

BOOK REVIEW

"THROUGH THE WORLD'S EYE", 2000

Justice Michael Kirby, The Federation Press, Sydney 2000 ISBN 1 86287 347 X pp 229

We are living in an era when we are incessantly distracted, if not engulfed, by instant views and opinions via the public media and the internet. The author of this book, Justice Michael Kirby, is one of Australia's most eminent jurists, one who is blessed with two special qualities, a deep intellect and a vast reservoir of energy. Those qualities have permitted him to detour from his very busy career as a justice on the High Court of Australia (Australia's Federal Supreme Court) and to reflect on some of the challenges of our time. The result is a kaleidoscopic collection of essays on issues of human rights and the law.

In the preface, Justice Kirby reflects that, before and since his first appointment to public office in 1974, he has often had opportunities of seeing at close hand the predicaments and the challenges of the modern world. He cites Shakespeare's 69th sonnet as the inspiration for his book's title: *"Once we saw issues and problems through the prism of a village or nation-state, especially if we were lawyers. Now we see the challenges of our time through the world's eye."*

Justice Kirby might just as easily have picked extracts from other of Shakespeare's well-known works: *"All the world's a stage, and all the men and women merely players; they all have their exits and their entrances ...and then the justice ...full of wise saws and modern instances; and so he plays his part"* (As You Like It, Act 2, Scene 7) or perhaps even *"Our doubts are traitors, and make us lose the good we often might win by fearing to attempt"* (Measure for Measure, Act 1, Scene 4).

But why stop with Shakespeare? This is, at its core, a book of moral philosophy and, like any other such offering, it is an assembly of intensely personal thoughts.

Much as I imagine Socrates would have done, Justice Kirby seems to be questioning whether, in an era when we know more about the world than ever before, we really have our right bearings and the right sense of direction. The difference with Justice Kirby is that he has written everything down; Socrates never did.

Justice Kirby expresses in his preface the concern that the limitation of this collection of essays may be the lack of coherence of a work with a single unifying theme. Although the essays certainly range over a wide number of themes, in expressing an opinion on the collection, the absence of a unifying theme is not a criterion I would ever think of employing. It would be different if the thoughts expressed were self-contradictory but they are not. The reader is able to select and read separately any of the 15 chapters in the collection.

The foreword by Lord Cooke of Thorndon identifies three constant themes in Justice Kirby's work: first, the function of the law in protecting disadvantaged groups and minorities; secondly, the rendering of municipal law accountable to the growing force of international law; and, thirdly, the conceptualising of case decisions as distinct from mechanically applying them.

The collection is divided into two distinct parts. In the first part (comprising 8 chapters), Justice Kirby reflects on issues relating to fundamental human rights and some of the emerging contemporary challenges in this field. One of the basic questions posed in this part is what the crucial civil rights issues will be in 20 or 30 years. Justice Kirby reminds us that, whilst laws made by the majority must be upheld, the book of civil liberties is not closed and that the human dignity of minorities must also be respected and protected by those laws.

In the 7 remaining chapters, Justice Kirby reflects on the law and its institutions, mainly with reference to Australia. However, in chapter 9 he explores the limits of acceptable judicial creativity and activism in four common law jurisdictions: the United Kingdom, the United States, Australia and India. He points out that no established protocol exists for the introduction of important new legal principles by judges. Justice Kirby provides no concrete answer, leaving the reader to reflect that *“the judge is not a completely free agent [and the] parameters [of judicial creativity] are ultimately fixed by the very nature of the judicial function.”*

Greater insight into Justice Kirby’s views on judicial creativity nonetheless may be gleaned from chapters 10 and 11 where he discusses the impact of Justices Anthony Mason and Lionel Murphy on the evolution of the jurisprudence of the High Court of Australia. Two more different jurists can hardly be imagined: Mason, former Chief Justice and a giant in the ranks of Australian legal intellectuals; Murphy, the robust, unconventional former Labor Party politician and Attorney-General, renowned for his lone dissenting judgments. Yet Justice Kirby reveals that there was more in common between these two men than appeared on the surface. In his own distinctive way, each of these jurists extended the outer limits of judicial creativity in the High Court of Australia in a way that has forever changed the way that the court responds to changing political and social circumstances and to international legal norms. Justice Murphy was, however, much more in dissent.

Justice Kirby too is changing the way the court responds (in 151 decisions between 1996 and 1999, he was in dissent in 48). As Justice Kirby is proud to say, he has been endeavouring to carry on Justice Murphy’s important legacy in contributing to the court’s *“increasing attention to international law and, in particular, to universal human rights norms as touchstones for the expression and development of our own common law in Australia.”*

In the final chapter of this collection (provocatively entitled “Has the Legal Profession Lost Its Soul?”), Justice Kirby muses whether Australians can escape the cynicism and scepticism that came with the convicts. I do not see the connection myself. Scepticism is a universal trait of the human personality to be nurtured and encouraged. As for cynicism, we must blame the ancient Greeks for that (specifically, Antisthenes, founder of the Cynic school of philosophy). Although some may think that Australians demonstrate cynicism to excess, it has never struck me as a distinctive Australian tendency.

As to the question whether the profession may be losing its soul, Justice Kirby again does not provide a concrete answer. Nor should he have to, according to Lord Cooke in his foreword. Instead, in all these essays, Justice Kirby, having identified issues, leaves the reader to reflect on them.

Unlike the best type of law, it has been suggested by a French commentator that the best type of philosophy is fearless, not flawless (Charles Peguy, 1914). This prompts me to suggest that, if there was to be any criticism of this collection, it could be that Justice Kirby sometimes seems to hold himself back, allowing his readers no alternative but to draw their own conclusions. This is of course perfectly understandable in a jurist, for whom any disposition to pre-judgment would be an unacceptable trait, and Justice Kirby deserves plaudits for making any attempt to address many of these issues at all.

Before concluding this review, it should be emphasised that nowhere in this collection does Justice Kirby suggest that the judiciary rather than Parliament possesses ultimate authority over the law. He reminds the reader that, instead, the common law operates, at least in Australia, under the orbit of constitutional and political realities and that all laws validly made by the Parliament are there to be obeyed. Justice Kirby held as much in a recent Australian case challenging the power of the State of New South Wales to expropriate privately owned coal mines without adequate compensation: see **Durham Holdings –v- State of New South Wales [2001] High Court of Australia 7 (15 February 2001)**. Justice Kirby there observed that *“the courts cannot respond to ... complaints of discrimination and injustice ... [which are] complaints of a political and not of a legal character.”* This is yet another reminder of the value of bilateral and multilateral investment protection treaties in the promotion and protection of foreign investment — whereas domestic courts may be unable because

of a domestic law to respond to a complaint of injustice, institutions of international arbitration having appropriate jurisdiction over the dispute in question will not be constrained by such limitations.

The contemporary human panorama is so complex and confusing it warrants many thoughtful collections like this. That there should be so few serves to emphasise the value of Justice Kirby's contribution. In the service of justice, Justice Kirby is skilled, as was Socrates, in the art of intelligent scepticism.

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