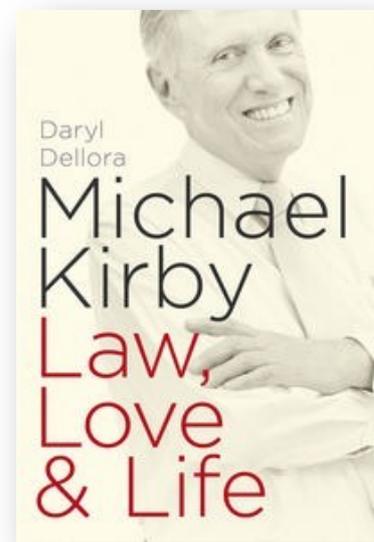


Michael Kirby: Law, Love & Life

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Extract

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The Yellow Jacket

Of course I'm optimistic. How could you be an Australian who's seen a nation that was rather self-satisfied solve or partly solve issues of Aboriginal land rights, issues of gay rights, issues of white Australia, and increasingly become a multicultural, multinational society, a much more interesting and vibrant society. I've seen many things improve in Australia in my lifetime and if you've seen that, then you know it can be done.

Michael Kirby.

Forty-six thousand photographs. Many carefully displayed under clear plastic in spiral-bound photo albums - 123 of them. Hundreds more still in their yellow, black and blue envelopes, Kodak, Agfa, Fuji, exactly as they were when retrieved from the chemist after developing and printing. Michael Kirby has been taking photographs for more than forty years, including almost every day of his professional life. It is unlike any other amateur photo collection, not just in its sheer volume, but also because it is unusually consistent in one major respect: the subject matter. Almost every one of these tens of thousands of photographs features people. Page after page of anonymous conference delegates, occasionally broken by a shot of Queen Elizabeth II or Nelson Mandela or a Nobel laureate. Young associates snapped in chambers on their last day of work, only to reappear years later as distinguished academics, lawyers, MPs or United Nations representatives. In their own way, the photos document a professional life through the people and the places that define it.

From 1996 to 2009 Michael Kirby served as a justice on the highest court in the Australian judicial system. His first judicial appointment, to the Arbitration Commission, had come in 1974 at the tender age of thirty-five, but by 1996 he was by far and away the best-known judge in Australia. Not all Australians would have known he was a judge of the High Court, or perhaps even what that institution was, but almost all would recognise the deep, mellifluous, somehow comforting tone of his voice when they heard it in one of his many radio or television appearances. He was uniquely accessible in a

profession that generally tries to remain aloof – certainly from the masses. Kirby was the most outspoken and active judge the High Court had ever seen.

But looking back at this collection of moments, album after album of them piled high on trolleys, it is almost as if those thirteen years on the High Court were a quiet time, compared with the life that had come before. ‘Well, maybe I’m trying to capture life before it all disappears,’ Kirby notes wistfully.

It’s unfolding day by day and I’m trying to stop it for a moment and capture the moment and capture the people. It’s probably my endeavour to rescue events from the inexorable pace of time. Maybe in the future, especially in the future of the High Court, internal photographs that are taken informally, a view of the court that has never before emerged, will be quite useful. Probably very embarrassing to some of the justices, but never to me because I’m behind the camera. My great-aunts in Ireland were portraitists, and I sometimes think composing a photograph and getting the balance in a photograph and centring or putting the subject in an appropriate position is a sort of endeavour for me to give an artistic expression. But artist will I never be, singer will I never be.

The stage, the spotlight, the roar of the crowd, that did have enormous appeal to Kirby and he sought it out. In 2002 he helped open the World Gay Games at the Sydney Football Stadium at Moore Park to rapturous applause from the thousands attending. In 2006 he even got out in his jogging shorts (and brown suede Hush Puppies) to run through the suburban streets of Sydney in the Queen’s Baton Relay for the Commonwealth Games. If there was an audience of twenty or an audience of 20 000, Michael Kirby would be up on the platform with microphone in hand.

‘Tread softly, tread softly.’ Kirby’s voice wasn’t melodic, it was rhythmic and slightly distorted by the PA. But all eyes were fixed on him. Hip-hop performer Elf Tranzporter leant towards the High Court judge and put his arm around him. They looked good together up on the stage, the judge belting out a rap of Yeats and the hip-hop artist creating the rhythm track, both holding microphones, an incongruous version of Mick and Keith. The crowd was enthralled, cheering and clapping wildly. The appearance of 68-year-old Justice Michael Kirby of the High Court of Australia at the 2007 Victorian Arts Law Week function had been determined well in advance, but the routine itself was far more spontaneous. He had agreed on the day to do an impromptu act with Elf Tranzporter. The only pre-planned part of it was his dress. He appeared on the stage at first apparently garbed in the traditional dark blue suit of a judge. Initially, he’d feigned surprised indignation at the act he was supposed to perform. ‘Why didn’t they tell me?’ he said. ‘I’d prepared a most wonderful address on the inter-relationship

between the Constitution and the implied right to free expression and the law on copyright.' Laughter from the crowd. 'This is something new . . . something new for the High Court . . . and we are going to get with it and get it on.'

And with that, he'd got it off – well, his suit coat, at least, revealing a garish yellow jacket underneath. 'It's a little number we are going to put in the High Court. They're all going to be wearing it next week! . . . And I'm going to have to get ready for the time in two years when I leave the High Court and I am going to become the Jerry Springer of Australia! So, here we go, out into the multitude.'

Kirby stepped down into the excited crowd and calmed them. The room fell silent and he began his recitation of the W. B. Yeats poem, 'He Wishes for the Cloths of Heaven':

*Had I the heavens' embroidered cloths,
Enwrought with the golden and silver light,
The blue and the dim and the dark cloths
Of night and light and the half-light,
I would spread the cloths under your feet:
But I, being poor, have only my dreams;
I have spread my dreams beneath your feet;
Tread softly because you tread on my dreams.*

The crowd seemed a little stunned, perhaps wondering if they had somehow missed the punchline. But then Elf Tranzporter began his beatbox rhythm track and Kirby jumped back on the stage, now singing along: 'Had I the heavens' embroidered . . . tread softly, tread softly, tread softly, tread softly.' The young audience revelled in it.

Kirby had worked the crowd beautifully. The 300 assembled lawyers and artists were in the palm of his hand, but they weren't going to escape until Kirby had turned their minds to some matters of human rights. He now reprised a part of the speech he had delivered at the opening ceremony of the Gay Games. Kirby added some new material to reflect the theme of that year's Arts Law Week, which was sponsored by Multicultural Arts Victoria.

But to come, there will be inclusion and fusion not exclusion. Fusion not exclusion. Under different stars, at the opening of a new millennium, in an old land and a young nation, we join together in the hope and conviction that the future will be kinder and more just than the past. At a time when there is so much fear and danger, anger and destruction, tonight represents an alternative vision struggling for the soul of humanity. Acceptance. Diversity. Inclusiveness. Participation. Tolerance. Joy. Ours is the world of love, questing to find the common links that bind all people. We are here because, whatever our identity, we believe that the days of exclusion are numbered. The days of fusion are come . . . Enjoy yourselves. And by our

lives, let us be an example of respect for human rights. Fusion not exclusion. And not just for minorities. For everyone.

The next day, Michael Kirby made it once more into pages of the nation's newspapers, this time for being the first High Court judge in the history of the Commonwealth to have performed a rap. As he said himself during the performance: 'This is a very important night, I don't see Sir Owen Dixon coming here and doing this, I don't see Sir Wilfred Fullagar coming here and doing this!' Dixon, perhaps the most respected of all High Court judges and his colleague Fullagar, both Victorians, were, of course, now long dead.

Only a few months before this, Kirby had been listed by *The Bulletin* magazine as one of Australia's top ten creative minds, alongside Aboriginal academic Pat Dodson, restaurateur Gay Bilson, philosopher Peter Singer and physicist Paul Davies. And the same year he was included as one of the hundred most influential Australians in a list that recognised Germaine Greer, Patrick White, Kylie Minogue and Robert Menzies. These accolades were becoming commonplace for Justice Michael Kirby. In 2002, *Who Weekly* had even put him up there with Halle Berry, Natalie Portman, Hugh Jackman and Denzel Washington in its annual round-up of the world's twenty-five most beautiful people.

From the moment Labor prime minister Paul Keating had quite unexpectedly appointed him to the High Court of Australia in 1996 to the day he left in February 2009, Michael Kirby was the most recognisable judge in Australia and a most unusual man. Openly gay, the first judge of any final national constitutional court in the world to have come out while still in office, Kirby had been controversial and outspoken – even, at times, to his own personal cost. As the first chairman of the new Australian Law Reform Commission (ALRC), from 1975 to 1984, Kirby was no stranger to media attention. In fact, from the outset he saw it as his duty to bring the law to the people. More importantly, he actually wanted meaningful input from the people themselves, especially those who would be immediately affected by the laws in question.

Most Australians were mystified by the legal process and in awe of lawyers and, particularly, judges. Indeed, in Australia in 1975 the law was a closed community, almost exclusively male, white, Anglo-Saxon, Protestant, straight (at least outwardly – homosexuality was still criminalised in most states) and extremely conservative. In nearly thirty-five years on the bench, Kirby was, in his judgements and public statements, to challenge many of these stereotypes. If there was a complex or difficult moral or ethical question, people quickly came to expect Michael Kirby to be outspoken about it. Unlike most of the politicians, Kirby was admired for not running away from the hard questions. He was careful to avoid conflict with issues that were before his court, or might in the future come before his court, and for the most part this was a successful strategy, but he would not shy away from difficult or controversial matters when it came to fundamental principles.

There was one regret in a long and extraordinary career on the bench: he came to the High Court too late to be part of the famous and lauded Court under Chief Justice Sir Anthony Mason. It was the Mason Court that heard the *Mabo* case and Kirby would have dearly liked to have been a part of that judgement.

If Melbourne barrister Barbara Hocking, the 'intellectual architect' of *Mabo*, had not completed her Master of Laws on the topic of native title land rights, it is unlikely that Eddie Mabo, who heard Hocking address a conference, would have set out his action in the way he did, or sought her out as the first counsel to be briefed on his claim. Hocking presented, eloquently and for the first time, the moral and legal issues at the heart of *Mabo*: the simple thought that Aboriginal people and their land claims must be treated equally, under Australian law, to every other landholder. That Indigenous Australians did not own their lands was a wrong that had long been relegated to the category of unfortunate and unfair but, by 1980, it had been settled Australian law for 200 years. At the time, no Australian politician was prepared to even acknowledge the wrong, let alone try to do something about it.

Michael Kirby was fascinated as the *Mabo* case finally emerged from the High Court twelve years later, and he was as shocked by the outcome as most other Australians. The judges could not simply put it into the too-hard basket, as every colonial administration and parliament had done since white settlement. The Court had a duty to decide the matter that was before it and that is what they did. Eddie Mabo died in January 1992 and the High Court found in his favour in June of the same year. All he had asked was that his traditional lands be recognised as belonging to his clan at the time of white settlement – that native title was real and that the proposition of terra nullius (land belonging to no one) was a fiction in the Australian context.

Like Hocking, Kirby saw it as his duty to speak up when his voice was needed. Whether it was for the rights of HIV/AIDS sufferers, the human rights of the Cambodian or Tibetan people, or the rights of prisoners and other disenfranchised Australians, including refugees and Aborigines, he was outspoken again and again.

Kirby wasn't always right – far from it. All judges make mistakes. Nevertheless, there were fundamental principles, as he saw it, that could not be compromised. The importance and relevance of international human rights law was one such principle, certainly one of the most important for him.

One case that Kirby sat on, in particular, illustrated this more than any other. A Palestinian man born in Kuwait, Ahmed Ali Al-Kateb, had sought political asylum in Australia but had been held in immigration detention for years. Israel would not allow Palestinians to return to Gaza once they left and no other country would take him, so he was stuck in Australia. He was classified under Australian and international law as stateless. In 2004 the Howard Government was arguing before the High Court that Mr Al-Kateb could, if necessary, be held in immigration detention, literally, for the rest of his life. Kirby strongly disagreed and invoked his understanding of

international human rights law to support his view that someone who is escaping persecution and has committed no crime ought not be put in jail, potentially for the rest of their life, on the whim of an immigration minister. As it turned out, the Government won the case; Mr Al-Kateb and the other two or three stateless people in Australian immigration detention centres could now be doomed to a life behind bars unless the minister decided to release them into the community. Mr Al-Kateb was eventually released by the minister but the unfairness entrenched in the law remained.

The yellow jacket was pulled out of the closet once more. In the month he retired from the High Court, February 2009, Kirby addressed a black-tie function at the Great Hall at Sydney University. Few knew the significance of the tiny glimpse of yellow that could be seen under the cuff of his black jacket. After the formalities and some introductory words there was an audible gasp from those assembled when Kirby removed his tuxedo jacket to reveal the yellow one beneath.

The dignitaries present included the chancellor of the university and New South Wales governor Marie Bashir, the vice-chancellor and several knights of the realm, the leader of the Opposition, the attorney-general and many other politicians and judges. But the most important guest as far as Kirby was concerned was Mr Al-Kateb himself.

Two weeks ago, on 7 February, [he] was made a citizen of Australia. Now Ahmed Ali Al-Kateb is here with us tonight. He is a person who used every legal endeavour, as was his right, and he went through the hierarchy of the Australian courts, as is rather unusual. I'm told that his ceremony of admission to Australian citizenship was marred a little by the fact that the official who was present at the time was, shall we say, not entirely sober. But I want to tell you, Ahmed, I want to tell you that you are now a citizen of a free and fair country that lives by the rule of law, that the judges who decided against you were doing what they believed the law to require, that the judges who decided for you were doing what they believed the law to require. That it is part of the price of a rule-of-law society that you have to have decision-makers, that they act according to their conscience and to their understanding of the law [. . .]

You have been accepted into our midst as an honoured citizen and I want, on behalf of everyone present, to say welcome to our citizenship. Congratulations and we honour you as an Australian citizen.

At the end of his address Kirby dived into the crowd in his self-appointed role as Australia's Jerry Springer. Dazzling in the yellow jacket, he shook Mr Al-Kateb by the hand and asked and answered questions about a bill of rights, terrorism, global and Aboriginal affairs. He may have ended a long career as a

judge but it seemed that Michael Kirby wouldn't be going anywhere soon. And despite a few minor protestations that the yellow jacket had passed its use-by date, it too was in for a lot more action.

The yellow jacket is just something that I have worn from time to time. My partner, Johan, says I've worn it too often. It has to be pensioned off. It's to show that all lawyers are, in a sense, double personalities. That you have your own inner soul, and your inner being, and your personal life and your loves and friendships, but you have to play a role in the administration of justice, and so this is a very physical and dramatic way of demonstrating that underneath everyone's dark suits is a bright golden outfit, which they're just waiting to get into.

But the yellow jacket meant a lot more than this. Throughout his whole life Kirby had been guided by some basic moral principles that came directly from his Anglican Christian beliefs. He didn't trumpet his religion; in fact, for the most part it remained a private side of his life. He neither hid it nor wore it on his sleeve, it was just part of him and always would be. But there was something else, something fundamental to him and to everything he did, whether in his private life or publicly, and unlike any other prominent public figure Michael Kirby was prepared to speak openly and regularly about it. It was something that came from his religion but was in no way exclusive to it. When the yellow jacket came out, when he literally took on a different aura, when every pair of eyes in the room were fixed on him, this was the time to act. Kirby stood out, at that moment, from all around him and he spoke from the heart.

I have a view that the foundation of human rights, international human rights, is love. Why do we respect human dignity? Why do we uphold the right to civil and political rights or economic, social and cultural rights? We do so because we can see enough in other people to understand that their lives are sufficiently similar to our own that we should 'do unto others as we would have them do unto us'. The golden rule is actually through all the religions. It's the common feature of all the human belief systems and all the spiritual explanations.

So, if you think in those terms and you ask, what is the absolute bedrock of human rights, of our legal system, of striving to have order? Why are we here today and tomorrow, and what does our life mean? Well, love has a lot to do with it and we can't leave love out of it. If you've had a life like mine, with a loving family and loving parents, siblings, good friends, and then a loving companion over such a long time, then you're very lucky. The foundation of so much of that is love and I've never been ashamed to say so.