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Michael Kirby's ideas of cosmopolitan justice

by Dr Roderic Pitty

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Coordinated by Professor Geoff Stokes, Deakin University

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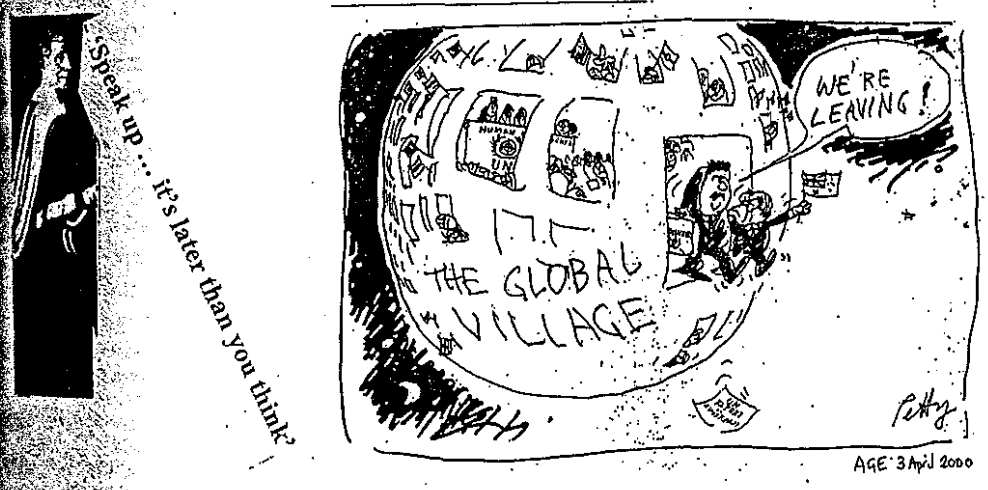

Michael Kirby's ideas of cosmopolitan justice

'To be human is to feel the pain of brothers and sisters everywhere. Feeling that pain we must each do whatever what we can to build a better world.' Michael Kirby, *Through the World's Eye*, 2000, p 13.

Introduction: the context of Australian cosmopolitanism

The start of the 21st century has been depressing for Australians committed to creating a better society as part of a better world. Instead of living in a state committed to protecting fundamental human rights, we have seen the resurgence of racism, isolationism and xenophobia. When Australia was subjected to concerted criticism from several human rights committees of the UN in 2000, the government's response was captured by cartoonist Bruce Petty's image of Howard and Downer departing the global village waving an Australian flag and declaring 'were leaving!'[1] The government's rejection of UN monitoring of human rights abuses in Australia has been labelled not just isolationist but 'exceptionalist', that is based on a claim that Australia should not be judged by universal norms.[2] This claim denies the growth since the 1970s of 'a fledgling human rights culture in both the legal and popular realms', which has provided a way of seeing Australia's contemporary challenges in a broader perspective.[3] Despite H.V. Evatt's role as President of the UN General Assembly when the Universal Declaration of Human Rights and the Genocide Convention were endorsed in 1948, that Declaration did not gain widespread support in Australia until the time for change of the Whitlam government in the 1970s. Since then there have been two images of Australia's future, one visionary and the other cramped. Those whom Manning Clark called 'the enlargers of life' have, like Patrick White, 'sought to integrate Australia into the world', creating visions 'not simply for the celebration of some localised sense of national identity, but so that we could recognise our humanity'.[4] Their visions have been cosmopolitan, seeking our future by widening our horizons. During this time one such enlarger of Australian culture has been Justice Michael Kirby, who says (quoting Shakespeare) that we must 'see the challenges of our time through the world's eye'.[5] His optimism seems unshaken by the cramping of Australian politics in recent years. This assessment of his ideas of justice will try to show why.

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[1] *Age*, 3 April 2000.
[2] Dianne Otto, 'From "reluctance" to "exceptionalism": the Australian approach to domestic implementation of human rights', *Alternative Law Journal*, vol 26 no 5, October 2001, p 220.
[3] Ibid, p 222.
[4] John Rickard, 'Clark and Patrick White', in Carl Bridge ed., *Manning Clark: Essays on his Place in History*, Melbourne University Press, Melbourne, 1994, pp 53, 54.
[5] Michael Kirby, *Through the World's Eye*, Federation Press, Sydney, 2000, p xxv.

Kirby is an important exponent of Australian cosmopolitanism for several reasons. First, the period of his public activity as a prominent and wide-ranging lawyer broadly covers the time when cosmopolitan ideas have contributed to the difficult process in Australia of 'throwing off the shackles of parochialism', as Kirby put it in an interview in 2000.[6] Kirby was chosen by Lionel Murphy to be the first chairman of the Australian Law Reform Commission in 1975, a position he filled until 1984. Then he was President of the NSW Court of Appeal from 1984 until appointed by the Keating government to the High Court in 1996. Kirby says he was a fairly orthodox lawyer before leading the Law Reform Commission, but that role broadened his social experience of the law throughout Australia, and his appreciation of how comparable countries had responded to legal dilemmas. He says he was still an orthodox judge before participating in 1988 in a conference of senior judges from Commonwealth countries in Bangalore, India, which opened his eyes to the possibilities for ensuring that legal decisions in Australia conform where possible with principles established in international human rights law.[7] Thus he has been closely involved in the development of a legal human rights culture in Australia. Second, Kirby has been unusually prolific for a judge in contributing to public debate about a range of social as well as legal issues, continuing in a new way the duties of public engagement that he assumed when with the Law Reform Commission. He is probably the only High Court judge to also be a public intellectual, although some former High Court judges (including William Deane who he replaced) later assumed a similar role. Well before his move to the High Court, Kirby said that 'because I have not been ashamed to express my views on a whole variety of topics, I have irritated a lot of people in my own profession, and I know that I have had that effect on a lot of political leaders'.[8] Thus he has been trying not just to help create a new respect for human rights among Australian lawyers, something he suggests is not as easy in practice as it may appear, but also to help enhance popular understanding of Australia and its place in a changing world. Third, Kirby is proud of his public school heritage, unusual as he says for a High Court judge, and not averse to talking about complex issues to a wide audience. He regards it as vital for intellectuals to communicate to others, to 'make the attempt to tell your fellow citizens (who share this world with you) of your work and the important things that you are concerned about'.[9] While *Who's Who* lists work as his only hobby, Kirby has a broad and very liberal approach to those he works for.

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[6] An interview with Justice Michael Kirby, by Professor Ralph Simmonds, Dean, School of Law, Murdoch University, 15 March 2000 (video).
[7] Ibid.
[8] Michael Kirby, 'The Intellectual and the Law: a personal view', *Meanjin*, vol. 50 no. 4, Summer 1991, p 531.
[9] Ibid, p 527.

Kirby's willingness to engage in public debate and his respect for the value of speaking to a broader audience are important in defining the sense in which he is a cosmopolitan. While this term is used variously, Heater contrasts two basic usages. First, the original meaning of the word 'derives from *kosmopolites*, citizen of the universe, and *polities*, citizen, notably in its Aristotelean definition, has a decided ethical content'; second, 'in non-academic parlance the word "cosmopolitan" has, from the eighteenth century, acquired the vague and vulgar connotation for an individual of enjoying comfortable familiarity with a variety of geographical and cultural environments'.[10] The latter definition seems to be prominent in recent discussions both internationally and in Australia. The French usage of 1738, when a 'cosmopolite' was 'a man who moves comfortably in diversity ... in situations which have no links or parallels to what is familiar to him', clearly applied only to aristocrats or wealthy merchants, since others lacked access to such an experience.[11] Many more people are now potentially cosmopolitan in this vague sense. Yet the term is often reduced to a 'consumerist' project that 'flourishes in the top management of multinational corporations', even by writers who reject the pretence that 'common folk are less sympathetic to diversity – a self-serving notion of elites'.[12] In Australia Judith Brett has adopted such a view, equating cosmopolitanism with tertiary-educated jet-setters, who use abstract reasoning and 'have the social skills and attitudes that enable them to move amongst people of different cultures with confidence and purpose, whereas locals, even when they travel, are more attuned to the familiar than the different'.[13] Seeing cosmopolitanism as an ideology of better-educated people who are distinct 'from their parochial compatriots' is unhelpful, even though Brett tries to link this contrast with the original ethical meaning of cosmopolitan by suggesting that it is only users of a tertiary 'style of knowing' who appreciate 'a universal moral community' based on recognition of human rights.[14] Kirby would reject this contrast, having observed from experience that Cambodian peasants often have a better appreciation of the significant range of human rights (especially economic, social and cultural rights) than most Australian lawyers.[15]

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[10] Derek Heater, 'Does cosmopolitan thinking have a future?', in K. Booth, T. Dunne and M. Cox eds, *How Might We Live?*, Cambridge University Press, Cambridge, 2001, p 179.

[11] Richard Sennett, *The Fall of Public Man*, 1977, quoted in Craig Calhoun, 'The Class Consciousness of Frequent Travellers: Towards a Critique of Actually Existing Cosmopolitanism', in Steven Vertovec and Robin Cohen eds, *Conceiving Cosmopolitanism: Theory, Context and Practice*, Oxford University Press, Oxford, 2002, p 104.

[12] Calhoun, 'The Class Consciousness of Frequent Travellers', pp 105-6.

[13] Judith Brett, 'John Howard and the Australian legend', *Arena Magazine*, no. 65, June-July 2003, p 24.

[14] Ibid. For Lynn Manias, a rural property lawyer in NSW, Kirby's worldly speeches are inspirational: review of *Through the World's Eye*, *Law Society Journal*, Vol. 38 no. 10, November 2000, p 83

[15] An interview with Justice Michael Kirby (video). In 1993-96 Kirby was Special Representative of the UN Secretary-General with responsibility for monitoring human rights in Cambodia.

It may be true that Kirby travels more than his High Court brethren but the fact that he once gave a speech to the Law Society of Western Australia titled '85 journeys to Perth' is not a substantive basis for calling him a cosmopolitan.[16] The description has to concern his views about the world, not merely his journeys around it. It also concerns his approach to public education and genuine dialogue. Barry Jones recalled on launching Kirby's book *Through the World's Eye* that once when Kirby was busy in the NSW Court of Appeal he flew to Perth just for an evening to give an unscheduled address to a science congress after the keynote speaker was injured in a plane crash and another prominent scientist could not fill in.[17] Kirby does not fit the image of a relaxed and comfortable tourist, 'armed with visa-friendly passports and credit cards' and seeing cosmopolitanism as nothing more than a 'rhetorical advantage' in the pursuit of an exotic experience.[18] Ironically, once when Kirby had been busy in Paris chairing an OECD meeting on trans-border data flows and was invited by a friend to celebrate his 40th birthday in Madrid, he was deported from Spain as an illegal immigrant because he lacked a visa, something he recognised as 'a very small taste' of what refugees endure.[19] It is that empathy with aliens, not extensive travelling or mere tertiary education and abstract thinking, which begins to suggest why Kirby can be considered a cosmopolitan. In 1995, speaking on the plight of refugees, he said 'the spectre of hordes of people arriving from Asia remains deep in the Australian psyche, long after the White Australia policy has been formally abandoned'. Dispelling 'the many myths that still exist amongst the Australian population', he warned of the need to address basic causes of refugee flight and said the likely increase in refugee numbers is no 'reason to pull up the drawbridge and throw compassion into the moat that marks us off'. He concluded:

> Australians share one continent. But we do not only share it among ourselves, selfishly and nationalistically. Australia is part of a wider region and a larger world. We must therefore consider how, in the future, we can do better. Doing better means more help to refugees here and abroad. But it also means urgent attention to the underlying causes of their terrible plight. And the journey to these truths will be helped by seeing refugees as we see ourselves – as people aspiring to life, dignity and hope.[20]

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[16] Michael Kirby, '85 Journeys to Perth', High Court Dinner, Law Society of Western Australia, 24 October 2001.

[17] Barry Jones, Notes for launching *Through the World's Eye*, Jubilee Room, NSW Parliament House, 17 August 2000, p 2. The subject of Kirby's talk then was the Human Genome, which he was back in Perth talking about nearly a decade later: 'Genomics and Democracy – A Global Challenge', The John Toohey Lecture 24 October 2002, *Western Australian Law Review*, vol. 31 no. 1, February 2003.

[18] Calhoun, 'The Class Consciousness of Frequent Travellers', p 89.

[19] Kirby, 'Refugees: Their Need Has Never Been Greater', in *Through the World's Eye*, p 14.

[20] Ibid., pp 19, 22-3.

That was a timely expression of a general principle, which is that national attachments themselves 'need not contradict the claims of cosmopolitan morality', if we recognise that 'no nation-based ethical commitments can ever constitute the entire sphere of a person's legitimate obligations'.[21] The cosmopolitan journey for Kirby is made of empathy, not mere travel.

The opposite of a cosmopolitan is not a local or merely a parochial compatriot, but rather one for whom there are no obligations beyond "border defence" as cynically articulated by the holders of state power. As proponents of a worldly political philosophy valuing universal rights, cosmopolitans are opposed by communitarians who consider 'that moral principles and obligations are grounded in specific groups', limited by national or state-based citizenship.[22] Kirby clearly thinks such a view is inadequate for Australians defining their role in a wider region and in a larger world, particularly so at a time of social and technological change. His recently published essays largely fall into two parts, with the broader questions of universal rights and global social issues first, as the context for the essays on Australian and comparative themes.[23] This presentation reflects Kirby's international commitments as a 'citizen of the world', which are large for a judge, albeit one who is described by an Australian barrister abroad as 'the best known Australian lawyer outside Australia', and by a Western Australian judge as a world-class striker contributing to international justice.[24] His contribution expresses his belief that 'it is our human nature that insists upon respect for the essential dignity of other human beings', because 'each one of us has an individual responsibility ... to lift our voices and not to remain silent' in the face of either injustice or force of arms.[25] This belief reflects Kirby's faith in the power of what in India is called *ahimsa* or non-violent resistance, which he shares with another cosmopolitan, the Indian writer Arundhati Roy, who has stressed that 'it isn't necessary to be anti-national to be deeply suspicious of all nationalism'.[26] It is Kirby's comparative and international experience that has led him to adopt a similar view, so it is useful to survey the range of this before reviewing how his ideas of cosmopolitan justice have evolved.

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[21] Charles Jones, *Global Justice: Defending Cosmopolitanism*, Oxford University Press, Oxford, 1999, p 169. Jones refers initially to 'nationalist attachments' but then precisely to 'national attachments'.

[22] Steven Vertovec and Robin Cohen, 'Introduction: Conceiving Cosmopolitanism', in Vertovec and Cohen eds, *Conceiving Cosmopolitanism*, p 10; Heater, pp 180-2.

[23] *Through the World's Eye*. Many of the issues addressed in part I: Law Reform and Human Rights, and part II: The Law and its Institutions overlap, and Kirby's New Zealand colleague Robin Cooke in his foreword (p xv) identifies 'three constant themes': protecting the vulnerable, the growing force of international law, and a conceptual rather than mechanical approach to judicial reasoning.

[24] *Through the World's Eye*, two forewords by Robin Cooke and by Geoffrey Robertson, pp xviii, xx; Hal Jackson, review, *Alternative Law Journal*, vol. 26 no. 6, December 2001, p 312.

[25] Kirby, 'Non-Violence, Compassion and Visions for the Twenty-First Century', *Through the World's Eye*, p 13.

[26] Arundhati Roy, 'Come September', in *War Talk*, South End Press, Cambridge, 2003, p 47.

Overview: the education of a worldly optimist

There have been two broad dimensions of Kirby's openness to the world of cosmopolitan ideas and the application of these ideas to achieve justice in particular cases. The first aspect is the window of comparative illumination provided by an awareness of relevant developments in other common law jurisdictions. Kirby's judicial work has been informed by a keen familiarity with the progress of the common law elsewhere, not just in Britain, but also in the USA, Canada, New Zealand and particularly in India. In 1984, soon after being appointed as President of the NSW Court of Appeal, Kirby met the Indian judge P.N. Bhagwati, soon to become the Chief Justice of India, and learnt that the Indian Supreme Court had been developing the common law in a way that required administrators to give reasons for adverse decisions, although this was a minority judicial view in England. Kirby boldly allowed the Indian light to influence a decision, only to be overruled by the Chief Justice of Australia, Harry Gibbs, who thought it 'hazardous' to assume that Indian principles of natural justice represented more than a peculiarity influenced by national legislation. In reviewing the experience from the perspective of the High Court in 1998, Kirby noted that Australian authority on the point had not changed, but he nevertheless thought the boundaries of the common law can be 'extended by lively intellects such as Justice Bhagwati's'.[27] Kirby's use of Indian jurisprudence to overcome an obscurity of NSW administrative law was an example of his open-minded approach to developing the common law, which he had strongly expressed in his book *Reform the Law* published in 1983. There, in one speech given in 1980 he had expressed concern about 'the decline and fall of the common law', due to 'the general retreat in judicial lawmaking' which was evident 'in recent decisions of the highest courts of Australia'.[28] Yet in another speech given in 1981 on the subject of whether law would simply be trampled beneath the onward rush of 'the chariot of science', Kirby said it would not because it could readily adapt. He said this capacity for adaptation was why he remained 'an optimist'.[29] His optimism presumes an open outlook, a willingness to seek signs of relevant change across the common law world. Kirby reiterated this view during a speech in India in 1996, stating that, although societies differ, when fundamental rights are at issue 'it is usually helpful to have one's thinking illuminated by the writing found in the opinions of the highest

[27] Kirby, 'P.N. Bhagwati – An Australian Appreciation', in *Collected Speeches of Justice P.N. Bhagwati*, 1998, at http://www.lawfoundation.net.au/resources/kirby/papers/19981220_de.html Bhagwati monitored Australian detention centres for the UN Human Rights Commissioner in 2002.
[28] Michael Kirby, *Reform the Law: Essays on the renewal of the Australian legal system*, Oxford University Press, Melbourne, 1983, pp 37-9.
[29] Ibid., pp 236-8.

courts of other nations, particularly those which share the same legal tradition'.[30] In another speech the following year in India, Kirby outlined the constraints on excessive judicial activism, yet noted the renewal of judicial reform in recent decades, particularly in India but also in Britain and the US as well as Australia, where some 'remarkable' changes had occurred in the decade before Kirby reached the High Court. Not all these changes were illuminated by comparative considerations, but that which Kirby called 'most important of all', the *Mabo* decision, certainly was.[31]

The second dimension of Kirby's cosmopolitan outlook has been his extensive involvement with international organisations, particularly UNESCO. Kirby recalls first hearing about UNESCO at school in the late 1940s, soon after it was created. Upon accepting the 1998 UNESCO prize for human rights education, which he dedicated to 'the many in Australia who have been engaged in the struggle for human rights' and to members of the international non-governmental organisations which he had joined, he highlighted the courage of those involved with UNESCO in addressing difficult issues, such as the right of self-determination. Kirby participated in the NSW Council for Civil Liberties as a young lawyer in the 1960s, but in that speech he said in those days 'in Australia few indeed were the colleagues who were concerned with the particular human rights of indigenous peoples, of women, of homosexuals and of ethnic minorities'. Recalling 'the excitement of participating' in his first UNESCO General Conference in 1983, he said while it was 'unusual to give a prize such as this to a judge', his occupation is 'inescapably bound up in the promotion and application of human rights'.[32] In developing this perspective on the responsibility of judges for protecting human rights, Kirby's international activities in the past two decades have extended the comparative horizon he has seen through the common law. Kirby participated in UNESCO's committee on Human Rights and Peoples Rights in the mid-1980s, and became chair of the UNESCO Expert Group on the Rights of Peoples in 1989. He continued his earlier involvement with the OECD on privacy issues and the security of information systems, and became involved from the mid-1980s in the International Commission of Jurists, in the World Health Organisation's Global Commission on AIDS, and also in the ILO Inquiry into South Africa in the early 1990s. In 1993-96 he represented the UN Secretary-General monitoring human rights in Cambodia, then he

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[30] Kirby, speech at an Indo-Australian Public Policy Conference, New Dehli, 23-24 October 1996, at http://www.butterworthsonline.com/Print/Print/Print/Print/311647b8.htm

[31] Kirby, *Through the World's Eye*, pp 103-4.

[32] Kirby, speech at the Award of the UNESCO Prize for Human Rights Education 1998, Paris, 7 June 1999, at http://www.lawfoundation.net.au/resources/kirby/papers/19990607_unesco7june99.html For Kirby's early involvement protecting civil liberties in NSW see *Through the World's Eye*, chapter 8.

worked on UNESCO's Bioethics Committee, which in 1997 adopted the Universal Declaration on the Human Genome and Human Rights.[33] The list of Kirby's international activities in support of human rights is long, and the combined effect of these engagements on his thinking is likely to have been particularly significant at a time when he has been extending his appreciation of how much the common law can protect human rights.

Extensive involvement with a range of international organisations in various locations has exposed Kirby to global social issues that another judge might conveniently ignore. Kirby's friend Barry Jones says he 'was always struck by how interested he was in UNESCO and his eagerness to be a part of it'. Jones thinks that it was Kirby's 'exposure to international experience', particularly through UNESCO but also in other capacities, such as his work for the OECD, the ILO and in Cambodia for the UN, which 'had a considerable impact' on the development of his thinking. Jones summarises the impact of this experience on Kirby's thought thus: 'The central element is that he begins with the premise that everything in the universe, society or human experience is linked in some way and that we can't really understand our own situation, or locality without full understanding of the world generally.'[34] This dynamic world outlook is something Jones says Kirby shares with Lionel Murphy, whose influence upon Kirby was profound, if not always immediately apparent. Jones says that 'the emphasis of their shared view is the concept of law as a dynamic situation, a reality shaped by and reflective of the changing nature of society, its composition and priorities'. Such change means particular cases 'cannot be determined simply on the basis that if the legislation is silent on an issue then courts ought to make no determination'. For Kirby, like Murphy, 'the nature of the statute law does not determine where the law begins and ends, it's simply one of a number of factors to be taken into account'.[35] The key point is that a statute or the Constitution of a country must be interpreted in a changing global context. Kirby has argued that Anthony Mason has promoted this 'dynamic' view, that the Constitution 'is bound to be read in changing ways as time passes and circumstances change', so it is the current 'world of globalism and regionalism' that 'requires adaptability and imagination' in order for the contemporary meaning of an old text to be ascertained.[36] While the range of Kirby's international experience is unusual, the need for a dynamic view is now more accepted than it was in Murphy's time. Indeed, when Kirby gave the inaugural Lionel Murphy Memorial Lecture in 1987 he

[33] Kirby entry in *Who's Who in Australia 2002*, Information Australia, Melbourne, 2002, p 1071.
[34] Interview with Barry Jones, Melbourne, 7 July 2003.
[35] Interview with Barry Jones, Melbourne, 7 July 2003.
[36] Michael Kirby, 'Constitutional Interpretation and Original Intent: a form of ancestor worship?', *Melbourne University Law Review*, vol. 24, 2000, pp 6, 14. Mason himself says Deakin had a dynamic view: 'Deakin's Vision, Australia's Progress', *The Alfred Deakin Lectures*, ABC, Sydney, 2001, p 9.

said he had initially thought Murphy's use of international law to clarify gaps in the common law was 'erroneous', since he accepted the orthodox view that 'international law was not part of the domestic law unless specifically incorporated as such by a valid statute'. Yet Kirby soon saw value in Murphy's attempts to bring the Australian legal system 'into the necessity of harmony with those of others'.[37] The time when he did so largely corresponds with the growth of his comparative insights and international experience, which extended his role as a law reformer.

The transformation of a reluctant law reformer

Kirby's enduring impact upon law reform in Australia has been paralleled by the continuing development of his views as a law reformer. There is a little irony in this mutual transformation given Kirby's open recollections about the circumstances of his initial reluctance to accept Murphy's demand that he become the first head of the Australian Law Reform Commission. While the demand was backed up with glasses of champagne, Kirby says his first 'reactions were those of a typical lawyer. "Law reform. Law reform! Aren't things bad enough as they are?"', but his caution about the need for new laws soon abated.[38] Another important influence on Kirby's approach to law reform was his great law professor, Julius Stone, whose confidence and respect he had earned when working with him as a 'minor collaborator' in the 1960s.[39] Soon after taking over as head of the Law Reform Commission, Kirby was questioned publicly by Stone about his philosophy of law reform. The professor was hardly impressed. As Kirby later recalled, when Stone 'found that my answers betrayed ... an unhappily large concentration on practical achievements and actual law-making, he responded with noticeable despair mixed with a healthy serving of disappointment'. Kirby saw this critique as 'a healthy corrective to my own ambitious desire to prove that the Law Reform Commission was useful to the Federal Parliament and productive in its service'. Yet Stone's admonition was a direct challenge to Kirby's future, since he 'terminated his interrogatories with the melancholy comment: "One day, perhaps, the Commission will have a chairman who sees its role in a more challenging way. Alas, that will not be you."'[40] Kirby was 'stung by this reproof by so honoured a teacher', yet he accepted that 'Stone's harsh words were timely for me'. He was 'naturally propelled

[37] Michael Kirby, Inaugural Lionel Murphy Memorial Lecture, University of Sydney, 28 October 1987, reprinted as 'Murphy: bold spirit of the living law', no date, pp 8, 9.
[38] Michael Kirby, 'The Law Reform Commission and the essence of Australia', *Reform*, issue 77, 2000, p 60.
[39] Michael Kirby, 'Julius Stone and the High Court of Australia', *UNSW Law Journal*, vol. 20 (1), 1997, p 240. This assistance concerned the 'great gulf' between reality and propaganda in Russia.
[40] Ibid., p 241.

into a deeper reflection upon the relationship between the Law Reform Commission and Parliament and the resolution of the tension between practical utility and conceptual boldness'.[41] Kirby's initial reluctance as a law reformer was soon replaced by continuing reflection about the scope for ensuring that legal change would not lag too far behind social change. He was assisted in this transformation by working with 'a powerful team' of law reformers, committed to promoting a new 'harmony' of change.[42] He soon claimed that bold law reform was needed to fill the 'institutional vacuum' that had been created by 'the retreat of the creative judiciary and the unresponsiveness of the legislative bodies'.[43] In 1983, Kirby stressed, regarding controversial social issues, that 'unless Parliaments are given help, they are likely to put these issues to one side'.[44] Later as a judge he pressed for judicial law reform. In 1988 he argued that, because 'there has been a general retreat from confidence in the ability and inclination of the legislatures to face up to' critical social issues, 'there is an obligation on the judges who, after all, are sworn to do justice according to law, to face up to the responsibility to develop the legal system'.[45] He emphasised the urgency of law reform, and the need for judges to respond dynamically.

When describing the approach that the Law Reform Commission adopted to the task of promoting change, Kirby said its methodology 'was distinctively Australian', characterised by public hearings and use of the media to involve ordinary citizens in developing proposed changes.[46] He noted that 'in the process of legal change, the poor and the powerless are often disadvantaged', and saw the Law Reform Commission as providing 'an institutional voice' that could help to overcome discrimination. Kirby commented with regard to his own experience of discrimination based on sexual orientation, that while taste of 'discrimination in life' is 'bitter', it can 'give you a special strength to make sure, when you can, that others do not suffer wrongs through law'. He knew 'that equal justice under law is an aspiration yet to be realised in Australia', and said acknowledging the need to end discrimination 'goes to the very essence of what it should be to be an Australian'.[47] It was in responding to this need that the Law Reform Commission had to search beyond Australia for comparative and international solutions to common problems. The International Covenant

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[41] Ibid.
[42] Kirby, 'The Law Reform Commission and the essence of Australia', p 60, acknowledging the roles of Gareth Evans, Gerard Brennan, John Cain, Alex Castles and Gordon Hawkins.
[43] Kirby, *Reform the Law*, pp 12, 31, 46.
[44] Michael Kirby, *Morality and Law: Old Debate, New Problems*, Tenth Walter Murdoch Lecture, Perth, 13 September 1983, Murdoch University, p 16.
[45] Michael Kirby, interviewed in Garry Sturgess and Philip Chubb, *Judging the World: Law and Politics in the World's Leading Courts*, Butterworths, Sydney, 1988, p 369.
[46] Kirby, 'The Law Reform Commission and the essence of Australia', p 60.
[47] Kirby, 'The Law Reform Commission and the essence of Australia', p 61.

on Civil and Political Rights was linked to the Law Reform Commission statute, although Australia ratified that covenant only several years after the Commission had been created. Kirby says that link was crucial, since when considering proposed reforms the Commission was obliged to look at that international covenant and see whether the proposals measured up to international human rights standards. This was the first of three lessons that he learnt from his time with the Commission, the need to be regularly aware of international human rights law. The other two lessons were the importance of comparative experience in seeking solutions to common dilemmas, and the need to conceptualise fundamental principles when human rights are concerned, not see a particular issue in isolation.[48] Together these lessons helped turn Kirby into a powerful law reformer. By applying the insights of these lessons while with the Commission and subsequently, Kirby has attempted to help overcome the partial isolation of Australia from the international human rights movement, resulting from parochialism and the lack of any regional human rights institution.[49]

Two broad issues addressed by Kirby and his colleagues at the Law Reform Commission have had enduring significance for his approach to justice. The first concerns the need for legal pluralism in a diverse society and specifically for appropriate recognition of Aboriginal customary law. This was probably the largest, longest and most controversial topic that the Commission investigated during Kirby's time there, although he was in charge of it only for two years and the eventual report was completed two years after he left the Commission.[50] Kirby noted that recognizing Aboriginal customary law required 'some fairly important decisions about the nature of law, the rights of the white majority to enforce its rule on the indigenous minority, the tolerance of legal pluralism and the principles that should guide the Australian Parliament in establishing a new relationship between the Aboriginal and non-Aboriginal inhabitants of the country'.[51] Kirby accepted that the Commission was 'unlikely to be able to offer answers', but he said 'we are at least beginning to ask the right questions'.[52] He carefully and extensively outlined the argument that 'it is now too late, if ever it was possible, to recognize and enforce the traditional laws' of indigenous people within Australian law, reviewing several reasons why the anthropologist T.G.H. Strehlow held this view.[53] Despite great respect for Strehlow's knowledge, Kirby seemed ultimately

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[48] An interview with Justice Michael Kirby (video).
[49] Ibid.
[50] Law Reform Commission, Report No31, *The Recognition of Aboriginal Customary Laws*, (two volumes), AGPS, Canberra, 1986. Professor John Crawford oversaw completion of the report.
[51] Kirby, *Reform the Law*, p 21.
[52] Ibid., p 126.
[53] Ibid., p 125. This chapter of *Reform the Law* was based on a longer article: M.D. Kirby, 'T.G.H. Strehlow and Aboriginal Customary Laws', *Adelaide Law Review*, vol. 7 no. 2, January 1980.

unconvinced by 'this despairing viewpoint'. His brief response expressed the essence of his dynamic view of law, seeking answers across horizons:

> No legal system in the world stands still as the community it governs changes. Just as our legal rules change, so we should expect Aboriginal laws to change and adapt. Whilst rejecting oppressive elements, out of keeping with today's society, we may still find in Aboriginal traditional law answers that will restore acceptable social control to at least some Aboriginal communities. Indeed, in scrutinizing the firm basis for the healthy functioning of Aboriginal society, we may find answers to some of our own legal and social problems.[54]

This cosmopolitan perspective was eventually reflected in the report of the Commission, which made extensive recommendations for recognition of Aboriginal customary law in accordance with the covenant on Civil and Political Rights, especially article 27 concerning the rights of ethnic, linguistic and cultural minorities.[55] Although the Commission presented proposals, which it considered 'suitable for immediate implementation', there has still been no legislative response, let alone any consideration of the prospect for cross-cultural scrutiny that Kirby raised 20 years ago.[56] This lack of response is the clearest example of institutionalised paralysis obstructing law reform, a problem that Kirby has regularly emphasised.[57]

The second enduring issue that Kirby highlighted while head of the Law Reform Commission is the impact of science and technology, which he has viewed as comprising 'probably the most dramatic and insistent forces of change in our time'.[58] Kirby's main point has been that 'science and technology are advancing rapidly', and without 'a new institutional response' including legal reform 'we must simply resign ourselves to being taken where the scientists' and technologists' imagination leads'.[59] His continuing attention to the need for awareness of scientific changes is another aspect of his dynamic approach to social issues. Barry Jones says that 'Kirby's central thinking is to say if we are part of that dynamic process ourselves we cannot be indifferent to what's going on not only in other legal systems but also in science and technology, such as the genetic revolution'.[60] Kirby has played a prominent and continuing role in

[54] Kirby, *Reform the Law*, pp 125-6.
[55] Reform Commission, *The Recognition of Aboriginal Customary Laws*, vol. 2, pp 208-9. The report analysed comparable jurisdictions such as Papua New Guinea, the USA, Canada and New Zealand.
[56] Ibid., p 242, noting that 'continuing review should take place, to enable changes to occur'.
[57] M.D. Kirby, 'Uniform Law Reform: will we live to see it?', *Sydney Law Review*, vol. 8 no. 1, January 1977, p 1.
[58] Kirby, *Reform the Law*, p 8.
[59] Ibid., p 238. For a similar view about 'The Human Genome', see *Through the World's Eye*, p 42.
[60] Interview with Barry Jones, Melbourne, 7 July 2003.

helping generate adequate international legal responses to this revolution. This interest in the social and legal implications of scientific changes is another similarity with Murphy, who had a long and 'abiding fascination with science and technology', and what Kirby describes as 'a conviction that rationality would ultimately triumph', including an open attitude to change that is 'perhaps' more common now than in the 1980s.[61] At that time Kirby was already highlighting the need for a radical reconsideration of the implications of scientific change for the adequacy of human rights treaties. While emphasising the importance of existing conventions, he argued in 1987 that people professing 'an interest in human rights should lift their sights from the catalogue of concerns of the seventeenth-century philosophers – important although they still are – and interest themselves in the new challenges which science and technology present today'.[62] He noted then the problems posed by 'the deranged terrorist or determined blackmailer having access to nuclear material', and the challenges raised by 'biological manipulation' for the guarantees of human dignity stated in the Universal Declaration of Human Rights.[63] This aspect of what Jones calls Kirby's 'passion' for reform and his 'extraordinary willingness to get out there and play that educative role' illustrates how far he has left behind his initial cautious beginning at the Law Reform Commission.[64] As with the issue of customary law, Kirby's principal concern has been to ensure that old statutes and international human rights conventions are reviewed in terms of changing social realities, not mechanically applied. While extensive work promoting law reform in Australia led him to adopt such an approach, it was a learning experience in India that developed it.

Learning from Bangalore: human rights jurisprudence

In February 1988 Kirby was invited as the only Australian to attend a colloquium of senior judges from Commonwealth countries and also the USA convened in Bangalore, India, by his friend P.N. Bhagwati, former Chief Justice of India.[65] Kirby has described this meeting as constituting a 'second awakening' in his appreciation of the significance and relevant of international human rights norms for a judge's role in a modern society.[66] Despite his already extensive involvement in international education at

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[61] Michael Kirby, review of Jenny Hocking, *Lionel Murphy: a Political Biography*, *Australian Law Journal*, vol. 72 no. 2, February 1998, pp 162-3.
[62] Michael Kirby, 'Human Rights and Technology: A New Dilemma', *University of British Columbia Law Review*, vol. 22 no. 1, 1988, p 126.
[63] Ibid., pp 132, 140-1.
[64] Interview with Barry Jones, Melbourne, 7 July 2003.
[65] Participants are listed in an appendix to M.D. Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms', *Australian Law Journal*, vol. 62, July 1988, pp 531-2, summarising the discussion. No participants attended from Canada or New Zealand.
[66] An interview with Michael Kirby (video).

that time, he says that before this meeting he 'was certainly a sceptic' with regard to the possibilities for applying international human rights law in a country like Australia with a legal system which 'seems always susceptible' to 'insularity'.[67] Kirby says what the Bangalore meeting 'did was to expose me to the fast developing jurisprudence of international human rights norms'.[68] The timing of the meeting was undoubtedly very important in his 'conversion' from sceptic to sagacious proponent of the practice within Australia of international human rights jurisprudence, an approach which he saw as taking 'on an urgency and greater significance in the world today'.[69] Kirby returned from Bangalore committed to the view that 'judges must do their part, in a creative but proper way, to push forward the gradual process of internationalisation' which had developed with respect to human rights since 1945 and which seemed then, in the late 1980s, to be gathering momentum.[70] He was able to promote such a view effectively in Australia and abroad in the years after the Bangalore meeting because the principles agreed there crystallised his views about the scope for judicial activism in an increasingly inter-connected world.[71] In his presentation to that meeting he noted that some judges in Australia were beginning 'belatedly' to follow a practice already adopted in other jurisdictions such as England, India, Sri Lanka, Canada and the US.[72] He was well aware of the hurdles that adherents of the domestic application of international norms would have to overcome, and referred particularly to 'latent xenophobia' as such a problem.[73] Yet he thought it obvious that, when exercising the scope for discretion, 'the judge should normally seek to ensure compliance by the court with the international obligations of the jurisdiction in which he or she operates'.[74] He claimed, repeating his view of the responsibility of judges to adopt a dynamic view of their role, that

> There is no getting away from the fact that, in important decisions on human rights, the courts have frequently cut the Gordian knot where the legislature and the executive have lamentably failed to do so. It is in this sense that, by its dialogue with the people and the other branches of government, the courts can become a kind of "political conscience" of the community which they serve.[75]

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[67] Michael Kirby, 'The Australian Use of International Human Rights Norms: From Bangalore to Balliol – a view from the antipodes', *UNSW Law Journal*, vol. 16. no. 2, 1993, pp 364, 366.
[68] Ibid., p 365.
[69] Ibid., pp 364, 374.
[70] Ibid., pp 374-5.
[71] Kirby, *Through the World's Eye*, p 109, says 'informed observers have come to understand that some measure of judicial activism is not only permissible but is traditional in our system of law'.
[72] Kirby, 'Role of the Judge', p 516.
[73] Ibid., p 523.
[74] Ibid., p 525.
[75] Ibid., pp 526-7.

When summarising his conclusions at the time of the Bangalore meeting, Kirby argued that in a rapidly changing world 'it behoves the judiciary to struggle for release from a too narrow and provincial conception of its role and duties'. He thought 'cases do present themselves where judges can opt for an internationalist approach to the issues before them', so he considered that international human rights treaties constitute 'part of the law of the world we live in', even 'where domestic law does not bind us to apply them'.[76] These views reflected Kirby's cosmopolitan outlook on contemporary life. He emphasised that 'in the world after Hiroshima, all educated people have a responsibility to think and act as citizens of the world'. Despite much 'resistance from hide-bound provincialists', Kirby believed the 'act of will' required for judges to 'place domestic law into its international setting ... will happen' gradually, even in Australia.[77]

In the early 1990s Kirby's optimism about such change was soon confirmed. Although he says for a while he 'felt somewhat lonely in the prosecution of the Bangalore cause in the Australian courts', his isolation in this respect did not last. Kirby says 'by about 1991 the tide of judicial opinion in Australia began to change', with more colleagues in the NSW Court of Appeal accepting his human rights jurisprudence, and implicit support for his practice from a former High court judge, Ronald Wilson, who previously favoured a narrow view of the external affairs power.[78] The 'breakthrough' for the Bangalore cause came, in Kirby's view, with the ultimate *Mabo* decision in 1992, when the High Court 'pointed the way to the future development of the Australian common law in harmony with developing principles of international law, just as the *Bangalore Principles* had suggested'.[79] Kirby has repeatedly quoted the key passage in the leading judgment of Brennan (endorsed by Mason and McHugh), stating that 'international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights'.[80] He emphasises the significance of Australia's acceptance of the First Optional Protocol to the International Covenant on Civil and Political Rights enabling people in Australia to complain to the Human Rights Committee which monitors this treaty when no domestic remedy has been provided for human rights abuses. Although this complaints procedure is incredibly time-consuming and the best outcome is only a recommendation from the Committee for a

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[76] Ibid., pp 529-30.
[77] Ibid., p 530.
[78] Kirby, 'The Australian Use', pp 384-5.
[79] Ibid., pp 384, 385-6.
[80] *Mabo and Others v Queensland [No 2]*, 175 CLR 1 at p 42, quoted in ibid., p 386, and in Michael Kirby, 'The Impact of International Human Rights Norms: 'A Law Undergoing Evolution'', *Western Australian Law Review*, vol. 25, July 1995, p 35; and in *Through the World's Eye*, p 137.

change to domestic legislation, Kirby sees this as an important part of the process of overcoming the separation of domestic and international law. Optimistically, he suggests that this transcendence of narrow nationalism is an 'inevitable' process so that 'if a domestic law is measured and found wanting, a country must bring itself into conformity or be revealed as a mere participant in human rights "window-dressing"'.[81] Within five years of the Bangalore meeting Kirby was heartened by 'the rapid progress' of human rights jurisprudence in Australian law. He considered this 'all the more remarkable' because of 'the high conservatism of the judiciary' here and 'the features of provincialism which are almost inescapable in a legal system now largely isolated from its original sources' of development, as well as the weak constitutional protection of human rights in Australia and the complications of federalism.[82] By the mid-1990s Murphy's basic lesson, that guidance should come not from what Kirby called 'disputable antiquarian research' into old English decisions but rather from relevant international treaties which Australia is obliged to uphold, seemed finally to have been accepted, even by some of those who had scorned Murphy.[83] While Kirby says 'self-satisfaction and complacency' are 'emotions alien to my character', he observed on the eve of moving to the High Court that even one conservative Sydney barrister had 'been known of late to cite international human rights norms in support of his opinions'.[84] It seemed he could look forward to more respect for human rights jurisprudence.

When reviewing a book on the rights of subordinated peoples at the time of his elevation to the High Court, Kirby made two interesting points of criticism that have implications for his cosmopolitan perspective. First, noting that the substance of the book derived from a 1988 conference but the impact of recent events (including the *Mabo* decision and the demise of apartheid in South Africa) had been ignored, he questioned the editors' 'hopeful suggestions' of optimism because the book lacked an analysis of international developments (such as the draft Declaration on the Rights of Indigenous Peoples) which might have shown how subordinated peoples can be freed from state oppression. He commented that 'being an optimist in the face of many of the problems revealed in this book may require either foolhardiness or a leap of faith about humanity's ultimate destiny'. Second, Kirby expressed regret that papers on Maori rights given at the conference had 'for unexplained reasons, been deleted' from the book. He

[81] Kirby, 'The Impact of International Human Rights Norms', p 43.
[82] Ibid., p 391. Kirby has noted the irony of Australia's increasing isolation from English law at a time when the latter is increasingly being brought into conformity with international human rights norms.
[83] Kirby, 'The Australian Use', p 380, quoting his 1988 judgment in *Jago*. Kirby notes his approach was not supported in that case by Justice Samuels, but then refers to another NSW case in which it was.
[84] M.D. Kirby, Farewell speech, Supreme Court of NSW, 2 February 1996, *Australian Law Journal*, vol. 70, April 1996, p 272; Michael Kirby, 'The Australian Constitution – A Centenary Assessment', *Monash University Law Review*, vol 23 no 2, 1977, p 231.

said this was 'a shame because there is no doubt that, despite obvious failings, the New Zealanders have done rather better in their dealing with Maori issues than have most other settler societies', particularly due to Maori 'success in securing a treaty and legal recognition of their rights'.[85] Three years later, when speaking in New Zealand, Kirby suggested that the 'special treaty position' of Maori 'in the polity of New Zealand would not necessarily be an impediment to New Zealand's future association with Australia' in some form of trans-Tasman union. Indeed, he pointed out that 'there seems little doubt that in the matter of the treatment of its indigenous peoples, Australia could benefit from closer acquaintance with the New Zealand story'.[86] In the intervening years Kirby had cause to temper his optimism about human rights jurisprudence in Australia. Whereas in 1996, in his first lecture honouring Anthony Mason's judicial metamorphosis into the leader of a reforming High Court, Kirby declared boldly that 'all Justices now reveal an awareness' of international human rights and 'a new sensitivity to the position of the indigenous peoples of Australia', when the lecture was reprinted in *Through the World's Eye* in 2000 this claim had disappeared, for reasons which deserve explanation.[87] The explanation involves an assessment of Kirby's isolated position in perhaps the most important test case for the Bangalore cause, which was the *Kartinyeri* case concerning the Hindmarsh Island bridge legislation.

This controversial case raised major questions concerning the five broad aspects of Mason's legacy for 'the future' of Australia that Kirby has highlighted. These areas are: Australian character, democracy, human rights, policy and society. Kirby said the High Court that Mason left had 'embraced the principle that the people of Australia are ultimately the legal foundation for the legitimacy of the Australian Constitution'.[88] The court had rejected 'simplistic notions of democracy as involving no more

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[85] Michael Kirby, review of Oliver Mendelsohn and Upendra Baxi eds, *The Rights of Subordinated Peoples*, Oxford University Press, New Dehli, 1994, *Australian Law Journal* (check printed source) at http://www.lawfoundation.net.au/resources/kirby/papers/19960411_bralj.html Kirby also mentioned the number of Maori, their assertiveness towards the British colonisers and 'the respect which many of the colonisers felt for their established social structures'; while the last factor is historically contingent (and largely absent from New Zealand law for a century after the end of the 19th century land wars), the other primary factors are all related to the principal point about the Treaty of Waitangi, which although declared a nullity by New Zealand's highest court in 1877 did a century later achieve renewed respect.

[86] Michael Kirby, 'Trans-Tasman Union – was Sir Douglas Graham right?', Rudd, Watts and Stone Public Lecture, Grand Hall of Parliament, Wellington, New Zealand, 19 August 1999, available at http://www.lawfoundation.net.au/resources/kirby/papers/19990819_transtas.html Kirby wondered whether it is 'the very similarity of Australia and New Zealand' that makes 'bold achievements' (like those made in creating regional human rights institutions in Europe) impossible or disregarded here.

[87] Michael Kirby, 'Sir Anthony Mason Lecture 1996: A F Mason – from *Trigwell* to *Teoh*', *Melbourne University Law Review*, vol. 20, 1996, p 1102. Cf. *Through the World's Eye*, p 124.

[88] Kirby, *Through the World's Eye*, p 124. Cf. ch 12, an abridged version of Kirby's 1997 Deakin University Law School Oration, 22 August 1997, published in the *Deakin Law Review*, vol 3 no 2; and Kirby, 'The Role of the Judge', p 519: 'the legitimacy of the constitution is normally traced nowadays to the will of the people who live under it'.

than majority votes in Parliament intermittently elected', it was willing to interpret Australia's constitutional and legal principles in the 'setting' of international human rights developments, and it was open about deciding key issues of 'judicial principle and policy' in a dynamic 'society that is increasingly complex and affected by technological change and by a changing population with new and different ethnic, religious and cultural imperatives'.[89] The key issue that arose in the *Kartinyeri* case concerned whether section 51(xxvi) of the Constitution, as amended by a massive Yes vote in the 1967 referendum, permits racist legislation specifically against Aboriginal people. Kirby had noted 20 years previously that 'the declared aim of the Constitution Alteration (Aboriginals) Act 1967 was to remove any ground for the belief that the Constitution of Australia discriminated against people of the Aboriginal race, and at the same time to make it possible for the Commonwealth Parliament to enact special laws for these people'.[90] In 1998, he was the only High Court judge to use the *Kartinyeri* case to affirm this belief clearly and without equivocation. His argument was essentially cosmopolitan, based on the premise that the Constitution 'does not operate in a vacuum' of national isolation; rather, he said it 'speaks to the international community as the basic law of the Australian nation which is a member of that community'.[91] Pointing out that racist laws introduced in Nazi Germany and apartheid South Africa 'provide part of the context' in which the Australian Constitution must now be read, Kirby said there was no place 'in late twentieth century Australia' for a view of the Constitution that 'supports detrimental and adversely discriminatory laws when the provision is read against the history of racism during [the 20th] century and the 1967 referendum in Australia intended to address that history'.[92] Because the meaning of the 'race power' in the Constitution is clearly ambiguous, the contemporary meaning of the Constitution must be read in line with, not in opposition to, Australia's international obligations. Since the clearest principle of international human rights law, endorsed by Australia, is 'the prohibition of detrimental distinctions on the basis of race', Kirby said 'the purpose of the race power' must now only be beneficial, not adverse and racist.[93]

In the year before being appointed to the High Court Kirby argued that courts in Australia, like in New Zealand and England, had cautiously 'begun to edge towards a new technique appropriate to the coming millennium'.[94] By the time the millennium arrived the new world outlook of Australian courts seemed not to have lived up to Kirby's expectations.

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[89] Kirby, *Through the World's Eye*, pp 124-5.
[90] Kirby, 'Strehlow and Aboriginal Customary Laws', p 177.
[91] *Kartinyeri v Commonwealth* 195 CLR 337 at p 418, per Kirby J.
[92] Ibid., pp 416-7.
[93] Ibid., pp 417-9.
[94] Kirby, 'The Impact of International Human Rights Norms', p 45.

A review of his own judicial discretion in cases where human rights were involved showed Kirby consistently applied the *Bangalore Principles* (that is, using relevant international law to clarify ambiguity in statutes or the Constitution), but also that he was the lone dissenter in two such cases (including *Kartinyeri*).[95] Kirby may have been a bit surprised about this retreat from the consensus that Murphy and Mason made, having become accustomed to the judicial acceptance of yesterday's heresies. Although he still affirms the 'inevitable' nature of the end to national isolation that the *Bangalore Principles* endorse, it seems that Evatt's old words about 'the gradualness, the extreme gradualness, of inevitability' have returned to challenge his optimism.[96] Indeed, by 2002 Kirby seemed resigned to accept 'the slow pace of change in the Australian democracy', viewing Nugget Coombs' 'great sense of impatience' with lost opportunities to rectify Aboriginal injustice as 'out of place' for a person so experienced in observing the procrastination of Australian politics.[97] Before Justice Gaudron retired, he joined with her in interpreting the requirements of the *Native Title Act* beneficially for Aboriginal peoples, against the view that indigenous customs cannot develop autonomously or the view that native title is a political problem that the High Court should just seek to shelve.[98] Kirby would probably say that is too soon to judge whether the cause of Bangalore has suffered a major setback, since it was only in 1997 that he first 'extended to constitutional interpretation' the principle of reading an ambiguous text in line with international law. He remains committed to articulating 'a new way of thinking that is harmonious to the realities of the world', living on 'this little planet' where 'we are all ultimately bound together'.[99] He rejects the 'barren philosophy' of 'narrow nationalism' as 'the opposite of my own'.[100] He views Australia as 'no longer a historical anachronism or settler or purely European society', which must come 'to terms with the challenges and opportunities of our geography and our regional destiny'.[101] And, knowing the history of adverse discrimination is deep in Australia, he looks for 'other injustices to which we are still impervious, or indifferent or which we do not yet see clearly'.[102] Kirby may have joined Murphy in splendid dissent, but he has enlarged society.

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[95] Leigh Johns, 'Justice Kirby, Human Rights and the Exercise of Judicial Choice', *Monash University Law Review*, vol 27 no 2, 2001, pp 311-17.
[96] Michael Kirby, 'Domestic implementation of international human rights norms', *Australian Journal of Human Rights*, vol 5 no 2, July 1999, p 120; Kirby, 'Australian Constitution', p 230, citing Evatt in *R v Hush; Ex parte Devanny* (1932) 48 CLR 487, 518.
[97] Michael Kirby, 'Surface Nugget', *Quadrant*, vol 46 no 10, October 2002, p 55.
[98] *Yorta Yorta v Victoria* 194 ALR 538, at pp 568-71 per Gaudron and Kirby JJ. Cf *Kartinyeri* 195 CLR 337 at p 398 per Kirby J.
[99] Kirby, 'Domestic implementation', pp 124-5.
[100] Kirby, 'Mason Lecture 1996', p 1102.
[101] Michael Kirby, Swearing in and welcome speech, High Court, Canberra, 6 February 1996, *Australian Law Journal*, vol 70, April 1996, p 275.
[102] Ibid.

Conclusion: Kirby's credo - 'Speak up ... it's later than you think' [103]

It is remarkable that someone with Kirby's extraordinary passion for contributing to informed public debate has been the subject of so little informed critical analysis of his ideas. His ideas have been influential in Australia and abroad, yet given less public attention in recent years than malicious gossip about him personally. Kirby is not surprised by 'uneven and biased' media coverage, having claimed this reinforced a division at the time of the 1999 republic referendum (which he opposed) between 'lower income and rural groups' and 'a push by intellectual, well-off east coasters, not necessarily to be trusted by the nation'.[104] While he failed to justify the implication of this comment, that intellectualism in Australia is geographically distorted, Kirby's public role for many years has been that of challenging 'insufficiently critical' and anti-intellectual beliefs among Australian society.[105] He suggests that one reason for the pervasive nature of such beliefs has been Australia's 'colonial history' as a secondary not a primary location, 'only strong in that we were white, surrounded by a cesspool of coloured people who were always threatening to take us over'.[106] Kirby would have been among those Australians least surprised by the reactivation in the new millennium of what he in 1991 warned was 'a spirit of intolerance that, mixed with the anti-intellectual stream of Australia, will make an explosive and unsavoury concoction'.[107] Then he said 'time will tell' and remained 'hopefully optimistic', even suggesting that despite 'resistance in Australian society to law reform' he is 'always optimistic'.[108] A core reason for Kirby's optimism has been his belief that Australia cannot be separated from the influence of global developments, particularly increasing international attention to human rights. In 1991, when the Bangalore cause began to be appreciated in Australia, Kirby said Australian lawyers 'must now face the prospect of international scrutiny of their system of laws', having only 'just begun the process of escaping the unquestioning capture by the ideas of the English legal

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[103] Kirby, 'The Intellectual and the Law', p 532.

[104] Michael Kirby, 'The Australian Republican Referendum 1999 – ten lessons', speech at the Faculty of Law, University of Buckingham, England, 3 March 2000, available at http://www.lawfoundation.net.au/resources/kirby/papers/20000302_referendum.html The basic reason for Kirby's scepticism about the republic is his denial of flaws in the Constitution (influenced perhaps by his dynamic view of constitutional interpretation), but he has expressed regret that in debates about reform 'the bolder dreams and broader aspirations have been cast aside', as 'constitutional imagination has been dampened down by gallons of Tipex' (a print remover for deleting references to the Queen). Kirby, 'Trans-Tasman Union' speech.

[105] Kirby, 'The Intellectual and the Law', p 526.

[106] Ibid. For a remarkably similar analysis of Australian ambivalence by a leading Indian intellectual, see Ashis Nandy, 'Foreword: the need to have inferiors and enemies', in J.V. D'Cruz and William Steele, *Australia's ambivalence toward Asia*, Monash University Press, Melbourne, 2003, pp 1-6.

[107] Kirby, 'The Intellectual and the Law', p 531.

[108] Ibid., pp 528, 531.

system'.[109] When some countries withdrew from human rights treaties at the turn of the millennium, Kirby claimed that Australia remained, like New Zealand, 'usually' a leader 'in advocating basic human rights and human dignity'.[110] His optimism was evident in late 2000, when he said Australia would be 'one of the first nations' to ratify the statute of the International Criminal Court; two years later, it was only the 75th.[111] Such exuberant optimism reflects Kirby's conclusion years before that 'lawyers must develop a greater sense of urgency' because 'our use of passing time seriously affects the future happiness of mankind'.[112] As he wrote earlier still, 'It is cold comfort to say that good ideas will triumph in the end.'[113]

The main reason for Kirby's sense of urgency is his dynamic view of the world. He appreciates that without continual reform, social changes will be distorted by powerful anti-social forces into directions harmful for human rights. This perspective is evident in his active concern about the implications of the genetic revolution for democracy. While viewing this scientific change as producing knowledge that will 'overwhelmingly' be 'to the benefit of humanity', he is worried about the privatisation of this knowledge for commercial benefit at the expense of creating a global 'genetic divide' between the powerful and powerless.[114] Such concern also informs his strong belief that judges have the 'potential to contribute to the gradual movement of internationalisation, in rendering solutions to common problems'.[115] Kirby's image of the appellate judge, applied to Murphy, is that of 'a swimmer cast adrift in rough seas', facing waves of work but still searching the horizon for the changing tide, and struggling valiantly to make a 'contribution to humanity'.[116] While his contribution has involved an extraordinary public role promoting international human rights, it also reflects something beyond 'the public record of the life of a man', which in his case is a childhood lesson from a visitor, that was 'to take the extra step' and 'offer the extra help' to those in need, beginning 'at home' but extending to 'our sisters and brothers in other lands'[117].

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[109] Michael Kirby, 'The New World Order and Human Rights', *Melbourne University Law Review*, vol. 18 no. 2, December 1991, p 213.
[110] Michael Kirby, 'Human Rights – the way forward', *Victoria University of Wellington Law Review*, vol. 31, November 2000, pp 708-9.
[111] Michael Kirby, 'Australia Honours Two Champions of Human Rights for the Downtrodden', Launch of the Castan Centre for Human Rights Law, Monash University, Melbourne 31 October 2000, http://www.lawfoundation.net.au/resources/kirby/papers/20001031_castan.html
[112] Kirby, 'Human Rights and Technology: A New Dilemma', pp 144-5.
[113] M.D. Kirby, 'Reforming the law', in Alice Erh-Soon Tay and Eugene Kamenka eds, *Law-making in Australia*, Edward Arnold, Melbourne, 1980, p 69.
[114] Kirby, 'Genomics and Democracy', pp 5, 8, 9, 15.
[115] Kirby, 'The Australian Use', p 392.
[116] Kirby, 'Murphy: bold spirit of the living law', p 2.
[117] Kirby, 'Strehlow and Aboriginal Customary Laws', p 173; *Through the World's Eye*, p 202; Michael Kirby, *Manual for Human Rights Education*, UNESCO, 18 January 1998, at http://www.lawfoundation.net.au/resources/Kirby/papers/19980118_unesco.html