

Law, Education and the Global Conversation

University of Sydney Alumni
University of Sydney Union
University of Sydney Great Hall
28 February 2009.

The Hon. Michael Kirby AC CMG

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SATURDAY 28 FEBRUARY 2009

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A DINNER CONVERSATION WITH

THE HON. MICHAEL KIRBY AC CMG

IN THE GREAT HALL

Two weeks ago, a famous *alumnus* of this University (and one of the greatest Chief Justices), Sir Anthony Mason, who does me the honour of attending this event, launched a book of essays on my judicial contribution: Ian Freckleton and Hugh Selby, *Appealing to the Future: Michael Kirby and his Legacy* (Lawbook Co., 2009). With uncharacteristically unrestrained praise, he implied that everyone should have the book on their shelves. At least, that is what I took to be his drift. And, naturally, I agreed.

After countless functions to mark my retirement from the High Court of Australia on 2 February 2009, and my conclusion of 34 years of judicial service in a number of courts, Sir Anthony, in his book launch speech, pronounced that the Michael Kirby Festival was over. Alas, it was not to be so. Since then there have been many more functions, including a lunch in recognition of my service

at Parliament House on 25 February, attended by many leading citizens. There are still more to come. Indeed, I fear that friends and acquaintances are crossing the street to avoid meeting me, lest they be pressed into service in yet another farewell. I run a danger of out-performing Nellie Melba.

For a graduate, or under-graduate, of the University of Sydney, an event in this Great Hall must surely be the crescendo of aspiration. How beautiful the Hall appears. Bedecked with decorated tables, enlivened with conversation amongst old and new friends, and with fine food and wine. This is a splendid setting for all of us who count the University of Sydney as our *alma mater*.

It is here, in this Hall, that we experienced the centre of our education at this University and events important to our lives. That was exactly what Edmund Blacket, its architect, envisaged when he conceived this Hall, built with festive confidence in 1854, as a reduced version of the famous Hall at Westminster.

It was here, in this Hall, that I first encountered the University in Orientation Week 1956. Not far from where I am now standing, the Chancellor, Sir Charles Bickerton-Blackburn, quietly welcomed the new under-graduates. With amazing gaucheness, I turned up wearing my school blazer. Robert Hughes was wearing a long flowing Oxford scarf (in the middle of a heatwave). Clive James was there sporting his Student Christian Movement badge. It is all recorded in Clive's *Unreliable Memoirs*.

It is here, with many in this room tonight, that I underwent annual examinations – looking imploringly at the gargoyles in the vaulted ceiling for inspiration. It was here that I came for my five graduations. The first (BA) in 1959. The last (Hon. LL.D.) in 1996.

Down there in the body of the Hall sat my late mother, my grandmother, my Aunt Lillyan, and also my father, my brothers and sister celebrating these special occasions. They are fragments in time, captured in precious photographs that bring back the smiles and happy memories of accomplishment.

This dinner is a great occasion for my family but especially because it is held here: for my father, who reached his 93rd birthday last week, is still driving and takes no nonsense from his children. For my partner, Johan Van Vloten, who has been with me these past forty years since about the time I completed my service on the Senate of the University, so long ago. Now we can speak of our relationship, freed from false shame or embarrassment. So we have made progress in Australia in my lifetime. Just as a civilised and educated country should do.

This Hall has been the place, over the years, of other important events in our lives. In due course, as President of the Students' Representative Council, I addressed the new under-graduates from this podium. Here, great public lectures and events have taken place. And the greatest benefit of this evening's event is the occasion it gives for old friends to meet, to share

memories, and to renew affectionate and professional ties. I thank everyone for attending. I pay a tribute to the sponsors and to Dr. Robin Fitzsimons, who brought this occasion to life. It is intended to be a conversation. But first I must spark your interest and say a few words of my own.

STUDENT AFFAIRS

Like many other Australians who have gone on to service in public office, I was formed and shaped in my University years and specifically in the student societies which instilled confidence and trained future leaders in the arts of civic discourse. At this University, I was successively elected President of the University Law Society (1961), President of the Students' Representative Council (twice) (1962-4), President of the Sydney University Union (1965) and Fellow of the Senate elected to represent the under-graduates (1966-1969). These were offices that gave me an insight into the operation of collegiate bodies exercising responsibility in relation to others. From all of the fellow students, young men and women at the time, who took part in these activities, a goodly number of them here on this occasion, I learnt the skills that would serve me well in the decades that followed. Moreover, I made friends who remain true to this time and have been with me through good times and bad times, as friends should.

My first encounter with student affairs was accidental and unpredicted. According to Murray Gleeson, a past Chief Justice of Australia (who would never tell a lie), he nominated me to the student Law Society in my absence from lectures one day, believing that it would be stimulating to see if such a

post would make any difference to one he described as the shyest boy in the class. He was later to lament the “juggernaut” of student politics that was unleashed by his rash move.¹ At the time of my election to the committee of the Law Society, its constitution provided, in a rather old-fashioned way, that the president of the society would be a judge of the Supreme Court. So it was. The President was Mr. Justice (later Sir) Kenneth Manning. He was an able but somewhat short-tempered man, used to throwing his weight around and getting his own way.

I was, as expected, reticent in the Society. Accordingly, I made few enemies and rose through the ranks to the highest position on offer, Vice President. But then things happened quickly. Urged on by an extremely feisty and radical student politician, Bronwyn Setright (now the Hon. Bronwyn Bishop MP also here tonight), I began to lobby for an increase in the pittance that was paid to articled law clerks at the time (1959-60). My efforts attracted the interest of the trade union movement. The possibility of initiating proceedings in the State Industrial Commission was debated. It was at this point that the Executive of the Law Society received a summons to come into the presence of its President, Mr. Justice Manning. I was sent on a mission, some said, of no return, to see the judge in his chambers in the old Supreme Court in King Street. With Bohdan Bilinsky, who is also present, we called on the judge. I recall that he ate his sandwiches, dipping them into tomato sauce. This, he declared, was a habit derived from school days at the Sydney Grammar School.

¹ A.M. Gleeson, “Retirement of Justice Michael Kirby from the Court of Appeal (NSW), 2 February 1996 (70 ALJ 269).

Had he attended public schools, as I did (Fort Street High School), he would have been caned for much lesser offences.

Sir Kenneth got right to the point. “I have had a lot of complaints from leading solicitors about your campaign for higher salaries for articled clerks. I do not regard that as appropriate for the Society. If you go on with this campaign, I will have no alternative but to resign”. Bohdan Bilinsky and I looked at each other in despair. I then said: “The Society is very sad to receive your resignation, judge. We will report it to the committee. We thank you for your service as President in the past”. We fled the judicial chambers and the ink was not dry on the amendment to the constitution of the Society before I was elected President. We invited that fine judge Mr. (later Sir) Justice Jacobs to be the patron of the Society. Under relentless insistence from the radical Bronwyn Bishop, we pressed on in our campaign for wage justice. We eventually enjoyed some success.

This experience in student affairs taught me the importance of seizing the moment whilst insisting upon important principles. These were lessons I was to put to good use in my later career in public life.

THREE PERSONALITIES

Meeting in this room, it is natural to cast one’s mind back to the earliest days of acquaintance with the University. At the old Accounts Office, not far from here, I presented the documentation for my University Bursary, and my

brothers and I presented our Commonwealth Scholarship forms (the great gift conceived by the Chifley government and effected with energy by the Menzies government to stimulate the growth of the university sector in Australia).

I remember the University Union, at that stage divided on gender lines. As President, I was to play a part in the amalgamation of the Union and the Women's Union and contributed to the removal of the distinction that had outlived its usefulness. It was in the Union that I attended debates and saw some of the great figures of verbal dexterity of those times. It was there that I purchased second-hand books and ate my first oyster, under the tutelage of Miss Pearson, Director of Catering Services.

Three personalities of the University of the 1950s and 1960s stand out in my mind. I will mention each of them and what I learned from them.

The Chancellor, as I have said, was Sir Charles Bickerton-Blackburn. He was a distinguished medical practitioner who had been born in 1874². His father was a noted lepidopterist. I had to look that word up and it means a person who collects butterflies and moths. The young Charles, after graduating from the University of Sydney at the top of his class, served for a time in the First World War. Soon after that service, and his return to Australia, he was elected to the University Senate in 1919. Remarkably enough, he remained a Fellow of the

² C.R.B. Blackburn, "Blackburn, Sir Charles Bickerton", *Australian Dictionary of Biography* Vol.7, 1979, 310

Senate until 1964. Indeed, he was presiding, as Chancellor, at the first meeting of the Senate that I attended as representative of the under-graduates. It was to be his last.

Sir Charles was known as a stickler on all matters of morality and ethics. He was first elected chancellor in 1941. He remained in the office until retirement in his 90s. At the time of his retirement, he had conferred 31,000 of the University's then 48,000 degrees. For most of us, at that time, there had only been one chancellor. He appeared to have been created for the office by Central Castings.

From Sir Charles, I learned two important lessons in my journey in life. The first was from his quiet skill in running meetings and deftly bringing long-winded discussion to a close. He was impeccably courteous. He treated everyone with respect and won great affection as a result. But he was business-like and thoroughly focused.

There was also an occasion in which he taught me the importance of compassion and mercy. A young medical student, by name Steyn, was celebrating Orientation Day at the Wallace Theatre in 1964. The heat and excitement got to him and he performed a "hambone". This, for the uninitiated, involved the removal of his lower garments. Unfortunately, in the audience in the Wallace Theatre, were a group of Catholic nuns. The media jumped on this and were baying for blood. Several in the university

community demanded that Mr. Steyn be “sent down”. The final appeal for mercy lay to the Chancellor.

As President of the Students’ Council, I accompanied young Mr. Steyn to the Chancellor’s rooms in Macquarie Street, not far from where my own new chambers are now to be found. Ascending in the elevator I told the student: “The old chancellor is a medical practitioner himself. He may have a bit of sympathy for you. My advice to you is to tell the truth and to cry”. So, in due course, Steyn did. He cried and cried. Niagara itself never had such an outpouring of water. In the end I had to tell him to pull himself together. But he was saved. The word later came that a reprimand would be sufficient. The Chancellor tempered old-time justice with mercy. This may be why, like our wonderful present Chancellor, Professor Marie Bashir, old Sir Charles was greatly beloved of the students and of the wider community.

My second personality is Sir Stephen Roberts³. Vice Chancellor of the University from 1947 to 1967, Roberts was a working-class boy. His father had been a miner. He had won scholarships that took him to Melbourne University. He was an historian and wrote a famous book *The House That Hitler Built*. Eventually, he was appointed Challis Professor of History at Sydney University. He rejected the romantic view of history, common in imperial times. Instead, he insisted on empiricism and on basing all historical narrative upon sound factual data. This was also an approach he took to university

³ D.M. Schreuder, “Roberts, Sir Stephen Henry”, Australian Dictionary of Biography, Vol.16, 2002, 104.

affairs. And it was needed because his service at the helm coincided with a time of unprecedented growth and challenge in the University.

Roberts could not abide pushy students. Perhaps he saw in them too much of the working-class boy of his own youth. He repeatedly told me that I spoke too much at the Senate meetings. Perhaps he was right. He was not in favour of the initiatives for transparency of university government that I urged. He did not agree to the University Senate papers being made available to the Students' Council. He did not agree to the students' president being invited to attend the Senate as an observer. He did not agree even to informal discussion about student-related items on the agenda. He did not agree to the President of the Students' Council being appointed to the disciplinary committee.

For all this, Roberts, the traditionalist, had strengths. He was an innovator in reaching out to the business community. He secured many benefactions from business interests. He began a course of outreach to the private sector that has continued to this day. I take this occasion to honour, in this respect, Mr. Michael Hintze, Chair of the University of Sydney United Kingdom Trust. A graduate of this University, he has diverted his international travels to be present on this occasion. He has been a generous benefactor and has led others to do likewise. He is an example of the sense of obligation that exists in the business community, particularly amongst university graduates. It was this feeling that Roberts tapped.

The portraits of Blackburn and Roberts are on the wall of this Great Hall. They are both executed by Sir William Dargie. Blackburn is shown with his characteristic steady gaze. Roberts is portrayed, with political incorrectness by today's standard, holding a cigarette in his hand. So many times I saw that cigarette lose its ash onto his waistcoat. I am afraid he found me hard to take. But his lessons about an empirical approach to controversies and an innovative outreach to challenges were lessons I have carried with me from those university years.

The third personality is Margaret Allison Telfer⁴. For many of us in this room, our testamurs from the University, issued over a very long time, were uniformly signed by Miss Telfer. She was a meticulous, slender, dark-haired and elegant woman. She had begun her service in the University's administration as an adviser to women students. Encouraged by Roberts' predecessor, Sir Robert Wallace, she had been promoted in the registry in 1944, ultimately rising to Deputy Registrar in 1950 and to Registrar in 1955 – just before my arrival here. She was the first woman to be appointed as administrative head of any university in the Commonwealth of Nations. She carried the position with scrupulous attention to detail and faithful observance of the necessities of integrity.

I can still remember looking plaintively into Miss Telfer's eyes, when begging some advantage for the students. There I saw limpid grey pupils and they always looked to be ready for tears. Perhaps it was simply that she suffered

⁴ Ursula Bygott, "Telfer, Margaret Allison", *Australian Dictionary of Biography*, Vol.16, 2002, 374

from glaucoma. Perhaps it was the power of my persuasion. Yet, in truth, I rarely budged her. On her retirement, Professor William O'Neill described her as a traditionalist in a period of great change in the University. She was completely trust-worthy and what she said, she would deliver. She was also efficient and a great example of a woman in a highly demanding position at a time when there were few such role models.

Margaret Telfer taught me the importance of meticulous attention to detail. Also how an element of stubbornness was needed where principle was concerned. As I look at the great portraits in this Hall, I think of the other fine University officers and also of many whose portraits are not here. Harold Maze, Fred Deer, Betty Archdale, Ian Rammage (who recently died), Dan Abercrombie (also of the Union), and the many officers of the University, high and low, who were devoted to its affairs.

Fortunate are the students who take part in University student activities. A fully rounded education at our universities would not be possible if the entire time were spent in lecture halls and libraries. Look around the parliaments, courts and businesses of this nation, indeed everywhere, you find, amongst the leaders, those who have been privileged to play a part in student affairs. The spirit then acquired remains with us life-long. It brings us together on an occasion such as this.

ABIDING VALUES

Looking back at the time in which I took part in the Students' Council and the Union of this University, it can be said that many of the themes remain important into our own age. One of the main endeavours of student bodies in the early 1960s was to increase the participation of Aboriginal and other indigenous students in tertiary education. As Vice Chancellor, Roberts was proud that it was on his watch that Charles Perkins graduated from the University as the first Aboriginal student in Australia to earn a degree⁵. Roberts also worked to support the training of students from the Pacific Islands and Papua New Guinea in the University's medical faculty. Students, for their part, supported ABSCHOL – the provision of scholarships to Aboriginal students.

Students also supported the demolition of the White Australia Policy which was still legally in force until 1966. They opposed the imposition of quotas on the numbers of Asian students who had been a feature of the campus, following the Colombo Plan. They worked towards friendship with neighbouring countries in Asia and with student groups in those countries. The animosity created by the White Australia Policy was brought home to me when I led delegations for the National Union of Australian University Students to Nigeria and Ghana and to Malaya and Singapore in 1962-3. University students were in the vanguard of demands in Australia for racial tolerance and acceptance of diversity.

⁵ Schreuder, above n.3 106.

I pay a tribute to the late Dr. Peter Wilenski. As a student he was most forward looking in his vision of issues that should engage Australian students. He had ideals, and being from a family that had survived the Holocaust, he showed a strong determination to convert his ideals into effective action. Thus, one learnt not only from great university personalities but also from fellow students. Wilenski defeated me in my first bid to be the Student Senator. However, soon afterwards he left to continue his studies in England and I took his place. Happily other fine student leaders of those years, and dear friends, are present on this occasion.

Seeking a renewal of my mandate as Student Senator, in September 1967, I was recorded in *Honi Soit*⁶ expressing views that seemed strangely familiar to me, forty years on. In fact, when I re-read the declarations of approach and policy that I expressed in that election, I could see reflections of some of the attitudes that were to mark my later service in the Australian Law Reform Commission, the New South Wales Court of Appeal and the High Court of Australia. Asked what my general policy on the Senate of the University would be I said:

“If a supine puppet is wanted on the Senate: a compromiser, someone expert at cocktail parties and always good to second a motion, then out I go. I make no apology: I seek to protect and advance the liberal and tolerant tradition of this University.”

⁶ Thursday, September 7, 1967, 3

Liberal and tolerant. These are values that have informed my later professional work. I went on:

“I talk a lot on the Senate. One very senior administrator says I talk too much. Perhaps I do. I make no apology. I stand for an active and independent Senate. I stand against a mere cipher for administrative action, however well-intentioned. I stand for a bold Senate, not frightened to ‘buck the experts’, not scared into silence by the pressures of politeness or personal relationships.”

This remained my attitude, including to the role of a constitutional court in a modern democracy. Not for me a “laissez-faire attitude to challenges to constitutional validity”.⁷

At a certain point in my policy speech in 1967, I expressed an attitude that might, perhaps, have been interest to my future judicial colleagues, had they known of it:

“What is needed is a combination of patient persistence on matters of principle and ready compromise and co-operation on matters of form. I

⁷ *NSW v. The Commonwealth* (2006) 229 CLR 1 at 246 [615]; *Forge v. Australian Securities & Investments Commission* (2006) 228 CLR 43 at 130 [218]; *Attorney-General (Vic) v. Andrews* (2007) 230 CLR 369 at 431 [164]; *Combet v. The Commonwealth* (2005) 224 CLR 494 at 626 [294].

believe I offer these qualities and that they are very much needed just now.”

Repeatedly in 1967, I declared that “graceful retirement” was not for me. Believe it or not, occasionally, in recent days, I have experienced the same feelings. It is interesting to see the way declarations of values, so soon after school days, appear relevant to the manner in which one approaches other and later tasks. The body declines, but the values stay on.

GLOBAL CONVERSATION

The subject that I have selected for a conversation with this audience is the use of international law in the interpretation of legislation and in ascertaining the meaning of the Australian Constitution.

The issues of justice to Aboriginals, to racial minorities and to women are much the same today as they were when I was at university, 40 years ago. Some improvements have been made. But much remains to be done. Virtually no-one in those days ever raised the issue of justice to sexual minorities. But we have seen progress on that subject in Australia, largely because of the influence of scientific research conducted in universities. Such was the research of Alfred Kinsey in the unlikely setting of Bloomington, Indiana. It was his scientific research at Indiana University that undermined the religious dogma about homosexual people. In the end, human beings are genetically programmed to prefer science to irrational animosity. But it took good science

and educated people to spread the word and to change the prevailing attitudes.

In Australia two groups whom we have treated more harshly than other countries have been refugees and prisoners. To refugees we hung up the “not welcome” sign. To prisoners, we demanded, more than ever “law and order” campaigns from our politicians. And we added to the formal punishment the deprivation of the right to vote in our elections, treating the prisoner as a kind of “non-citizen”.

Both of these issues came before the High Court during my service over the past thirteen years. Indeed, the refugee question threatened, at one stage, to swamp the court before it introduced its own measures to permit such cases to be dealt with on the papers.

In one case⁸ two young boys claimed refugee protection and a right to be released from detention by reference to the principles of international law. Whereas a *Convention on the Rights of the Child* declared that detention of juveniles was to be a “last resort”, under Australian migration law, such detention was mandatory, and a first resort. The boys argued that the federal law should be read as applicable only to adults so that children would not be locked up, contrary to the agreed international standard.

⁸

Minister for Immigration & Multicultural & Indigenous Affairs v. B (2003) 219 CLR 365.

Theoretically, it might have been possible to read down the federal law but for two difficulties. First, there was a provision to govern the searching of children whilst in detention. This indicated a parliamentary acceptance that detention of children was indeed contemplated. As well, the Hansard record showed that officials had drawn to notice the possible breach of the *Children's Convention*, which Australia, had ratified, unless children were excluded from such automatic detention. Yet the Parliament went ahead without amending the law. These features made it impossible for me, as a judge, to "read down" the law. Where it is clear, judges must give effect to the law unless it is constitutionally invalid. No such invalidity was claimed. This case shows that it is not possible for judges to solve all problems, even when they believe that an Australian law involves a breach of acknowledged international standards.

Another similar case came before the High Court of Australia in 2004. It involved Mr. Ahmed al-Kateb. He was a Palestinian national who arrived in Australia in 2000 seeking asylum. He had been born in Kuwait but it denied him nationality. His father was lost during the Gulf War, and Mr. Al-Kateb fled to Australia, claiming to be a refugee. He was placed in detention and refused refugee status.

Eventually, in 2003, Mr. Al-Kateb requested the Minister for Immigration to end his detention by returning him to his country of nationality. Kuwait would not take him. Israel would not permit him to cross its territory to enter Palestine. On the theory of the law as propounded by the Minister, he could

be kept detained indefinitely. Mr. Al-Kateb came to the High Court arguing that this was not the proper interpretation of the migration law. He asked to be released on the basis that the Act of Parliament did not cover his case, as a stateless person. Three judges of the High Court (Chief Justice Gleeson, Justice Gummow and I⁹) upheld this argument. However the majority of four judges (Justices McHugh, Hayne, Callinan and Heydon) rejected it. They also rejected the contention that a law, allowing indefinite governmental detention, was constitutionally invalid because such forms of punishment were reserved to the judiciary.

Just before the last Federal election, a new Minister for Immigration, under pressure from Australian citizens supporting Mr. Al-Kateb, released him. He secured educational training in computer drafting. He now has such work. On 7 February 2009, he was successful in obtaining Australian citizenship. He is here tonight in this Great Hall on this occasion. As a fellow citizen, I congratulate him. May his life be a contribution to the diversity and strength of the Australian nation. May Australia bring blessings to him. Not all such stories have happy endings.

More recently, a majority of the High Court¹⁰ held that prisoners, serving less than three years imprisonment, are still entitled to vote in elections. They are in prison for punishment. But they remain human beings and citizens and had

⁹ *Al-Kateb v. Godwin* (2004) 219 CLR 562. See at 622 [169].

¹⁰ *Roach v. Australian Electoral Commission* (2008) 82 ALJR 233 CLR 162

not lost their basic civic rights. This decision was reached with appropriate reference to decisions of courts in other countries and principles of fundamental human rights. Such citations were criticised by the minority judges but adhered to by the majority (Chief Justice Gleeson, Justices Gummow, Crennan and myself).

Business people and scientists would treat as astonishing a refusal to inform the mind about developments, theories and ideas occurring in other countries. One of the biggest changes from the university of forty years ago is the advent of globalism. The Australian economy is inescapably part of the global economy. Science is inextricably connected throughout the world. Law must also adjust and adapt to the gradual elucidation of the universal standards of human rights. Such standards are not, as such, part of our law unless Parliament makes it so. But in expressing our law, and understanding the problems to which it is addressed, courts today do not put their heads in the sand. They too access the internet. They learn from other countries. Increasingly, they understand Australian legal issues in the context of international developments.

These are lessons we can learn from reflecting on the case of Mr. Al-Kateb, the child detainees and the prisoner electors. Law is no longer entirely parochial. Like everything else it is now increasingly global. Each one of us is connected to the liberty and dignity of every human being. From this Great Hall to the entire world the message is spread: Australia is part of the global

conversation. And the University of Sydney is still the training ground of many Australian leaders who participate in, and contribute to, this conversation.