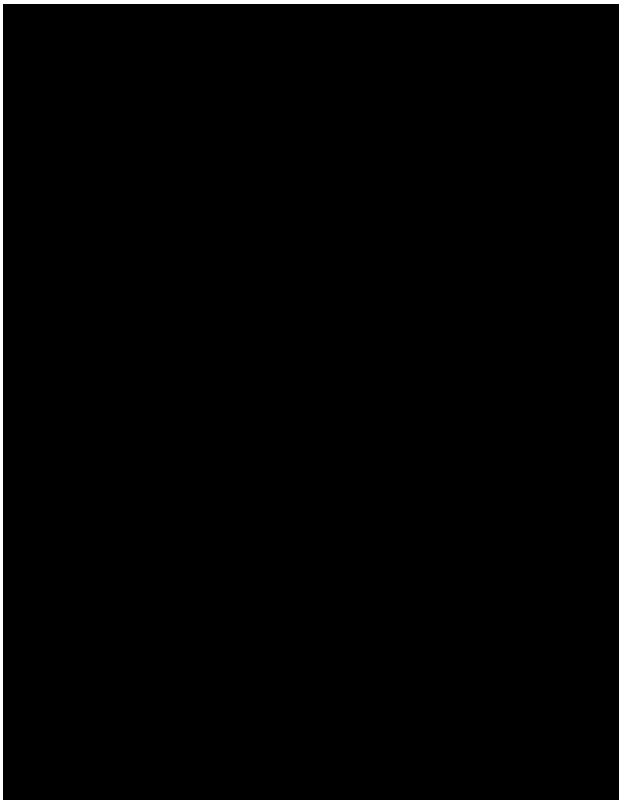
unlawfully in the country attracted a right to a hearing before deportation, at least in relation to whether a minister should have regard to a relevant international treaty (a treaty to which Australia was a party, but which it had not implemented in domestic legislation) before making a decision.

Robin Creyke

**Kirby, Michael Donald** (*b* 18 March 1939; Justice since 1996). When appointed to the High Court, Kirby had already held judicial office for more than 20 years: from 1975, as Deputy President of the Australian **Conciliation and Arbitration** Commission; from 1983 to 1984, as a judge of the **Federal Court**; and from 1984, for 11 years as President of the NSW Court of Appeal. On several occasions, he had acted as Chief Justice of NSW. Between 1995 and 1996, he was President of the Court of Appeal of the Solomon Islands.

In March 1939, Australia was emerging from the **Depression**. In September 1939, **World War II** was declared. Religious and racial intolerance flourished, often unrecognised, not merely in the attitudes of many Australians but also in the nation's policies. Parenting was difficult. Kirby's mother, Jean Langmore Knowles, was an Australian of Anglican Ulster stock. Kirby's father, Donald Kirby, also Australian-born, was an Anglican from a mostly Catholic Irish family, hard-working and devoted to his young family. Typically of the time, both parents venerated the monarchy and its place at the heart of the British Empire. The family, though never in want, was not well off. Their sympathies were generally with the Australian Labor Party. Jean Kirby was ambitious for her children, and lived long enough to see those ambitions for Kirby and his surviving brothers and sister fulfilled.



Michael Kirby, Justice since 1996

From childhood, Kirby was exceptional. An iron discipline and relentless application drove him towards set goals. One brother has described his routine of daily study as intellectual weightlifting. Kirby has said of himself: 'I don't think I was ever young.' The slightest failure at school fuelled only greater determination. His interests extended to the theatre, debating, and refereeing rugby union—the last a gesture towards being the rounded person. Kirby's school was Fort Street Boys High, one of Australia's oldest, and renowned for its teaching; its former students included **Barton**, **Evatt**, and **Barwick**. Kirby achieved the highest grades and carried into the University of Sydney intellectual muscle built on discipline and concentration. He graduated BA in 1959, LLB in 1962, BEc in 1965, and LLM in 1967.

In June 1961, Kirby's classmate **Gleeson** nominated him as the law representative on the Students' Representative Council. In 1962, he became President. The many issues he spoke about included the 'essential barbarity of capital punishment' and the mistreatment of **Aboriginal peoples**. He became President of the University Union and a Fellow of the University Senate. His success in student politics was founded on his mastery of any subject of debate. Politics was the obvious career choice for him.

The future that called was one of austere self-sufficiency, in part the price of his homosexuality. The law at the time forbade him open love and companionship. But the experience of forced isolation taught him the pain and distress that **discrimination** causes. That experience combined with his Labor Party links and stringent upbringing to fire a champion of anti-discrimination and human rights. Kirby became a radical. And he chose to be a lawyer.

Both in and away from the Court, Kirby has protested against the injustice that discrimination breeds. He has said that to discriminate against people because of their **sexual preference** is like discriminating against people because they are left-handed. In 1991, he was the winner of the Australian Human Rights Medal. In 1998, he was named Laureate of the UNESCO Prize for Human Rights Education.

Such enlightenment seemingly sits uncomfortably with a monarchist. Kirby has remained unmoved by proposals that Australia become a republic. No doubt part of his attachment to constitutional monarchy derives from his upbringing. But he has explained his support for the present constitutional arrangements as being based on the success of constitutional monarchy as the least dangerous form of government, and on his distaste for nationalism. He has portrayed adherence to a constitutional system with an absentee international monarch as the radical option. But in fundamentals (Crown, **religion**, and the **rule of law**), Kirby's attitudes reveal a conservative element in his **values**.

Kirby was admitted to practice as a solicitor in NSW in 1962 and as a member of the Bar in 1967. However, he saw himself as a mediator rather than gladiator, and after only eight years at the Bar accepted judicial office. His role in education continued. Between 1965 and 1993, he was a member of the governing bodies of Sydney, Newcastle, and Macquarie Universities, and from 1984 to 1993 Chancellor of Macquarie University. The honorary degrees of LLD (Macquarie,

Sydney, National Law School of India and Buckingham), D Litt (Newcastle and Ulster), D Univ (SA), and Honorary Fellowship of the Academy of Social Sciences in Australia recognised his services to education both in Australia and beyond.

Kirby pursued reform as the foundation Chairman of the Australian Law Reform Commission for nine years, until 1984. He worked to take law reform proposals beyond lawyers and experts to the community at large, using surveys, laymen's discussion papers, public hearings, interdisciplinary consultations, consultation with special groups, and—something of a novelty for a judge—the **media**.

Law reform brought Kirby to the interface between scientific developments and the law. The Human Genome Project, the largest cooperative scientific activity in history, established in 1990, was an international effort over 13 years to find and determine the biochemical nature of all genes on every chromosome in the human body. One unique goal of the project was to address its ethical, legal, and social consequences. Kirby became a member of the Ethics Committee of the Human Genome Organisation—work he regarded as among his most important.

For two and a half years until 1 May 1996, he was the special representative of the Secretary-General of the UN for Human Rights in Cambodia. Kirby measured the laws and practices of Cambodia against the UN's principles of human rights and reported departures to the Secretary-General and the government of Cambodia. That country's protection of cultural rights, and the rights of its people to health, education, a healthy environment, and sustainable development came under his scrutiny. The work was dangerous. In his last mission, he concentrated upon the human rights of **women**, and made recommendations about providing school education for women, teaching judicial officers about the particular vulnerability of women, and establishing shelters for victims of sexual, physical, or mental violence.

Kirby has written books, articles, and papers and spoken about a huge range of topics. Library catalogues list hundreds. In 1983, he gave the six Boyer Lectures about the judiciary. In July 1987, the *Australian Law Journal* noted that Kirby had completed a ten-day visit to NZ, during which he took a seat on the Court of Appeal, delivered lectures at Victoria University (Wellington) and Canterbury University (Christchurch), and addressed the annual dinners of the NZ Law Society in Wellington and the Southlands Law Society in Invercargill. His themes included the future of the judiciary, the impact of science and technology upon the law, and the possible entry of NZ into an Australian federation. For Kirby, this was a common pattern. Between 1984 and 2000, he was a member (and in 1992–95, President) of the International Commission of Jurists.

A feature of Kirby's written judgments is the attention they give to the **argument**. When presiding in the Court of Appeal, he helped to develop counsel's argument, particularly if it was not well put or seemed the weaker argument. This characteristic is carried into his reasons, where arguments are presented in all their force. Kirby's mastery as an advocate puts each argument at its highest. Detailed analysis follows. To the reader, the solution often seems inevitable.

Kirby is a judicial innovator, and his perceived judicial **activism** has brought its critics. In *Osmond v Public Service Board* (1984), he was part of a majority in the Court of Appeal that extended the **common law** to impose upon a statutory tribunal an obligation to give reasons despite the absence of any statutory requirement to do so. To many **commentators**, this was desirable in the interests of fairness and good administration. Kirby did not see this development as constrained by any binding **precedent**. But, allowing the appeal, the **Gibbs Court** unanimously held that Kirby's conclusion was contrary to overwhelming authority. Any such change, even if beneficial, involved a departure from settled rules on grounds of **policy**, and was for the legislature to make.

Kirby is an admirer of Evatt and **Murphy**, whom he sees as examples of Australia's general rejection of its prophets. Australia 'reserves its special humiliations for intellectuals and men and women of learning and idealism'. Though a flawed human being, Evatt was a libertarian warrior, a man of gigantic intellect, courageous and tenacious, an architect of the Charter of the UN and the Universal Declaration of Human Rights, and, in Australia, a defender, at great personal and political cost, of the fundamental freedom threatened by the attempt to amend the Constitution to dissolve the Communist Party of Australia and to 'declare' its adherents (see ***Communist Party Case*** (1951)). Kirby's admiration of Evatt typifies his inclination to stress the goodness and downplay the frailty of his fellow beings.

Kirby gave character evidence at Murphy's first trial during the **'Murphy affair'**. He knew Murphy well, and much admired him. To him, Kirby attributes the new impetus in the High Court to learn from and use the decisions of courts in other jurisdictions, not merely those of England, and, when interpreting legislation, to pay greater regard to human rights and explanatory materials (see **Foreign precedents**; **Extrinsic materials**). Murphy 'was an early herald of an important creative period in the work of the High Court'. He broke the spell of unquestioning acceptance of old rules where changes in social circumstances and community attitudes had made those rules inappropriate and inapplicable.

The affinity between Murphy and Kirby was not born of like interests but from Kirby's admiration of a man of ideas, often heterodox at the time, often expressed in **dissenting judgments** that have subsequently become accepted doctrine in Australia. 'Powerful ideas, simply expressed can work within our legal system to plant their seeds of doubt until, in due time, the once dissenting view becomes accepted. This is the beauty of our common law system with its judicial right to dissent.' Dissent in the final appellate court is neither a badge of honour nor a mark of dishonour but an appeal to the future.

Kirby dissents from his colleagues more often than any other current or past Justice of the High Court. That was also the case in the Court of Appeal. To Kirby, the nature and dimensions of a problem are often different from those perceived by others. He has been more inclined than some of his colleagues to pay regard to international views about human rights and the need to fashion the common law in Australia to attend not only to Anglo–American traditions, but to those of other common law countries—particularly Australia's neighbours in the Pacific, Indian Ocean, and near-Asia. The breadth of experience and research revealed in his judgments and other writings is awesome.

Inevitably, Kirby's difference in approach has led him to dissent and often to be in sole dissent. Dissent against powerful counter-arguments brings out the polemicist in Kirby. In *Commissioner of Taxation v Ryan* (2000), he saw the majority reasoning as a return to 'the dark days of **literalism**' in **statutory interpretation**. Kirby added: 'It is hubris on the part of specialised lawyers to consider that "their Act" is special and distinct from general movements in statutory construction … The Act in question here is not different in this respect. It should be construed, like any other federal statute, to give effect to the ascertained purpose of the Parliament.'

Four cases in particular reveal Kirby's underlying judicial philosophies. In the High Court, Kirby has reiterated that it is permissible, indeed requisite, to resolve ambiguities in Australia's Constitution, its statutes, and common law in ways consistent with the norms of international rights law. The first case, *Newcrest Mining v Commonwealth* (1997), concerned the **acquisition of property** in the Northern Territory. Section 51(xxxi) of the Constitution requires that any such acquisition must be 'on just terms'; but *Teori Tau v Commonwealth* (1969) had held that this requirement did not apply in the **territories**. Kirby was one of a strong minority arguing that *Teori Tau* should be **overruled**. Noting the international recognition of rights to **property**, he held that where there is an ambiguity in the meaning of the Constitution, it should be resolved in favour of upholding such fundamental and universal rights. There can be no estoppel against the Constitution: its true meaning prevails, no matter how long, and at what level in the **hierarchy**, error in the decided cases has persisted.

Section 51 (xxvi) of the Constitution, 'the **race** power', was considered in the second case, the ***Hindmarsh Island Bridge Case*** (1998). The High Court upheld the validity of legislation that removed the Hindmarsh Island Bridge area from the scope of the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1994 (Cth). Kirby alone dissented. In his view, the race power permitted special laws for people on the grounds of their race, but not so as to discriminate adversely against such people on that ground. In part, his reasons proceeded on common assumptions against the background of which he thought the Constitution should be read. Those assumptions were reinforced in his view by the resolute stand of **international law** against discrimination. The Constitution should not be interpreted so as to condone an unnecessary withdrawal of the protection of such rights.

In the third case, *Re Wakim* (1999), the second and successful challenge to the **cross-vesting** legislation, Kirby, in dissent, lamented the revisiting of constitutional issues addressed but a few months previously in *Gould v Brown* (1998). He disagreed with the view that the Court's function in **constitutional interpretation** was to give effect to the intention of the **framers** as evinced by the terms in which they expressed their intention. Kirby was rather of the opinion that once the framers' draft was settled and approved by the Australian people and enacted by the Imperial Parliament, it took upon itself its own existence and character as a constitutional charter. The framers did not intend—nor did they have the power to require—that their wishes and expectations should control those who now live under its protection. The Constitution is read by today's Australians to meet, so far as its text allows, their contemporary governmental needs.

The fourth case was *Green v The Queen* (1997). The appellant had been convicted of murder. At his trial, he relied on a defence of provocation claiming that the victim, a person he looked up to and trusted, had made a homosexual advance towards him. There was evidence that the accused was especially sensitive to matters of sexual abuse because of childhood memories of his father's assaults on his sisters and mother. The trial judge had directed the jury that this evidence was not relevant to the issue of provocation. **Gummow** and Kirby, in dissent, held that the trial judge's view was correct. They said that the gravity of the affront may help to explain whether the accused was *in fact* provoked. But provocation in law conventionally required a second element that is measured against the objective standard of the ordinary person's self-control. However unwarranted the provocation, the common law has always set its face against extending mercy to extreme loss of self-control.

In 1983, Kirby was made a CMG for service to the law and in 1991 an AC for service to the law and law reform. Since 1969, Kirby's partner and companion has been Johan van Vloten, who was born in The Netherlands and migrated to Australia in 1963. Although *Who's Who* describes Kirby's recreation as work, he has developed a keen interest in photography. Typically, when he meets people he produces a camera and arranges for photographs to be taken of everyone present—a habit that will no doubt one day enrich the High Court's **archives**.

SIMON SHELLER

*Further Reading*

Michael Kirby, 'Lessons for Life as a Solicitor' (1999) 37(11) *LSJ* (NSW) 62

Michael Kirby, 'Seven Ages of a Lawyer' (2000) 26 *Mon LR* 1

Michael Kirby, *Through the World's Eye* (2000)

***Kisch Case*** (1934). Egon Kisch, a left-wing journalist, was refused entry to Australia in November 1934. Various rulings by the High Court contributed to the ensuing controversy but did not determine why the ban was imposed. Kisch remains an enigmatic figure in Australian history, viewed as a martyr by those on the left of politics and as an *agent provocateur* by those on the right.

Born and educated in Prague, Kisch worked as reporter for the German-language newspaper *Bohemia*. His early writings portray the underworld in his native city and are still regarded as pioneering works in the genre known as reportage. He added to his reputation as an investigative journalist on the eve of **World War I** by revealing that a high-ranking officer in the Habsburg empire, Chief of Staff General Alfred Redl, had been caught spying for the Russians.

Kisch served on the Serbian front as a corporal. A trenchant critic of imperial wars, he commanded a group of Red Guards in Vienna when the Habsburg empire was overthrown. Throughout the 1920s, in Berlin, Moscow, Shanghai and New York, the widely travelled reporter, who was fluent in many languages, moved with artists and intellectuals of