pacific region, but there are plenty of reasons why we should.

You were talking about lawyers getting involved in Amnesty International and the

ICJ.

Not just lawyers, of course.

Why, then, is the law seen as inaccessible, and lawyers seen as greedy and out-of-touch? Why is the law held in many quarters in such disrepute?

Because many lawyers are greedy, and many are completely unconcerned with the subject matters of this conversation, but they should not be. There is hope, because the force that takes people originally into the law is often an idealistic concern with issues of justice, non-discrimination, equal rights and equal opportunity. That gets lost on the way, and that must be in part the fault of social conditioning and of legal education, but my belief has always been, for my own part, an idealistic view of the law, and I continue to give voice to that view of the law, and I believe there's plenty of scope for it. And so far as I can encourage young people to have such an attitude to their vocation, I do so.

Getting all the legal idealism of relief from Hosts' treatment, what sort of a place was Sydney University when you were a student?

Smaller, more conventional, more beautiful - this was Sydney University pre-Carlaw - and perhaps less bold. We as students and as student politicians were inclined to be more conventional than student politicians of today. I have a criticism of universities generally, and it's one that I voice often as chancellor of Macquarie University. I think universities in Australia are too bland, and my feeling is that universities should be one of the few places in this rather bland country that constantly challenge accepted values and orthodoxies. There's not as much ferment of ideas in universities as I would like to see. I'm a great believer in the philosophy *do non ten - oh - ent*: we need people who are constantly challenging accepted values.

When you were at university, you were attorney for various students who were arrested in demonstrations, and you were a champion of student rights against conservative administrations. How do you get along with student leaders now that you're chancellor of Macquarie University?

I've always believed, both in my life as a chancellor, and my life as a judge, and in my life in various different agencies, in stirring things up a bit, because I think it's by that means that progress is made. So I'm not unsympathetic to student attitudes. I don't always agree with them, but I respect the right of people to have different views, and I respect the possibility that they may, in the long term, be shown to be right and I to be wrong.

How do the demands of student leaders today compare with the demands of yesterday?

They seem, in some respects, to be more selfish. As about the time I left university, student politics took a sudden look at the world, and became much more concerned with the rights of students throughout the world, the right to education, issues of human and social rights generally, and became more involved with society and the world. But now it seems as though students have gone back to a question of their scholarships and the internal university politics, which is a much more narrow focus, in some ways, a more conservative, orthodox focus of attention than existed for a time in the sixties, seventies, and even eighties. Perhaps it's a factor of hard economic times; people then become more concerned with the nitty-gritty as they see it, and less concerned with other people.

Why are you a champion of the monarchist cause?

It's a curious thing when some Australians, who should be thinking about a million people unemployed, instead of this side-issue, are talking of changing the very stable bedrock of our Constitution, when so many countries are in ferment, and some are even talking about establishing constitutional monarchies. There are strong rational arguments for supporting a constitutional monarchy. We are entering an age of populist politics, with a strong danger of fascism, and a constitutional monarchy is a system of government which has the advantage of putting transient political leaders as number two in the hierarchy of things - not in power, but in their self-conception. They are the Queen's ministers,

...into the chambers of the
...of the NSW Court of Appeal, one
... judges in the land, and
... the most influential. Re-
... government, this ex-student
... Sydney University looked
... and with respectably
... in his best Shakespeare-
... The last time I met an
... he intoned, "I sacked

The Hon Justice Michael Donald Kirby AC
... known, for close to two
... Australia's chief law reformer,
... who has pulled the nine hundred
... of the common law into
... computers and human tissue
... the first Chairperson of the
... Releem Commission, he
... to the Federal govern-
... the child welfare, privacy,
... law and police
... And now, as one of Australia's

... Queen judges, in the theory of the
... and that puts a brake on the
... of their own, infallibility, or their
... and reminds them they are
... of positions of power or
... and that they are part of a
... government that has been going
... So it's more to remind
... including myself as a judge, that we are
... holders of passing responsibility.
... I think the present Queen
... whose life has been one
... that I admire: discipline,
... attention to others, and
... are factors that are very
... in my own makeup.

... seems to have restored so-
... other than the bal-
... to the political agenda.
... that a debate on repu-
... and debate on what we are and
... will be a catalyst
... and constitutional change?

... I believe that it is a recession to
... nationalism After the
... behoves us all, espe-
... of your age, to be an interna-
... All of this talk about Australian
... and our nation and our
... and our separate-
... of attitudes
... have been
... in the nineteenth
... centures and

reforming judges, he brings compassion and
liberalism to the often unsatisfying and un-
settling domain of the courtroom.

In some of his other incarnations, the judge
is Commissioner and Chairman of the Ex-
ecutive of the International Commission of
Jurists. He was a foundation member of the
Global Commission on AIDS, an organ
of the World Health Organisation that works
to protect the human rights of people with
HIV/AIDS. He accepts up to two hundred
speaking engagements a year, and produces
a constant, exhausting stream of articles and
book reviews. A selection of some of the
topics recently covered include censorship,
capital punishment, drug labels and class
actions. When he was interviewed by Hunt
Kirby had just returned from Paris, where he
chaired an OECD Committee meeting on
data protection, and South Africa, where he
addressed a convention on AIDS and the
law. Our interview was interrupted several
times, once by a delegation of Supreme Court

judges. Little wonder, then, that Kirby's en-
try in Who's Who lists his only recreation as
'work'. Said Kirby himself in a previous in-
terview: "There was an excellent Sunday pro-
gram on the ABC on workaholicism, but I was
working and missed it."

It is not just the extraordinary quantity and
variety of the judge's output that is unusual.
The judiciary is perhaps the most reactionary
element of one of the world's most conserva-
tive professions. The bench usually shies
away from publicity, avoiding nominal is-
sues of 'policy' and cloaking itself in silence.
Yet Justice Kirby is prepared to speak on the
most controversial issues. Years before the
American president could bring himself to
use the dreaded acronym, Kirby was speak-
ing and educating on the danger posed by
the AIDS epidemic. He has advocated taking
another look at the drug war waged by Aus-
tralia and other western nations. When he
recently opened an art exhibition at the Ivan
Dougherty Gallery on 'The Phallus and Its

Functions', he said that those present were
celebrating their freedom of expression by
being there. The Australian Human Rights
Medalist of 1991 is aware that the advoca-
cy of human rights is most important
"when minorities and their beliefs, opin-
ions and expression are at risk."

It is wise not to make too many assump-
tions about Michael Kirby, however. His
policy positions are far more complex than
those held many trendy liberal lawyers.
He has consistently fought against the con-
servatism of the legal profession and the
arbitrary effects of the legal system, and
yet he retains a real belief in the common
law. He is an avowed internationalist, but
also a founding member of Australians for
Constitutional Monarchy. Uncomfortable
with orthodoxes of all political colours,
Justice Michael Kirby is a true radical.

... utterly opposed to them. I am an interna-
tionalist, and if I were to change the Australian
flag, it would be to change it to the flag of the
United Nations. I'm against this reversion to
nineteenth and early twentieth century na-
tionalism, because one has only to think of
the history of our century and the century
before to see what a curse that's been. I also
think it's fundamentally inimical to the
multicultural nature of Australia, which is
one respectful of the various and diverse
ethnic and cultural groups that make up the
society, and republicanism is an endeavour
to force on people the stamp of 'one nation'
and one nation's attitudes. I am an interna-
tionalist, not a nationalist.

You have said that judges are not supposed to
have ambition. What are your ambitions?

I believe my life is likely to be more of the
same because I have an interesting though
demanding job. I am not discontented. I
have a very interesting and, I believe, in-
fluential judicial job. I am involved in a
number of important national in-
stitutions, and interest-
ingly,

I have participation in international bodies.
So all of that is very busy and very inter-
esting, and I make no complaints about the
cards which life has dealt out to me. All that
sounds a little self-satisfied and self-con-
sented, but I don't feel that way. I feel a
constant need to make a contribution to try-
ing to make the world a marginally better
place, in the little fields of influence that I
have, and to think of people who are less
fortunate than I. I had no control
over the physiological, intellec-
tual gifts given to me, and so I
am mindful never to get too
big for my boots, and
always to re-
member my
mortality.
and
tran-

stency. So I don't which to appear or to be a
self-satisfied person, but somebody who is
constantly striving to make the world a bit
better.

