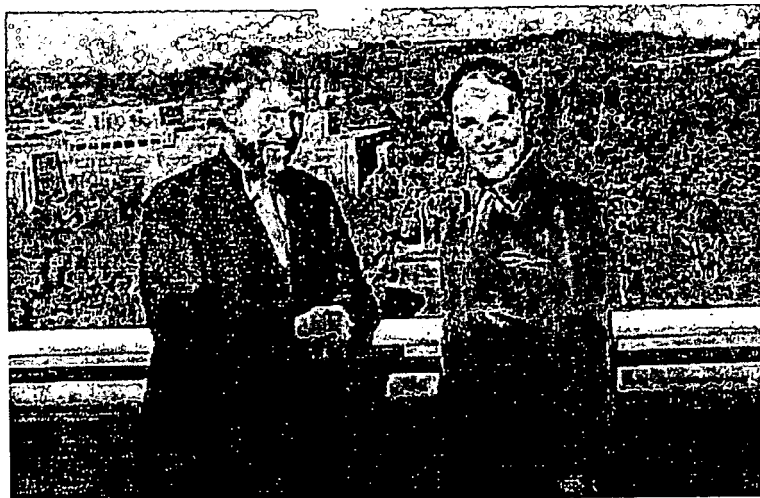




On the morning of 28 April 2003, the Honourable Justice Michael Kirby AC CMG gave his time to be interviewed for Peppercorn. His contribution to human rights law both in Australia and internationally, is widely recognised and admired. In February 1996, Justice Kirby was appointed as one of the members of the High Court of Australia. Appointed in November 1993 as the Special Representative of the Secretary General of the United Nations for Human Rights in Cambodia (a position he held until April 1996). Justice Kirby went on, in 1997, to be named Laureate of the UNESCO Prize for Human Rights Education. In 1991 he was appointed a Companion of the Order of Australia for his contribution to law and law reform.

Which countries have been most progressive in implementing human rights standards since the creation of the UN?

You would have to say Scandinavia and the old English-speaking democracies. But the biggest impact is not in those countries where human rights would normally muddle their way to the correct solution. The biggest impact is in new countries that didn't have an established indigenous legal system or other countries that had an autocratic or dictatorial legal tradition. In those countries the charters of human rights were, and are, extremely important. They continue to play a very big educative role. Indeed, they continue to press us all to a greater respect for human rights. And by "all" I mean, all of us: the Scandinavian countries, the old democracies and Australia as well as autocracies and dictatorships.

Given the varying conceptions of what basic human rights should consist of, is suspicion of the effectiveness of international law justified?

There is some difference about the content of human rights. However, there is also a great deal of agreement. I wouldn't want to over-emphasise the points of difference and suspicion. For example, the Singapore Foreign Minister pointed out at the Vienna World Conference on Human Rights that it wasn't so long ago that Britain refused to allow women to vote. It wasn't so long ago that countries like Australia and Canada locked up gays. It wasn't so long ago that many Western countries had racial discrimination enshrined in their statutes. Laws on White Australia were a

feature of the Australian scene when I was growing up, so it's all in human memory. Therefore, we are all on a road of discovery and of enlightenment. However, there are some stragglers and some rear-guard reactionaries. We have to gather them up and bring them into the fold. Even as we speak, a resolution is before the United Nations Human Rights Commission on the issue of the human rights of homosexuals. In a vote on that issue the world is sharply divided. On 25 April 2003, the Islamic countries sought, and obtained, an adjournment of the resolution; but it will come back next year. The lesson of the half-century since the beginning of the revolution in global human rights is that progress takes time. Paper victories are not enough. Yet the course of expressing and upholding human dignity in international human rights law is unstoppable.

How has international law primarily influenced and shaped Australian domestic law during the past decade?

To answer this you have to divide international law into at least two categories. First, there is the vast area of international law which is dealing with the relationship between States, international trade and matters of a technical kind. There is a huge amount of such law. In a sense, technology has forced it on us. Fast-moving planes need international agreements to permit them to cross the airspace of other nations. Information technology and cyberspace demand responses from a co-operative legal system. Fast developing problems like HIV/Aids or SARS call forth international responses. Those responses are often expressed in international agreements. So there is a vast amount of law of that technical kind. Trade law, for example, is an extremely important part of international law. In our relations with New Zealand for example, the Close Economic Relations Treaty is the clearest example of that. Issues under that treaty came before the High Court of Australia in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355. Therefore, problems of that kind come before the courts all the time.

The second part of international law is the international law of human rights. This has grown since the Universal Declaration on Human Rights. Indeed, it was foreshadowed by the Charter of the United Nations. That area of human rights has a very great impact because of the terms of international treaties such as the Refugees' Convention, which is incorporated in the Migration Act as part of Australia's domestic law. Other treaties have an impact because Australia is a party to the optional protocols for the complaints by citizens against Australia's non-compliance with such treaties. The decision in *Mabo v Queensland [No2]* (1992) 175 CLR 1 at 42, in respect of native title, took as an important starting point the obligation of Australia to conform to rules against racism in the International Covenant on Civil and Political Rights. This most interesting idea challenges the basic doctrine of dualism. That is to say that international law is something separate and apart from domestic law. Since the Bangalore Principles of 1988 many courts throughout the Commonwealth of Nations and beyond have been looking to international human rights law to resolve ambiguities in the Constitution of the nation, in legislation enacted by Parliament and gaps in the common law or the unwritten law. So this is the way by which international law is coming to affect our domestic law. The clearest and most important Australian example of the application of the Bangalore Principles of 1988 is in the *Mabo* decision. We are therefore seeing the interaction of international law and municipal law. We shouldn't be surprised at this. If you live in

a world of global interactivity, you have got to expect there to be rules. Those rules are now greatly influenced by the developments of international human rights law and international law generally.

What areas of human rights law will take precedence in future years?

International trade law is very important. It's interesting to think that the Closer Economic Relations Treaty with New Zealand is, in a sense, rather like the Treaty of Rome. You will remember that the European Community began as the European Economic Community. It began not so much as a political entity as a trade entity. It will be interesting to see whether in our relations with New Zealand we go down the same or a similar path. Trade brings countries together. It interlocks their economies and their technology. Nowadays it makes war extremely difficult or unthinkable. That's why the big impact of the European Economic Community, now the European Union, is not limited to the degree to which it enhances trade between the member countries and increases the standard of living (and thereby contributes to human rights and human happiness). These developments also reduce the risks of war and conflict. They thereby contribute to international peace and security.

If you go back to the Charter of the United Nations you will see that the Organisation was founded on three principles: international peace and security, international economic equity and international human rights. They are really the three foundations of the modern world legal order. The pushing forward of international law in a consistent, coherent way is all of a piece. It has a unity because the world we live in is now so much more interdependent. The existence of effective legal rules helps to make sure that we live together in peace, harmony and mutual respect. This is a natural development. It continues to gather pace.

I think that it's an exciting time to be a lawyer because the development of international law is something new. Past generations of lawyers didn't have to worry too much about international law. International law was the activity of princes. Now, increasingly, in this generation, international law is having a daily impact on our legal system. Good lawyers are increasingly alert to it. Swimming with self-satisfying in our own little Antipodean backwater of so called "strict and complete legalism" cuts us off from the rest of the world. Perhaps it's intended by its adherents to do so. But it can't last. Fundamentally, it is deceptive: at best self-deceptive.

In your commitment to bringing human rights issues to the fore of public consciousness, what types of changes do you strive to affect?

Well I strive to work within the law. There are plenty of instruments that are now available as part of the law. Most of them are statutory. For example, quite a lot of cases come to the High Court in respect of refugees. That, to a large extent, involves applying the international Refugees Convention of 1951 which Australia ratified and which it incorporated into its domestic law in the *Migration Act* 1958 (Cth). As well as that, other aspects of international law come frequently before the court. Extradition law is a common visitor. It was considered recently in a case in Hong Kong in *Attorney-General (Cth) v Tse Chu-Fai* (1998) 193 CLR 128 and in another case involving Poland, the case of *Oates v The Commonwealth* [2003] HCA 21 which was decided recently. In addition to that, International trade law comes before the

Court from time to time, as the *Project Blue Skies* case shows. International human rights principles come up in all sorts of cases. They even come up in constitutional cases in my opinion as in the *Kartinyeri* case (1998) 195 CLR 337. These are the ways in which international law has a big and growing part to play in the Australian legal system.

What challenges will students entering into the legal profession today face that differ from those you were exposed to at the commencement of your career?

One challenge is actually getting into law. I heard last week of the percentile qualification that is necessary to get into Australian law schools. It was astonishing to me. Many fine lawyers of the past (including Sir Owen Dixon) would probably not have got into law on those HSC requirements. (I would have because I was always a bit of a swat!) But many would not. That fact raises a question as to how we are now selecting our future lawyers. Are the people we are choosing those who will be most empathetic to the problems of ordinary folks? Because of my background, upbringing, religion and education I never feel very different from ordinary folks. I hope that the selection procedures of lawyers are not making it more difficult for the legal profession to reflect the aspirations and values of ordinary citizens more than was already the case when I entered the law school. I say that because lawyers often advance to positions of great responsibility within the practice of law, in government, in business and in the judiciary. They have power. That fact makes the choice of lawyers very important indeed.

Secondly, I think the ethical principles of the legal profession are in some ways different today. It was much more small time in my generation. Nowadays, with the growth of national firms and even international firms and the erosion of country practice and suburban practice, the delivery of legal services is quite different from what it was 40 or even 20 years ago. It seems more commercial - a business not a calling. I'm not saying that all of these changes are for the worse. On the contrary, the provision of legal aid, especially in criminal cases, and the growth of bodies such as the Public Defenders is definitely a step in the right direction. Yet in our legal system we have a big problem of delivering the product. That problem has become aggravated, not wholly solved, in my time. To some extent this is the product of the forces of globalism and regionalism, as I mentioned earlier. To some extent is a product of economic forces. To some extent it's the result of the abolition, or decline, of big turnover areas of legal practice. For example, we are seeing that happening to personal injury law now because of caps and limitations that have been enacted or proposed.

Thirdly, there is the importance of international law. Previously, it was not an important practical subject. It was merely an interesting theoretical subject. Now, because of the growth of international trade law and international human rights law and the growing practical impact of those areas of law, we are seeing the growing relevance of international law. That is a good and natural thing. We must all be alert to it. It will make us more creative. Sometimes it will help us to avoid clear injustice and disharmony in the law.

International Law is only compulsory at a few Australian law schools.

It was compulsory in my day. In my day many things were compulsory. There was relatively little choice in the law course at Sydney Law School in the 1960s. We could choose between exotic subjects like Admiralty and Lunacy. However, most subjects, the core subjects, were overwhelmingly compulsory. Jurisprudence, for example, was compulsory. I'm always shocked when I go to law schools and find that jurisprudence is not compulsory and there is no equivalent subject. Jurisprudence or some subject like it is what gets us thinking about what we're actually doing as lawyers; what law is all about; what theories of law and justice exist. The practice of law is inevitably concerned with justice, at least as I approach it.

Finally, what's the one thing law students should know about the legal profession that they won't find written in a textbook?

To love justice. To be concerned about injustice and to do what we can, using legal means, to cure injustice. To be sensitive to injustice and to be aware that the law is sometimes itself an instrument of injustice, as we have seen in laws that denied the rights of Aboriginals, that restricted women's votes and equality, that stigmatised Asian Australians and that locked up gays. The constant questioning of the law and doing what you can, within the letter of the law, to improve it is a contribution lawyers can make to our democracy. I find it hard to tolerate lawyers' complacency or indifference to clear injustice and inequality in the law.

Democracy is not simply a majority voting up on the hill in Canberra. Democracy is a complex interaction of institutions that bring a good quality of life to all people and ensure respect for the human dignity of all people. Lawyers have more than usual power to influence the way our institutions work. I therefore see myself as a participant, under the Constitution, in a democratic symphony. I don't know whether I am a double bass or a violin or just an occasional clinking cymbal. But I do know that everyone has to play their part. The hope and aspiration must be that the entire symphony, though occasionally cacophonous, will eventually yield a beautiful harmonious sound with a part for everyone to play. A symphony of equal justice under law.

