Justice Kirby, Human Rights and the Exercise of Judicial Choice

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In 1988 the Hon Justice Michael D Kirby[1], President of the Court of Appeal of the New South Wales Supreme Court delivered a paper to a judicial colloquium in Bangladore, India, convened by the Commonwealth secretariat and the Government of India on the domestic application of international human rights norms. The colloquium resulted in the adoption of the 'Bangladore Principles'. In February 1996 Kirby J was appointed to the Hight Court of Australia. Since that time he has delivered in excess of 250 judgments which have been reported in the Commonwealth Law Reports. This research paper explores the extent to which, since his appointment to the High Court, Kirby J has sought, through his judgments, to ensure compliance by the High Court with Australia's international obligations.

INTRODUCTION

In 1988, Justice Michael D Kirby, then President of the Court of Appeal of the New South Wales Supreme Court delivered a paper to a judicial colloquium in Bangalore, India convened by the Commonwealth Secretariat and the Government of India on the domestic application of international human rights norms. The colloquium resulted in the adoption of the *Bangalore Principles*.[2] In the course of his paper he said:

> [T]here is often plenty of room for judicial choice. In that opportunity for choice lies the scope for drawing upon each judge's own notions of the contents and requirements of human rights. In doing so, the judge should normally seek to ensure compliance by the court with international obligations of the jurisdiction in which he or she operates. ... This perception of the function of courts in human rights questions is one which I find persuasive.[3]

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1 Michael Donald Kirby was appointed to the High Court of Australia in February 1996. At the time of his appointment he was President of the New South Wales Court of Appeal, having been appointed to that office in September 1984.
He was admitted to the New South Wales Bar in 1967. He was appointed a Deputy President of the Australian Conciliation and Arbitration Commission in 1975. He served as first Chairman of the Australian Law Reform Commission from 1975 to 1984. In 1983 he became a judge of the Federal Court of Australia, serving on that Court until 1984. He has held numerous national and international positions including on the Board of CSIRO, as President of the Court of Appeal of Solomon Islands, as UN Special Representative in Cambodia and as President of the International Commission of Jurists. In 1991 he was appointed a Companion in the General Division of the Order of Australia

2 (1988) 62 *Australian Law Journal* 531. A summary of the same appears later in this paper.

3 M D Kirby , 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms', (July 1988) 62 *The Australian Law Journal* 514.

In February 1996 Kirby J was appointed to the High Court of Australia ('the High Court'). In the first two and half years of his appointment he delivered in excess of 250 judgments which have been reported in the *Commonwealth Law Reports*.[4] This research paper explores the extent to which, in that time, Kirby J has sought, through his judgments, to 'ensure compliance by the [High Court (Australian law)][5] with [Australia's] international obligations'. In undertaking that examination I eliminated from consideration those judgments his Honour delivered jointly with other members of the High Court.[6] Consequently, there were 84 decisions to be taken into account. 86% of those decisions concerned subject matters unrelated or remote to human rights and therefore they have not been considered further in this paper.

The remaining 12 High Court decisions of his Honour can then be divided into three classes. First, those decisions in which it was necessary for the High Court to interpret international human rights obligations that Australia has incorporated into its domestic law. Secondly, cases in which Kirby J has referred to (but, not necessarily relied upon) international human rights norms, and thirdly those decisions in which his Honour has sought to rely upon international human rights law principles which are not a part of Australia's municipal law.

It is having regard to this latter, albeit small, category of decisions that, it is contended, demonstrates a consistent commitment by his Honour to use and promote international human rights norms.

Kirby J is not the only Justice of the High Court to take such an approach to judicial reasoning. In fact there have been, at least since 1978,[7] more and more examples of the High Court applying international human rights norms.[8]However, a focus on Kirby J is appropriate given his preparedness to publicly acknowledge that 'judges do make law.... just as surely as the Executive and the Legislature make law';[9] and secondly, his preparedness to publicly defend the right (his Honour might prefer responsibility) of judges to be judicial activists.[10] Further, although Kirby J is not the youngest member sitting on the High Court Bench, it can reasonably be expected that he has before him at least another 81/2 years in which, as Australia's leading human rights jurist, to 'stamp upon [17] million people his ... viewpoint about the meaning of the Constitution, the limits of government power and the content of the human rights of people in

4 (1996) 186 CLR 630 - (1999) 196 CLR 553.

5 There are a number of examples of his Honour attempting to 'ensure compliance by the [Supreme Court of New South Wales] with [Australia's] international obligations'. See those cases cited by his Honour in M D Kirby, 'The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A New View from the Antipodes' (1993) 16(2) *University of New South Wales Law Journal* 363.

6 Obviously it is not possible to attribute responsibility for the use of international human rights instruments to any particular judge when the decision is a joint one.

7 *Dowal v Murray & Anor* (1978)143 CLR 410 (Murphy J) as cited in M D Kirby The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View from the Antipodes, (1993) 16(2) *University of New South Wales Law Journal* 363, 375.

8 See generally Penelope Mathew, 'International Law and the Protection of Human Rights in Australia: Recent Trends', (1995) 17 *Sydney Law Review* 178 and also M D Kirby, 'The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View from the Antipodes', (1993) 16(2) *University of New South Wales Law Journal* 363.

9 M D Kirby, 'The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View from the Antipodes', (1993) 16(2) *University of New South Wales Law Journal* 363, 372.

10 By *judicial activist* I mean a judge who is prepared to make new law or take a lead in the development of the law before there is public consensus about or support for the same such that it might be achieved through political processes (ie at the ballot box).

[Australia]'.[11]

In order to better appreciate the judicial work of Kirby J, section II of this paper will establish what is meant by Australia's international human rights obligations having regard to the primary international instruments[12] to which Australia is a party. Section III of the paper will then examine the current judicial authority concerning the status of international human rights law in Australian municipal law.

Sections IV and V of this paper will, respectively, acquaint the reader with the arguments advanced against judicial activism and those suggested by Kirby J for judicial creativity in his 1988 Bangalore address (and then more recently). Section VI then summarises the relevant decisions (in the three categories above) in which Kirby J has referred to or considered Australia's international human rights obligations. The paper concludes with an assessment of his Honour's judicial practice as one being inconsistent with, what his Honour refers to as, the 'irritating habit of judicial restraint'[13] and one which advances international human rights in Australia in a modest way consistent with the *Bangalore Principles*.

AUSTRALIA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS[14]

In *Kruger v Commonwealth of Australia*[15] Dawson J said:

> ... [T]he Australian Constitution, with few exceptions and in contrast to its American model, does not seek to establish personal liberty by placing restrictions upon the exercise of governmental power. Those who framed the Australian Constitution accepted the view that individual rights were on the whole best left to the protection of the common law and the supremacy of parliament. Thus the Constitution deals, almost without exception, with ..... distributing power between the federal government ... and the State governments. ... The Constitution does not contain a Bill of Rights. Indeed, the 1898 Constitutional Convention rejected a proposal to include an express guarantee of individual rights...[16]

It is conceivable that it is this constitutional feature that has facilitated Australia's sometimes poor human rights record. For example because of a lack of a Constitutional protection for basic human rights successive Australian

[11] Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms', above n 3 516.

[12] It is not possible in, in a paper of this size, to exhaustively explore all of Australia's international human rights obligations. Accordingly, the reference, in this paper, to primary international instruments is to be taken to be a reference to: The *International Declaration of Human Rights* 1948, the *International Covenant on Civil and Political Rights* 1966, the *International Covenant on Economic, Social and Cultural Rights* 1966.

[13] Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms', above n 3, 519.

[14] See generally David Kinley (Ed) *Human Rights in Australian Law* (1998) including the very useful table compiled by Kate Eastman, xxxii- xxxiii. Also, Hon EG Whitlam, 'The Eighteenth Wilfred Fullagar Memorial Lecture: International Law Making,' (1989) 15 *Monash University Law Review* 176.

[15] (1997) 146 ALR 126.

[16] Ibid 153 - 4.

Governments were not prohibited from appropriating mixed European/Aboriginal children from their families. This practice which resulted in the tragedy of the 'Stolen Generation'[17] was not contrary to the *Australian Constitution*.[18]

Accordingly, it is not entirely surprising that Australia and Australians have had to look towards the international arena for a statement of its obligations and their human rights. The most notable source of such obligations are the treaties to which Australia is a party.

The primary international human rights instruments to which Australia has acceded include the:

- *Universal Declaration of Human Rights* ('the *UDHR*'),[19] which is a 'statement of rights to which [in 1948] no country objected'[20];
- *International Covenant on Economic, Social and Cultural Rights* ('the *ICESCR*'),[21] which calls for progressive implementation[22] by State parties; and
- *International Covenant on Civil and Political Rights* ('the *ICCPR*'),[23] which calls for immediate implementation[24] by State parties.

This 'troika' of international human rights instruments calls for the protection of a number of basic human rights. Often these human rights are classified as either 'first generation' or 'second generation' depending on whether they relate respectively to civil and political rights or economic, social and cultural rights.

> From one point of view, this second-class treatment of second generation rights is surprising. After all, ... the UDHR makes no distinction between the two categories of rights. Further, the United Nations has repeatedly affirmed that all the rights enshrined in the international Bill of Rights are interdependent and indivisible.[25]

Any customary list of human rights would include such features as the right to: life,[26] liberty and security of person,[27] equality before the law and without discrimination to equal protection of the law,[28] be free from arbitrary arrest, detention or exile,[29] the economic, social and cultural rights indispensable for ... dignity,[30] work, to free choice of employment, to just and favourable conditions

17 Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, '*Bringing them Home*' April 1997, <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/>

18 Above n 16.

19 10 February 1948, entered into by Australia on that day.

20 Peter Bailey *Human Rights - Australia in an International Context* (1990) 1.

21 4 January 1976, entered into by Australia on 10 March 1976.

22 *ICESCR* art 2.

23 23 March 1976, entered into by Australia on 13 November 1980. Australia has also ratified (in September 1991) the *First Optional Protocol to the ICCPR* which makes it possible for complaints to be made to the UN Human Rights Committee.

24 *ICCPR* art 2.

25 Paul Hunt, 'Reclaiming economic, social and cultural rights: The Bangalore Declaration and Plan of Action' 1996 *New Zealand Law Journal* 67.

26 art 3 *UDHR*, art 6 *ICCPR*.

27 art 3 *UDHR*, art 6 *ICCPR*.

28 art 7 *UDHR*, arts 14(1) and 26 *ICCPR*.

29 art 9 *UDHR*, art 9(1) *ICCPR*.

30 art 22 *UDHR*, arts 9 and 15 *ICESCR*.

of work and to protection against unemployment,[31] and to education.[32]

This is by no means an exhaustive list.

In addition Australia has entered into or supported specific human rights instruments such as the:

- *Convention Relating to the Status of Refugees*;[33]
- *Protocol Relating to the Status of Refugees*;[34]
- *Declaration on the Rights of the Child*;[35]
- *Convention on the Rights of the Child*;[36]
- *Discrimination (Employment and Occupation) (ILO Convention 111)*;[37]
- *International Convention on the Elimination of all Forms of Racial Discrimination*;[38]
- *Declaration on the Rights of Mentally Retarded Persons*;[39]
- *Declaration on the Rights of Disabled Persons*;[40]
- *Convention on the Elimination of all forms of Discrimination Against Women*;[41]
- *Declaration on the Elimination of All Forms of Religious Intolerance*;[42] and
- *Convention Against Torture and other Cruel Inhumane and Degrading Treatment or Punishment*.[43]

Few of the above instruments have been specifically incorporated into Australian municipal law. However, a number of the above treaties 'including the ICCPR and the ICESR, and resolutions or declarations of international bodies which are not formally binding at international law, are scheduled to the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth). Inclusion in the schedules, however, does not confer full legislative force or justifiable rights.'[44]

Another source of Australia's international human rights obligations arises out of the operation of customary international law and also a special branch of it known as *jus cogens*. That is those obligations which a

> number of jurists [have] identified [as] certain basic principles of international law ... from which states cannot derogate. These principles stand at the top of the international law hierarchy above other norms and principles. ... [because] it is accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the

31 art 23 *UDHR*, art 7 *ICESCR*.

32 art 26 *UDHR*, arts13 and 14 *ICESCR*.

33 22 April 1954, entered into by Australia on 22 January 1954. The *Migration Act* 1958 (Cth) adopts the Convention definition of refugee in s 5.

34 4 October 1967, entered into by Australia on 13 December 1973.

35 20 November 1959, supported by Australia on that day.

36 2 September 1990, entered into by Australia on 16 January 1991.

37 15 June 1969, entered into by Australia on 15 June 1974.

38 4 January 1969, entered into by Australia on 30 October 1975.

39 20 November 1971, supported by Australia on that day.

40 9 December 1975, voted for by Australia on that day.

41 3 September 1981, entered into by Australia on 28 August 1983. Note that the current Federal Government has refused to ratify the *Optional Protocol* to the Convention.

42 25 November 1981, supported by Australia on that day.

43 26 June 1987, entered into by Australia on 7 September 1989.

44 Penelope Mathew, 'International Law and the Protection of Human Rights in Australia: Recent Trends', (1995) 17 *Sydney Law Review* 178, 183.

same character.[45]

International human rights considered to be in the category of *jus cogens* include 'the prohibitions on slavery, genocide and racial discrimination.'[46]

THE STATUS OF INTERNATIONAL HUMAN RIGHTS LAW IN AUSTRALIAN MUNICIPAL LAW

Although the former Chief Justice of Australia, the Honorable Sir Anthony Mason has mused that 'customary international law may form part of our law without legislative incorporation'[47], and that may be the case generally '[t]he Australian approach to the implementation of rules of customary international law is [not] clear. ... [as] there has been no decision where the issue has been directly considered.'[48]

However, the same uncertainty cannot be said for the legal consequence of treaties.

> It is a well settled principle of the common law that a treaty ... has no legal effect upon the rights and duties of Australian citizens and is not incorporated into Australian law on its ratification by Australia. ... To achieve this result the provisions have to be enacted as part of our domestic law, whether by Commonwealth or State statute.[49]

There are two policy reasons why treaties do not automatically become a part of domestic Australian law.[50] The first arises out of the tension that exists between the Executive and the Parliament in this country because of their different roles.

> In Australia it is rare for the Executive Government, elected by a majority of representatives in the Lower House of Federal Parliament, to command a majority in the Upper House.... Accordingly, it is perfectly possible for the Executive Government to negotiate a treaty which would have the support of the Executive and even of the Lower House but not of the Upper House of Parliament. The objects of the treaty, ratified by the Executive Government, may be rejected by the Senate. Legislation to implement a treaty, if introduced, might be rejected in the Senate. It might thus not become a part of domestic law as such. If, therefore, by the procedure of direct incorporation of international legal norms into domestic law, a change were procured, this would be to the enhancement of the powers of the Executive. It would diminish the powers of the elected branch of government, the Legislature. As the Executive may be less democratically responsive than the Legislature, in its entirety, care must be taken in adopting international legal norms incorporated in treaties that the democratic checks necessitated by a

45 Andrew D Mitchell 'Genocide, Human Rights Implications and the Relationship between International and Domestic Law: *Nulyarimma v Thompson*' (2000) 24 *Melbourne University Law Review* 15, 19.
46 Department of Foreign Affairs and Trade *Human Rights Manual* (1993) 31.
47 Sir Anthony Mason, *Human Rights and Australian Judges* (1996) 10.
48 Mitchell, above n 46, 29 - 30.
49 *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168, 224 (Mason J).
50 For an excellent discussion of the relationship between international and domestic law see Mitchell, above n 46, 25 - 30.

requirement of legislation to implement the treaty are not bypassed.[51]

Accordingly, 'the protection of human rights in Australia therefore rests largely on statutory foundations. The relevant statutes, whether Commonwealth or State, deal with particular aspects of human rights.'[52]

The second policy reason finds its genesis in the fact that Australia has a federalist system of government comprising one Federal, 6 State and 2 main Territorial Governments. The Federal Executive may be at liberty to enter into treaties but may not be able to enforce compliance with them because of the task of having to obtain 'the legislative assent not of the one Parliament to whom they may be responsible, but possibly to several Parliaments to whom they stand in no direct relation.'[53] However, the existence and use of the external affairs power weakens this argument.

Accordingly, this policy reason is again based on a desire not to substantially disturb established limits on powers. 'The fear which is expressed, in the context of domestic jurisdiction of federal states, is that the vehicle of international treaties (and even of the establishment of international legal norms) may become a mechanism for completely dismantling the distribution of powers established by the domestic constitution.'[54]

The practice of referring 'to international treaties ratified by [a] country as a source of guidance in constitutional and statutory construction and in the development of the principles of the common law',[55] while relatively recent,[56] is not unique to Australia. It is now a well established doctrine in other common law countries.[57]

However, the status of international law has been given greater standing as a result of the High Court's decision (before Kirby J's appointment) in *Minister for Immigration & Ethnic Affairs v Teoh*.[58] This case has been acknowledged by Kirby J as standing for the proposition that:

> while the ratification by the executive of [a] Convention did not, as such, incorporate its provisions into domestic law, it nonetheless affected the lawful exercise of administrative discretion. The positive statements by the executive, manifested by the act of ratification, of its intention to act in accordance with its provisions, gave rise to an expectation that officers of the executive would not act in a contrary manner. If they contemplated doing so, they should provide an opportunity to the person affected to argue against such

51 Kirby, The Australian Use of International Human Rights Norms, above n 10, 369.

52 Sir Anthony Mason 'The Role of the Judiciary in Developing Human Rights in Australian Law' in David Kinley (Ed) *Human Rights in Australian Law - Principles, Practice and Potential* (1998) 27.

53 M D Kirby, 'The Australian Use of International Human Rights Norms', above n 10, 370 citing *Attorney General for Canada v Attorney General for Ontario* [1937] AC 326, 348.

54 Ibid.

55 Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms', above n 4, 515.

56 Aside from the decisions of Murphy J, Kirby J cites, in The Australian Use of International Human Rights Norms, above n 10, 386, the important decision of the High Court in *Mabo v Queensland* (1992) 175 CLR 1 and in particular the decision of Brennan J in which he stated, at 422, that 'The common law does not necessarily conform with international law, but 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.'

57 Ibid. See in particular his Honour's consideration of the practice of the English Courts.

58 (1995) 128 ALR 353.

> a course. This was necessary to satisfy the requirements of procedural fairness.[59]

Further, and probably more significantly, even before his Honour's appointment to it and prior to the decision in *Teoh's* case, the High Court was 'willing to look to international legal standards and practice concerning human rights to guide their judgments. The *Mabo* decision[60], in which the High Court recognised native title, is the leading example of this development.'[61]
In that decision his Honour Justice Brennan said:

> ... [I]nternational 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. A common law doctrine founded in unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule.[62]

THE CASE AGAINST JUDICIAL ACTIVISM

Having regard to Australia's international human rights obligations and the limits on them forming a part of municipal law questions arise as to whether

> [a] judge should simply wait until the local lawmaker, within constitutional competence, has enacted law on the subject? Should the judge wait until the federal lawmaker has enacted a constitutionally valid law on the subject? Or is the judge authorised to cut through this dilatory procedure and to accept the principle for the purpose of interpreting ambiguous statutes or developing local common law?[63]

During the Sir Anthony Mason Lecture[64] in September 1999 Kirby J made the case for the *Australian Constitution* to be considered a 'living force' and referred to his own decision in *Re Wakim*[65] where his Honour said 'the makers [of the Constitution] did not intend, nor did they have the power to require, that their wishes and expectations should control us who now live under its protection.'[66]

However, not all are convinced about the appropriateness of the case advanced by his Honour.[67]

One of the arguments advanced by those who champion judicial restraint is that judicial activism is an assault on the sovereignty of the Parliament (the sovereignty criticism). Accordingly, they argue that '[i]f judges are to observe

59 M D Kirby, 'The Impact of International Human Rights Norms: A Law Undergoing Evolution', (July 1995) 25 *Western Australian Law Review* 30, 47.
60 *Mabo v Queensland* (1992) 175 CLR 1.
61 Mathew, above n 45, 181.
62 Above n 61, 42.
63 Kirby, 'The Australian Use of International Human Rights Norms', above n 10, 371.
64 MD Kirby 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?', (2000) 24 *Melbourne University Law Review* 1.
65 (1999) 73 ALJR 839.
66 Ibid 877.
67 See the various writings of Jeffrey Goldsworthy, Professor of Law, Monash University. In particular J Goldsworthy, 'Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue', (1997) 23 *Monash University Law Review* 362.

their proper and limited constitutional and legal function, whilst at the same time retaining their individual integrity, they must be able to trace each and every development of the law to a democratically sustained source of legitimacy.'[68] However, in Australia, with a federal system under a written constitution, it has always been so that the High Court has the authority to review the administrative actions of governments[69] and to hold legislation invalid if unconstitutional. Accordingly, Kirby J is correct when he asserts that 'the doctrine of parliamentary sovereignty is no longer accepted as a universal truth in all countries'.[70] In fact, one might be so bold as to suggest that 'judicial supremacy' under a written Constitution is probably a more accurate description of the Australian common law system and that any remaining notion of parliamentary supremacy is misplaced. However, while the debate about activism continues it will especially be the case that 'when judges assert a legal duty to observe human rights which cannot be traced satisfactorily to a constitution or other enacted law, ... they [will] invite criticism.'[71]

Accordingly, it is probably not surprising that 'it appears that the High Court is concerned not to usurp the role of the executive or legislature when the Australian community can be considered as not directly affected'[72] by its decision making.

The sovereignty criticism is usually coupled with the assertion that judge-made law is undemocratic because, unlike legislative lawmakers, judges are not elected by the people and not accountable to them ('the undemocratic criticism'). It is argued that, unlike judges, 'if the legislature or the Executive Government err, the people, in democracies at least, have the possibility in the long run of removing their oppressors and reinstating their rights.'[73] However, judges are appointed by the Executive which, under the conventions of our constitutional system, must have the confidence of a parliamentary majority, elected by the people. Therefore, while the link between the judiciary and the people is remote (necessitating 'prudent caution by judges in some cases'[74]), it is valid. Further, it would naive to assume that 'courts themselves are [not] inescapably affected by community opinion on issues as that opinion is perceived by the judges.'[75]

Having addressed both the sovereignty criticism and undemocratic criticism there is one argument left that speaks against the judicial introduction of human rights norms. That is, that it 'may divert the community from the more open ... adoption of such norms. ...[and] it would be preferable to engage in a national debate and openly to embrace an enacted Bill of Rights than to accept such a

68 Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms', above n 4, 520.

69 Kirby writes that 'judicial review can be justified as a necessary implication derived from the constitution in order to provide a practical means of giving authoritative decisions to resolve conflicts of power between the various arms of government.', 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms', above n 4, 520.

70 Kirby , 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms', above n 4, 519.

71 Ibid 520.

72 Mathew, above n 45, 192 and more generally 189 - 94.

73 Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms', above n 4, 521.

74 Ibid 529.

75 Ibid 526.

development from a well-meaning judiciary, introducing it "by stealth"'.[76]

This argument carries some force. It is unlikely that community (and their governments) acceptance of international human rights norms will be achieved as a result of the courts quietly, and appropriately, going about their work. Public debate and discourse is needed to build a consensus and appreciation of such norms. Accordingly, the adoption of a Bill of Rights 'should not be based upon judicial innovation. Instead, it should be built upon the commitment and participation of the Australian people and their elected representatives.'[77] However, that does not mean that the courts should cease to rely upon human rights norms in the development of the common law; simply that the legislature and the rest of the Australian community should not abdicate their responsibilities and abandon the field to the judiciary. There can never be too many advocates for the protection of human rights.

One final reason advanced for non-activism is the perceived threat that activism poses to the integrity of the judiciary. The English jurist Lord Devlin once wrote:

> Enthusiasm is not and cannot be a judicial virtue. It means taking sides and, if a judge takes sides on such issues as homosexuality and capital punishment, he loses the appearance of impartiality and quite possibly impartiality itself. ... Thus the law will suffer.... Social justice guides the law maker: the law guides the judge. Judges are not concerned with social justice, or rather they need not be more concerned with it than a good citizen should be; they are not professionally concerned. It might be dangerous if they were. They might not administer the law fairly if they were constantly questioning its justice or agitating their minds about its improvement.[78]

Such an argument relies upon the fiction that, in the exercise of their judicial function, judges do not have choice and that judges are 'automatons dispensing edicts based upon rules which are clear'.[79] The attractiveness of the activist argument therefore is that it relies on no such fiction but, conversely, is based on an honest acknowledgement of the role played by the judiciary in modern society. Is it not better therefore that, in the exercise of that choice, regard is had to international norms, especially in cases involving human rights? Such a practice has the potential to invest, 'a decision [with] ... greater legitimacy if it accords with international norms that have been accepted by scholars and then by governments of many countries of the world community.'[80]

However, it is conceded that the High Court could go too far. 'To interpret [the Constitution] as containing a general scheme of protection for fundamental freedoms would compromise the legitimacy of the High Court as the arbiter of the Constitution. ... The [High] Court would exceed its brief if it were to go beyond those rights expressed by or necessarily implied in the text.'[81] But this is not what is advocated by Kirby J or required by the *Bangalore Principles*.

76 Kirby, 'A Law Undergoing Evolution', above n 60, 41.
77 George Williams *A Bill of Rights for Australia* (1st Ed, 2000) 13.
78 Lord Devlin, 'Judges and Law Makers' (1976) 39 *Modern Law Review* 1, 5.
79 Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms', above n 4, 529.
80 Ibid 526.
81 Williams, above n 78, 12.

JUSTICE KIRBY'S ARGUMENT FOR JUDICIAL CREATIVITY

Kirby J has himself provided by far the most convincing reason for judicial activism. There is great force in the argument that '[t]he harsh implication of a narrow restraint on the part of the judiciary in the definition and enforcement of human rights is a recognition of the fact that great wrongs will otherwise be sanctioned by the law.'[82]

- This is especially so when it is accepted, as it must be, that there has been a 'universal failure of legislatures in democracies [including Australia] to attend to many urgent tasks of law reform, relevant to the protection of individual liberties.';[83]
- one has regard to Australia's less than wholly satisfactory human rights record (including the current Federal Government's confinement of the United Nations' Committee system which seeks to promote human rights and has assisted 'international human rights law ... [develop] into one of the most significant areas of international law and an increasingly important foundation of a global civil society.'[84]).

In any case the cause being advanced by Kirby J is not radical. In fact the *Bangalore Principles*, which have been re-affirmed time and time again,[85] are in fact quite conservative. Relevant for present purposes they provide that:

- Fundamental human rights and freedoms are inherent in all humankind and find expression in constitutional and legal systems throughout the world and in the international human rights instruments;[86]
- These international human rights instruments provide *important guidance* in cases concerning fundamental human rights and freedoms;[87]
- [The] impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights and freedoms and their application. ... is of *practical relevance* and value to judges and lawyers generally;[88]
- .... there is a growing tendency for national courts to have regard to ... international norms for the purpose of deciding cases *where domestic law* - whether constitutional, statute or common law - *is uncertain or incomplete*;[89]
- .... this process *must take fully into account local laws, traditions,*

82 M D Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms', above n 4, 528.

83 Ibid 528.

84 Hilary Charlesworth et al, 'Howard's human rights stance a concern' *The Australia Financial Review* 8 September 2000, 67.

85 M D Kirby, 'The Australian Use of International Human Rights Norms' , above n 10, 365 (footnote: 3) 'The *Bangalore Principles* have been re-affirmed successively by *The Harare Declaration of Human Rights* 1989; *The Banjul Affirmation* 1990; and *The Abuja Confirmation* 1991. See Commonwealth Secretariat, *Developing Human Rights Jurisprudence*, Interights (1991) where the four instruments are published'.

86 The *Bangalore Principles*,(1988) 62 *Australian Law Journal* 531, Principle 1.

87 (emphasis added) Ibid, Principle 2.

88 (emphasis added)Ibid, Principle 3.

89 (emphasis added)Ibid, Principle 4.

circumstances and needs;[90]

- It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes - whether or not they have been incorporated into domestic law - *for the purpose of removing ambiguity or uncertainty from national constitutions*, legislation or common law;[91]
- However, where national law is clear and inconsistent with the international obligations of the State concerned, in common law countries the national court is obliged to *give effect to the national law*. In such cases the court should draw such inconsistency to the attention of the appropriate authorities ....[92]

Accordingly, what Kirby J is advocating, consistent with the *Bangalore Principles*, is not that judges act arbitrarily, whimsically or even that they automatically apply international norms. Rather he asserts that:

> If the organised institutions of the international community reached conclusions upon issues analogous to those arising in my Court, *and if the local law on the point was uncertain or ambiguous*, it seem[s] ... self evident that a judge would wish to inform himself or herself upon the thinking of jurists tackling like problems and drawing upon the developing jurisprudence of the international community.[93] (my emphasis)

To do otherwise is to be unnecessarily restrictive.
Further, more recently, his Honour has said:

> ... it should, I think, be accepted that the judiciary also has a role, albeit in the minor key, to shape, express and develop the law. In the exercise of that role, the judiciary of the common law tradition may, in appropriate cases, play a part in moulding the common law to universal principles expressed in international human rights law. In doing so, they should not simply incorporate a treaty *holus bolus* "by the back door".[94]

With statements such as these it is difficult to take seriously any complaint about or criticism of the level of judicial activism being advocated for in this country. Further, it is difficult to understand why Kirby J has 'faced a view on the part of some of [his] judicial colleagues that [he is] indulging in legal heresy.'[95] In fact when one considers that the *'Bangalore Principles* have been applied in many Commonwealth jurisdictions as part of a rich body of international and

90 (emphasis added)Ibid, Principle 6.
91 (emphasis added)Ibid, Principle 7.
92 Ibid, Principle 8.
93 Kirby, The Australian Use of International Human Rights Norms, above n 10, 366.
94 The Hon Justice Michael Kirby AC CMG, 'International Law - Down in the Engineroom' an address to the Australian and New Zealand Society of International Law/American Society of International Law, Joint Meeting, Sydney, Australia, Opening Session, 26 June 2000 <http://www.hcourt.gov.au/speeches/kirbyj/inter_law.htm>
95 The Hon Justice Michael Kirby AC CMG, 'Educating the Legal Profession in Human Rights - Practical or Pie in the Sky?' an address to the International Bar Association Section on General Practice, 25th Anniversary Conference, Boston, USA, 2 June 1999 <http://www.hcourt.gov.au/speeches/kirbyj/iba2june.htm>

comparative human rights law'[96] the question that arises is why more members of Australia's judiciary have not adopted the *Bangalore Principles*.

JUSTICE KIRBY'S DECISIONS IN THE HIGH COURT OF AUSTRALIA

An exploration of Kirby J's decisions while a member of the High Court reveals not only the broad range of matters that come before the High Court in both its original and appellate jurisdiction but, also the incredible work load of its members. It is not surprising that there are such a small number of decisions dealing directly or indirectly with the specialised field of international human rights law.

Of the 12 decisions considered below only 4 can properly be characterised as examples of the *Bangalore Principles* in practice ('category three decisions'). The other 8 are either decisions in which it was necessary for the High Court to interpret international human rights obligations that Australia has incorporated into its domestic law ('category one decisions') or cases in which Kirby J has referred to (but, not necessarily relied upon) international human rights norms ('category two decisions'). All of them, however, are important in the furtherance of a discourse about human rights jurisprudence in Australia. References to human rights norms in each category is important because it advances international human rights law as a constant touchstone of judicial reasoning and interpretation and emphasizes the importance of human rights norms as a framework within which judicial reasoning can occur.

Category one decisions

In *De L v Director-General New South Wales Department of Community Services*[97] ('*De L*') the High Court was concerned with a case of child abduction and the interpretation of the *Convention on the Civil Aspects of International Child Abduction* ('the Hague Convention').

The Australian regulations ('the abduction regulations') provided that if the removal of a child to Australia from another Convention country was wrongful because it was in breach of a parent's custody rights, the Family Court was required to order the return of the child to the Convention country.[98]

The mother of the children (the abductor) challenged the validity of the regulation on the basis that it was inconsistent with the *Family Law Act*[99] which provided that, in relation to the custody of a child, the Family Court must regard the welfare of the child as 'the paramount consideration'.[100]

The High Court unanimously held that the regulation was valid. However, Kirby J dissented on the question of whether the paramount consideration under the Act applied to proceedings under the regulations. The majority found that it did not. In his judgment Kirby J was concerned to protect the intention of the

96 Lord Lester of Herne Hill QC, 'The Challenge of Bangalore: Making Human Rights a Practical Reality' Spring 1999 *Commonwealth Law Bulletin* 47, 60.
97 (1996) 187 CLR 640.
98 *Family Law (Child Abduction Convention) Regulations* 1986 (Cth), reg 16(3)(c).
99 1975 (Cth).
100 Ibid s 64(1)(a).

Hague Convention. However, he observed that:

> ...The objective fact is that it has taken the Australian legal system more than eighteen months to complete its decision in this case. This offends the spirit of Article 11 of the Convention[101]. ....The longer the delay, the greater the potential for harm to the child. Similarly, the longer the delay, the more likely it is that a counsellor's report or the impression of the primary judge (even if directed to the correct issue) would become invalid as a basis for decisions of the judicial authority at a later time.[102]

His Honour then enunciated the principles to be applied when a treaty is incorporated as part of local law. Namely that:

> Australian courts will interpret that law in accordance with the international law governing the interpretation of treaties'[103]....This approach is now reflected in the Vienna Convention on the Law of Treaties. Those provisions are regularly applied by Australian courts to guide them in a principled and consistent construction of treaties of local significance.[104]...Except in cases of unarguably clear treaty language, courts today regularly have resort to the opinions of scholars, reports on the operation of the treaty and decisions of municipal courts addressing analogous problems. But in the end, the object of the task of interpretation of treaty language is the same as that of interpreting municipal legislation. It is to give meaning to the words used, read in their context and, to the fullest extent possible, for the purpose of achieving the objects which are stated or otherwise apparent.[105]...Australian legislation will be construed, and the common law developed, so far as possible, to conform with Australia's obligations under treaties which Australia has ratified.[106]

His Honour was then able to reconcile the operation of the *Family Law Act* and the abduction regulations by deciding that what 'the [Hague] Convention, reflected by the [abduction regulations], has done is to recognise that it is in the best interests of children as a class not to be subjected to the turmoil and emotional divisiveness of international abduction.'[107] Accordingly, Kirby J was able to find that the paramountcy principle is relevant to proceedings under the abduction regulations, but may require modification so as not to defeat the attainment of the objects of the Hague Convention and the abduction regulations.

In *Applicant A and Another v Minister for Immigration and Ethnic Affairs and Another*[108] ('*Applicant A*') a married couple (the wife being pregnant), both nationals of the People's Republic of China, arrived in Australia on a boat from China. They were detained as illegal entrants. 'Both lodged applications for recognition as refugees on the grounds that, as parents of one child and not accepting the one child policy, (enforced, if necessary, by sterilisation in their home province of China) they held a well-founded fear of being persecuted for

[101] Above n 98, 667.
[102] Ibid 669.
[103] Citing *Shipping Corporation of India Ltd v Gamlen Chemical Co A/asia Pty Ltd* (1980) 147 CLR 142, 159.
[104] Above n 102, 675.
[105] Ibid 676.
[106] Ibid 682.
[107] Ibid 684.
[108] (1996) 190 CLR 225.

reasons of membership of a particular social group.... Section 4(1) of the *Migration Act* 1958 (Cth) defined "refugee" as having the same meaning as in Art 1 of the Convention Relating to the Status of Refugees.' [109]

By a majority of 3 to 2 the High Court held that the husband and wife were not refugees within the meaning of the *Migration Act*. With Brennan CJ and Kirby J dissented.

Kirby J acknowledged that 'Australia is a party to each of [the] international instruments [relating to the status of refugees]. By its relevant domestic law it has afforded enforceable rights of protection to certain non-citizens whom enter or remain in Australia and claim such protection.'[110]

His Honour then acknowledged the evidence received by the Refugee Review Tribunal in this matter was that 'the husband insisted that, in his village, unconsensual [*sic*] abortion and sterilisation were the primary sanctions to enforce the 'one child policy'....[and that] the Tribunal accepted the husband as a 'forthright and consistent' witness.[111]

The Minister having conceded 'that forced sterilisation could amount to 'persecution' within the Convention [and there being a] finding that the appellants had a well-founded fear of compulsory sterilisation if they returned to China'[112] the primary issue to be determined was whether the couple were members of a 'social group' as defined in the relevant convention.

Kirby J considered the decision of the Federal Court of Australia at first instance (which found in favour of the applicants) and the decision of the Full Court of the Federal Court of Australia (which went against them). His Honour then again set out the principles to be applied to the interpretation of domestic legislation.

> ... Although the definition of "refugee" in the Convention...is incorporated as part of Australia's domestic law, and to that extent the task of the Court is one of statutory construction, it is desirable... that this Court should adopt a definition which pays appropriate regard to the fact that the definition of "refugee" originates in an international treaty. The Court should thus interpret the words in the context in which, and for the purposes for which, they were devised. Clearly, they are intended to have application to a variety of countries and situations and for the indefinite future.[113]
>
> ... [Accordingly,] it would be an error to construe the definition so as to ignore the changing circumstances on the world in which the Convention now operates.[114]
>
> ... [Further, having regard to *The Vienna Convention on the Law of Treaties*] a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[115]

Kirby J then articulated the 'particular social group' relevant in this matter as one

[109] Ibid
[110] Ibid 287.
[111] Ibid 288.
[112] Ibid 289.
[113] Ibid 292.
[114] Ibid 293.
[115] Ibid 294.

that was

> ...constituted by persons who: (i) were in the reproductive age group; (ii) were a couple and had given birth to a surviving child; (iii) desired to have another child; (iv) were fertile and therefore likely, unless prevented, to have another child or children; (v) were members of the Han majority ethnic group and thus not entitled, on grounds of ethnicity or any other ground, to exception from the general policy; (vi) could not, under the law in force in their particular prefecture have a second child without official permission; and (vii) were liable, in the evidence, to be subjected to unconsensual sterilisation or enforced abortion to prevent the realisation of their desire for another child or more children.[116]

Kirby J then had regard to 'travaux préparatoires which record the history of the development of the Convention and the discussion of its text as it was being refined'[117] and stated that 'the mere fact that 'groups', as wide and diverse as "capitalists and independent businessmen", were nominated as justifications for the added criterion, demonstrates that a relationship in the nature of a voluntary association, society or club was not considered to be a necessary factor for the existence of such a 'group'.... [It was only necessary that they] be definable by reference to common pre-existing features.'[118]

After considering Canadian authority[119] on the point Kirby J held that: ' In my view, there is a "particular social group" of the kind suggested, defined by the objective characteristics which exist in the case of the appellants.'[120] Accordingly, he held that the Chinese couple were properly to be considered 'refugees' as defined.

In *Qantas Airways Limited v Christie*[121] the High Court was concerned with the desire of Captain John Christie, an international airline pilot for 30 years, to continue flying for Qantas past his 60th birthday. Qantas refused to allow him to do so on the basis that it would breach the *Convention on International Civil Aviation*. One Convention rule in particular ('the *Rule of 60*') allowed State parties to exclude from their airspace aircraft being flown by sexagenarians. The USA, Singapore and Thailand all enforced the rule.[122]

However, the relevant international instrument to be considered was not the Rule of 60 but, the *Convention Concerning Discrimination in Respect of Employment and Occupation*. It had been partly enacted in the unfair/unlawful dismissal sections of the *Industrial Relations Act* 1988 (Cth) ('the *IR Act*') . The legislation provided an exemption if the reason for the termination was based on 'the inherent requirements of the particular position.'[123]

In his dissenting judgment Kirby J found that there had been a breach of the *IR Act*. After referring to the 'general provisions against discrimination ...

116 Ibid 298.
117 Ibid 299. In fact his Honour stated that it is 'legitimate (if not essential), both by Australian and international law, to have regard to' the same.
118 Ibid 301.
119 *Mayers v Canada* (1992) 97 DLR (4th) 729, 737.
120 Above n 109, 308 - 9.
121 (1998) 193 CLR 280.
122 This meant that Captain Christie could only effectively fly tothree international destinations, namely Denpasar in Indonesia, Fiji and New Zealand.
123 *Industrial Relations Act* 1988 (Cth), s 170DF(2).

contained in the *UDHR* (art 7), the *ICESCR* (art 2.2; see also art 6.1) and the *ICCPR* (art 2.1)'[124] and restating that 'where, as here, the Act contains words derived from international sources, it is legitimate for a court to have regard to those sources in assigning meaning to the words of the Act,'[125] his Honour found that 'the "inherent requirements" of the particular position must be those which can be regarded as permanent and integral'.[126]

The obligation that Captain Christie be able to fly in the USA, Singapore and Thailand airspace was not such a requirement. To accept otherwise would mean that 'Qantas would be entitled to terminate the employment of all of its female pilots if one or more foreign countries on its routing would not permit them to fly into their airports. ... To allow such discrimination to operate would be to defy the purposes of the *[IR Act]* and of the international law to which it gives effect.'[127]

Unfortunately for Captain Christie the other four members of the High Court[128] did not accept, with respect, the force of that logic.

In *East and others; ex parte Nguyen*[129] Mr Nguyen had been charged with armed robbery, theft and making a threat to kill. He was initially sentenced to a 2 year community based order, however when he failed to abide by the order, he was re-sentenced for the original offence and imprisoned for a period of 2 years and 3 months.

At no stage during any of the proceedings was Mr Nguyen (who was represented by counsel) provided with an interpreter, nor did he request that one be provided.

On appeal to the High Court Mr Nguyen 'contended that his lack of ability in speaking and understanding the English language meant that, without an interpreter, he was not able to give adequate instructions to his legal representatives or to understand and properly defend the charges against him.'[130] He asserted that he had been discriminated against under the *Racial Discrimination Act* 1975 (Cth) ('the *RDA*') which was enacted to implement the *International Convention on the Elimination of all Forms of Racial Discrimination*.

The appeal failed on the basis that the High Court was not satisfied that Mr Nguyen had identified an immediate right, duty or liability which would establish a justiciable controversy that could properly be brought before the High Court.

However, in the course of his judgment, Kirby J again championed the *Bangalore Principles* (although without expressly stating such), restating that:

> .. [T]he general rule is the treaty of itself does not form part of Australia's domestic law unless its provisions are validly incorporated by law. If not so incorporated, the treaty provisions do not operate as a direct source of individual rights and obligations. Treaties may influence Australian domestic law in other ways. This is particularly so where they declare fundamental human rights as recognised by international law and accepted by civilised countries. In such circumstances the provisions of treaties expressing

[124] Above n 122, 330.
[125] Ibid 332 - 3.
[126] Ibid 340.
[127] Ibid 343.
[128] Brennan CJ, Gaudron, McHugh and Gummow JJ.
[129] (1998) 196 CLR 354.
[130] Ibid 355.

> international law may, by analogy, contribute to judicial reasoning to resolve ambiguities in the Australian Constitution or other legislation and in the development of the common law. However, this process is interstitial. It does not afford to the judiciary the means, by the 'backdoor', of incorporating a treaty, with its detailed rights and obligations, as part of Australia's domestic law without the irksome necessity of parliamentary implementation.[131]

Category two decisions

Although Australia has no Bill of Rights and very few constitutionally guaranteed human rights, it must fairly be stated that Australia has a long common law history that has developed principles relatively consistent with our international human rights obligations. 'Given the clear state of the common law on [these issues] the role of international law [is] limited, at best, ... [to] an interpretative device.'[132] The following decisions of his Honour's demonstrate this fact.

In *Levy v The State of Victoria and Others*[133] the High Court was asked to extend the operation of the implied freedom of communication contained in the *Australian Constitution* when the well known anti-duck shooting campaigner Laurie Levy was charged with breaching a regulation[134] that prohibited him from entering a permitted hunting area without a game licence for the purpose of protesting against Victorian hunting laws.

Mr Levy argued that the regulations (which prevented his protest and ability to obtain information about the activities of the duck shooters that he could use in his public campaigns) were invalid by reason of their breach of the implied freedom. Essentially Mr Levy sought the

> development of a body of jurisprudence akin to that fashioned in the United States of America out of the First Amendment to that country's constitution. There, the marches and bus rides for racial desegregation or the protests against involvement in the war in Vietnam were typically conducted in public places. They were upheld by the courts, notwithstanding the fact that they often presented challenges to the safety and tranquillity of the participants, onlookers and the general public. Such challenges had to be accepted as an inescapable feature of constitutionally protected communication.[135]

It was held by the High Court 'that the regulation was not invalid by reason of any implied freedom of communication limiting the legislative powers of the Victorian Parliament as it was reasonably appropriate and adapted to the protection of individual or public safety.'[136]

Kirby J also was not prepared to extend the implied freedom of communication to assist Mr Levy. In rejecting the appeal his Honour held that:

> The purpose of the freedom must be kept in mind. It is to contribute to protecting and reinforcing the system of representative government for which the text and structure of the Constitution provide.... They are freedoms from the operation of laws which would otherwise prevent or control

[131] Ibid 380 - 1 (citations omitted).
[132] Above n 45, 196
[133] (1996) 189 CLR 579
[134] *Wildlife (Game) (Hunting Season) Regulations* 1994 (Vic), reg 5.
[135] Above n 134, 631 (Kirby J).
[136] Above n 134, 579.

communications on political and governmental matters in a matter.

> No one suggests that such freedoms are absolute. Even in terms of individual human rights, freedom of expression, however important, is not absolute. International statements of human rights themselves acknowledge other rights or considerations which may conflict with free expression and which should also be respected and upheld.[137] Whenever possible, Australian law on such subjects should be developed in harmony with such universal international principles to which Australia has given its concurrence.[138]

Having considered those international principles, his Honour conceded that 'the effect of reg 5 is to inhibit political communication to some degree. However, it cannot be argued that it does so in a way inconsistent with the freedom of communication implicit in the system of representative government for which the *Australian Constitution* and the Victorian Constitution provide.[139]

In *BRS v The Queen* (1997)[140] a teacher at a boarding school had been charged with having committed certain sexual crimes against a pupil ('H').

During the course of the trial a friend of H gave evidence that the prosecutor relied upon to rebut the accused's character evidence and also to support and confirm H's evidence. 'Defence counsel then submitted that the judge should direct that there was no corroboration of H's evidence by W's evidence. [However], no re-direction was given.'[141] BRS was convicted (although the Judge at first instance said during sentencing; 'had I been the tribunal of fact (which I was not), I would have entertained a reasonable doubt as to his guilt'[142]).

It was held by the High Court that 'there was a real risk that without a direction about the use they could properly make of W's evidence, the jury would impermissibly rely on it as showing that the accused was the sort of person who would engage in the conduct the subject of the charges and would use it as evidence of guilt. No such direction having been given by the judge, the accused had been denied a real change of acquittal and hence a fair trial.'[143]

In agreeing with the majority decision Kirby J, did not need to refer to international human rights law principles but, nonetheless he chose to do so. As he explained it:

> ... [T]he product of the endeavour of [is for] the courts to avoid the risk of unfairness to an accused person. Such unfairness could arise quite readily if evidence of other conduct, criminal or simply discreditable, were admitted which tended to label the accused with a "bad character" from which a jury might reason to a conviction of guilt of the charges under consideration.
>
> The foregoing explanations for the strictness of the common law have lately been reinforced by two further developments. The first is the obligation expressed by international human rights law that a person "charged with a criminal offence shall have the right to be presumed innocent until proved

137 Citing the *ICCPR*, arts 17 and 19 (protection of privacy, reputation and freedom of expression)
138 Above n 134, 644 - 5.
139 Ibid 647.
140 (1997) 191 CLR 275.
141 Ibid 276.
142 Ibid 313 as cited by Kirby J.
143 Ibid.

> guilty according to law".[144] The application and development of Australian law on this topic should, so far as possible, conform to such principles of international law.[145]

In *Ousley v The Queen*[146] Kirby J was again in dissent in relation to a matter involving the use of listening devices. The accused had complained about the form of the warrants[147] used to authorise the use of the listening devices (the evidence from which lead to his conviction for trafficking in a drug of dependence).

In indicating that he would allow the appeal Kirby J stated that 'in a sense...the attack on the warrants presents a legal technicality. However, our criminal law and procedure are replete with technicalities raised in the vindication of legal requirements, including those defensive of basic rights.'[148]

His Honour then referred to the existing common law relating to the approach to search and other warrants and stated that 'it is well established that legislation authorising intrusion into an individual's property and privacy is strictly construed. ...In part, the rule of strictness reflects the particular attitude of the common law to the enjoyment of an individual's property and privacy.'[149]

Then consistent with his practice Kirby J added to his interpretation of the common law by referring to international human rights norms.

> The basic human rights...include the right to protection of the law against interference or attacks upon the individual's privacy and home[150]. International expressions of the right to privacy to no more than to reflect the applicable common law. It is impermissible to justify a breach of the law's requirements, protective of property and privacy, by reference to the utility of the materials thereby gained. The strict approach is required to ensure that provisions enacted by Parliaments, protective of fundamental rights, are not treated as mere formalities but as a real check on the exercise of the Executive's power.[151]

And in a reference to the Bangalore Principles:

> [A judge should not] be "over-zealous to search for ambiguities or obscurities in words which on the face of them are plain, simply because [they] are out of sympathy with the policy to which the Act appears to give effect". ...But when a real defect can be demonstrated, courts err, rightly in my view, on the side defensive of the fundamental rights of the individual affected.[152]

Therefore Kirby J held that 'because, on its face, each warrant was incomplete and misleading it was defective.'[153]

In the final category two case, *The Queen v Swaffield*[154] the High Court was

144 Citing the *ICCPR* art 14.2.
145 Above n 141, 321 - 2 (citations omitted).
146 (1997) 192 CLR 69.
147 It did not refer to the jurisdictional ground required pursuant to s4A(1)(b) of the *Listening Devices Act* 1969 (Vic), that the use of the listening device was necessary for the purposes set out in the provision.
148 Above n 147, 132.
149 Ibid 141.
150 Citing the *UDHR*, Art 12; *ICCPR*, art 17.
151 Above n 147, 142 - 3.
152 Ibid 144 (citations omitted).
153 Ibid 157.
154 (1997) 192 CLR 159.

again concerned with criminal jurisprudence.

In this case confessions and admissions had been variously obtained from two individuals, Messrs Swaffield and Pavic, that had lead to their convictions on charges of arson and murder respectively.

The High Court held unanimously that:

> [T]he admissibility of confessional material turns first on the question of voluntariness, next on exclusion based on considerations of reliability, and finally on an overall discretion taking account of all the circumstances (including the means by which any admission was elicited and whether unfair forensic disadvantage may be occasioned by admission of the evidence) to determine whether the evidence was admitted or a conviction obtained at an unacceptable price having regard to contemporary community standards.[155]

Accordingly, the High Court held that 'the admissions in the arson case were rightly excluded on appeal and (Kirby J dissenting) that the High Court should not interfere with the judge's decision to allow the admissions in the murder case into evidence.'[156]

In that part of his judgment that was in dissent Kirby J stated:

> In judging whether a right is fundamental, regard might be had to any relevant constitutional or statutory provisions and to the common law.
>
> It is also helpful, in considering fundamental rights, to take cognisance of international statements of such rights, appearing in instruments to which Australia is a party, particularly where breach of such rights give rise to procedures of individual complaint. In the present case it is pertinent to note that the International Covenant on Civil and Political Rights (which provides such procedures) includes, amongst the "minimum guarantees" to be enjoyed "in full equality" in the determination of any criminal charge against an accused person, certain rights to legal advice and representation and a right "[n]ot to be compelled to testify against himself or to confess guilt".[157] These provisions reflect notions with which Australian law is generally compatible. To the fullest extent possible, save where statute or established common law authority is clearly inconsistent with such rights, the common law of Australia, when it is being developed or re-expressed, should be formulated in a way that is compatible with such international and universal jurisprudence.
>
> ...four principal considerations arise in relation to the covert use by police of surveillance tapes. They are that such circumstances involve depriving the suspect of a caution which would otherwise be required of police; of the opportunity to consult a lawyer; of the right to remain silent; and of the general privilege of the suspect against self-incrimination.[158]

Kirby J considered the jurisprudence in Canada and the Unites States of America and then considered the nature of the taped conversations engaged in between Mr

[155] Ibid 159 - 60.
[156] Ibid 160.
[157] Citing art 14.3(g). See also art 14.3(d); Nowak, *United Nations Covenant on Civil and Political Rights: CCPR Commentary* (1993), 264.
[158] Above n 155, 213-15.

Pavic with his close friend (a police informer). In finding that the Supreme Court of Victoria ought to have rejected the evidence his Honour stated:

> These were not conversationalists who had the relationship of two prisoners in a common cell. They were not new acquaintances engaging in conversation in a social setting. They were close friends, one of whom had been led to believe that he was a suspect and who was motivated to prove his innocence by obtaining for the police as many inculpatory admissions from the other as repeated expressions of anxiety for his own situation could elicit.
>
> [The Police] would have anticipated that Mr Clancy, as their agent, would set out to exploit the special characteristics of his relationship with Mr Pavic so as to secure inculpatory statements from him. They were not disappointed. They relied on the association of trust between the two men.
>
> ...these tactics crossed the forbidden line.
>
> ...when the police arranged for Mr Clancy to act in this way, they knew that Mr Pavic had already exercised his legal entitlement to refuse to answer further police questions. The course adopted was designed effectively to deprive Mr Pavic of that right.[159]

Three out of the four decisions above decision concern criminal jurisprudence. Many cases that come before the High Court do. However, unlike the above examples most do not refer to international human rights law. This is no doubt because there is a 'strong preference [shown by Australian courts] to legitimise the development of a substantive human rights jurisprudence by reference to traditional domestic sources of law and established common law interpretative techniques rather than through overt application of international legal norms.'[160]

Category three decisions

The *Bangalore Principles* provide that 'where domestic law - whether constitutional, statute or common law - is uncertain or incomplete'[161] regard is to be had to international norms. The following four decisions reveal Kirby J's conformity with that principle.

In *Newcrest Mining (WA) Limited v The Commonwealth of Australia*[162] the High Court was concerned with the power of the Commonwealth Parliament to acquire property on just terms.[163]

The *National Parks and Wildlife Conservation Act* 1975 (Cth)[164] ('the *Conservation Act*') prohibited mining in Kakadu National Park. An amending Act, the *National Parks and Wildlife Conservation Amendment Act* 1987 (Cth) ('the *Amendment Act*'), provided that the Commonwealth was exempt from liability to pay compensation to any person by reason its enactment. In 1989 and 1991 Newcrest Mining was prevented from being able to fully exercise its mining leases because two proclamations, made under the *Conservation Act*, brought parcels of the leased land within Kakadu National Park. Accordingly, it claimed

[159] Ibid 223-5.
[160] Above n 45, 195.
[161] Above n 3, Principle 4.
[162] (1996) 190 CLR 513.
[163] *Australian Constitution* ss 122 and 51(xxxi).
[164] s 10(1A).

that there was an acquisition of its property and that the Commonwealth was required to compensate it on just terms.

Kirby J (in the majority) held that the purpose of the *Conservation Act* was the performance of Australia' international obligations. However, before deciding the matter his Honour first reminded himself

> of two observations about the approach which should be taken to the task of constitutional interpretation. In *Australian National Airways Pty Ltd v The Commonwealth*, Dixon J said:
>
> > "[I]t is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances."

He continued:

> "We should avoid pedantic and narrow constructions in dealing with an instrument of government and I do not see why we should be fearful about making implications."[165]

Kirby J then stated:

> The settled authority of this Court in matters of constitutional doctrine is a specially important element in ensuring stability and predictability in the fundamental arrangements affecting government and the exercise of political power in this country.
>
> However, when a challenge to an established decision comes, it is the duty of each Justice to discover the precise state of the Court's authority and then to examine the arguments of the parties and to look afresh at the constitutional text...
>
> There can be no estoppel against the Constitution.[166]

Kirby J then invoked the *Bangalore Principles*:

> Where the Constitution is ambiguous, this Court should adopt that meaning which confirms to the principles of fundamental rights rather than an interpretation which would involve a departure from such rights.
>
> ...If the Constitution is clear, the Court must (as in the interpretation of any legislation) give effect to its terms. Nor should the Court adopt an interpretative principle as a means of introducing, by the backdoor, provisions of international treaties or other international law concerning fundamental rights not yet incorporated into Australian domestic law.
>
> ...However, international law is a legitimate and important influence on the development of the common law and constitutional law, especially when international law declares the existence of universal and fundamental rights. To the full extent that its text permits, Australia's Constitution, as the fundamental law of government in this country, accommodates itself to

[165] Above n 163, 645 (citations omitted).
[166] Ibid 646 - 7.

> international law, including in so far as that law expresses basic rights. The reason for this is that the Constitution not only speaks to the people of Australia who made it and accept it for their governance. It also speaks to the international community as the basic law of the Australian nation which is a member of that community.

His Honour then turned to the *UDHR* (which, in art 17, provides that 'no one shall be arbitrarily deprived of his property') and commented that 'whilst this article contains propositions which are unremarkable to those familiar with the Australian legal system, the prohibition on the arbitrary deprivation of property expresses an essential idea which is both basic and virtually uniform in civilised legal systems.'[167] After considering the statements on the principle contained in *Magna Carta*[168] and in the Constitutions of France, the United States of America, India, Malaysia, Japan and South Africa his Honour declared it to be 'now recognised by customary international law.'[169]

Therefore '51(xxxi) in the *Australian Constitution* ... must be given a meaning and operation which fully reflects that application. In this way, in Australian law, it extends to protect the basic rights of corporations as well as individuals.'[170]

However, in his interpretation Kirby J needed to overcome one difficulty in the form of a 28 year old unanimous decision of the High Court in *Teori Tau v The Commonwealth*.[171] In that case the High Court had decided that the power of the Commonwealth to acquire property in all territories under section 122 was unqualified by section 51(xxxi) requiring that it be done on just terms. In addressing him self to the problem his Honour held that:

> The authority of *Teori Tau* apart, a correct understanding of the Constitution does not oblige a construction condoning a law made by the Federal Parliament for a territory providing for the acquisition of property otherwise than on just terms. The obstacle which *Teori Tau* presents to the adoption of the correct constitutional principle should be overcome. This may the more readily be done because that decision effectively breaks a promise given on behalf of the Commonwealth at federation adopting a safeguard, restriction or qualification on its law making powers relevant to the fundamental rights of all persons from whom property is compulsorily acquired under federal law. That promise extends to the territories and to laws for the government of the territories. This Court should ensure that the promise is kept. The decision in *Teori Tau* should be overruled.[172]

Gaudron and Gummow JJ joined Kirby J in disapproving of *Teori Tau*.

In *Chakravarti v Advertiser Newspapers Limited*[173] Mr Chakravarti had sued the publishers of The *(Adelaide) Advertiser* for defamation arising out of two articles that it had printed (concerning a Royal Commission into the near collapse of the State Bank of South Australia) about him.

At first instance the trial judge 'found for [Mr Chakravarti] in respect of both

[167] Ibid 658 - 9.
[168] 1215, art 52.
[169] Above n 163, 660.
[170] Ibid.
[171] (1969) 119 CLR 564.
[172] Above n 163, 661.
[173] (1998) 193 CLR 519

articles'[174]. However, the Full Court of the Supreme Court of South Australia held that he was only entitled to succeed in relation to the second article. Accordingly, the newspaper appealed and the Mr Chakravarti cross appealed to the High Court. The essential question was whether the imputations said to arise did in fact arise from the articles.

Kirby J first established the nature of a defamation action.

> The ordinary person is a layman, not a lawyer. He or she approaches perception of the matter complained of in an undisciplined way and with a greater willingness to draw inferences and to read between the lines than a lawyer might do, used to precision. Where words have been used which are imprecise, ambiguous or loose, a very wide latitude will be ascribed to the ordinary person to draw imputations adverse to the subject. That is the price which publishers must pay for the use of loose language.
>
> ...Long ago, it was suggested that the ordinary person, being reasonable, would read the entirety of the matter complained of. Such a person would refrain from drawing inferences adverse to the reputation of another simply because part of the publication included matters discreditable to the subject. This reasoning has lately been endorsed by the House of Lords in *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65.
>
> ...Respectfully, I cannot agree with their Lordships' opinion. In my view it ignores the realities of the way in which ordinary people receive it, and are intended to receive, communications of this kind. It ignores changes in media technology and presentation. It removes remedies from people whose reputation may greatly be damaged by casual or superficial perception of such publications. And it overlooks the purpose of defamation law.[175]

His Honour then turned his attention to the international human rights aspect of the matter and the conflict between competing human rights.

> The protection of an individual's reputation is a fundamental human right, recognised by international human rights law.[176]
>
> ...Nevertheless, in considering whether, as claimed, the matter complained of actually harms the reputation of the plaintiff, it is appropriate for the decision-maker to keep in mind the importance attached to freedom of communication. This too is a fundamental human right. Reconciling the attainment of freedom of communication in circumstances where the individual's reputation is also protected is a function of the law of defamation.[177]

After then considering the defamation alleged, the imputations and the failure of the newspaper to fairly report on the Royal Commission, his Honour, and the High Court, then found in favour of Mr Chakravarti on both counts.

[174] Ibid 522.
[175] Ibid 573 - 4.
[176] Ibid 575. Citing the *UDHR* 1948, art 12 ['No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his Honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.'] ... *International Covenant on Civil and Political Rights* 1966, art 19.3(a).
[177] Ibid 576. Citing the *ICCPR* 1966, art 192.

In *Kartinyeri v The Commonwealth of Australia*[178] the High Court was concerned with the powers of the Commonwealth Parliament to make laws for 'people of any race for whom it is deemed to make special laws.'[179]

The matter came before the High Court after the Commonwealth Parliament passed legislation, the *Hindmarsh Island Bridge Act* 1997 (Cth) ('*the Bridge Act*'), that prevented the Minister for Aboriginal and Torres Strait Islander Affairs from making a declaration, pursuant to the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) ("the *Heritage Protection Act*"), that land in the County of Hindmarsh, South Australia 'was a significant Aboriginal area (to the Ngarrindjeri people) under threat of injury or desecration'.

> It was claimed that the Bridge Act was invalid and not a law with respect to people of any race for whom it was necessary to make special laws within s 51(xxxvi) of the Constitution; or that it was not a law for the benefit and/or advancement of any race or alternatively the Aboriginal race; or that it was not a law reasonably adapted or proportional to the execution of the power vested in the Parliament.[180]

By a majority of 5 to 1 (Kirby J in dissent) the High Court held that the *Bridge Act* was valid.

In his dissenting judgment Kirby J again explored the proper approach to the interpretation of the *Australian Constitution*.

> ... The duty of the Court is to the Constitution. Neither the Court, nor individual Justices, are authorised to alter the essential meaning of that document
>
> ... This emphasis upon the text of the document is beneficial. It tames the creative imagination of those who might be fired by the suggested requirements of changing times or by the perceived needs of justice in a particular case.
>
> ... Among the circumstances which inevitably affect any contemporary perception of the words of the constitutional text are the changing values of the Australian community itself and the changes in the international community to which the Australian community must, in turn, accommodate.[181]

Notwithstanding that it should embarrass every Australian that it did so, in its arguments before the High Court the Commonwealth contended that the *Australian Constitutional* power authorised the enactment of 'special laws' on the basis of race that were adverse or detrimental to or which discriminated against particular races.

However, Kirby J expressly rejected that contention.[182] In doing so he again invoked the *Bangalore Principles*:

> Where the Constitution is ambiguous, this Court should adopt that meaning which conforms to the principles of universal and fundamental rights rather

[178] (1998) 195 CLR 337
[179] *The Australian Constitution* s 51(xxvi).
[180] Above n 179, 339.
[181] Ibid 399 - 400.
[182] Ibid 417 (citations omitted).

> than an interpretation which would involve a departure from such rights. Such an approach has, in recent years, found favour in New Zealand - where Cooke P (as Lord Cooke of Thorndon then was) has referred to the "duty of the judiciary to interpret and apply national constitutions ... in the light of the universality of human rights". Likewise, interpreting the Canadian Charter of Rights and Freedoms, that country's Supreme Court has frequently had regard to international instruments. To do so does not involve the spectre, portrayed by some submissions in these proceedings, of mechanically applying international treaties, made by the Executive Government of Commonwealth, and perhaps unincorporated, to distort the meaning of the Constitution. It does not authorise the creation of ambiguities by reference to international law where none exist. It is not a means for remaking the Constitution without the "irksome" involvement of the people required by s 128. There is no doubt that, if the constitutional provision is clear and if a law is clearly within power, no rule of international law, and no treaty (including one to which Australia is a party) may override the Constitution or any law validly made under it.
>
> ...Where there is ambiguity, there is a strong presumption that the Constitution, adopted and accepted by the people of Australia for their government, is not intended to violate fundamental human rights and human dignity.

...In the contemporary context it is appropriate to measure the prohibition by having regard to international law as it expresses universal and basic rights....Likewise the Australian Constitution, which is a special statute, does not operate in a vacuum. It speaks to the people of Australia. But it also speaks to the international community as the basic law of the Australian nation which is a member of that community. [183]

His Honour then turned to the international human rights norms to be followed in this instance.

> If there is one subject upon which the international law of fundamental rights resonates with a single voice it is the prohibition of detrimental distinctions on the basis of race.[184] I consider that Judge Tanaka was correct, in the International Court of Justice, when he declared that:
>
> > "[T]he norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law".
>
> ... the arguments presented and the divergent approaches taken by members of this Court do, I think, make it abundantly clear that par (xxvi) is ambiguous. Therefore, the final consideration which reinforces my conclusion is resolute steps taken by international law to forbid and prevent detriment to, and adverse discrimination against, people by reference to their race.

Accordingly, his Honour alone found the *Bridge Act* invalid.

[183] Ibid 417 - 18.

[184] Citing the *United Nations Charter* 1945, arts 1(3), 55(c), 56; *UDHRs* 1948, art 2; *International Convention on the Elimination of all forms of Racial Discrimination* 1965, arts 1(1), 1(4), 2, 6; *ICCPR* 1966, Art 2(1); *International Covenant on Economic, Social and Cultural Rights* 1966, art 2(2); *Declaration on Race and Racial Prejudice* 1978, art 9(1).

The final decision in *Northern Territory of Australia v GPAO*[185] again concerned a family law dispute and again concerned the interplay between Federal laws and those of an Australian Territory.

The Family Court of Australia had issued a subpoena, pursuant to the *Family Law Act* 1975 (Cth) ('the *FLA*') to the manager of the Child and Family Protective Services unit of the Northern Territory Health Services Department after a mother made an allegation that the father of her child (who was entitled to access) had sexually abused the child. The *Community Welfare Act* 1983 (NT)[186] purportedly absolved the manager from complying with the subpoena. The question to be decided was the ambit and operation of the federal law.

By a majority of 6 to 1 the High Court found in favour of the Northern Territory legislation. Not surprisingly the dissenting judgment was that of Kirby J who again asserted that the ambiguities in the federal law 'should be resolved in a way compatible with international law and so as to ensure that Australian law conforms, as far as it properly can, to international law.'[187]

In finding that the Northern Territory legislation provided the manager with no excuse not to comply with the subpoena his Honour stated:

> It has been suggested that the principle binding on the Family Court, requiring it to regard the best interests of the child as the paramount consideration, only attaches, relevantly, at the stage at which that Court makes its final decision as to the particular parenting order that should be made in relation to that child. On that footing, the paramountcy principle has nothing to say to an "anterior" decision by a judge of the Family Court. Specifically, it has no application to the question presented in this case by the objection to the subpoena requiring production to the Family Court of the departmental files and records relating to the child....I cannot accept that construction of the Act.[188]

His Honour then gave 4 domestic reasons for why he differed from the opinion of the majority. His final reason again invoked the *Bangalore Principles* and the principles of international human rights law.

> ...[T]there is a final consideration, external to the *FLA*, which reinforces the conclusion to which the foregoing matters drive me. It is that the changes to Pt VII of the FLA were introduced by the *Family Law Reform Act* 1995 (Cth) to give effect to Australia's obligations under international law following its ratification of the United Nations Convention on the Rights of the Child (the Convention). Unsurprisingly, the duties imposed on States Parties by the Convention make no artificial distinctions between a final judicial decision affecting the interests of a child and interlocutory decisions anterior to such a final decision. On the contrary, the Convention makes it clear that the States Parties are bound to ensure that the best interests of the child are taken into account throughout the process.

185 (1999) 196 CLR 553.

186 s 97(3).

187 Above n 188, 630. Citing the Convention on the Rights of the Child, art 9(1). The Convention was adopted and opened for signature, ratification and accession by resolution of the General Assembly of the United Nations No 44/25 of 20 November 1989. In accordance with art 49, it entered into force on 2 September 1990. And also Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1, 38.

188 Ibid 638 - 9.

> Where, as here, an Act of federal Parliament has been amended, in part at least, to ensure conformity with Australia's obligations under international law, this Court should construe any ambiguity in the Act arising in the text of the amended law in favour of the construction which would uphold international law and ensure Australia's conformity with it.
>
> ...In the present case it provides an additional reason for adhering to this Court's consistent recognition and application of the paramountcy principle in the interpretation of Australian laws affecting the welfare and interests of children in positions of vulnerability.[189]

Accordingly the subpoena was effective as against the manager of the Northern Territory Family Protective Services unit.

CONCLUSION

Each of the 12 decisions above contains an international human rights law discourse between Kirby J and the Australian people. That, of itself, is important in the promotion of human rights in this country even if, in relation to the category one and category two decisions, the references to international human rights law are, at times, inessential to the ultimate reasoning.

Each of those decisions demonstrate that Kirby J takes seriously what, he concluded in 1988, is '[o]ur duty as lawyers ... to make ourselves aware of the gradual evolution of international statements of human rights and the jurisprudence developing around them, even where domestic law does not bind us to apply them.'[190]

The category 3 decisions, however, are in a different class all together.

Those decisions are a testament to the fact that the wrongs of discrimination and other breaches of human rights are the 'legitimate concern of all civilised people. That includes judges. Judges must do their part, in a creative but proper way, to push forward the gradual process of internationalisation...'[191]

Having regard to his record to date on the High Court and as 'an evangelist spreading the message from Bangalore and beyond his own country'[192], Justice Michael Kirby is playing his part in that process with distinction, making '[i]mportant advances in [the] law ... with [his] mind and pen and actions [as] an individual jurist'.[193]

Hopefully the fact that 'the text of the *Australian Constitution* ... is written in language which is brief, sometimes obscure and usually ambiguous'[194] will provide Kirby J with further opportunities to do so during his remaining time on the High Court. Hopefully, too his work will encourage other members of Australia's judiciary to accept the responsibility that they have to protect human rights.

189 Ibid 641 - 2.
190 M D Kirby , 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms', above n 4, 530.
191 M D Kirby , 'The Australian Use of International Human Rights Norms', above n 10, 375.
192 Lord Lester of Herne Hill QC, above n 97, 49.
193 The Hon Justice Michael Kirby AC CMG, Forward to (1997) 3(2) *Australian Journal of Human Rights*, i.
194 M D Kirby, 'Constitutional Interpretation and Original Intent', above n 65, 2.