

‘You’re not an Irish  
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name like Liam, are  
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Macquarie University Brief  
Article by Liam Cavell  
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# **MACQUARIE UNIVERSITY BRIEF**

## **YOU'RE NOT A REVOLUTIONARY, ARE YOU? – MICHAEL KIRBY**

By Liam Cavell

'With a name like "Liam" you're not an Irish revolutionary, are you?' Michael Kirby quips as he greets me. 'Oh, ah no, no, no' I blurt out. Re-assured, he smiles.

The former High Court Justice has cause to be suspicious of Irish revolutionaries. His family heralds from Northern Ireland, a region that has endured violent unrest for decades. Although the conflict now shows promise of resolution<sup>1</sup> with the disarmament of the Irish Republican Army (IRA) and commencement of power-sharing arrangements, the Massereene Barracks shooting earlier this year provided a grim reminder of the years of fighting, known as 'The Troubles'.

Most law students probably become acquainted with The Troubles in the course of discussing human rights. Jeremy Waldron<sup>2</sup> asked readers to consider the detention and torture of IRA suspects. In August 1971, the British Army arrested 340 people thought to have connections with, or knowledge of, IRA activities. Most were released within forty-eight hours. About a dozen suspects were detained for further interrogation. These men were tortured using the 'five techniques'.

The five techniques is a method of torture used to coerce prisoners into revealing information. Waldron posed a challenge to readers in order to help them understand the pain one experiences undergoing the treatment:

Find a wall and stand facing it. Raise your arms above your head as high as you can, and place your fingers against the wall. Spread your legs and move your feet back away from the wall so that you are

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<sup>1</sup> British Broadcasting Corporation, *Quick Guide: Conflict in Northern Ireland* (2006) British Broadcasting Corporation <[http://news.bbc.co.uk/2/hi/uk\\_news/northern\\_ireland/5097948.stm](http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/5097948.stm)> at 21 June 2009.

<sup>2</sup> Jeremy Waldron, *The Law* (1<sup>st</sup> ed, 1990) 88.

standing on your toes with the weight of your body mainly on your fingers. Try maintaining this posture for, let's say, five minutes.<sup>3</sup>

The men stood at the wall for a total of between twenty to thirty hours. They were hooded, deprived of food and sleep, and were subjected to a constant hissing sound.

The interrogation led to the gathering of a considerable quantity of intelligence, including the identification of 700 members of the IRA and information regarding 85 previously unexplained criminal incidents.

It is easy to update this example by substituting Al-Qaeda for the IRA, the American army for the British, and water boarding for the five techniques.

The interrogation of suspected terrorists presents hard questions for human rights advocates. Lives might be lost, for instance, if pressure is not placed on terrorist suspects to give up the location of a bomb. On the other hand, if we are serious about protecting human rights we must be prepared to stand by our convictions regardless of the situation.<sup>4</sup> '[F]undamental human rights', says Kirby, 'don't bend in the wind simply because there are new challenges to society, including the challenge of terrorism'.

'Naturally, there is an adjustment to be made between the way in which human rights are protected and the way in which a society responds to terrorism'. Kirby believes a balance must be struck. However, 'it is not a balance that requires the abandonment of the fundamental principles of human rights'.

'The countries that have been most successful in counter-acting terrorism have been those that have continued to differentiate the product and to draw a line between the techniques of terrorists and the principles of modern human rights respecting democracies'. Kirby says that nation states who fail to balance national security with fundamental human rights hand victory to the terrorists.

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<sup>3</sup> Ibid 88.

<sup>4</sup> Ibid 97.

‘Uruguay was, for a very long time, a jewel in South America. When military dictators ruled all the other states on the continent, or most of them, Uruguay was a democracy. However, the state was greatly threatened by the advent of the Tupamaros. The attempt to suppress the Tupamaros by abandoning the democratic and human rights features of Uruguay failed and it greatly damaged the state and took away its essential democratic character’.

Human rights are an essential feature of the international law landscape, which has developed rapidly since 1945 with the creation of the United Nations. International law, Kirby explains, was traditionally divided into the law of war and the law of peace. However, international law ‘increasingly plays a part in expressing the universal principles of civilised nations. These include principles such as the principles of opposition to piracy, opposition to genocide and in favour of universal human rights’.

‘The endeavour to get universal principles of human rights expressed in international law received a big fillip in 1948 with the adoption by the General Assembly of the Universal Declaration of Human Rights’. Aside from the desire to avoid disputes between nation states and secure the dignity of people around the world, Kirby identifies two other forces propelling the creation of international legal principles: technology and trade.

‘Technology presents a force because when you have new universal technologies such as informatics—radio, television, satellite telecommunications, internet connections—you do need international legal principles, institutions, and sometimes treaties to regulate the operation of the new universal technology’.

‘Trade occasions the need for international law because of the need to regulate the huge trade, which now exists in the world between nations and between regions, and to provide for the settlement of disputes either by court processes—international, regional or domestic—or by arbitration, mediation and other forms of non-court resolution’.

International law is not without problems. According to Kirby, these include the slow pace at which international law develops in response to new problems, the common

reliance on nation states to enforce international law, and the way the United Nations is controlled by voting blocks. But these problems 'shouldn't surprise us given that the proliferation of international law is very substantially a phenomenon of the second half of the 20<sup>th</sup> century'.

The incorporation of international principles into municipal law is primarily a task for the legislature. Despite this, Kirby says that other lawmakers, such as the courts, play a minor role in bringing international law into operation. 'In the processes of the common law, the courts can incorporate some principles of international law in the elaboration of the local common law'. This is what the High Court of Australia did in *Mabo v Queensland (No 2)*<sup>5</sup>.

In that case, the High Court looked to international law in declaring the common law. This was the key, Kirby says, which 'unlocked the door and allowed the High Court to overrule more than 100 years of settled land law and to declare a new principle'. The Court judged 'that a principle of the common law of Australia, which was founded on a racist approach to the rights to title of people in this country, could not be a principle of the common law today'.

This was 'a valid exercise of the law making power because it was within the province of the Court to state the common law and the Court did so by reference, amongst other things, to the international law against racism' says Kirby. Meanwhile, a separate debate has raged over the use of international law to expound the meaning of the Commonwealth Constitution. This came to a head in *Al-Kateb v Godwin*<sup>6</sup> where Justice McHugh argued that interpreting the Constitution according to international principles was tantamount to amending the Constitution, contrary to section 128.<sup>7</sup>

This debate is not unique to Australia, and there have been heated exchanges on the issue in the United States.<sup>8</sup> It is Kirby's view that international principles can be used

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<sup>5</sup> (1992) 175 CLR 1 at 42.

<sup>6</sup> (2004) 219 CLR 562 ('*Al-Kateb*').

<sup>7</sup> *Al-Kateb* (2004) 219 CLR 562 at 589, 592.

<sup>8</sup> See *Atkins v Virginia* 536 US 304 (2002); *Lawrence v Texas* 539 US 558 (2003).

to interpret the Constitution.<sup>9</sup> 'That view is founded ultimately on the basis that interpretation is a task that cannot be performed accurately by taking out a magnifying glass and putting it upon words read in isolation' Kirby says. He points out that contextual factors have informed the way in which courts have interpreted the word 'jury' in section 80 of the Constitution.

'In the 1890s, that word would undoubtedly have meant a jury of 12 men. Indeed, it would have meant a jury of 12 men of property. Yet today, juries are made up with women and with people without established property interests. It is a true cross-section of the community of citizens. So that demonstrates that contextual factors have informed the way in which courts have looked at the meaning of words in the Constitution'.

'One of the most potent contextual factors of the current age is the factor of international developments, international technology and international law. And all I have said is that a modern judge brings the knowledge of international law to bear on the way he or she reads the constitutional text. To tell them to put all of those things out of their mind and to take their mind back to the 1890s is, in my opinion, frankly ridiculous. Moreover, it is contrary to the purpose of the Constitution, which is to be an instrument by which people—free people—govern themselves from age to age and century to century'.

International law will continue to grow in importance, Kirby says, and will become even more pervasive than it is today. 'I have no doubt that in the future most of what I have said about the impact of international law on our common law; on understanding of our statute law; and on construction of our Constitution, will be accepted by the High Court of Australia'.

'I rest quite comfortably, and I am quite confident that if nothing else I did in my service on the High Court of Australia ... survives, what I have said and written about international law will.'

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<sup>9</sup> *Al-Kateb* (2004) 219 CLR 562 at 624.