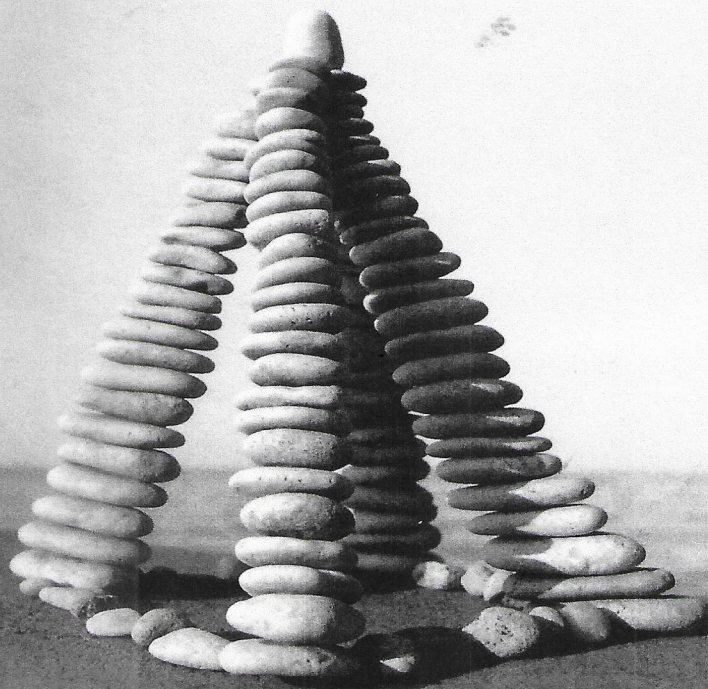


CONSTITUTIONAL CZARS

IN THE HALL OF FAME

Musings, Anecdotes & Episodes

N Vijayaraghavan
V Lakshminarayanan



Special Contributions

Justice P N Prakash

Justice G R Swaminathan

Justice N Anand Venkatesh


OakBridge



Justice G.R. Swaminathan,
Judge, High Court of Madras.

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JUSTICE MICHAEL D. KIRBY

How to introduce the Hon'ble Justice Michael D. Kirby? To say that he was a judge of the highest court of Australia would be factually correct, but not quite adequate. He is to Australian judiciary what Lord Denning is to UK and Justice V R Krishna Iyer and Justice H R Khanna put together are to us. Plus something much more. Many of us would have come across his erudite "Sexual Orientation & Gender Identity - A New Province of Law For India" (Tagore Law Lectures).

I got acquainted with him in 2019, thanks to Vikram Raghavan, the lead counsel at U N What opened the doors of friendship was my Arunkumar judgment. Arunkumar is a male who had married a transwoman. The couple wanted to register their marriage under the Hindu Marriage Act. The registering authority took the stand that a valid marriage can be solemnized only between a bride and a bridegroom; a bride is a woman on her wedding day; since Arunkumar had not married a woman, the marriage cannot be registered. I rejected this stand and held that a transwoman can also fall within the expression "bride" and directed registration of their marriage.

This judgment had warmed the heart of Kirby, J. Perfectly understandable! He possessed stunning looks and girls did fall for him. But he was simply not interested. Very early in life, Kirby realized that he was gay by inclination. Yet he had to keep it as a dark secret deep within. Australian criminal law contained the equivalent of our own Section 377 of IPC. There was also vigorous crack down and prosecution of persons accused of sodomy. Though Kirby had met Johan van Vloten in February 1969, he could make the relationship public only 30 years later. Australia had decriminalized homosexuality only in late 1990s. Kirby's commitment to Johan is comparable to Rama's loyalty to Sita. But he could formally marry Johan only on the 50th anniversary of their first meet because it took so long to legalize same sex marriage.

Kirby loves India and had been a regular visitor. He had been in Koyambedu market in 1970! He developed deep friendship with Justices Khanna, Krishna Iyer and Bhagwati. He was close to H M Seervai. Let me illustrate his great respect for our jurisprudence. Once I mailed a judgment of mine in which I had quoted Justice Ravindra Bhat who in turn had relied on a decision of Justice Kirby. I got the following response:

"This is often the way that important ideas spread from one common-law country to another. I copied Justice Bhagwati's reasons in Maneka Gandhi's case in my decision in the NSW CA of Osborne v Public Service Board of New South Wales. I upheld the right to reasons from a public official. I was joined in my opinion by Justice Priestley. Justice Glass dissented. But it was appealed to the High Court of Australia (before my elevation to that court). My decision was reversed. (1986) 159 CLR 656. But I have always considered that the Indian line of decisions was preferable to the Australian (based at that time mainly on English decisions that often reflected a bureaucratic attitude to secrecy that seemed inappropriate to a modern democracy)."

Kirby was born on the eve of the Second World War. He did not hail from a privileged background. He was precocious. He wrote a Will at the age of eight – the schedule of property comprising his books and some personal belongings. He spent hours on studies and was a topper both in school and college. His debating and oratorical skills made him a natural student leader.

He loved student politics and enjoyed his position as the President of Students' Representative Council (SRC), University of Sydney. However, in order to stay in the said role, he had to be doing a degree. Kirby copied the Dravidian model but in a positive way. I have heard that some of the leaders of the Dravidian movement used to deliberately fail in their examinations so that they could continue as students and propagate the ideology. Kirby instead joined one course after another and in the process, he got four degrees from Law to Economics and thus continued to be a student in the campus!

Kirby can be an inspiration to any aspiring young lawyer. He had no godfather in the profession. He had no background either. He simply put in long hours of work. His work ethic soon gained the attention of Lionel

Murphy, the then Attorney General who appointed Kirby as Deputy President of the Arbitration Commission at the young age of 35. Soon thereafter he was asked to head the Australian Law Reform Commission. The way he carried out his job made him a national figure. His reports compelled attention and the government could not ignore the same. The reports were personally written after great deliberation and thought. The general public was involved in the debates. Issues such as impact of technology on law, privacy and data protection with which we are now grappling were dealt with by him with consummate ease. He was seen as the man reshaping the laws of the nation.

In September, 1984 he was sworn in as President of the New South Wales Court of Appeal. He churned out a number of judgments and at the same time was deeply involved in the humanitarian activities of international bodies. He was the UN Special Representative for Cambodia for three years, from 1993 to 1996. He travelled widely throughout the country. He spoke directly to the people. He visited hospitals where people were dying of AIDS. Seeing human misery at such close quarters, he submitted a forthright report which laid the foundation for some fundamental changes.

In 1996, Kirby was elevated to the High Court of Australia (their High Court is equivalent to our Supreme Court, their Supreme Courts equivalent to our High Courts). His approach to adjudication stood out. At the very commencement of his professional career, his firm received an application from one Owen Westcott for representing him in a local court. Owen was an aboriginal Australian. He was fortunate to get admission in a university. Since the aboriginals were not allowed upstairs in the cinema hall, Owen decided to make it an issue. He purchased box office tickets and climbed the staircase with some aboriginal students and demanded entry. He was stopped and a scuffle ensued. He was arrested and charged with trespass and other offences. Kirby was his solicitor and his experience deserves to be recounted in his own words:

"I decided to get barristers for Owen, and we approached Gordon Samuels QC. He was later to be my colleague on the Court of Appeal in NSW. He immediately agreed to do the case pro bono. His junior was Malcolm Hardwick, an Oxford graduate, who also accepted the brief."

We examined the law and looked at a case that had gone to the Privy Council early in the 20th Century. It concerned a claim by a person who had boarded a Sydney ferry, who had bought a ticket, and who was entitled to travel on his ticket. We had a legal argument in the case. But, in the end, the magistrate found that Owen and his Aboriginal friend were guilty of trespass and blocking access to a public place. The magistrate dismissed the legal arguments but, under the First Offenders' provision of the Crimes Act, he proceeded to find the defendants guilty. He did not, however, impose a penalty.

That case brought it home to me that, despite the high aspirations we have of our legal system, the law in Australia was sometimes quite discriminatory. It was discriminatory against women, people of colour, and Aboriginal Australians. I knew discrimination extended also to me, as a gay man, at a time when the law criminalised gay activity. But it also taught me how important it was for lawyers to stand up for the right cases. Sometimes, even losing the case can have consequences that are beneficial for the state of the law.

The very week I retired from the High Court of Australia, I received a letter in the mail. It came from a man who said that, in 1965, he had been the magistrate in Walgett and had heard and determined the case concerning Owen Westcott. He said he greatly admired the way in which our legal team had defended Owen and his Aboriginal colleagues. However, he had not felt able, at the time, to uphold our arguments. He wanted me to know that, two weeks after the end of the case, the manager of the Walgett cinema announced that discrimination was ending, and that Aboriginals could go anywhere in the cinema.

Owen lost his case, but he won his cause."

This case left a lasting impact on Kirby's approach towards law and life. It underpinned his entire work. For him, compassion was fundamental judicial virtue. His commitment towards human rights and personal dignity was non-negotiable. No wonder, he was labeled as an activist Judge and criticized. He withstood calumny and character assassination. He was accused of having had sexual relationship with minor male prostitute. The accusation was made in the parliament with

the backing of the Prime Minister. For full one week, newspapers ran juicy and gossip stories. It then turned out that the allegation was not only false but built on forged documents. The accuser had to apologize and he was censured by the parliament.

Kirby, J became a loner on the bench. His colleagues were often not on the same page. Dissent became the norm. But he did not flinch. He stuck to his convictions. He reminded his colleagues "Judges of final courts will have to think a little bit differently because there is no further appeal. They have to think about the long term directions. They march to a different drumbeat... If they think that they are just an ordinary judge solving a problem, then they're missing both their responsibility and their opportunity in the final court of a nation." Obviously, they were not amused. When Kirby, J retired none of them even attended his farewell ceremony.

Kirby's love and care encompassed every section of humanity - from aborigines to AIDS affected patients. After his retirement, he became a voluntary of animal rights too. While launching a book "Animal Law in Australia" Kirby, J had this to say :

"If the ordinary Joe and Jill in the street knew how bacon comes to be made; how pigs are kept in close confinement in crates, unable to move or scratch themselves; how chickens, which are one of the most sociable of animals, are corporatized and killed on a production chain and pumped with hormones in order to get to the stage where they can be killed quickly; and how animals are pained during experimentation on them and other animals are subjected to terrible conditions for entertainment of human beings in sports, they would really think twice about it."

Kirby is now 83 and still going strong. He continues to engage himself actively in several pursuits, academic, intellectual, professional and humanitarian. He is an iconic figure. An inspiration to every one of us. In my perspective, a true constitutional Czar in the hall of fame.

**Justice G R Swaminathan,
Judge, High Court of Madras.**