

SMH, Saturday, November 18, 1995

As one of Australia's most outspoken judges, Justice Michael Kirby has confronted many tough issues. But none tougher than his newest challenge: to determine what it means to be human. By TONY STEPHENS

# God's STIRRER



Justice Michael Kirby . . . "The transition from prac-

**F**OR a chap who dismissed the possibility of a career in medicine because he could not bear the thought of dissecting a frog, Justice Michael Kirby has taken a remarkable and excited interest in the march of medical science.

The judge is excited that the potential to change the human species is being reached in our lifetimes. He talks of "future generations which look back on us as the time when the future species stood on the shoulders of humanity, our species having at last perceived the way to unlock the riddles of life and to create something new and different from evolution's imperfect, disease-ridden and always terminal creation".

Kirby is talking about eugenics, the study of methods of improving the quality of the human race. He knows some of the dangers, that critics will raise, and his eugenic lieutenants, because "unravelling these mysteries threatens the potential of crazy people playing God and changing the very nature of what it is to be human". He knows of reports that

wouldn't want you to think I am a conservative, either, but it is a matter of reforming that which exists."

He is a judge and a Christian, who prays from time to time. He prayed two weeks ago in the Holy Trinity Church, Mahatma Gandhi Road, Bangalore, India, during the meeting that elected him president of the International Commission of Jurists. The ICJ, the oldest of the human rights global organisations, has adopted as a project the human rights implications of the Human Genome Project. And the Human Genome Organisation recently told Justice Kirby that he had been selected by the Ethical, Legal and Social Issues Working Group (ELSI) and the International Council of the Human Genome Organisation (HUGO) to serve as a member of a joint HUGO-ELSI working group.

Kirby sees his task as a great challenge: "This body will be charged with nothing less than the mission of responding to the ethical, legal, social, psychological, economic and policy considerations of the information being rapidly produced through the international Human Genome Project." Kirby and colleagues will have to take care

that history has provided three great leaps in the prevention and treatment of disease: sanitation systems, surgery with anaesthesia, and vaccines and antibiotics. Gene therapy would bring the fourth revolution: "Our society went into the age of nuclear energy blindly and we went into the age of DDT and other pesticides blindly. But we cannot afford to go into the age of genetic engineering blindly."

In the same issue of the magazine, Dr Arthur Caplan, the director of the Centre for Bioethics at the University of Pennsylvania, asks: "Who will decide whether characteristics such as short stature, baldness, albinism, deafness, hyperactivity or aggressiveness are classified as diseases rather than mere differences? We need to decide

because he thought he had wasted a lot of his life at the law. Hastening to add that he is no Dixon, Kirby says the late judge left his judgments and a certain legal spirit to Australians but Kirby shares his doubts about whether the long hours have been worthwhile. "I don't think I was ever young."

*Who's Who* lists Kirby's recreations as "work". He is in his chambers about 5.30 am most days and works about 14 hours a day. Of his four weeks law vacation in December and January, two will be spent in Cambodia as the special United Nations representative and one in the Solomon Islands, where he is the president of the Court of Appeal. The fourth probably will be spent at his home in Rose Bay, where he has a swimming pool, and attend-

# TIRRER



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Kirby is talking about eugenics, the study of methods of improving the quality of the human race. He knows some of the dangers that critics will raise and his eugenic lieutenants, because "unravelling these mysteries threatens the potential of crazy people playing God and changing the very nature of what it is to be human".

He knows of reports that human eggs have been fertilised with human sperm. "It should be said that the resulting embryo would develop beyond the two-stage... and of successful experiments involving the in vitro fertilisation of chimpanzee with human spermatozooids.

He knows the difference between using gene transfer to cure serious diseases, on the one hand, and body enhancement for sporting on the other. He knows that as research discovers genes that control the colour of eyes, even skin, and intelligence, or even compassion, they will be tempted to change children's genetic make-up. He knows all of this, but looks at it in a positive spirit.

He accepts the description of himself though he has said: "I am not a revolutionary. I

wouldn't want you to think I am a conservative, either, but it is a matter of reforming that which exists."

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Kirby sees his task as a great challenge: "This body will be charged with nothing less than the mission of responding to the ethical, legal, social, psychological, economic and policy considerations of the information being rapidly produced through the international Human Genome Project." Kirby and colleagues will have to take steps to alleviate potential harm caused by the project and to maximise its potential to benefit humankind.

David Suzuki and Joseph Levine say in their book, *Cracking the Code* (Allen George Unwin, \$19.95), that prominent molecular biologists have rallied to the Human Genome Project as a Holy Grail: a mission to draw accurate maps of the chromosomal location of genes. The project's principal goal is to find the minute differences in DNA sequences that predispose individuals to a wide range of inherited and degenerative diseases.

Kirby points to a recent issue of *Scientific American* in which W. French Anderson, a professor of biochemistry and pediatrics at the University of Southern California, says his-

tory has provided three great leaps in the prevention and treatment of disease: sanitation systems, surgery with anaesthesia, and vaccines and antibiotics. Gene therapy would bring the fourth revolution: "Our society went into the age of nuclear energy blindly and we went into the age of DDT and other pesticides blindly. But we cannot afford to go into the age of genetic engineering blindly."

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That is where Michael Kirby comes in.

A STORY told in legal circles illustrates the workaholic habits of Justice Kirby, the president of the NSW Court of Appeal. Gerard Brennan, now the Chief Justice of the High Court, telephoned Kirby's chambers on a Christmas Day, expecting to leave a message on his brother judge's answering machine. Kirby picked up the telephone.

"Sadly, I have to admit it's true," says Kirby. "It's not something to boast about."

Kirby talks of Sir Owen Dixon, a former Chief Justice of the High Court, who was touched with remorse late in life

because he thought he had wasted a lot of his life at the law. Hastening to add that he is no Dixon, Kirby says the late judge left his judgments and a certain legal spirit to Australians but Kirby shares his doubts about whether the long hours have been worthwhile. "I don't think I was ever young."

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Barbie? Does the judge go to barbecues?

"Despite rumours to the contrary, I am human."

Kirby resists questions about his personal life, saying he doesn't mind promoting issues but is too boring a person to promote himself.

Born 56 years ago to working-class parents in Concord, he personifies the Protestant work ethic. He recalls telling his Northern Irish mother he had come second in a primary class. His mother wanted to know why he hadn't come first.

He was plucked out of North Strathfield Public School and sent to Summer Hill Opportunity School after a test showed he had an IQ of 150. It was at Summer

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# Lawing down the LAW

Justice Kirby on . . .

**Popularising the law:** The law is not a mystery to be enjoyed by lawyers behind closed doors. The law belongs to the people and, if we are to reform the law and consult the people about it, we must communicate with them. If that involves appearing on television between the soap powder ads, so be it.

**Influencing Singo:** I was not a particularly heavy prefect (at Fort Street). I can only remember putting two chaps on detention. One was John Singleton and the other was a chap who later became a priest. Obviously my detention had a considerable effect on each of them. One turned to God and the other to Mammon.

**Reform:** I am not a revolutionary. I wouldn't want you to think I am a conservative, either, but it is a matter of reforming that which exists.

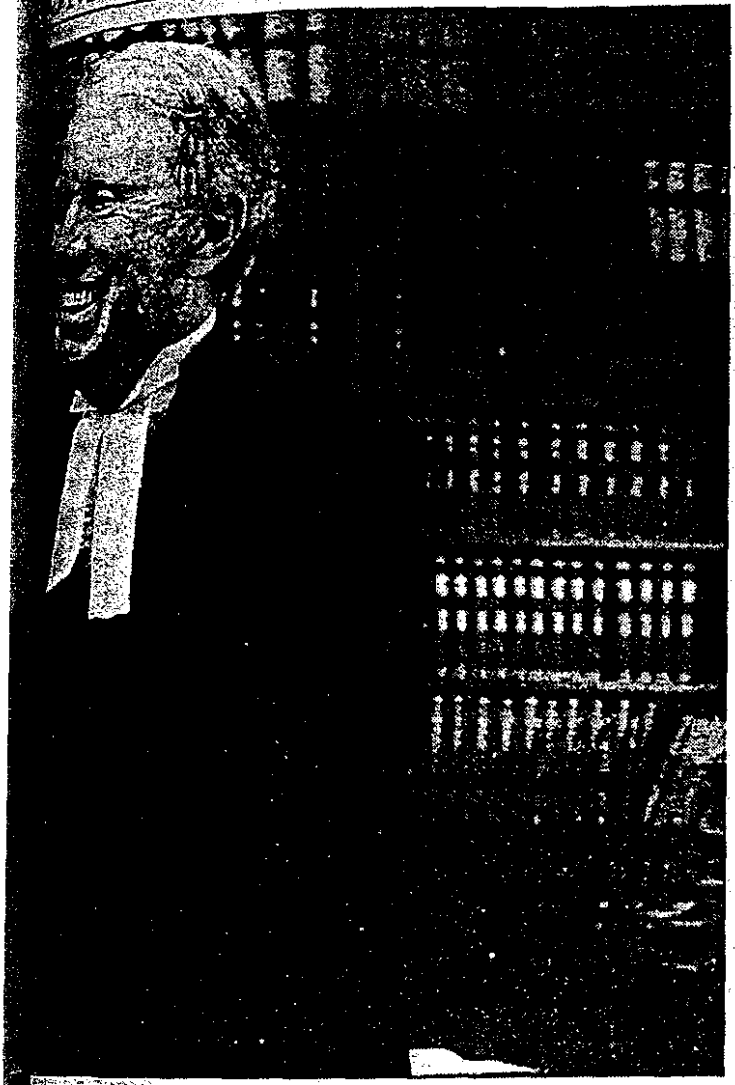
**Mabo:** The Mabo decision of the High Court is extremely important for the human rights of Aboriginal Australians. In their quiet moments of reflection, I think most fair dinkum Aussies will accept that the time had come to explode, at last, the myth that Australia was an empty continent when the white settlers arrived in 1788.

**Drugs:** Often as I sit there as a judge in the presence of 200 years of legal history, I ask myself: "Why do people have to go to jail for using the drug Ecstasy and why do I have to impose very heavy sentences in those cases?"

would also attack the corruption that was revealed by the Police Royal Commission.

URGING recently that judicial stress be brought out of the closet. Kirby said: "The transition from practising lawyer to judicial officer involves a journey to loneliness."

Kirby, a single man, doesn't have time for loneliness. He says he doesn't know what the future holds for him, although his interests take him increasingly to foreign fields. Writing about Australia's intellectuals four years ago, Barry Jones, the ALP president, said of Kirby: "He should have been appointed to the High Court but his intimidating intellect and extraordinary range of knowledge, has



Photograph by PALANI MOHAN

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he knew he did not want  
to go and that he wasn't  
going. It looked like the  
end of the judiciary for a  
time. I was put into  
detention and out of that into  
university," he said in  
an interview. "I think my life was  
changed by the Education  
Commission. They've probably  
done more for me. It probably  
wasn't enough. "Very  
few chambers in class  
rooms to achieve."  
Kirby, at Fort Street, he  
told John Singleton, told  
him. He wanted to  
be a Minister, liked Latin  
and Gilbert and Sullivan.  
University as a  
contemporary... of  
Kirby, Clive James,  
and Bob Ellis and  
others he obtained

distinctly xenophobic rodomontade [pretentious, blustering talk]". Kirby said this was absurd.  
Richard Ackland, the editor of *Justianian*, says Meagher likes and admires Kirby as a civilised, well-read and amusing companion. There is evidence of mutual fondness and respect. Kirby received a postcard last week from Meagher, who is on leave in Europe. Part of Meagher's art collection crowds the walls of the floor they share in the Supreme Court building. Meagher has hung several sexually explicit Brett Whiteley drawings right outside the president's chambers.  
Lionel Murphy, the then Attorney-General whom Kirby admired, asked Kirby in a lift to become the first chairman of the Law Reform Commission (LRC)

— he says they are too inclined towards entertainment and to set the agenda; AIDS — he urges compassion, saying it is not just a statistical but a human issue; political debate — "The airwaves and newsprint are full of vindictive, petty, personal and crass vituperation," he said in 1986. And now: "I am not anti-politician. Judges must defer to an elected parliament." But he does not regret his decision to drop those early prime ministerial ambitions: "I try to keep away from the bear pit. To enter it is to attract fleas."  
On the question of whether judges should simply interpret law, Kirby has said: "There was a time when it was thought almost indecent to suggest that judges make law — they only declare it. Those with a taste for fairytale

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Kirby, a single man, doesn't have time for loneliness. He says he doesn't know what the future holds for him, although his interests take him increasingly to foreign fields. Writing about Australia's intellectuals four years ago, Barry Jones, the ALP president, said of Kirby: "He should have been appointed to the High Court but his intimidating intellect and extraordinary range of knowledge has been held against him." In a conservative profession such as the law, breadth of knowledge can be ground for suspicion.

Kirby, so willing to discuss so many issues, will not discuss such a personal matter.

The ICJ and the genome project are different matters altogether. He wants to enlist idealistic young lawyers to the ICJ, to make it more open, more universal and more modern. He believes the project will create "a modern Domesday Book, providing the encyclopedia of the human genome which will stimulate and facilitate research for the coming millennium ... It should not be thought of as something alien to humanity, but as part of humanity discovered by humanity. The future of the species is involved."

... to judicial officer involves a journey to loneliness." Photograph by PALANI MOHAN

he knew he did not want frogs and that he wasn't a mathematician. It looked like the judiciary for a moment. Out of that I was put into the street and out of that into the University, he said. I think my life was shaped by the Education Department. They've probably passed on me. It probably bored me enough. "Very never chatters in class. Trying to achieve." Kirby at Fort Street, he said. John Singleton, told Ron Horan he wanted to be Minister, liked Latin and Gilbert and Sullivan. Sydney University as a contemporary of, of Hughes, Clive James, Murray, Bob Ellis and John Greer, he obtained a Bachelor of Economics, a Bachelor of Laws, a Bachelor of Fine Arts, a Master of Laws, with class honours. The late Wilenski beat Kirby for the student senator position. He succeeded R. (Roddy) Dwyer as student senator in 1987. Kirby criticised Meagher for consulting the Students' Representative Council. Kirby was the first of several members between the two men to share the same Bench. Kirby was elected in 1991 when Kirby was 47. H.V. Evatt, the former Labor leader was a champion of civil rights, to which Kirby said this was like the case of Robert Menzies as a champion of republicanism. They met on the Bench in 1993 when Meagher accused Kirby of being "an elaborate and

distinctly xenophobic rodomontade [pretentious, blustering talk]". Kirby said this was absurd.

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Lionel Murphy, the then Attorney-General, whom Kirby admired, asked Kirby in a lift to become the first chairman of the Law Reform Commission (LRC). Since his appointment, in 1975, he has become the most public of Australian judges. Criticism of his public stance on a variety of issues from a conservative profession unaccustomed to public examination and accountability has dwindled in 20 years.

His work on the LRC included a report on changes in arrest procedure, bail and confessions and the tissue transplants report that changed the legal definition of death, relating it to the brain rather than the heart. Since then, Kirby has spoken out frequently and eloquently on such questions as republicanism — he opposes any move from constitutional monarchy and a photograph of the Queen hangs in his chambers; threats to judicial independence — he questions the removal of judges or their courts; the media

— he says they are too inclined towards entertainment and to set the agenda; AIDS — he urges compassion, saying it is not just a statistical but a human issue; political debate — "The airwaves and newsprint are full of vindictive, petty, personal and crass vituperation," he said in 1986. And now: "I am not anti-politician. Judges must defer to an elected parliament." But he does not regret his decision to drop those early prime ministerial ambitions: "I try to keep away from the bear pit. To enter it is to attract fleas."

On the question of whether judges should simply interpret law, Kirby has said: "There was a time when it was thought almost indecent to suggest that judges make law — they only declare it. Those with a taste for fairytales seem to have thought that in some Aladdin's cave, there is hidden the common law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words, 'Open Sesame'. Bad decisions are given when the judge has muddled the password and the wrong door opens."

He says now, of the Mabo decision: "It was a very bold decision. It would have been better in principle if the democratically elected politicians had made it, but they had not done so in 150 years. As a citizen, I am very glad the step was taken."

He told a NSW Legal Convention two weeks ago that fines, not jail sentences, should be imposed for the possession and use of small quantities of cannabis. Drug law reform