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Who's Who in the Legal Zoo: The Hon Michael Kirby AC CMG – 'The Eagle of Equality'

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At the risk of coming across like the quizmaster in some sort of legal 'Trivia Night' contest, who wrote the following?

Democracy now requires respect for minorities and protection of basic constitutional principles such as the rule of law, the independence of the judiciary, and regard for fundamental human rights.

Rousseau? John Stuart Mill? Martin Luther King?

Amazingly, it was written as recently as 1994, and there had never been a time in Australian history when it was most in need of being written. Its author was one of the most distinguished, best-known, most respected and most highly revered lawyers ever to occupy a seat on the Australian High Court Bench, Michael Kirby.

He was writing in a journal called *The Australian Lawyer* in December of that year, in which he openly advocated a Bill of Rights for all Australians, which could then be used by judges as a basic set of principles upon which to defend the freedoms of all people. He had by then already become a familiar figure on the political platform, advocating for gay rights at a time when his own sexuality was shortly to be cruelly misinterpreted in Federal Parliament. Two years previously, the High Court (prior to his membership of it) had handed down its cartwheel judgment in Mabo,1 overturning two hundred years of common law dogma which had refused to recognise even the moral rights of Aborigines to the land which their ancestors had preserved for generations. With reference to that brave re-assertion of human rights in Australia, which had almost immediately been 'written down' by Commonwealth legislation, Michael Kirby wrote that:

... we are on the path towards a judicially created bill of rights. The common law has always protected certain rights. But its protection against a clearly expressed statute could not always be effective. Against the common law the will of the legislature will ultimately prevail. That is why voices are now lifted, with increasing determination, to suggest that an Australian constitutional bill of rights is necessary, timely and achievable.

For those who knew Michael, or had simply followed his career, it was no surprise to find him advocating fiercely for the rights and dignities of those who had the least friends, and were the least attractive in our increasingly image-besotted society. In 1988, he had represented Australia at the *Bangalore Colloquium on Human Rights*, and had observed that:

There is often plenty of room for judicial choice. In that opportunity for choice lies the scope for drawing upon each judge's own notions of the contents and requirements of human rights. In doing so, the judge should normally seek to ensure compliance by the court with international obligations of the jurisdiction in which he or she operates This perception of the function of courts in human rights questions is one which I find persuasive.

Who are you calling a 'judicial activist'?

Following this, and similar utterances,² he can hardlyhave been surprised when he became labelled as a 'judicial activist'. And yet he has consistently rejected this description of his work on the Bench, regarding it as a term of disparagement applied by reactionaries to those whose progressive attitudes towards judicial policy-making they fear. Such people would indeed draw little comfort from the many judgments he has handed down over the years in a heartfelt belief that the international principles and protocols underpinning human rights in which he so fervently believes should be absorbed into Australian common law in what appears to be the only way possible – namely, by being seeded into it by serving judges of the highest court in the land.³

He perhaps explained his exact position most clearly in 2006, when he was invited to the University of Exeter (U.K.) to deliver the prestigious *Hamlyn Lectures*, in one of which he observed that:

Clearly it would be wrong for a judge to set out in pursuit of a personal policy agenda and hang the law. Yet . . . judges do more than simply apply law. They have a role in making it and always have.

I am probably risking one of his characteristically mild (and therefore far more effective) chastisements by describing him as 'The Lord Denning of his generation', but the students I taught in the decade or so in which Michael Kirby graced the High Court Bench assigned to him the almost mythical status which students of my generation afforded to that most famous Master of the Rolls in the 1960s – to the point at which, when I once introduced him at a student breakfast like some sort of conjurer with a magic cape, there appeared to be some to whom it came as a shock to learn that Michael actually existed.

There are, however, limits to the comparison between Michael Kirby and Tom Denning. Whereas one got the distinct impression that Denning first decided what his final judgment was to be, and then massaged the law to accommodate that outcome, Michael Kirby has consistently stood for the integrity of the law as it is inherited by each generation of judges, and argued instead for the right of the 'newcomers' to openly and accurately steer it through the turbulent waters of changing societal values.

But whether he likes it or not, Michael Kirby has become

that rarest of creatures – a people's icon from a world of which they have little personal experience; a kind of judicial Mother Theresa whom people trust, if only for his openness and honesty in respect of uncomfortable (to some) matters which must be aired, not the least of which being his own sexual orientation. This enthusiasm for confronting prejudice and fighting the dragons of bigotry comes with a side-order of ordinary humanity which those meeting him for the first time find almost counter-intuitive. 'After all', they report, 'he's a famous judge, yet he spoke to me as if he was really interested in what I had to say'.

This is because he is interested, and anyone who has been in conversation with him beyond the formal pleasantries of an official function will also be required to adjust very rapidly to his gentle good humour and sheer joy of life. The same kind tolerance of, and engaged interest in, his fellow citizen, which runs through his judgments like the lettering down a stick of rock, is evident in the genuine interest which he takes in every cause which he champions, and every group of people he meets. At academic functions, for example, he has been known to cut short the formal speeches in order to go and find a group of students and chat away to them about their studies. To him, they are not labelled 'students', but 'individuals who are studying'.

Australia's strongest honours magnet

Despite (and perhaps because of) his natural tendency to be self-effacing, Michael Kirby has attracted civic and academic honours by the truckload. In his early forties he became a Companion of the Order of St. Michael and St. George, and less than ten years later received Australia's highest civil honour, the Order of Australia.4 He became the youngest appointee to the Federal Bench at the age of fortyfour, and served for over a decade as the President of the New South Wales Court of Appeal, before his elevation to the High Court in 1996, to the seat previously occupied by Sir William Deane. Even that was not without some reference to his courage in speaking for causes in which he believes; he is a strong pro-Monarchist, and there was some suggestion that Prime Minister Keating had appointed him in order to shut him up in the only way he could, given that members of the High Court are denied the freedom we all enjoy to express political opinions.

Academic honours are offered to Michael Kirby almost on a weekly basis, and he is closely associated with the University of Sydney (from which he first graduated in 1959), Macquarie University (of which he was the Chancellor from 1984 to 1993) and the Australian National University, in whose Law Revue he once played a starring role. Since his retirement from the High Court, he has been kept busy with academic duties at ANU ('Distinguished Visiting Fellow'), New South Wales University ('Visiting Professorial Fellow'), and the University of Tasmania ('Adjunct Professor of Law'). Despite all this, Michael has, with his usual unquenchable thirst for matters academic, accepted the role of 'Judge in Residence' at Bond University in 2011.

This profile can conclude no better than with a final, typical, quote from a man who has fought prejudice from the inside. As the keynote speaker at the opening ceremony of the Sydney Gay Games in 2002, he proudly asserted that:

The movement for equality is unstoppable. Its message will eventually reach the four corners of the world.

That it has reached as far as it has already is a tribute to those who, like Michael Kirby, have the courage of their convictions and a strong faith in their beliefs.

In an age in which it was not a good career move to criticise the monarch, another judicial hero⁶ told the King that he was not above the law. He obviously passed the baton of 'equality before the law' into very safe hands.

References

- ¹ Mabo v Queensland (No.2) (1992) 175 CLR 1.
- This included an address to the Bar Association of India almost a decade later, in which he referred to "...a kind of 'judicial activism' that is often in tune with the deeply felt emotions of ordinary citizens".
- Read, for example, his judgments in *Newcrest Mining (WA)*Limited v The Commonwealth of Australia (1996) 190 CLR 513

 (on the power of the Commonwealth Parliament to compulsorily acquire property without adequate compensation), Chakravarti v

 Advertiser Newspapers Ltd (1998) 193 CLR 519 (on the protection of an individual's reputation) and Kartinyeri v The Commonwealth of Australia (1998) 195 CLR 337, on the issue of the Hindmarsh Island bridge, in which Kirby J handed down a lone protest over the passage of legislation which was blatantly racist in its effect.
- In the same year he received the Human Rights Medal, and I have somehow never summoned up the courage to ask him which he is more proud of.
- ⁵ Including an Honourary Doctorate from Bond University.
- 6 Chief Justice Coke in *Prohibitions del Roy* (12 Co Rep at p.65). The monarch in question was James 1st of England, and Coke was dismissed from office for stating the truth as he perceived it.

Researching a great man and his beliefs...

- What is Justice Kirby's position regarding a Bill of Rights?
- Should Australia have a Bill of Rights?
- What do you think have been the greatest achievements of Justice Kirby's life to date?
- What do you think should be the role of a Judge in Residence at a law school?



Justice Michael Kirby, Photo provided by Justice Kirby

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