



Book Review

Appealing to the Future: Michael Kirby and his Legacy by Ian Freckleton and Hugh Selby (Eds), Thomson Reuters, 996pp, ISBN 9780455226699, \$160 (hardback), \$84 (paperback).

Justice Michael Kirby's professional life — at the public level — can be divided into three roughly equal periods. The first as head of the Australian Law Reform Commission from 1975 until 1984; the second as President of the NSW Court of Appeal between 1984 and 1996; and the third as a member of the High Court from 1996 until 2009. The first two periods were much more successful, at least in a conventional sense, than the last.

One of the early contributions to this collection is what is described as a 'biographer's note' by A J Brown, who is writing a life of Kirby. Many aspects of Kirby's career are well known but this essay contains some intriguing vignettes. The account of his appointment as the first chairman of the ALRC in January 1975 is a good illustration of the impulsive style of the then Attorney-General, Lionel Murphy. Murphy knew Kirby well, however, and could make a judgment about him. This was not always true of Murphy's appointments and some others proved disastrous. As it happened, his offer to Kirby was one of his last actions before his own move to the High Court. When Kirby became President of the NSW Court of Appeal in 1984 it was another long-time friend, the then Premier Neville Wran, who arranged the appointment. But not everyone was delighted. Kirby had earlier been invited to tea with some of the judges of the Court of Appeal where he was warned off accepting the appointment — needless to say, unsuccessfully.

What the book makes clear is that, in most respects, there was nothing radical about Kirby's judicial method. He often referred to the fiction that judges do not make the law but simply discover it. But this was assumed to be a myth by the American 'realists' at Yale and Columbia Law Schools as early as the 1920s.¹ Sir Anthony Mason is one of a range of Australian judges who have rejected the fantasy that judicial officers merely declare the law.² So this view is now quite orthodox, if it was ever really contested.

In many areas of law Kirby pursued a similarly orthodox approach. In the field of administrative law, for example, Wendy Lacey surveys Kirby's judgments and quotes the following traditional approach:

Courts and tribunals must faithfully carry into effect the purpose made clear in the express language of Parliament, even though they may consider an injustice to be occasioned thereby. They have no legitimacy or authority to substitute their will for that which Parliament has clearly and expressly enacted.³

¹ See, eg, K Llewellyn, 'Some Realism about Realism' (1931) 44 *Harvard L Rev* 1222.

² See, eg, A Mason, 'Legislative and Judicial Law-making: Can We Locate an Identifiable Boundary' (2003) 24(1) *Adelaide L Rev* 15.

³ *Lisafa Holdings Pty Ltd v Gaming Tribunal (No 3)* (1992) 26 NSWLR 391 at 402 but see *Lisafa Holdings Pty Ltd v Commissioner of Police* (1988) 15 NSWLR 1 where Kirby P

It is true that in *NEAT Domestic Trading Pty Ltd v AWB Ltd*⁴ Kirby was in the minority on the question of whether a private body was subject to judicial review at the federal level when the decision-making power was conferred on it by federal legislation. But Gleeson CJ took the same view and the 3:2 division in the court indicated that the arguments in that case were finely balanced.

So far as corporate law is concerned, Kirby has rightly pointed out that the Corporations Act 2001 (Cth) is 'a statute with few equals for complexity, disorganisation and sheer weight'.⁵ But, as Vincent Jewell points out, he has taken a broadly supportive view of the role of the corporation in modern society:

The needs of the economy change and are reflected in the law. But no participant in the delicate work of corporate law should forget the essential character of the trading corporation as a risk-taker and the inevitable consequence that some risks, honestly, diligently and carefully assumed, will sometimes not come off. To forbid this by law might save a few investors from unexpected losses. But it would be to destroy the brilliant idea of the corporation which remains one of the few truly creative contributions of the law to the economic well-being of the world and the economic liberty of its people.⁶

It is interesting that in *Rich v ASIC*⁷ he emphasised the purposes of the regulatory scheme under the Corporations Act in finding that a common law right to resist an order for discovery that might expose the person in question to a penalty — in this case allowing disqualification from managing a corporation — was not applicable in this context. The majority, however, placed greater weight on the interests of the individual and considered that the common law rule did apply to proceedings for a civil penalty.

Kirby's approach to criminal law is assessed by Bernadette McSherry. It might have been thought that Kirby would be reluctant to extend the concept of recklessness to offences requiring a subjective intention but, in a case where the accused argued that he had simply failed to think about whether the victim had consented to sexual intercourse, Kirby said:

To allow accused persons to escape conviction merely because they do not realise the significance of what they have done, where they have completely ignored the requirement of consent as a prerequisite for sexual interaction, is completely antithetical to the attainment of the goals which the criminal law properly sets for itself in this area.⁸

Kirby took a similarly cautious view of the ambit of the defences of self-defence and provocation:

joined other members of the NSW Court of Appeal in rejecting what might be thought to have been the express language of the same legislation.

4 (2003) 216 CLR 277; 198 ALR 179; [2003] HCA 35; BC200303104.

5 *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1999) 195 CLR 636; 162 ALR 441; [1999] HCA 24; BC9902256 at [37].

6 M D Kirby, 'Rethinking Company Law and Practice', Speech, National Corporate Law Teachers' Conference Dinner, 6 February 1995.

7 (2004) 220 CLR 129; 209 ALR 271; [2004] HCA 42; BC200405817.

8 *R v Tolmie* (1995) 37 NSWLR 660 at 672; (1995) 84 A Crim R 293 at 305; BC9505467. See also *R v Kitchener* (1993) 29 NSWLR 696 at 697.

No civilised society removes its protection to human life simply because of the existence of a history of long-term physical or psychological abuse. If it were so, it would expose to unsanctioned homicide a large number of persons who, in the nature of things, would not be able to give their versions of the facts. The law expects a greater measure of self-control in unwanted situations where human life is at stake. It reserves cases of provocation and self-defence to truly exceptional circumstances.⁹

This view was reflected in Kirby's scepticism as to the reliability of both the concept and the evidence adduced in support of what became known as 'battered woman syndrome'.¹⁰

It is true that Kirby's concern to restrict the comments to the jury of the trial judge was essentially limited to statements that reinforced the Crown case. But, in this respect, his position was little different from that of almost all the other members of the High Court.¹¹

It is hardly surprising that some of Kirby's sharpest disagreements with a majority of his colleagues on the High Court came in the area of constitutional law. The cryptic terms of the Australian Constitution have always allowed judges of the court to employ their social and political values in a more direct fashion than in most other cases that come before them. This is in many ways an inevitable consequence of the combination of a written constitution and a system of judicial review. But it should be noted that, even in this field, Kirby has always rejected the notion of 'fundamental rights' — above and beyond the Constitution — that limits the power of the Commonwealth or State Parliaments to make laws. He first spelt out this position in *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister of Industrial Relations*¹² when still sitting in the NSW Court of Appeal. In considering legislation that effectively negated challenges by the BLF, pending in the courts, to its deregistration, he upheld the legislation and made the following remarks:

In the end, it is respect for long standing political realities and loyalty to the desirable notion of elected democracy that inhibits any lingering judicial temptation, even in a hard case, to deny loyal respect to the commands of Parliament by reference to suggested fundamental rights that run 'so deep' that Parliament cannot disturb them.¹³

Kirby reiterated this view in *Durham Holdings Pty Ltd v New South Wales*¹⁴ where there was a challenge to state legislation that allowed the acquisition of coal deposits without full compensation. In agreeing with the majority that the challenge could not succeed, Kirby added:

Ultimately, this conception of the judicial function rests on political facts. These include the existence and powers of the Parliaments of the States and the

9 *Osland v R* (1998) 197 CLR 316; 159 ALR 170; [1998] HCA 75; BC9806597 at [165]. See also *Green v R* (1997) 191 CLR 334; 148 ALR 659; [1997] HCA 50; BC9705819.

10 See *Osland v R* (1998) 197 CLR 316; 159 ALR 170; [1998] HCA 75; BC9806597 at [164].

11 See, eg, *RPS v R* (2000) 199 CLR 620; 168 ALR 729; [2000] HCA 3; BC200000084; *Crompton v R* (2000) 206 CLR 161; 176 ALR 369; [2000] HCA 60; BC200007092 at [45] and [132].

12 (1986) 7 NSWLR 372; 20 IR 19.

13 *Ibid.*, at NSWLR 405.

14 (2001) 205 CLR 399; 177 ALR 436; [2001] HCA 7; BC200100263.

inappropriateness of judicial questioning of such basic political realities ... the commonly expressed view about the common law in Australia envisages a 'more modest' role, at least where a legislature has made law within the ambit of its constitutional powers. This is because, in Australia, the common law operates within an orbit of written constitutional laws and political realities.¹⁵

These prescriptions did not, of course, apply in the context of a requirement that legislation comply with express or implied provisions of the Constitution. Thus, as noted in the chapter on constitutional law by Heather Roberts and John Williams, Kirby was prepared to invalidate state legislation on the ground that it contravenes the principle set out in *Kable v Director of Public Prosecutions (NSW)*¹⁶ by detracting from the institutional integrity of a state court on which federal jurisdiction is conferred by s 77(iii) of the Constitution.¹⁷

Perhaps Kirby's two best-known dissenting judgments in the High Court were in the challenge by the states to the then Commonwealth Government's changes to industrial relations legislation in 2005¹⁸ and in the challenge to the scheme of cross-vesting legislation enacted by the Commonwealth and the states in the late 1980s.¹⁹ In the first of these cases Kirby's judgment was really a quixotic protest against the steady current of the court's decisions, over 35 years, on s 51(xx) of the Constitution — the corporations power. He pointed out, quite correctly, that an expansive reading of this power allows the Commonwealth to legislate in spheres that were never contemplated at the time of Federation. In the second case, Kirby recoiled from a conclusion that would strike down 'efficient legislation of great benefit to litigants throughout Australia and to the administration of justice'.²⁰ He rejected the highly technical limitations constructed by the majority from Ch III of the Constitution and added:

It would require the most compelling arguments of constitutional authority, principle and policy to persuade me that the combined Parliaments of the Commonwealth of Australia cannot, after nearly a century of federation, do together (with all the travail that such a course involves) what the Imperial Parliament might readily have done in 1901 on a relatively straight-forward machinery matter of its kind.²¹

In many ways the high point of Kirby's career was his period as President of the NSW Court of Appeal, perhaps because this required considerable administrative as well as legal skills. He proved to be an excellent administrator and the court operated with great efficiency. In addition, Kirby's own calm and courteous style on the Bench became the norm in hearings before the court. Kirby's time as President of the Court of Appeal is the

¹⁵ (2001) 205 CLR 399; 177 ALR 436; [2001] HCA 7; BC200100263 at [62].

¹⁶ (1996) 189 CLR 51; 138 ALR 577; [1996] HCA 24; BC9604181.

¹⁷ See *Baker v R* (2004) 223 CLR 513; 210 ALR 1; [2004] HCA 45; BC200406383; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; 210 ALR 50; [2004] HCA 46; BC200406384; *Forge v ASIC* (2006) 228 CLR 45; 229 ALR 223; [2006] HCA 44; BC200606891.

¹⁸ *New South Wales v Commonwealth* (2006) 229 CLR 1; 231 ALR 1; [2006] HCA 52; BC200609129.

¹⁹ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; 163 ALR 270; [1999] HCA 27; BC9903189.

²⁰ *Ibid.*, at [183].

²¹ *Ibid.*, at [207].

subject of thoughtful chapters by David Ipp and Ian Barker. His period at the ALRC required a different mix of skills, including political and bureaucratic roles. Kirby's career in law reform is discussed comprehensively by David Weisbrot and in a shorter memoir by Murray Wilcox.

A number of contributions deal with Kirby's advocacy of a bill or charter of rights. This is not the place for a debate on that question, although the case against such legislation will not be found anywhere in the book. The elitist character of the case for a bill or charter of rights is, however, well captured in the contribution by Geoffrey Robertson who argues that 'democracy is not the same thing as majority rule' and that 'MPs rarely understand what they are doing'. The same general notion is reflected in Kirby's own comment that 'Parliament tends to reflect, in a very general way, transient popular majorities'.²²

There are 38 contributions to this book — from 44 contributors, given some joint authorship — and there is inevitably a degree of duplication between some chapters so that the book is simply too long. In addition, there are significant variations in the quality of the contributions. Taken overall, however, it is a formidable survey of Kirby's career and of his own contribution to the law in Australia.

M G Sexton SC SG

²² M D Kirby, 'Deep Lying Rights: A Constitutional Conversation Continues', the Robyn Cooke lecture, Wellington, 25 November 2004.