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NATIONAL LAW UNIVERSITY  
ODISHA

CUTTACK, ODISHA INDIA

29 JULY 2018

JOURNEYS IN THE LAW 1958 - 2018

The Hon. Michael Kirby AC CMG

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The Hon. Michael Kirby AC CMG HON LLD (NLUO)\*\*

*RETURN TO THE FORT*

I salute the Honourable the Chief Justice of India, Chief Justice Dipak Misra, who is the Visitor to the University. I salute also the great Court that he leads. I understand that it is on his suggestion that I have the honour of being here today. So I thank him with all my heart.

I express thanks to the Vice-Chancellor, Council and members of the National Law University of Odisha for the honour of inviting me, a former Judge from Australia, to deliver this address to the Fifth Convocation for the conferral of degrees.

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\* Address at the fifth Convocation of National Law University Odisha on 29 July 2018.

\*\* On whom was conferred the degree of Doctor of Laws (honoris causa). Past Justice of the High Court of Australia (1996-2009); Chair of the United Nations Commission of Inquiry on North Korea (2013-14); Co-chair of the International Bar Association Human Rights Institute (2018-).

I am proud to join with my fellow graduates this day in celebrating our graduation from one of the finest national university law schools in India. Mind you, I have received mine without the irksome necessity of study and stressful examinations.

In a short span of time, students of this university have proved themselves amongst the best mooters and debaters in national and international mooting and debating competitions. In 2017, the NLU Odisha Mooting Team reached the semi-finals in the Jessup International Mooting Competition and were Octa finalists in 2016. Dazzling achievements lie ahead. The future beckons. So I also felicitate my fellow graduates for their toil and triumph. I congratulate their parents, families and friends who helped them to this day. From my years as a university chancellor in Sydney, Australia, I know what a special day this is.<sup>1</sup> Fellow graduates! Pause to thank your loved ones. Acknowledge that you would not be here but for their support. And reflect on the instruction given by outstanding teachers, stretching back to your first day in primary school.

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<sup>1</sup> The speaker was Chancellor of Macquarie University, Sydney (1984-93); Deputy Chancellor University of Newcastle (NSW) (1978-83); and Fellow, of the Senate, University of Sydney (1964-69).

My high school in Sydney is the oldest public school in Australia. Known as Fort Street High, it has produced many famous judges, scholars and explorers. It was built near the old British fort in colonial Sydney and was founded in 1849. To its students it is known as “the Fort”. That is the meaning of *Katak*, anglicised to Cuttack, the city in which this Convocation occurs. My journey has been one from a fort in Australia to a fort in India. Life is a journey. I will share with you some of the lessons that my journey has taught me.

### *IMAGINATION FOR THE UNUSAL*

This is not my first visit to Cuttack. Lawyers are not generally noted for geographical imagination. However, back in 1970, when I was 30, my partner persuaded me to interrupt my life as a young barrister in Australia, to join in a Kombi trip through India. We arrived in Madras (as Chennai was then called). We drove to Cape Kumari and up to Ooty, Jaipur. Down we drove to Calcutta. And on this epic journey we stayed overnight in Cuttack. Lucknow, Delhi, Shimla and the Grand Trunk Road lay ahead. I have seen more of India, I warrant, than anyone at this Convocation. Certainly, more cows on the road and wagons overloaded. We returned to do the same thing in 1974. We could not get the magical memories of India, the temples and the people, out of our minds. To this day, we still

talk of those two long journeys as the most wonderful years of our lives. After 50 years and much travel, India remains the jewel in our experiential crown.

I am proud today to return to Cuttack.

I am honoured to receive a Doctor of Laws degree from the Visitor. I am privileged to have the opportunity to address this Convocation. So what is the first lesson that I carry from those early days? It is to give way to imagination. To be ready to do the unusual in life. To be interested in, and engaged with, other lands and cultures. To wonder at the magnificence of the world. To realise its essential unity, in the human species and the biosphere. To appreciate that there is a life beyond the law. Law is important. But people, whom the law serves, are even more important. I thank Cuttack for bringing me back to its beauty. Life goes quickly. It seems but yesterday that I was first here. Yet it is 50 years since my last visit.

### *LAW SCHOOL & LEEWAYS FOR CHOICE*

When I left my school, the Fort, I also took BA LLB degree at the University of Sydney. Then it was the only law school in the State of New South

Wales. Now, there are more than 15 there. At the time of my legal education, which began in 1958, there was a great clash between the theory of law that was fashionable and propounded by distinguished judges and the theory propounded by great teachers of law, including Professor Julius Stone. Stone taught me international law and jurisprudence. The international law included many lessons on the then recent decision of the UN Security Council to send a UN force to repel the invasion of South Korea by North Korea. Little did I imagine that 50 years later I would chair a Commission of Inquiry of the United Nations into human rights abuses in North Korea.<sup>2</sup> It was in his lessons in jurisprudence that Professor Stone took on the big battalions of the judiciary in Australia. In those days, he was brave to do so.

The Chief Justice of Australia at the time, Sir Owen Dixon, a great judge, had declared there was no role for the courts except “strict and complete legalism”.<sup>3</sup> In this, he appeared to deny the creative role of the judges. He reinforced the “fairytale”<sup>4</sup> that judges had no creative role. Yet Stone explained, and illustrated, how creativity was inherent in the ambiguities of language and in the necessities of adapting old laws to new social

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<sup>2</sup> United Nations, Human Rights Council, Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea (A/HRC/25CRP.1) (7 February 2014).

<sup>3</sup> O. Dixon, speech on appointment as Chief Justice of the High Court of Australia (1952) 56 ALJ 2.

<sup>4</sup> Lord Reid, “The Judge as Lawmaker” (1972) 12 *Journal of Public Teachers of Law*, 22. See M.D. Kirby, *The Judges* (ABC Boyer Lectures 1983), 59.

problems. Judges had what Stone called “leeways for choice”.<sup>5</sup> They must be wise, principled and honest in exercising their choices.

At the time, this was a clash between Titans of the law in Australia. One of Stone’s research assistants of the time was a young Upendra Baxi from India. Later he was to return to India to become a great law teacher himself and Vice-Chancellor of the University of Delhi. He has remained my friend. Friendships made in university days sometimes last an entire lifetime. I like to think that my friend Upendra, knowing of the enormous challenges of India, urged Stone on to express more and more challenges to the great Dixon. That too is something that the young can and must do. Challenge orthodoxy.

The lesson of that period of my life was the importance of appreciating the choices we have in the law. Advocates and other lawyers, in-house counsel and judges have choices to push the law in good or bad directions. We must be alert to those “leeways for choice”. We must use them to the benefit of our societies. Law and the courts must remain uncorrupted and honest but adaptive to change. A lawyer and a judge is not flying the law on automatic pilot. He or she has choices to make. A

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<sup>5</sup> J. Stone, *Legal System and Lawyers Reasoning*, (Maitland, Sydney, 1964) 265-285.

great law school like this teaches how to find the choices and how to exercise them wisely.

### *LEGAL PRACTICE AND EDUCATION*

My years at law school were not always a good preparation for legal practice. Virtually every subject at law school in my day was compulsory. There was little choice. Rote learning was the way of those times. It was not a strong period in Australia for questioning the law. Our job as lawyers, we were taught, was just to apply it unquestioningly. Never mind the injustices. They were the prerogative of politicians. Never mind that the politicians were often indifferent. That was just how things were.

Never in my time at law school did I raise my hand to ask my teachers why our legal system had so many injustices:

- \* Why, in land law, we did not recognise the claim to title for their traditional lands of the Aboriginal people of Australia”?
- \* Why we did not allow people of different races (“non-whites”) to migrate to Australia during the long years of “White Australia”?



- \* Why women suffered so many inequalities in the law? Why to get a divorce a woman could only do so by suing in the domicile of her husband?
- \* Why Australia had no Bill of Rights? Why serious injustices affecting prisoners could not be cured by the courts because control of prisons rested in the Executive Government, not the judiciary.

As I look back on those days I feel ashamed that I never asked such questions. I never challenged the status quo. This only really happened after I left law school. Today, a great law school like this will imbue in its students the obligation to challenge. To know the law well. But also to challenge it and to accept the lawyer's duty to reform the law.

This is why law schools must ensure a diverse intake. Why they must welcome vulnerable students and help them to survive their studies. Why they must encourage engagement between lawyers and civil society. Why they must promote all forms of legal aid so that access to justice is not just a dream. Why they must expose miscarriages of justice and create innocence clinics. Why they must undertake reliable empirical research and law reform projects. Why they should be ready to learn from foreign

legal systems, just as I tried to do during my journey through India in the 1970s.<sup>6</sup>

A law school must, it is true, teach its students the essentials to get them through life so that they can truly help clients with problems in the law. But doing that is not inconsistent with preparing the lawyers of the future to push the law in good directions. After I left law school. I joined the Council for Civil Liberties and other *pro bono* activities to take on the powerful at the behest of the weak and vulnerable. National law schools in India may be ‘elite’ of the law in some senses. However, they should never succumb to unthinking corporatisation of law. I am glad that this university has established a Centre for Access to Justice, to make access to justice more of a reality for marginalised communities. And that it has established a Centre for Child Rights, with the support of UNICEF. And the Barefoot Lawyers College, to cater for unmet legal needs and to develop socially relevant legal education. This is why this university is ranked near the very top in the national law school universities in India.<sup>7</sup> The law school that only turns out self-satisfied lawyers who ask no questions is inherently a failure.

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<sup>6</sup> M.D. Kirby, “Unmet Needs for Legal Services in Australia: Ten Commandments for Australian Law Schools” (Leo Cussen Justice Lecture 2015).

<sup>7</sup> Opinion expressed in *India Today*.

## *GLOBALISM & ITS CHALLENGES*

During most of my journey through the practicing legal profession and early years in the judiciary, I worked in a legal system that distained international law. It rejected use of international sources unless they came filtered through the Judicial Committee of the Privy Council. At least that court gave us an occasional glimpse of other legal systems and the usefulness of reasoning and receiving new ideas in other jurisdictions. But generally speaking, the legal system in which I worked was strongly resistant to ideas from outside its territory. Even 20 years ago most lawyers in Australia were ignorant of, and indifferent to, the legal reasoning in adjoining states of the country. This was jurisdictionalism reinforced by localism. It was especially resistant to references to, or use of, overseas judicial authority. Especially where that authority made any mention of fundamental human rights.

In 1988, I had a stroke of luck. I was invited to return to India by Justice P.N. Bhagwati, then the Chief Justice of India. He summoned together a judicial meeting in Bangalore. Present at the meeting were distinguished judges from England, Zimbabwe, Pakistan, Malaysia and other lands. I came from Australia. Ruth Bader Ginsberg (later and still now a Justice of the Supreme Court of the United States) was the only non-

Commonwealth judge. We adopted the *Bangalore Principles on the Judicial Application of International Human Rights Norms*.<sup>8</sup> Those principles would later be influential in my judicial decisions both in the New South Wales Court of Appeal<sup>9</sup> and in the High Court of Australia.<sup>10</sup>

In fact, an approach very similar to the *Bangalore Principles* helped the High Court of Australia, before my appointment,<sup>11</sup> to overrule and re-express the common law concerning the recognition of the land title for Australia's Aboriginal people.<sup>12</sup> Later decisions of my colleagues were mostly hostile to the Bangalore approach.<sup>13</sup> But time is on the side of globalism in the law. In India it is supported by constitutional provisions.<sup>14</sup> It is also supported, even in Australia, by the practical realities of trade, travel and technology of the world we live in.

Our national laws must now operate in a world international law, including on the subjects of human rights and justice for all people. These are

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<sup>8</sup> M.D. Kirby, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 ALJ 514 at 531 (*Bangalore Principles*).

<sup>9</sup> See e.g. *Gradidge v Grace Bros. Pty Ltd* (1988) 93 FLR 414 at 422. See M.D. Kirby "The Australian Use of International Human Rights Norms from Bangalore to Balliol – a View from the Antipodes" (1993) 16 UNSW LJ 363.

<sup>10</sup> *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417 [166] ff per Kirby J. Cf 383 [95] ff per Gummow and Hayne JJ.

<sup>11</sup> *Mabo* (below) was decided in 1992.

<sup>12</sup> *Mabo v Queensland [No.2]* (1992) 175 CLR 1 at 42 per Brennan J.

<sup>13</sup> See e.g. *Al-Kateb v Godwin* (2004) 219 CLR 562 at 617 [152] per Kirby J. Cf at 589 [62] ff per McHugh J; *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 225 [181] per Heydon J; Cf 203-4 [100] ff per Gummow, Kirby and Crennan JJ.

<sup>14</sup> *Indian Constitution*, article 51 (c).

lessons the Indian courts and lawyers can help teach to a wider world. I pay tribute to many judges and senior advocates of India whom I have counted as my friends and teachers: Justice H.R. Khanna, Justice V.R. Krishna Iyer, Justice Bhagwati, Justice A.P. Shah, Soli Sorabjee and Fali Nariman and many others. Great spirits of the law. Their luminous writings speak, through the English language, to lawyers on every continent.

The lesson of Bangalore was the need for internationalism and a greater readiness in lawyers' minds to sharing ideas, analogies, approaches and notions of justice. We can share across borders. But not if we have learned our law by rote. Not if we apply its rules mechanically. Not if we believe in 'strict and complete legalism' and deny the choices that judges and lawyers must face every day.

The advances of technology bring us closer together; jumbo jets; the internet; artificial intelligence; the integrated biosphere and climate change; the perils of global epidemics; the challenges of the gender revolution; the special catastrophic risks of nuclear weapons. Localism will not do. This law school has prepared its graduates for a global world and a different future.

## *JOURNEY BACK TO OURSELVES*

My journey is almost completed. But, as in all journeys, it finally brings back to oneself. To our conscious minds that are unique, finite and that reflect upon deep moral questions, great and small. Like justice, fairness and universal human rights for all.

When I was at my law school, and later in the midst of my professional life, I had a dark secret that my society told me I had to keep to myself. It was a secret, unremarkable in itself, but that law and my society covered with shame and a code of silence. I refer to my sexual orientation as a gay man. In Australia, until the 1980s this was governed by criminal laws inherited from British colonial times.

For many years, I complied with the rule of silence. I did so although I knew that there were plenty of gay judges and plenty of gay lawyers. Always have been. Gays would be in this audience and in every audience. Science teaches that this is just one of the many variants in human nature. My brother was left handed. I was gay. Nothing to be ashamed of.

My partner, who journeyed with me 50 years ago, including in the Kombi trip through India, was Johan. Still together. I left his name out earlier;

but no more. He also loves this country. It was he who insisted that we should be open about this issue. We should do this, he said, for the young people. So that their journeys would be easier in the future.

So, this is the last lesson of my journey that I must share with you. It is relevant to this occasion. It is important that I share it with you. It is not irrelevant to the events of today, commissioning young lawyers for the future.

Indeed, it is central to our lives as lawyers – and especially if we become judges – to be honest, candid and respectful of human rights for all, including for our own humanity. Integrity lies at the very heart of a lawyer's life. Honesty, respect and kindness to one another, are vital accompaniments on our life-long journeys as lawyers.

Prejudice against others for who they are, not for what they have done, is anathema to lawyers. Lawyers are committed to the banner of equality. Equal justice under law for all. That is our banner.

I extend felicitations to my fellow graduates. Honour and praise to their parents and families. Respects to our law school at Odisha. And great expectations for all in the years ahead.