

Think Globally

Michael Kirby

On September 7, 2000, *Green Bag* Contributing Editor Dan Currell visited Justice Michael Kirby of the High Court of Australia in Canberra, the capital of Australia. Justice Kirby was appointed to the High Court, Australia's supreme court, in 1996. He has held numerous national and international positions, including Commissioner of the WHO Global Commission on AIDS, President of the Court of Appeal of Solomon Islands, Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia, and President of the International Commission of Jurists, among others.

Through the United Nations you've been involved in efforts to understand and reach agreement on some legal issues relating to the human genome – but how did you get started down this path?

I was appointed chairman of the Australian law reform commission in 1975. That commission quite early in its life was given a task to prepare laws on the subject of human tissue transplantation. That took me into the area of bioethics. I've remained attached to that area ever since – because the issues have become larger, they've become more complicated and more sensitive and more global. So, one thing led to another and I became involved in the OECD work on data protection and data security, and later I

became involved in the UNESCO International Bioethics Committee, which was in turn responsible for the preparation of the Universal Declaration on Human Rights and the Human Genome. I also became involved in the ethics committee of HUGO – the Human Genome Organisation.

Indeed I leave tomorrow for a number of conferences, three of which will be related to the genome. So, that's a long way of saying that, in life, you tend to get on a track and it leads onto all sorts of opportunities. I find it a great joy to get out of the circle of lawyers and to meet scientists and technologists. To a very large extent the future will belong to lawyers – but the dynamic of the future belongs to

scientists and technologists. Their works are semi-miraculous and they present very great problems to society and quandaries for lawyers.

What do you see as the next few key legal choices to be made with respect to the treatment of genetic research and genetic information?

It's important to understand what the genome is – it is the entirety of the genes of the species. Indeed it's perhaps important to know that 50 percent of the human genome we share in common with the banana. So, the genome is really the key to life, the great mystery of consciousness and life. It's quite interesting isn't it that at the one moment in human existence we've reached out to space and to the edges of the galaxies and we've reached down into ourselves into the most tiny infinitesimally small elements of our being. The announcement has been made of a working draft of the human genome in June 2000, and that really will be the key to the future of medicine.

But it also presents many issues for lawyers. Some of them include the issues of privacy and non-discrimination on the basis of the genome. The question of consent to access to genomic data, access by insurers, access by employers, access by the state, access by your family to your genetic information. The issue of the implications of genomic discoveries for basic concepts of mental responsibility which are significant for criminal law. And the topic which gets the most attention at international gatherings on the subject – intellectual property protection, because of the conflict between those who assert that the genome belongs to all of humanity and those who say that it can only be translated into something practical and useful if we can invest a lot of money in it – and to do that we've got to have intellectual property protection. So that's just a handful of problems. There are many more but there are plenty of issues there for lawyers to be concerned about.

I'm interested in your mention of criminal law. Better genetic science could provide a new understanding of a defendant's mental predilections, with implications for criminal law. Will we be able to apply the old legal concepts any more – or do we need new rules?

American lawyers in my experience are often the most resistant to change in fundamentals. To some extent it's the price of having the oldest written living constitution in the world, and to some extent it's the price of living in a whole world, all of your own. But the need to re-examine fundamental propositions as we get more information is obvious, and the need to do so with scientific information which won't go away and won't bend to our desires is clear. The problem is to get that information to the minds of lawyers who are sometimes resistant and to get it into the minds of people who can pick it up and rethink the fundamentals.

Now, the law has always allowed a form of genetic information concerning people's mental disabilities to be taken into account. It's just done so according to a paradigm which may need to be completely rethought. Starting with the old *M'Nachten* rule, the law has recognised that some people for the purposes of the criminal law are to be regarded as incompetent, but it devised a test at a time when not a great deal was known either about psychology, psychiatry, still less about the genome. Now that we have this extra information the question is, What do we do with it? We could allow it to be adduced in criminal trials as being relevant to sentencing if a person is convicted. We could allow it to be adduced in some cases as we do in profound mental incompetence at the point of considering whether a person has *mens rea*, or can be shown to be guilty of a crime according to our dual requirements. Somewhere in between those two possibilities are various staging points along the way.

Obviously genetics can't be simply picked up as if it provides the complete answer to criminal

liability. Otherwise you could contend that because 50% of the population are males and because that is a genetic phenomenon and because that is overwhelmingly relevant to criminal liability that people could go along to court and say 'Well, I want it to be taken into account that I'm a male and I just can't help myself.'

But there is no doubt that some people are probably violent because of some genetic cause. Some people's sexual behaviour might well have a genetic cause. And if that is so then, if we're talking in terms of moral culpability, such people are not as morally culpable as persons who, with full power over themselves, deliberately decide to do some cruel, violent and wicked act.

The answer to the quandary will probably lie in getting more information about the effect of genetics on behaviour. That is a science which is only in its infancy at the moment. The unravelling of the genome to provide knowledge in this field is undoubtedly going to increase exponentially in the years to come. What is important is that lawyers should be aware that something is happening. That it's something big. And that it's going to affect the law. But the use we make of it will depend upon the usual lawyer's craft – evidence, testing propositions and argument. Not simply accepting any theory that is put forward, but requiring it to be clearly established to a court of law, clearly established to the policy maker and the legislator.

On the topic of intellectual property and genome research, different jurisdictions have taken different views as to how to treat genetic information. How important is it to have an international standard on these questions with respect to genetic information?

Well this is the problem nowadays, that if you ban it in one place, it will pop up somewhere else. That's why, inevitably, global solutions are necessary. If the problem needs a solution,

then if it's in the field of any of the technologies of the twentieth century, it's going to be important to try to find a global solution.

There really were three great technologies of the twentieth century: nuclear fission, informatics, and genetics. And no doubt, as time goes by, we will see the interlinkages of those because things normally have interlinkages. We could not have had genetics without informatics. We could not deliver nuclear fission without information technology. So they are all linked. But we cannot solve the problems arising from any of these technologies without a global approach.

This is illustrated by what happened in Australia when human tissue transplants came up. Under Professor Carl Wood, Australia was at the forefront of human tissue transplants and in vitro fertilisation. The Parliament of Victoria enacted a law that forbade any experimentation with embryonic tissue over a certain period of time – I think it was 48 hours. That meant that it was not possible for the laboratory in which these Australian scientists were involved to continue their work in Victoria. So the work simply moved offshore to Singapore.

There have been similar developments in the United States. Dr. Richard Seed has been working on reproductive cloning of the human species. Because of the President's intervention and the adoption of a moratorium on federal funding to any agency which is engaged in reproductive cloning of the human species, Dr. Seed was not able to continue his experimentation in the same laboratory. My understanding is that he then set about looking for other places in which he could do so, and at one stage he was looking to Japan. Japan has a genetics industry and the capacity to deliver the pharmaceuticals and other products that would be the result of his labours. But even if it weren't Japan, there are a host of other amenable countries to choose from.

So if it is important to regulate – as it cer-

tainly is with the nuclear issue, and it may be in some respects with information technology and with genetics or genomics – unless we can find global solutions we will not regulate. And not to regulate is to make a decision, in effect, to permit science to go ahead unhampered by law.

It's probably fair to say that the model for such regulation right now is through the military and economic power of large nations. So that's one regulatory model. But what are the regulatory alternatives assuming that there are commercially attractive but morally unacceptable applications of genetic technology?

Well, the answer may be in the end that there is none – that the scientists will find somewhere to pursue their intellectual inquiries, and particularly if there is a potential market. Myself, I don't get very excited about reproductive cloning of the human species. It is ridiculous to assert that a person who may be cloned from another human being would be exactly that human being. Their life experience would be utterly different. Therefore life, being made up of our genetics and our experience, would fashion a different creature.

As well as that, I have watched over twenty-five years the way in which debates rise and fall. Originally there was a big debate about artificial insemination by husband. Then there was a debate about artificial insemination by donor. Then there was a debate about in vitro fertilisation. And now there's a big debate about the question of reproductive cloning of the human species. If science can deliver genetically related children to human beings who can't beget them, it serves such a powerful desire that it will be next to impossible to prevent. Even the will of such a powerful country as the United States will not be able to stop it.

And maybe that's not such a bad thing. But then you reach what one might call the bottom line. It's rather like the issue of nuclear fission.

What about the production of some kind of hybrid of the human species and animal species? There are experiments conducted between human sperm and polecat eggs simply to watch the scientific phenomenon. And given that our genome has so much in common with the higher forms of life – if it's 50% with a banana, it's going to be up at 99% with the chimpanzee – it will be natural that there will be experimentation with various forms of animal life.

Intuitively one reacts with a sense of disquiet to some such experiments. With a lack of effective international regulation, they will happen. And it may be that we can say that the good sense of scientists and market forces will control these developments and prevent nightmares occurring. But nightmares did occur in the twentieth century. We therefore have to learn the lesson that unless we choose to regulate, we have made a decision.

That's why I am interested in the efforts of the international community to address these issues. It certainly isn't easy. For example, if you're talking in terms of the use of embryonic tissue, it's by no means true that all religions have the same view about when human life begins. Some forms of Christianity such as the Roman Catholic Church teach that human life – deserving of moral respect and legal protection – begins at conception. Other religions would place it at some other time – Islam and Judaism place it at 40 days, the quickening. Islam places ensoulment of the foetus at 120 days. And the common law believed life began at birth. So that when you get an international meeting, such as the UNESCO Bioethics Commission, it is a real challenge to find common ground. Yet it can be done. The achievement of the Universal Declaration of Human Rights and the Human Genome is that it affords at least some basic rules, almost at the level of motherhood statements. But it represents the beginning of humanity's struggle in a matter that

touches the species to lay down some basic propositions that will influence the way that municipal governments should deal with these questions.

As an American lawyer, I can tell you – from my perspective, at least – it doesn't seem like these international efforts are very real to us in the United States. American lawyers just don't think of anything outside the 50 states as a potential source of domestic law.

Well in fairness to you there's only so much data that you can absorb and process. If you've got 50 or more jurisdictions, you have a wealth of information that is bombarding you, and all speaking in terms that you can basically understand. Now, that is not the case in a country like Australia. You will remember in the course of the case that you saw argued,¹ I asked about United States decisions relating to the practice of customs officers seizing goods and not releasing them until the importer has paid the duties. I questioned whether that ran into any problems under the Due Process clauses of your constitution. Apparently it doesn't.

Increasingly a court such as the High Court of Australia looks beyond its traditional sources when solving a problem. Its traditional source was the law of England, and maybe it would look to Canada and the United States. But now we will take information from the Supreme Court of India, or the Court of Appeal of New Zealand, or the Constitutional Court of South Africa. Mainly English-speaking countries because they tend to be common law countries and they tend to write their decisions in the English language. But, where relevant, we will look beyond that. It's a wise reminder for all of us that the best thoughts, the most creative thoughts, will come from outside of your magic circle. It's

therefore important to stimulate your mind with analogous reasoning.

One problem in the United States, in my experience, is that lawyers are not as stimulated as in other countries by external forces that really challenge their thinking. England, which is the source of the legal system in both our countries, is being fundamentally challenged now because of its association with Europe and the civil law system. Other countries, similarly, are being challenged by the forces of globalism. America is in danger, I think, of becoming something of a legal backwater in a world of such radical global changes, and it's not good enough simply to go to a lawyers' conference in London and feel like you've been globalised. You've got to realize that the legal systems of Asia, Latin America and Africa are speaking to us as well. And not just the old comfortable traditional legal systems of Europe, which we can understand better because they speak the same language and think in terms of the same paradigms.

Since Americans tend not to draw from external sources of law, do you sense that we'll get a polarisation between American law and law in the rest of the world? Doesn't that suggest that treaties and legislatures will have to provide uniformity where necessary?

Well, I'm not as pessimistic as that. Judges travel. They tend to go to the same conferences. I go next week to a number of international conferences, but one of them is going to be a conference at the law school at Yale University. And there will be judges there from the final courts of appeal of fifteen countries – including Justice Breyer of the Supreme Court of the United States, Justice Iacobucci of the Supreme Court of Canada, Lord Woolf, the Lord Chief Justice of England, Justice Ahraron Barak of Israel and so on.

¹ *Malika Holdings Pty Ltd v. Stretton*, [2001] HCA 14, available at www.hcourt.gov.au.

Therefore, there will be a meeting of minds between these highly influential intellectual leaders of their nations.

The technology of the Internet makes interconnection much easier. But what is lacking, sometimes, is a will to look beyond what you absolutely have to. This is in part because lawyers are busy, with many things to do. They've got lots of information; maybe too much information. The lesson of the Yale conference is that at the same moment, whether it is the Supreme Court of Japan or the High Court of Australia or the Supreme Court of the United States, we are getting very similar problems. We can learn from other countries.

In this regard, one could consider the metamorphosis of the English House of Lords. The English judiciary in the days of empire was supremely self-confident. It believed that English law was the greatest gift to British subjects. With the decline of empire, the House of Lords is now just another final court of appeal. And if you look at their decisions in the last decade, they are increasingly looking at decisions of courts in New Zealand, Australia, the United States – they will always look at analogous solutions in the common law.

So I'm not so pessimistic. If it can happen to the British Empire, it can happen to the American empire. The lesson of the long eye of history is that empires come and empires go. At the moment you are in the ascendancy. But your moment will come. I think the technology is pushing us together. The technology of travel is pushing us together. The inquisitiveness of the human mind brings our minds together. The leadership of the judiciary meets quite often. And I think this new, higher level of communication will influence the next generation, the Internet generation, in a way that the generations of books and paper were not quite so open to influence.

Assuming judiciaries can converge on major issues, would that mean that we should promote judicial independence as a way to drive that convergence internationally? That is, legislatures are responsible to their constituencies, so perhaps they can't create uniformity across jurisdictions. Is it up to the judiciary?

I think that would not be appropriate. And I am not as pessimistic about our democracies. It is better in principle that the solutions to the large questions of the kind we've been discussing should be found by the representatives of the people. But what we have to do is to somehow ensure that the democratically elected mechanisms of lawmaking work more effectively. That they do so at a moment in history when the problems are coming upon us very quickly. They are extremely complex. The technology has gone beyond the ability of even highly intelligent and informed people to understand it. The solution to a problem will ultimately be found (if the legislators or the executive government under power fail to act) by people like me. By the judges.

That is the beauty of the common law system – there will always be a solution. But it's likely to be a much better-informed solution if the problem has gone through a legislature. If the legislature have gathered information. If they have got the very best scientists and sociologists and philosophers and others together.

This happens internationally, too. In the area of the genome, the Bioethics Commission in the United States and other bodies in the United States that are amongst the best in the world will be represented in London in two weeks' time at the International Bioethics Commissions meeting, which is now a global meeting of these bodies. They will be talking about how we can search for common solutions to shared problems.

That's not easy if you take for example the issue of intellectual property protection. If

you're from a country like India or Solomon Islands you are not going to be a big player in genetic technology or the pharmaceutical industry. You will tend to have a different view about intellectual property protection. You will tend to be much more concerned about the human genome as the "common property of humanity".

If however you come from a country like the United States or Japan you will tend to be thinking in terms of the legitimate claim of large corporations to have a measure of intellectual property protection if they are to invest very much in developing related pharmaceuticals. But, obviously, we will need to find consensus on these issues. We've got to develop a mechanism for doing so. Just throwing up our hands and saying that it's all too difficult is really not very satisfactory.

Global trade seems to be a driving force behind much international regulation – and a controversial one at that.² What of the role of trade in driving common regulations?

There's no doubt that one aspect of globalism and regionalism is the economy. It's no longer possible for countries to live entirely in their own economy, at least if they are a country like Australia. To some extent the United States or China could do so, but it is enormously to their advantage to have robust trade relationships. And they do.

It's actually quite interesting the way in which, in the past twenty years, a development in thinking has occurred in the global economic agencies. The World Bank, the IMF, the World Trade Organization have all come to realize the importance of law. They've all come to recognise the signifi-

cance of constitutions dependent on a vigorous legal profession. And that is not by accident. Unless you have these institutions, that we take for granted, then you can't really build economic strength.

I saw this in Cambodia. It's one thing to have a magnificent constitution and to have free and fair elections. But, unless you have independent laws, professional judges, impartial adjudicators, a vigorous and vigilant legal profession, written laws which are available to the people, and discussion about legality and about reform, then you can't really build sustainable economic growth. When I was UN Special Representative, I tried to get the World Bank interested in training judges in Cambodia. They declined at the time because they said, and I understood this, 'We cannot get sucked into the black hole of the budget of Cambodia.' But we will probably see the use of the World Trade Organization to stimulate democracy and constitutionalism and the rule of law as preconditions to economic assistance. This is a change of institutional attitude of great significance for lawyers.

The problem is whether or not these agencies, used to disciplining the small countries, will have the strength to stand up to the economic policies of the large and the powerful. For example, under the United States Trade Act, there is a blacklist of countries: those countries which do not provide, in their laws and in their policies and enforcement, protection of intellectual property judged adequate by the United States.

This is very relevant to the discussion of the genome, and of the intellectual property protection of certain life forms. In some countries the idea of owning the rights to a form of life is

² Indeed, the World Economic Forum took place in Melbourne several days later, Sept. 11-13, 2000. While protests were not as massive or as violent as at the World Trade Organization meeting in Seattle the previous year, they were fairly effective in reducing attendance at the meetings. Many Australians expressed shock at the protesters' behaviour.

a total anathema. It mustn't be forgotten that *Diamond v. Chakrabarty* was only decided by five justices to four of the United States Supreme Court.³ So it concerns a controversial question. But unless countries afford intellectual property protection to the satisfaction of the United States Patent Office, they will go on the blacklist under the U.S. Trade Act. They will probably come under pressure through the World Trade Organization. In this way the rich enforce their legal policies on the poor and the weak.

As you point out, the current model for ensuring the protection of intellectual property globally is through the economic power of the United States – bludgeoning other jurisdictions into compliance through the threat of sanction. Yet there are also efforts to create international consensus through agreements reached by many nations as equal partners in the effort. Do you see these systems being reconciled over time?

It's sometimes difficult to get Americans generally to take the rest of the world seriously. This is not something which is confined to lawyers and judges. This is something which is rooted in the culture. It comes from an instinct for self-sufficiency and not a little self-satisfaction.

On the whole, the rest of the world has been greatly advantaged by American values – American values of personal liberty, American values of constitutional law, American values of international trade, and of respect for human rights and upholding democracy. All of these have had a beneficial impact.

So I wouldn't be quite as critical as your question suggests – Americans aren't bludgeoning the rest of the world. To a very large

extent Americans just get on with their own lives. It just happens that their economy and their population are very great. The rest of the world just gets swept up in the process. But, on the whole, the rest of the world have been very lucky that we have had you as the next empire after the British empire. Overwhelmingly it has been to the benefit of humanity.

A challenge of the 21st Century is going to be to get America to realise that it has to live with the rest of the world. And to recognise the variety and difference of the rest of the world. It's just a pity that you don't get as much of the rest of the world as we get of the United States. I am hopeful that something will happen in the course of travel, the media, and of the inquisitive spirit of Americans to bridge that gap – but it seems a long time in coming.

A sceptic could argue that these global agreements – like the Universal Declaration on Human Rights and the Human Genome – are just the efforts of wealthy nations with developed legal systems to force their rules upon others. Common law nations might sign off on these U.N.-led efforts, but have we seen their laws being affected by them?

One of the features of internationalism that we saw in Australia was the manner in which we got rid of the laws against homosexuals. That was done because Australia had subscribed to the First Optional Protocol to the International Convention on Civil and Political Rights (ICCPR). Not having a general bill of rights in our constitution, that became the stimulus to the reform of the law. The federal parliament enacted a law which protects the rights of adults to their sexual privacy. Ultimately that law led to the change of the law in the part of Australia that still had the old laws – the state

3 447 U.S. 303 (1980). The Court (Chief Justice Burger and Justices Stewart, Blackmun, Rehnquist, and Stevens) held that a "human-made, genetically-engineered bacterium" could be patented under 35 U.S.C. § 101. Justice Brennan, joined by Justices White, Marshall, and Powell, dissented, arguing that, while the processes used to produce and employ the organism could be patented, the organism itself could not. 447 U.S. 303, 318.

of Tasmania.

As a gay man myself, that was a development in which I showed more than academic interest because I had lived through the oppression which can be done by law, and which is still done in many parts of the world – sadly, in many parts of the United States – and sometimes it helps you to see the truth when you do so with the stimulus of outsiders. In this case it was the stimulus of the U.N. Human Rights Committee, which told Australia that, in this respect, we were not according to our residents (citizens and non-citizens) the protections we had accepted at the international level.

The United States has signed the ICCPR, but not the First Optional Protocol. Therefore you don't have access to the U.N. Human Rights Committee. Apparently you feel comfortable that you have a bill of rights. You have access to the Supreme Court of the United States.

I mention this subject for this reason: There have always been homosexual lawyers and judges. Up until now they have always been told that they should be ashamed of

themselves, and they have been deeply secretive of their sexuality. Science shows that sexuality is not something that one can choose or can change. There may be some people who because they are bisexual can change in part. But overwhelmingly this is an indelible feature of human existence and thus of human rights. It's important, I think, that judges who are dedicated to truth should be willing to break down irrational fears based on lack of knowledge and of basic scientific data. I consider that something that I have to say to homosexual lawyers and judges in the United States and their supporters – because overwhelmingly, well-informed heterosexual people will support reform in this regard. As in the past, the United States taught the world the importance of human rights. Now the world is watching the United States to see how it deals with this latest challenge in the arena of human rights. But I hope you don't delay things – and are willing to learn from others, just as others learned from Abraham Lincoln, Rosa Parks and Martin Luther King, Jr. *GB*