

Assorted Recollections of an interview with Justice Michael Kirby

Dr. Roderic Pitty, at Commonwealth Law Courts library, Melbourne, 15 October 2003

Q.1 I understand that you have had a chance to read a paper that I recently presented about your ideas; are there any specific comments that you would like to make?

Kirby: Yes, I have read the paper with interest because it is not often that one has the opportunity to read such an analysis, as distinct from what appears in the media such as the Heffernan controversy which is the type of thing the media seem interested in. Sometimes I am a little concerned that I might be principally remembered, even after I am gone, for what has been written in the media about me, not for what I have done and the real concerns I have had. The media are usually concerned just with froth and bubble stories rather than with a substantial analysis, so it is good to know that there are some people endeavouring to look for a deeper record of my activity and ideas. You seem to have taken a lot of trouble to read a large number of my public speeches and publications, some of which I didn't even see in the final printed version. I think your paper is worthwhile, and would make three specific comments about it.

First, I must say that I have some difficulty with the meaning that you ascribe to the word 'cosmopolitan'. In regular everyday English usage that word has quite another usage that is different from either of the two classic uses that you have noted.¹ The regular use of the word is to mean something that is stylish, trendy or in vogue or urbane. Now while you have no doubt thought carefully about this because it is a key aspect of your project, I think you should reconsider whether the meaning you want to convey is actually going to be conveyed by the word you have chosen. For someone who is not a specialist in the way that you use the term 'cosmopolitan', and this will of course be most of your intended readers, the word itself may get in the way of the concept you want to use. So while I find that my ideas fit clearly within the concept, which is to say the basic theme of global citizenship as understood by someone who is a worldly Australian as you put it, I think I would express a dissenting opinion about the workability of the term 'cosmopolitan' in this context. Of course, it is a matter for you what to make of this opinion, but that is the first observation I want to make.

Q.2 Are there any synonyms that you think might appropriately convey the meaning?

Kirby: Well, I think there are other words that might work better, but it doesn't need to be only one word. There could be a combination of words that readily make sense to the audience who you are seeking to inform. Worldly Australians seems clear, like global citizenship as the key idea. Empathy is a basic focus. Globalism is a word that is much in use these days so it might be more effective than 'cosmopolitan'. To talk about 'cosmopolitan' today seems to mean something that would appear in a trendy magazine, like *Vogue* or some such publication. Now I have never been concerned with being in vogue or trendy, and some of my colleagues who know my ideas well would, I think, be surprised for them to be described as merely stylish or fashionable, which is the regular usage of the word cosmopolitan. So you should really think about whether another word or a particular combination of words would be much clearer.

¹ These are a) citizen of the world or universe, and b) familiar traveller in alien environments, as distinguished by Derek Heater, 'Does Cosmopolitan Thinking Have a Future?', in Ken Booth et. al. eds, *How Might We Live? Global Ethics in the New Century*, Cambridge University Press, 2001, p 179.

Second, every person studying a particular subject is entitled to their own views, their own perspective about it. The questions that you ask about my ideas are those that most interest you, and it may be possible from your perspective to see some aspects of my ideas and activity which might not seem so familiar to me, because you are approaching the subject with your own concerns in mind, and working out ideas in your own brain. I would say that your perspective might be equally legitimate so long as it is carefully formulated, and properly informed. I would also say that my opinion is that there should be no censorship involved in any discussion of my or ideas or anyone elses.

Third, you have highlighted some themes more than others, and while there are some issues that you come back to throughout the paper there are matters where from my perspective I might see things with somewhat of a different emphasis. That is, you have focused on many issues that I think are important but emphasised aspects that I might not view so strongly, and not stressed other areas that seem more salient to me now. One such example concerns the extent to which I have been influenced by Lionel Murphy, who was very important to me in the development of my thinking and in the way that my career has developed, but also a very different person to me. I tried to convey this in the speech I gave about him when I referred to us as both originating from Irish heritage, but his from the South and mine from the North. Murphy was a very gregarious person, someone who was a cosmopolitan in the everyday or regular use of the word as well as someone who was committed to global citizenship. He was quite ready to be stylish whereas I am not. He undoubtedly had a strong influence on my career, which wouldn't have developed in the way it did without his support, but I am not like him in many ways. One of the ways is that whereas he tended to be very direct and perhaps at times dogmatic in the way he that expressed his opinions, I have been around in conservative legal circles for so long that I have given more attention to the challenge of communicating my ideas in a way that might persuade others, who do not presently accept them. Murphy has been gone for well over a decade now and I have developed my ideas into new areas so I would not overstate his influence on me.

Q.3 I am interested particularly in the development of your ideas rather than in the area of personality, and I note that in your 1987 lecture about Murphy you said that while personally very different, in your philosophy you came together. What was the philosophy or perspective about global citizenship that you shared with Murphy?

Kirby: With Murphy I shared a commitment to the relevance of international ideas for Australia, as well as a belief in the rational improvement of society, particularly through effective law reform. We shared a belief in the possibility and necessity of making the world a better place, in concern for the underprivileged, and in the need to ensure that Australian lawyers are aware of the changes occurring in the larger world. We both had a strong interest in scientific changes and their implications for society and the law. Murphy had the background of a science degree as well as a lawyer, while I developed my enduring interest in science through my work with the Law Reform Commission. We both had a close interest in the High Court, Murphy when he was a judge there and myself well before my present position. Very frequently, when Murphy was on the Court he would ring me to discuss particular legal issues, and like any lawyer when a High Court judge was on the phone I was very attentive. So I did have a lot of legal interaction with Murphy. We had many similar ideas about the implications for Australia of developments in international human rights law, but with my background as a fairly orthodox lawyer I was quite aware of the many

obstacles to the acceptance more broadly within Australia of these developments. At times, Murphy was too impatient for change. He could see what needed to be done, and was less concerned with persuading the sceptics, of whom there remain many. In my own judicial opinions I have paid special attention to the importance of expressing new ideas in ways that can be appreciated by others, not just by the already converted.

Q.4 When did you first develop your awareness of the responsibilities that you felt to the wider world as a global citizen, extending beyond other people in your country?

Kirby: This was at an early age, because there was a lot of internationalism around in Australia when I was growing up. It was not so unusual to be an internationalist or have an international awareness then. This was partly due to the British connection. Australia, as part of the broader British Empire, was affected by many international developments, including the evolution of the common law in England. Australians were British subjects then before later becoming Australian citizens, so the idea of having wider commitments was not so strange. There was then a lot of information and various perspectives from Britain readily available in Australia through radio, with the ABC taking a lot of programmes from the BBC. Things started to change through the introduction of television, which required pictures, and these initially had to be largely local. Local nationalism in Australia is now stronger than it was when I was becoming aware of the wider world in the period after the Second World War. So the need for a broader perspective is something that I think was widely felt at that time.

Q.5 With reference to your article around the time of the Bangalore colloquium, which was published in the Australian Law Journal in July 1988, I am interested in two things: firstly, in clarifying when exactly it was written, before the colloquium as a representation of your ideas then or afterwards as a result of the impact that the discussions there evidently had on you?; secondly, there is a specific passage in the conclusion, at p 530, referring to 'the world after Hiroshima' as one in which 'all educated people have a responsibility to think and act as citizens of a wider world'. When did this idea of educated responsibility arise for you and what does it mean?

Kirby: The first question is interesting, and I think the answer is that the article was largely written before I went to Bangalore, and so it reflects my views prior to what I have termed my conversion there.² Yet there is also evidence there of my openness to the consensus of views about the relevance and feasibility of applying international law which was formed amongst those who attended that meeting, which all of us then felt needed to be shared more widely in our own countries and internationally. As for the quotation, well there is nothing particularly remarkable about that expression of the responsibilities of global citizens. The world in which I grew up was shadowed by the legacy of Hiroshima and the nuclear testing that was then occurring. The Soviet atomic bomb test was on the front page in 1949, and in the years thereafter there was a lot of public attention given to international events, albeit often in very crude terms such as the red peril, the yellow peril, and various other perils. For an educated person there was no way of remaining responsible and escaping from the enormity of what was being done to the world. There were so many thousands of nuclear weapons built

² 'The Australian use of international human rights norms: from Bangalore to Balliol – a view from the Antipodes', *UNSW Law Journal*, 1993, vol. 16(2), section I: 'Conversion in Bangalore'.

that it was enough to destroy the world many times over, and I think the situation is not so different today. The need for such responsibility is as great as it ever was.
[Q.6 How do you think your advocacy in Australia of the Bangalore Principles was initially received by your colleagues?]

Kirby: Well, the initial reception was difficult, particularly in the few years after 1988, when there were not many converts. I knew it was a challenging idea to make international human rights law applicable in Australian cases, but I persisted in the effort to articulate carefully the logic of my position, because I had been convinced at Bangalore that the changes which were occurring in other legal jurisdictions could not pass Australia by, as remote as we may sometimes appear to be. These were changes that Australia would have to adapt to and adopt at some point in the future, because of the increasing interconnections between different jurisdictions as well as the growing importance of international human rights law. The change was necessary. It could not be avoided indefinitely though it could be delayed. The task was to make the need for change clearer and more evident at the right time, which happened to be in the years after the Bangalore meeting. Despite the initial scepticism of many of my colleagues, before long some were prepared to agree with me. Perhaps my position as President of the NSW Court of Appeal helped in this respect, because the law is so hierarchical that more attention is given to an opinion expressed by someone in that position than may have been given if my approach had been initially advocated by another judge. Anyway, by 1992 with the strong affirmation of the relevance of international law by Justice Brennan in the *Mabo* case the situation had clearly changed. I like to think that the attention that I had given in the few years before 1992 to articulating the relevance of the Bangalore Principles might have played some little role in the formulation of that key passage by Justice Brennan. There needed to be a key that would unlock the obstacle which 150 years of land law had erected, preventing the recognition by the common law in Australia of indigenous title, as had occurred in other jurisdictions. The basic idea of non-discrimination in the enjoyment of universal human rights, particularly on grounds of race, provided that key. That idea was clearly relevant for Australia, and so the law of Australia changed in accordance with international law.

Now, the significance of that change is not diminished by the fact that there is presently a more cautious or conservative approach adopted by the High Court than there was a decade ago. I'm not in accord with that approach, but then I don't think I have ever been in vogue. I still think that the relevance of international human rights law will become increasingly accepted in Australia in the future, notwithstanding the current prevalent attitude of satisfaction with the way things are. Such an attitude was widely expressed in the recent conference on the centenary of the High Court, where in my opinion even the speeches of past Chief Justices Mason and Brennan were largely in harmony with the current conservative outlook. The relevance of international law will not diminish in the future, but will most likely increase. This is something that is readily realised more by the younger generation in the law than by lawyers with established views, though I would count myself still amongst the young in inspiration. It happens quite often these days, at least much more often than a decade ago, that cases are argued in court as if international law is clearly relevant, even though sometimes the relevance is not clearly or fully understood. Yet such argument itself is an indication of some significant change that is continuing, notwithstanding the prevalent professional attitude today.

Q.7 There is a passage in a set of lectures by Hilary Charlesworth delivered at UNSW (published as Writing in Rights at p 60) where she summarises your strong dissenting opinion in the Kartinyeri case, then comments that your approach 'is not generally shared by the Australian judiciary'. Was that a test case for your basic approach?

Kirby: No, I don't think it would be appropriate to view the result in that case in such a way, for a number of reasons. One reason concerns the difficult factual situation in that case, which was disputed. There were some Aboriginal people who rejected the claims of the Aboriginal women, and there was the issue of evidence from the women that had been provided to an inquiry but which men were not culturally authorised to see. There was a Royal Commission that did not clarify the situation, and there was also the question of how to treat amending legislation. Further, there was the problem that the question in that case concerned not just ambiguity in a particular statute but in the Constitution. While some judges might be willing to interpret ordinary statutes in accordance with international law where feasible, the question can be more complex with regard to the Constitution, because of the view that it is something separate with a fixed existence that is not so readily in need of interpretation derived from outside this country to clarify its meaning. There is this view that the Constitution exists somewhere by itself and is not subject to the same principles of interpretation as ordinary statutes require. There is another view that I hold which might be called a contextual view of the Constitution. This sees it differently in terms of the context of the times in which the Constitution is read. So the issue of whether the Constitution is fixed in the context of the founders or moving forward as a dynamic part of history was also involved, and that issue has yet to be resolved.

Q.8 The reticence of other judges to interpret the Constitution in accordance with international law might be expressed as an unwillingness to judicially rectify basic problems in the Constitution that would be better fixed by Parliament, yet there was a clear ambiguity that had been exposed in previous cases concerning the race power and there was also the historical fact that the change to the Constitution by the 1967 referendum was clearly meant to benefit Aborigines, so the case does seem to suggest the rather limited acceptance presently of an approach that views international law, and particularly the principle of non-discrimination by race, as critically important?

Kirby: That may be the current situation, but even so there is no reason to think that the influence of international law will not eventually be recognised as extending to constitutional matters in Australia, where ambiguity is clearly established. It is worth noting developments in other jurisdictions, particularly in England where the common law is now much more open to international influences, especially from Europe, than in previous times. There is more scope for international law to have an influence upon constitutional matters in a state without a written constitution, such as Britain, than in a state like the US with an extensively defined constitution. Yet even in the US there are now some significant signs of openness towards international human rights law. There have been two particularly important US cases recently where the Supreme Court has begun to accept the relevance of utilising universal human rights in the task of constitutional elaboration. One of those was *Atkins v Virginia* involving the death penalty as imposed upon mentally retarded persons; the other decision was *Lawrence v Texas*, which held unconstitutional the Texas criminal law against consensual adult

homosexual conduct.³ When one of the most isolationist of legal jurisdictions has started to apply universal human rights in particular cases, there is more scope for change than is readily apparent. Pressures for more recognition of the relevance of international law will increase in Australia, as awareness grows of developments in other jurisdictions including the US. And international legal influences upon Australia arise not just from changes in a variety of other similar jurisdictions but also from the growing number of international treaties to which Australia has become a party.

Then in addition to all of this there is the logic of contextualism, which is a very important aspect of the law. In any particular matter attention needs to be given to the context of interpretation as well as the context of what is being interpreted. And the context of interpretation is something that is constantly changing, and is affected by changes in the wider world, including relevant cases in other jurisdictions and also international developments such as the creation of new treaties. There once was a time when, in England and Australia, reference to matters in other jurisdictions and to the basic principles of international law was very limited, and made only when there was another case elsewhere on exactly the same point. Now the situation is quite different, because the wider world is not just constantly changing but having a greater impact on what happens in particular countries, including Australia. Indeed, the changing context of interpretation may mean that the same judge will express a different view of a particular issue at different times, in different situations. I think eventually this will lead to significant adjustments in our law, though not as quickly as one might hope. I notice that you have suggested that at one point I have altered a little what I had previously said in a lecture when it was reprinted for publication in *Through the World's Eye*, like a case of air-brushing out of the picture something that was earlier there, in a sort of Leninist way - - -

Q.9 No, that wasn't the implication. What I'm interested in is where the text has been altered to reflect a changing reality, and the reasons for the change being necessary. This concerns your first Mason lecture ['From Trigwell to Teoh', Melbourne UniLR, p 1102; cf Through the World's Eye p 124]. There was originally a sentence there in the lecture which stated that decisions of 'all Justices' of the High Court 'now reveal an awareness' of developments in international human rights law and fundamental freedoms, including for indigenous peoples. Why could that not remain in the book?

Kirby: Well, the lecture was originally given in 1996. After that there were several new appointments to the High Court, three in fact before the book was published. So I could not simply leave that observation there, as if nothing had changed. And, since I expect my colleagues to respect my opinions, I must also respect theirs. The role of judicial independence is a key principle of the common law system that distinguishes it from the operation of a civil law system. While there has been a shift in recent years away from the approach established a decade ago, I believe firmly in the correctness of that approach and in the soundness of my basic reasons for judgment, or opinions as I like to call them, and I think that eventually my reasoning will be vindicated.

Q.10 There was another interesting passage in the original version of that lecture, where in reference to the character of the High Court as now 'a distinctly Australian institution', you added that in approving of that character you were 'not making the

³ Details drawn from Justice Kirby's speech, 'The High Court and the Death Penalty - Looking Back, Looking Forward', given to Reprieve and the Victorian Bar, Melbourne, 6 October 2003, p 20.

mistake of embracing narrow nationalism', which you described as being 'a barren philosophy' that 'is the opposite of my own'. [Trigwell to Teoh', p 1102]. I presume that you maintain that view, and I am interested also to know when you developed your philosophy including your strong scepticism about Australian nationalism?

Kirby: Yes, I maintain that view, and I am very sceptical about the trend in the past decade towards a strengthening of Australian nationalism. That, it seems to me, is not a positive change but rather a superficial and worrying one. The rise of nationalism in Australia particularly in recent times is not something that I welcome. There has been an increasing expression of a sort of drawbridge attitude towards the rest of the world, which has become quite widespread in recent years although I believe it is temporary. Australia is now more of a nationalistic country than it was some decades ago but this change is not a sensible one. It does not correspond with the broader developments that are happening in the wider world, including the increased cooperation between states reflected in the many new treaties and in the much greater interaction between Australians and the outside world. Seen against these broader international changes, the recent campaign in Australia for a Republic seemed to be just an expression of nationalism. This was one of the reasons why I opposed that campaign.

Q.11 Barry Jones says that the Republic is the one issue about which he claims that you have not expressed a rational position in his view?

Kirby: But I have done so. My view has been clearly outlined in many places. I saw the Republic campaign as fundamentally an expression of nationalism rather than any attempt to make a profound change to Australia's Constitution. The campaign was presented as if a Republic is necessary to make Australia become fully independent. That seemed to me to be a very unconvincing rationale for the change, because it is my view that Australia has been a wholly independent country for quite some time. This actual independence does not need to be symbolised through a superficial and nationalistic change. I also saw great dangers in the idea of concentrating any power in the hands of a new position of Australian head of state, whose only characteristic seemed to be an expression of nationalism, portrayed and manipulated by the media. The idea of having an international head of state is not a problem for me, given the importance of Australia's links with the wider world. There was also an anarchistic element in my opposition to the Republic campaign, since I did not want to be part of any attempt to create a new power structure that might conceivably concentrate or centralise power more so than the present system. So there did not seem to me to be any rational reason for the proposed change, and the reasons that were propounded for the Republic reflected just a superficial and unpersuasive satisfaction with Australian nationalism of the froth and bubble variety, rather than any substantive change.

Q.12 You made a comment in a speech you gave in New Zealand (Douglas Graham lecture) about the remarkable lack of substantial constitutional debate in Australia?

Kirby: Yes, that's true. In fact there are many particular changes to the Constitution that could be made to make it more effective and comprehensible. There are several passages that are clearly out of date and need to be modified. But this is a very large problem, particularly because of the lack of success with attempts to make changes to the Constitution. Historically, there have been only eight successful referenda. This shows the great difficulty of the task of constitutional reform in Australia. One of the

reasons for this is that, because of this difficulty, there are very few attempts made to change the Constitution, and consequently little substantive discussion about it in the public arena. Politicians are eager for success, and don't want to associate themselves with any possible failure, so they are very reluctant to engage in constitutional reform.

Q.13 How important was your work with the Australian Law Reform Commission in the development of your cross-cultural awareness, and in providing opportunities for you to develop your international experience in UNESCO and other such bodies?

Kirby: Certainly my work with the Law Reform Commission was vitally important in both respects. Without the opportunity that Lionel Murphy provided me as the head of the Law Reform Commission, my career would not have been the same. I would not have had the range of experiences that I have had, nor perhaps ended up where I am now. My legal career has been more wide-ranging, and I might even say more interesting, than is the case for most lawyers, although I also began as a rather orthodox lawyer. In life, one has to take advantage of the opportunities when they arise. This is what I did with the Law Reform Commission and have continued through my international activities. It was through my role with the Law Reform Commission that I first came to become involved in working with the OECD on matters concerning privacy in the context of new technology, and that led on to many other international involvements. Working with the Law Reform Commission also involved furthering my awareness of changes in other common law jurisdictions and the relevance of those changes for us in Australia. The common law itself can be a great agent for change, particularly if it is seen in its broadest context as an international institution. From the perspective of the Law Reform Commission, I became more aware of that dimension and was led to ask questions about situations in Australia that most other lawyers might not ask.

Q.14 The Report of the Law Reform Commission on the recognition of Aboriginal customary law is interesting when compared with the recent High Court decision in the Yorta Yorta case, because in that report are included statements from people who could only be called conservatives such as Geoffrey Blainey and Jeff Kennett, who at the time of that inquiry acknowledged the dynamic nature of Aboriginal customary law, whereas the majority decision adopted a very different approach to that issue?

Kirby: Yes, well, it is really a strange supposition to say that only Aboriginal law of all the laws in the whole world cannot undergo any change. Why such a supposition should be accepted remains unclear to me. If we are willing to accept and to engage in the reality of change in our own law, and if we can appreciate the ways in which the laws of other cultures throughout the world have had to change in accordance with the pressures of the modern world, then there seems no reason to make an exception for the indigenous laws of Australia and presuppose that they cannot also be adapted to the circumstances of the contemporary world.

Q.15 I think you made a reference during the hearing of the Yorta Yorta case to the importance of international comparisons, based perhaps partly upon your work in Cambodia, but specifically with respect to the historical position of Jewish people?

Kirby: Yes, I did. What I was trying to do then was to question the presentation of the Solicitor-General David Bennett QC by emphasising that particular point. You

see, when the Jewish people were separated from their homeland for 2,000 years they still managed to keep their culture alive during all that time. They did this by remembering it every Friday night and Saturday, and by other rituals. I knew the Solicitor-General was well aware of that, and I wanted to make the parallel clear. If that could happen internationally, with the Jewish people, then why should we not expect it to also happen here, in Australia?

Q.16 The Solicitor-General also made the statement in passing, if I remember it right, that there are no longer any Aboriginal people in Tasmania, which is quite a strange view to express in this day and age?

Kirby: There certainly are many people in Tasmania who claim to be Aborigines, but perhaps the Solicitor-General would question their history, perhaps he does not believe in the history that they believe in.

Q.17 The relation between history and law was one aspect not fully explored in that case, but I am also interested in the comparison between Australia and New Zealand, and I understand you have been interested in such a comparison for quite some time, indeed well before the aforementioned Douglas Graham lecture. What do you think are the important aspects of this comparison at present, both generally with respect to human rights and particularly with respect to the rights of indigenous peoples?

Kirby: Yes, I have a longstanding interest in relations between Australia and New Zealand, especially because we are such similar societies, albeit with some significant constitutional differences. You see, since New Zealand is mentioned in the Australian Constitution, it has been a dream of mine to embrace New Zealand so that we here can also enjoy some of the benefits of what they have achieved. But now that future political linkage, which was foreseen as possible at the time of Federation, is unlikely to occur, there are increasing connections in other areas, although there is a strong bias now towards economic contacts rather than developing cultural or other contacts. Everything seems to be connected with, or determined by, money instead of by other values or reasons for cooperation. Recently the Chief Justice of New Zealand, Dame Sian Elias was in Australia for a centenary conference about the High Court. There was so much emphasis at that conference on federalism and such matters, which New Zealand does not have to deal with, that I rather suspect the prospect of entering the Federation now would not have much appeal in New Zealand, however much we might both gain from it. However, there are other aspects of broader cooperation beyond the economic realm that might be successfully developed in future. There are parallels for us here from what is happening elsewhere in the world, especially in Europe, where cooperation initially focused mainly on economic relations has now extended to many other areas.

Regarding the situation for human rights, there has been widespread criticism in New Zealand in recent times of the current Australian approach to human rights, which is another area of difference where previously there was more of a similarity. Concerning the situations facing indigenous peoples in Australia and New Zealand, there are some important historical differences, which include the very strong Maori assertiveness at a national level in New Zealand, supported by the constitutional basis of their treaty, which establishes a different political situation than exists in Australia.

Q.18 Yet there are also historical parallels, because the Treaty of Waitangi was not respected by the authorities in New Zealand for over a century, and the changes that have occurred in recent decades particularly with the Waitangi Tribunal seemed to be broadly in parallel with some developments in Australia, until the last decade or so when there has been another historical divergence of Australia from New Zealand?

Kirby: Yes, that may be true, but this divergence might perhaps reflect the influence of other factors as well. The comparison needs to be viewed in terms of international as well as domestic aspects. In particular, there is another difference of perspective that has grown between Australia and New Zealand in recent decades, which is that Australia has been focusing much more on issues and countries to its north, whereas New Zealand's orientation has been and remains principally towards the Pacific.

Q.19 There is a point in my paper where I have quoted for comparison a statement by the Indian novelist, Arundhati Roy, who in response to what she sees as an inaccurate labelling of herself as "anti-national", says that 'it isn't necessary to be anti-national to be deeply suspicious of all nationalism, to be anti-nationalism'. [War Talk, p 47.] Do you agree with her about that?

Kirby: Yes, that statement expresses my own attitude very well. I am very sceptical of nationalism, but for me that does not and cannot mean being not for, or a part of, my own nation. After everything that my nation has offered me, all the opportunities that I have had by virtue of being a part of Australia, which might not have occurred in another place, such an attitude would be impossible to hold. Yet I think there are good reasons to be suspicious of all nationalism, in Australia as well as elsewhere, because of what has been going on in the world of international relations. Really, so much of what is done and said in international relations today is of an infantile nature. If you did not know, as we actually do, who is responsible for making these statements and taking the decisions, then you would think that many of the statements and decisions that are made today in international relations are the product of men at an age of excessive testosterone, rather than mature people with some understanding of the nature of the world and the complexity of its problems and the **critical** need for cooperation.

Q.20 Do you view the various international duties that you have undertaken, which have been beyond and in addition to your busy judicial role within Australia, as being the obligations of a global citizen?

Kirby: Yes, in a sense I do, although I have been quite happy to accept what you call obligations, since I don't see them as being some sort of an additional burden for me. By virtue of my positions in particular international organisations, I have had the great opportunity and the privilege of using my capacities to help make a contribution to improving the world in which we all live. I believe it is important for us all to use the brain capacity that we have actively, while it is still working well, because eventually there will come a time when it will cease to work. My international involvement has been a source of great interest over many years. This has complemented my judicial work, which is itself interesting, and provided me with many opportunities to travel and also to learn a lot from many other people involved in international organisations. I have had some further opportunities partly because I believe I have demonstrated my effectiveness in chairing meetings, and in producing a clear synthesis of decisions.

There was one occasion when I attended an international committee meeting in Paris, and at the end of a day the others involved in the meeting no doubt had a better idea of Paris and its opportunities than I did, so they went to the Café de Paris while I went back to my hotel room and produced a summary of what I thought had been agreed during that day's discussions, which I presented to the surprise and satisfaction of the other participants the following day. So I think that it is important to contribute to the best of one's abilities to the processes of international cooperation and understanding, and I have certainly tried to apply my capacities where they have been most useful.

Q.21 In a very interesting article published in Meanjin in 1991 on the subject of the intellectual and the law you suggested that, like Max Charlesworth, you were then 'among the last of the true liberals'. [Meanjin, Summer 1991 p 531.] What did you mean by that phrase, and how would you evaluate the current situation today?

Kirby: Now, I can't recall using that particular phrase, and I don't know about the implication of me being among the last of anything, but I would certainly still identify as a true liberal, in the sense of someone fully committed to open discussion and to using the power of ideas to promote rational change in society and to make the world a better place for everybody in it. Unfortunately, there seems to be less support and respect for this view than there was in 1991. The term 'liberal' has even in some places become a term of denigration or abuse. This is particularly so in the United States, where it has become harder than it was to find people who are willing to accept the term liberal and to promote the basic values of tolerance, compassion and respect for the human rights of others. There has been a similar shift in sentiment here in Australia towards the more conservative outlook prevailing at present, but I think this is just a temporary phase, which will pass. I am still optimistic about the future, and one reason for this is the increasing interconnection between Australians and the wider world, which runs strongly against the currently prevailing sentiment. The international criticism that has been made in recent years of various forms of Australian intolerance is something that is widely known within Australia, and this awareness of how the wider world sees us, and concern about it, shows that there is continuing potential for social change. I am as committed as ever to the importance of encouraging respect in Australia for universal human rights. My persistence about this might perhaps be viewed as a kind of Methodist pursuit of what I believe should be rightfully acknowledged, but I am not at all concerned with being seen as unfashionable. I think that my ideas provide their own justification, and my views about the importance of respect for human rights will gain increasing support.

Q.22 During the recent Morpeth lecture that you gave in Newcastle you referred in the question time there to the role of supernatural. What role do you believe that has?

Kirby: Well, I had an Anglican background and upbringing. I don't think I could say I've suffered from that experience, even though my sister would not allow her own children to be educated in a religious way. I do see some place for a supernatural role, although my partner and others do sometimes query how an intelligent and rational person can see a role for that. It is not something that I think must be taken literally, but is rather an additional element of experience that people can approach differently.

Q.23 When my paper was presented some weeks ago at UWA, a colleague there had two particular comments to make: firstly, that it does not include much analysis of

your judgments in different cases which is a bit like doing Hamlet without the Prince, and secondly, he raised a particular issue that you may or may not want to comment on which concerns any links that you may have had with the Labor Party and people in it, apart from your connection as a lawyer with Murphy?

Kirby: Taking the latter issue first, it is true that I knew Neville Wran and worked with him when I was an industrial relations lawyer, but that was some time before he went into politics. For myself, I was once, very briefly, a member of the Labor Party, but I only ever attended one Double Bay branch meeting and it clearly wasn't a place that was suitable for me. So I never returned and I did not renew my subscription when it expired, which was long ago. In terms of the left, or what's left of the left if there is anything left these days, I am sometimes categorised crudely as being someone who is always on the Labor side. There was an example of that only today in *The Australian*, with a columnist so characterising me. In fact, I haven't always voted only for Labor, or only for another party, so actually I am myself someone who is a swinging voter.

Regarding the former point, that was a significant and a perceptive comment by your colleague, but the significance of it really depends upon what you are trying to do. It would be possible and quite interesting, including for me, to read an analysis of the common themes in my judgments, as they are called, or reasons for judgment as I prefer to call them, but that would perhaps be a largely different exercise to what you are seeking to do. So the importance of this depends on the particular focus of your project, as to how much of a legal emphasis is required. There is a biography that I believe is being written about me, or will soon be written, by Dr A J Brown, which seems likely to present me and my ideas in their broader political context, rather than being focused on a lot of my judicial opinions. So this point is worth considering, but how you approach the task will ultimately be affected by the purpose of your analysis.

Q.24 Are you able to suggest several of the most significant cases for consideration?

Kirby: It is hard to provide an exhaustive or appropriate list of cases because what is required depends on the principal concerns you have, but it is worth giving attention to some of the most important key issues or areas and then link relevant or significant cases to those issues. Broadly speaking, the most important issues or areas to consider include: [about half a dozen particularly important areas were then mentioned]. If you wish, I will suggest some of the most significant cases concerning those areas, and send you a list of some of my opinions that you might usefully read. [later sent]

Q.25 What impact has your own personal experience of discrimination had on your outlook and perspective?

Kirby: It has been significant mainly in extending empathy on my part with all those in our society who have experienced, and who continue to experience, various forms of discrimination and oppression. But I should say that, apart from the prominence in the media of the Heffernan controversy, I haven't suffered directly from any harassment, and I haven't been bashed or assaulted myself. Of course it is unfortunately the case that when something erroneous appears in the media it cannot be entirely corrected by any statement later on, given the impact that has already made. However, since I had made my personal position clear in public many years ago the principal impact on me of the experience of discrimination has been to

develop my understanding of others who endure such experience, and to enhance my strength and commitment to ensure that every proper effort is undertaken to ensure that all such adverse discrimination is eliminated.

Q 26 What principal reasons would you give for your continuing optimism today?

Kirby: Principally, I remain optimistic and hopeful about the future because of all the positive changes that I have seen with my own two eyes during my lifetime, such as the **diminution** of various forms of discrimination **formerly taken for granted**, and the creation of closer international connections, and the involvement of many people acting together in order to improve humanity. I believe that there is in our species an inherent capacity for improvement, that we must act to use whatever capacities we have to make the world a better place.