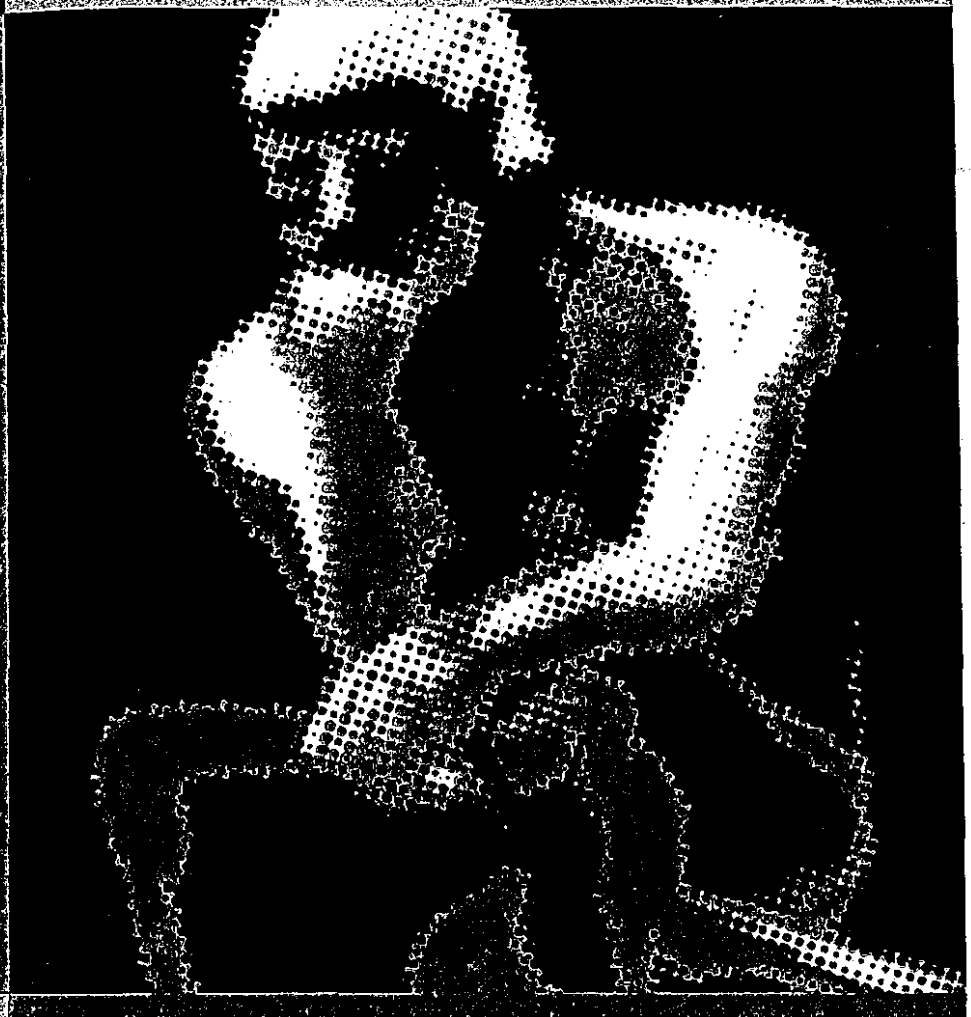
Intellectual Property Forum



Issue 53

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In Conversation with the Honourable Justice Michael Kirby, AC, CMG

To some in the legal community, Justice Michael Kirby is Australia's most distinguished living judge, an enlightened reformist who dares to pierce the veil of legalism to produce pragmatic, humane legal outcomes. To others, he is something of a judicial menace who challenges, some would say even flouts, the prevailing orthodoxies built on a time honoured legal tradition. To the wider Australian community, he is painted, more often than not, as a champion of human rights, a public intellectual, a creative spirit. In more recent times, and in some quarters, he has been praised as a moral hero who can sustain with rare grace and dignity the weight of public innuendo and political pressure.

To me, as an interviewer, he presents as the prospect of both a dream and a nightmare. The latter, for how does one condense in an hour or so a life not yet over but already crowded with such wide-ranging accomplishment? And a dream – for the very same reason – that his life is so rich and multi-layered, and he, a candid, courteous and courageous man, as I found to be the case in conversation in his Sydney chambers.

Q: In August 2001 you spoke at the grave of William Wilkins, the first Under Secretary of Public Education in New South Wales who came from England in 1851 to take up his post as headmaster of the new model school at Fort Street in Sydney, about how public schools have largely made up the values and responsibilities of the Australian community. You yourself are a product of a public school education. Tell me about the contribution that your early years at Fort Street Boys' High made to set you on what has become an already distinguished career.

A: Well, it wasn't only Fort Street. I am the only one of the seven justices of the High Court whose entire education was in public schools. The other six went to private schools. It has been that way for a very long time. Indeed, for most of the history of the Court and that, in itself, is a curiosity. After all, 64 per cent of Australian children receive their education in public schools.

I believe that this has contributed to the sometimes different way in which I look at society, its problems and the law. All of us are the product of our upbringing, our education, our background, our beliefs and our life experiences. Judges, especially judges of the highest courts, make choices all the time. They may sometimes deny it but that is the reality of the judicial role. Those choices are informed by their background and experience.

I went to the local public school in North Strathfield in Sydney. I can recite all of my teachers like a rosary. They had a great impact on me. From North Strathfield Public School I then went to the Summer Hill Opportunity School, which was a selective school chosen in those days by IQ tests. Many of those who sat with me in the Summer Hill Opportunity School went on to positions of leadership, including Graham Hill of the Federal Court of Australia. From there, I went to Fort Street Boys' High. From there, with scholarships and bursaries, I went to Sydney University.

Q: At Sydney University you studied arts, economics and law. Was there a defining moment that led you to take the legal path?

A: I always knew that I was going to be a lawyer, at least by the time I reached University. It was largely by a process of elimination. I was not a first-rate scientist or mathematician at school, but I was good in history, English and the general humanities. They seemed to suit me for a life in the law. Fort Street Boys' High also had a long tradition of people entering the law. As I look back now, history is the

field I really love – if I have any spare time, I spend that time reading history.

However, I chose the law. The defining moment in my law course was when I fell under the spell of Professor Julius Stone. Former Chief Justice Mason once said that if you sought the explanation for the creative phase that occurred in the High Court during his time as Chief Justice you could find it in the instruction of Julius Stone. By that time the majority of the Justices had been taught by Julius. His teaching was really in succession to Dean Roscoe Pound of Harvard. It was a teaching of a kind of legal realism that required decision-makers to confront the choices that they have, and to analyse, privately and quietly, the forces that inform them.

(pauses and smiles) I'm afraid that former Chief Justice Mason's thesis appears to be breaking down. The High Court configuration has changed, and though a majority, or at least a near majority, of the current Justices were taught by Professor Stone, I'm not so sure that the same Stonesian view of the world and of the law still reigns. However, it had a big effect on me, which I feel to this day.

Q: Law-making aside, do you feel jurisprudence can play a helpful role in everyday legal practice?

A: I can't understand how you can have a law course without a jurisprudence course. Yet, there are law schools in Australia that don't teach jurisprudence or, if they do, don't teach it as a compulsory subject. In fairness, sometimes they teach it under some different headings. They sometimes infuse questions about the purposes and deep currents of the law in particular courses. But it *was* useful in my law course to be forced to confront the question of what is the law, what is its purpose, what are its grand themes? It's a bit like in biotechnology confronting the truly fundamental questions of life – what is life, what is human existence, what is consciousness, how did consciousness come about? These are the truly curious questions which in recent years I've come to engage in with scientists. Sadly, these are questions that often cause lawyers' eyes to glaze over. I suspect that this is because lawyers are intensely practical people. They know that they can't give an immediate answer to those questions. But asking the deep questions of life, and in the law the deep questions about justice, is the fundamental duty of a thinking lawyer and individual.

Q: Also, possibly, it is too difficult to issue a bill of costs for rendering such services.

A: *(laughs)* Yes, perhaps I'm too far away from bills of costs. Don't forget that I'm now the longest serving male judicial officer in Australia, so my last bill of costs was sent out in December 1974 before most legal practitioners were born! So, perhaps I need to be ever so gently (but nonetheless quite rudely) pulled up by you to be reminded that there are quite practical necessities, when in Rumpole's words, "You don't have your trotters in the trough"! *(smiles)*

Q: Before we leave your alma mater, it appears that you began to exert leadership qualities at Sydney University when, correct me if I'm mistaken, you were elected as President of the Student Union, or was it the Law Students Society?

A: *(laughs)* I was *everything* at Sydney University – I was President of the SRC, I was President of the Sydney University Union, I was the Fellow of the Senate elected to represent the undergraduates. Chief Justice Gleeson has said unkindly of me that my advent on student politics was like the advent of Henry VIII to marriage – that once I had tasted of it, I could not let it go!

Q: But it also suggests to me, with the utmost respect, the signs of a highly driven character.

A: I think I *am* a driven character. That is explained to some extent by the excellent education I received, the encouragement of my parents and family, and my desire to make the most of my life. And I still try to do that. The best years are still ahead of me. *(smiles)*

Q: And after you graduated, you became a solicitor.

A: Yes, I was a solicitor for 7 years, followed by 7 years as a barrister. Then, out of my cradle I was appointed to the Australian Conciliation and Arbitration Commission, and then to the Law Reform Commission, which was the most formative experience of my legal career.

Q: Had the ACAC just been formed in 1974 when you were appointed a Deputy President?

A: No. The ACAC was the successor of the old Conciliation and Arbitration Court which was established in 1904 by the *Conciliation and Arbitration Act* of that year. Originally it was made up by the Justices of the High Court. Indeed, eight of the 44 Justices of the High Court were Presidential members of the National Conciliation and Arbitration Body. It is difficult for people of your youth to understand the very great power and importance of the ACAC in Australia's life. When I was growing up you heard much more about the

national Arbitration Commission than you did about the High Court. It was, in a sense, the great national court. So, that was my first judicial appointment. But I was only there for 40 days and 40 nights when I was whisked away to head the Law Reform Commission in February of 1975.

Q: What held the attraction of accepting the position of Chairman of the Australian Law Reform Commission – was it to provide the springboard to launch you into the arena of legal policy which, in turn, would enable you to embrace the wider social and public policy issues?

A: I think that's a fair comment. Up until that time I was a fairly orthodox barrister-turned-judge. My experience in the law was that of fighting cases. Although my intellectual training at university had taught me the importance of the deep currents, in daily life in the law I just wanted to win the case. But once I went to the Law Reform Commission I really came to see the confluence of the theoretical training that I had received from such teachers as Professor Julius Stone, the practical development of legal policy and the adaptation of legal principle and legal authority.

I was at first resistant to the appointment to the Law Reform Commission. Looking back, it seems astonishing to me now. It was Lionel Murphy, the then Federal Attorney-General, who persuaded me to accept the appointment. Much of my practice just before my appointment to the Australian Conciliation and Arbitration Commission had been in industrial relations. It is an extremely interesting field of legal practice often looked down upon by the legal profession. The legal profession is notoriously inaccurate in its judgments of what are the truly important fields of law. (I would also include criminal law and family law.) But once I arrived at the Law Reform Commission, and began to work with some top academics, practitioners and judges, I saw the way the law is a great mosaic. How you can't tinker with one area without, in many cases, having ramifications for other areas. I also began to see how important it is to conceptualise the law, to perceive one little problem in the context of a bigger picture.

Q: Back in 1975, what was Lionel Murphy's vision for the role of the Australian Law Reform Commission?

A: Lionel Murphy was a truly creative individual. His personality was quite different from my own. I have said elsewhere that he really was a person from the South of Ireland; whereas my people, for the most part, came from the North of Ireland. He was creative, restless, imaginative and a great partygoer. I was dour, applied, systematic and a party pooper. Yet, for some reason, he liked me. Maybe it was because, in some ways, I complemented his interests in the law and in life.

His vision for the Law Reform Commission was largely what we went on to build – a transparent, national institution that helped Parliament with problems, both large and small, that might otherwise have just been postponed or neglected, and engaged the community and the profession in discussing where the law should develop on large and small questions.

Q: What would you identify as some of Australian Law Reform Commission's more tangible legacies?

A: The most important legacy, which is still ongoing, is the way in which the law has become a matter of understanding and debate in society. Citizens now are less inclined simply to accept the law because it is the law. They are more inclined to question particular laws and quite fundamental aspects of the legal system. I think the engagement of the Australian Law Reform Commission in public debate at the grass roots level has had a significant and long-term impact on the way Australians look at what law is and what it should be.

In addition, there have been countless reports of the ALRC that have passed into law. They include the *Insurance Contracts Act*, the *Privacy Act*, the *Evidence Act*, and many other statutes of the Federal Parliament and of State Parliaments modelled on the ALRC reports. In fact, I saw a recent report of the ALRC indicating that something like 70 per cent of the reports of the Commission have either been wholly or partly implemented. By national law reform standards, this is a very good success rate indeed.

Q: As Chairman of the ALRC for close to a decade, did you ever feel as though you were working in a vacuum? By that I mean, while you were grappling with important legal policy issues did you ever feel removed from the daily rhythm of mainstream legal activity?

A: Well, no because we kept a very close link with the practising profession on every one of the projects that was given to the Commission by the Federal Attorney-General. We engaged a team of consultants – of judges, leading counsel, solicitors and academics. So we were never completely divorced. I made a point of keeping very close to the profession. Of course, I was not in the daily activity

of the courts. Yet it was amazing that, when I did return to the courts, as President of the New South Wales Court of Appeal, as soon as I hit the Bench it felt as if I had never left.

And so it was, one day in September 1984 I was Chairman of the Law Reform Commission, and the next day, after my welcome at 11.30 am, I was sitting with two other judges of the Court of Appeal presiding in the busy Motions List of the Court. I will never forget the experience I had with the Law Reform Commission – it was a unique experience. I concede that it was not a normal experience that prepares one for the office of a Justice of the High Court of Australia or of the President of the Court of Appeal. It focussed my mind on a number of lessons – first, the great contribution that academics play to the development of the law; secondly, the lessons that academics teach – that you must conceptualise problems and not simply patch up the latest difficulty; and, thirdly, the value of comparative law – looking outside one's own legal system for the lessons we can learn from others.

Q: In 1983 you were appointed to the Bench of the Federal Court of Australia. Did that brief appointment afford you your first real brush with intellectual property law?

A: I can't really claim that as a brush, however fleeting as it was, with intellectual property law. My appointment to the Federal Court was with a view to my eventual retirement from the Law Reform Commission. I only sat in the Federal Court on a few occasions and none of the cases that I sat in related to intellectual property law.

Q: How then did your appointment to the New South Wales Court of Appeal come about?

A: I was asked by the State Attorney-General to accept the appointment. The choice was then either taking up that appointment or proceeding with my commission in the Federal Court. The New South Wales Court of Appeal was then, and I believe still is, the busiest appellate court in the nation. It built up in a very short time, as Justice Heydon recently said on his retirement there, an amazing reputation for ability and energy for disposing of a huge caseload. I was very proud to be asked to join that court. I knew all of the judges of the Court from my days as an articled clerk and young solicitor and barrister. I admired them greatly.

Q: From the time that you sat on the Bench of the New South Wales Court of Appeal it appears that you also embarked on a new crusade, this time more directed at human rights issues. You accepted numerous international posts, amongst them as a Commissioner of the International Commission of Jurists, a member of the Committee of Counsellors on People's Rights, and a member of the WHO Global Commission on AIDS. From where stems your demonstrated commitment to advancing the legal, social and cultural rights of people, particularly of the less developed and advantaged countries?

A: My first involvement in international activities actually preceded my appointment to the Court of Appeal. The ALRC was given a reference by the then Federal Attorney-General Ellicott to investigate the laws on privacy. That led to my becoming involved in an OECD Committee on Transborder Data Barriers and the Protection of Privacy. I was elected Chairman of that Committee, and later as Chairman of an OECD Committee on Data Security. It was from those two appointments that I had my eyes opened to the world of international institutions and the development of international principles: to the processes of negotiating quite fundamental differences between people of quite different cultures and traditions on international problems; to the economic ramifications of human rights questions; and to the role that Australia can play in those developments.

If you ask what are the sources of my inspiration in human rights questions, they would include my parental upbringing, my religious upbringing, my sexuality, my having tasted discrimination myself, my dislike of it and my commitment to do what I can do in my life, within the law, to respond to issues of that kind. In a sense, human rights is a translation into principles of a kind of universal moral ethic. I had a strong upbringing in the Christian religion to which I still adhere. International human rights is a way of bridging different religious, moral and philosophical positions. It tries to build a framework for a better and safer world.

Q: Then comes 1996 which was to bring what I might coin your "judicial apotheosis". Did you look upon your elevation to the High Court of Australia as a natural extension of your judicial career?

A: Well, every judge I suppose (particularly every judge of an appellate court) has a baton in his or her knapsack containing a commission to the High Court of Australia. However, in the history of the Court only 44 people have received the call. That is not very many people in the course of a century. Therefore, I cannot say that I regarded my

appointment as natural or inevitable. I know that my name went forward on at least two earlier occasions. On one occasion it was reported to me that a very high political figure said that there was no way that he would appoint a homosexual to the High Court. So I was not appointed then. But in 1996 I was appointed. And so here I am.

Q: At the time did you have any qualms about accepting the appointment?

A: Not at all. I regarded it as a high honour and challenge. It *is* a high honour. The High Court of Australia is one of the great courts of the common law world.

A lawyer friend of mine, and a Michael Kirby fan, once referred to His Honour as the "rockstar" of Australian judges. At the time, I was taken aback and I chastised my friend, thinking the appellation discourteous, disrespectful. But there *are* comparisons, metaphorical or otherwise. Sure, he has a resonant voice, and a beautiful smile. But Michael Kirby *does* move to a different beat, he sees the bigger picture, he is not afraid to be himself. Shave away the minor touches of vanity, he is a man deeply engaged with the world, indeed as judges should be.

Q: Let's move to the field of intellectual property law. From my perspective as a practitioner, it would appear that, in the case of intellectual property law, there is not a great deal of actual law-making by the High Court. The vast majority of cases involving copyright and trade mark issues are disposed of by the Federal Court, either at trial or on appeal, and those that do reach the steps of the High Court tend, in the main, to be patent disputes. Do you think that is a fair overview and, if so, why is that the case?

A: I think that is a fair overview. The reason for it is that the High Court is no longer the trial court in intellectual property cases, as it was for the better part of the century. It was the trial court because of the constitutional head of power in respect of those matters you mentioned and because of the fact that the court was assigned that role. But, with the expansion of the caseload of the High Court, it became necessary to introduce a filter which was to take the form of the reformed special leave system. Once that happened, coinciding with the establishment of the Federal Court of Australia, it became both necessary and possible to ensure that other Courts performed the trial functions from which the High Court was removed to become truly and exclusively an apex court.

I should add here that the High Court gets through about 80 cases a year. That is approximately the same as the Supreme Court of the United States. It is fewer than the Supreme Court of Canada, but considerably more than the House of Lords. Naturally, there *is* a limit to the extent to which a final court can accomplish a large caseload. So the High Court has had to choose. It has done so in areas like intellectual property, that normally such cases should finish in the Federal Court. Only where there is some general issue of principle, or some other matter of high significance to the legal system or for our country or for justice in the individual case, will the High Court become involved.

Q: Jurisdictional considerations to one side, are there any particular areas of intellectual property law that interest or hold a fascination for you?

A: Well, because of my experience outside the courts, I find the area of biotechnology and the intellectual property law implications particularly interesting. Therefore, when I see a case with some ramifications for that area of activity my ears prick up. Dr Annabelle Bennett, who was Senior Counsel for the Respondent in *Aktiebolaget*[1], was extremely upset that it was Justice McHugh and I who showed such keen fascination for the case, and considered that it was a matter that definitely deserved special leave. Yet when the appeal was heard it was we two who dissented from the view of the majority of the Court. That is the kind of case that interests me because I can see its possible significance of the legal questions argued for the large questions affecting generic drugs, extremely important questions both in the area of biotechnology and in the particular area of AIDS.

Q: Yet cases like *Aktiebolaget* also illustrate to me the inherent tension in intellectual property law between the monopoly rights of creators and inventors as against the rights of users to exploit and enjoy the benefits of those creations or inventions. From my reading of that case, on the question of obviousness the result of the majority judgment certainly tends to favour patent owners, whereas in your own dissenting judgment you adopted the wider "route to try" obviousness test.

A: What is written is written. As the majority expressed their view, Justice McHugh and I expressed our view. What you are saying is that behind the views that the majority and the minority, severally expressed, are deep underlying currents of philosophical opinion as to where the balance lies between the legitimate claims of inventors and the legitimate entitlements of the public. I want to make

it clear that I am no opponent of intellectual property. On the contrary, the protection of scientific inventions is a human right. It is expressly mentioned in Mrs Roosevelt's *Universal Declaration of Human Rights*. Therefore, a balance has to be struck between the rights of access to information, the rights of public health care and the rights of intellectual property protection. It is a matter of one's individual view as to where the balance should be struck. This, in turn, must be found by applying legal doctrine and principle to each particular case.

Q: Another sector governed by intellectual property law is the arts. You have long been a supporter of the arts and, indeed, you were the first President of the Arts Law Centre of Australia. From a legal policy perspective, do you think Australia has made, or is making, good progress in protecting the legal interests of its artists? I am thinking, for example, of the introduction of the moral rights legislation.

A: The introduction of moral rights came about after an intense lot of lobbying. It is a good indication that Australia is addressing some of these issues. The legislation is, however, as yet still largely untested. Whether it will prove to be effective remains to be seen. I knew sculptors who created public works of sculpture, like Tom Bass, who were extremely disappointed with the way in which their works were subsequently damaged or effectively destroyed as public works of sculpture and who looked for the protection of moral rights. Australia was somewhat late in entering that field. Thankfully, the legislation has now been enacted.

Of course, the broader challenge of amending intellectual property statutes relates to the need for effective protection for new forms of original works. One of the legitimate complaints that can be made, I think, at an international level is that when entirely new problems are presented, such as with the intellectual property protection of software or of genomic sequences, rather than developing a new legal regime specifically apt to accommodate those particular new problems, the international intellectual property community has largely endeavoured to squeeze those new problems into the old legal regimes.

To put it quite bluntly, I believe that, because of the very nature of those technologies, patent protection for 20 years in respect of either of those new technologies is possibly too long. Yet, that is the international and national regime which we have. Whilst we have it, I will enforce it. But, to me, it is a typical case of the frozen mind of lawyers. They inherit a new problem and instead of attempting through a law reform-type process to develop a new regime, they try to squeeze a new problem into an old regime. To an extent, the plant varieties legislation approached the issues in a novel way. But, on the whole, we haven't done that with informatics or with biotechnology. Therein lies part of the present global problem in both those fields.

In 1995 Justice Kirby was appointed a member of the Ethical, Legal and Social Issues Committee of the Human Genome Organisation, based in London, and a year later, to the Paris-based International Bioethics Committee of UNESCO. His longstanding interest in the Human Genome Project has led him to consider the intellectual property law implications of genomics. In a speech given in June 2001 he noted:

> *The subject of intellectual property protection is obviously among the most important presented by advances in knowledge about the human genome. Although the* Universal Declaration of the Human Genome and Human Rights, *adopted by the International Bioethics Committee and accepted by the General Conference of UNESCO and the General Assembly of the United Nations, speaks of the human genome, in its natural state, as part of the "common heritage of mankind", intellectual property law is invoked to provide temporary rights of patent holders to license scientific processes, by reference to the genome. In my experience, now over ten years, it can be said with assurance that this is a topic that causes very strong feelings in any international meeting at which it is raised.*[2]

Q: You have spoken and written extensively on the subject of the human genome, and in so doing canvassed a range of issues such as how new biological data should be used, the distinction between "invention" and "discovery" when deciding on intellectual property protection, how to translate the principle of "common heritage" into effective content in intellectual property law, and whether intellectual property rights should now give way to higher rights that the law would establish. These issues are decidedly complex and cutting edge, but I wonder if you would care to summarise the imperatives, as you see them to be, for ensuring that any reforms of intellectual property law in the wake of genomics adequately reflects the fundamental nature and indivisibility of all human rights?

A: I have just returned from a conference in India of the National Chambers of Commerce and Industry on biotechnology and bioethics. The two international guests participating in that conference were Dr J Craig Venter, who was the head of the Celera Corporation, the private sector competitor to complete the mapping of the human genome, and myself. Dr Venter had the task of presenting the scientific and optimistic view of genomics. My task was to present the legal, moral, ethical aspects and, in a sense, the cautionary views about genomics. I identified three problems at this conference. They represent to me the three most important controversies in the field of the genome of relevance to the law.

The first relates to what actually we do in the technological field of genomics, out of which consequential questions like intellectual property protection arise. For example, do we by law forbid cloning or do we encourage these developments? I was surprised in India that this issue is a non-starter. The Indians, perhaps because of the teachings of their religions, philosophies, and long traditions, have no difficulty, for example, with experimentation with embryonic stem cells and with embryos, indeed right up to birth. They therefore don't face the prospect of laws forbidding the development of genomic science in those respects. On the contrary, they are incredibly enthusiastic to enter this area. They point out that India, in terms of human, animal and plant varieties, is a country of great genetic diversity, which can therefore enable it to become a leader in this field. They may introduce laws or policies that forbid reproductive cloning, that is to say if it is scientifically possible to develop a reproductive clone of another human being. But they won't interfere with experimentation in the development of therapies and tests that will be useful as products utilising the knowledge we are acquiring from the human genome. It is therefore very interesting to see this as a global issue affecting the human species but with utterly different legal and philosophical positions in different countries. While the science may be global, the ethical and legal starting points of different countries are quite distinct.

The second issue, which is perhaps not so significant for IP purposes, is the use of genetic data. The potential for discrimination in the use of genetic data is significant. Dr Venter urged the desirability of giving every newborn baby a CD-ROM which contains a map of that baby's DNA so that, throughout life, there can be a targeting of the medical problems to which the baby or individual is prone. He urged this both as a means of reducing public costs in health care and also of efficiently addressing the health conditions of each individual in order to prevent unnecessary suffering or to delay preventable death. The difficulty with this proposal, as has been pointed out recently in a discussion paper by the ALRC, is that data of this kind can be misused. There are many reasons for people to discriminate against others in insurance, employment, state social security as it is. Article 5 (c) of the *Universal Declaration on the Human Genome and Human Rights* enshrines the principle that people should be able to have access to their data, as well as not to have access to their data, if they don't want to know their genetic data.

The third issue, which was the one upon which the ears of the business people at the conference pricked up, relates to intellectual property protection. The strong feeling in India, as in most developing countries, is that intellectual property in the field of genomics is becoming a means of a new form of economic imperialism. In other words, the "common heritage of humanity", as mentioned in the *Universal Declaration of the Human Genome and Human Rights*, is (in effect) being "owned" for periods of time under intellectual property law by multinational corporations in the rich developed countries. The concern here is twofold. First, that it will add enormously to the costs of the tests and therapies when they are produced, and therefore effectively put them outside availability to developing countries and to their citizens. And, second and perhaps more fundamentally, that it will distort the focus of the human genome pharmaceutical developments towards those developments more apt for the rich countries. In short, that the prevention of wrinkles will become more important than the prevention of malaria.

In fairness, Dr Venter made the point that one of his corporations had recently described the genome of the mosquito in two major projects and also the genomic features of malaria, which is one of the fastest growing medical problems of the world. Potentially these would be extremely important developments for the whole world, and certainly for the developing countries. But the concerns of developing countries in this area are extremely acute. In fact, this is the hottest issue in genomics.

Q: We touched on Lionel Murphy before, that "bold spirit of the living law" as you once titled him. He was, of course, also well known as a frequently

dissenting judge during his period on the bench of the High Court. Only recently a study examined how the seven present High Court justices have ruled on cases over the past five years, with you emerging as the "marked outsider", dissenting in more than 33 per cent of all cases. Do you see certain parallels between yourself and Lionel Murphy, and, if so, how would you measure them?

A: I see some parallels; but I also see differences. Lionel Murphy was more impatient with the orthodox techniques of legal reasoning. He would go straight for the jugular, straight to the point. He therefore expressed himself very briefly and clearly and in terms of the great legal themes. In my process of legal reasoning I seek to adhere more closely to the orthodox techniques of the past. At the level of the High Court of Australia, these involve keeping a proper balance between legal authority and legal policy.

We therefore had different techniques but both of us, he was and I am, conscious of the defects of the law as it operates in respect of ordinary folks. If you come from the background of ordinary folks, and if you have never shaken that dust from your shoes, you will have a different view of the law, of its role in society and of the expectations that ordinary people have of it than if you come from a more privileged background. Lionel and I came from a different background. We express our vision of the law. As do other Justices of the High Court. As do other judges throughout the nation. We are all doing our job with integrity, but from different starting points.

So, that is the limit of the similarity. There are as many differences as there are similarities. *Don't* stereotype any of us.

At the close of our conversation, I ask Michael Kirby, an aficionado of history, who are his great heroes. Of them, he lists Denning of the law, Churchill of politics, Eleanor Roosevelt and H.V. Evatt in the United Nations, Mahler of music. The commonality of traits is clear – each was a non-conformist, a believer and leader, an outsider in their field who suffered for their calling.

Here, I conclude on a slightly self-indulgent note. In my literary excursions thus far, I have had the luck to meet and know well some of the men and women whom history has now recorded as the great Australians of our times. Amongst those I count Burnet of science, van Praagh and Helpmann of dance, Manning Clark of history.

While each had their own unmistakable individuality, they shared a common thread – a granite-like sense of their own destiny.

As reformist judge, human rights advocate, and public intellectual, Michael Kirby sits comfortably in the company of those greats, whether or not history elects to smile kindly to include him in its annals.

[*] Christopher Sexton is a Sydney based intellectual property lawyer and biographer.

1. *Aktiebolaget Hassle v Alphapharm Pty Limited* (2002) 77 ALJR 398; 194 ALR 485.
2. From a speech given to the Queensland Academy of Arts & Sciences on 24 June 2001.