
BOOK REVIEW

MICHAEL KIRBY: PARADOXES AND PRINCIPLES

By AJ Brown

(Federation Press, 2011, pp 528)

FEW judges are known to many in the general population. The most notable exception is Michael Kirby. Kirby rose to public prominence when he was installed as the foundation Chairman of the Australian Law Reform Commission in 1975.¹ His rise continued when he was appointed President of the Court of Appeal of the Supreme Court of New South Wales in 1984 and a Justice of the High Court of Australia in 1996. In his unapproved biography of Kirby, Professor AJ Brown describes Kirby as a 'celebrity judge'.² Everyone who has attended one of Kirby's countless speeches will understand why Professor Brown applied this appellation. I first saw Kirby speak at the University of Wollongong in 2005. The lecture theatre was overflowing with students. The demand to see Kirby was so great that students were sitting in the aisles and on the stage. The atmosphere was more akin to that at a political rally than a university lecture. Kirby held his audience spellbound for over an hour as he described his recent work in the High Court³ and as the United Nations Secretary-General's Special Representative to Cambodia.⁴ His presentation was met by rapturous applause.

The central thesis that Professor Brown develops in the biography, which is encapsulated in its subtitle, is that Kirby is committed to a range of principles that are inconsistent with each other, or at least do not sit together very comfortably.

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1. The head of the Australian Law Reform Commission is now styled as the 'President': Australian Law Reform Commission Act 1996 (Cth) s 6(1)(a). Originally, the head was designated as the 'Chairman' (Law Reform Commission Act 1973 (Cth) s 12(1)(a)). The title was changed by the Statute Law (Miscellaneous Provisions) Act 1985 (Cth) s 11(2).
 2. At pp 163, 188. It should be observed that while the biography was not approved by Kirby in the sense that he had the opportunity to edit the text, it was not unauthorised. Professor Brown acknowledges that he enjoyed Kirby's full co-operation in writing the biography; at p 447.
 3. The gist of Kirby's talk in this regard is contained in M Kirby, 'Ten Years in the High Court: Continuity and Change' (2005) 27 *Australian Bar Review* 4.
 4. In relation to Kirby's work in Cambodia, see M Kirby, *Report of the Special Representative of the Secretary-General for Human Rights in Cambodia*, UN Doc E/CN.4/1996/93 (26 Feb 1996).

Professor Brown points, for example, to the fact that while Kirby expressly identified himself as one of Lord Denning's 'bold spirits' rather than as a 'timorous soul',⁵ his decisions were not infrequently cautious and conservative.⁶ Professor Brown also refers to what he regards as a clash between Kirby's support for the monarchy and his image as a bastion for change. He writes that, 'there had always been a gap between Kirby's public reputation as a progressive reformer and his more traditionalist values'.⁷ It is difficult to quarrel with the picture that Professor Brown paints of Kirby in so far as he says that Kirby is an intriguing amalgam of competing ideologies. However, two points should be noted in this connection. First, Professor Brown's assessment of Kirby as a bundle of paradoxes is not wholly unexpected given Kirby's upbringing. Kirby was born into a middle-class family of English and Irish heritage, raised in western Sydney, publicly schooled, educated at a standstone university, committed to the Anglican faith and gay. Secondly, Professor Brown's claim must be read in view of the fact that human beings often embrace strange combinations of principles. Few people, if any, live according to a perfectly harmonious set of values.

Many biographers are unduly complimentary of their subjects and tend to examine their lives through rose-coloured glasses. This is scarcely surprising given that admiration for the person whose life is described is often the main motive that many biographers have for embarking on their work. Although it is clear that Professor Brown has great respect for Kirby, the biography cannot be impugned on the basis that it is too generous to him. While it naturally catalogues a wide selection of Kirby's admirable qualities and significant public and personal achievements, it is simultaneously forthright and does not refrain from criticism. Many unflattering details of Kirby's life are revealed.

Arguably Kirby's most important contribution to the law was rendering judicial reasons significantly more intelligible than was previously the case.⁸ Kirby's influence in this regard is examined at some length in the biography. Professor Brown notes that, '[e]ven critics [of Kirby] were forced to recognise his style of writing as the most accessible that Australian courts had ever seen'.⁹ Before Kirby's appointment as President of the Court of Appeal, judicial reasons in Australia were often difficult to navigate. Headings were virtually unheard of. Kirby ushered in a new approach. His style was to state clearly what the case was about at the outset and to enumerate reasons for and against a given conclusion.

5. At pp 184, 385. Lord Denning so categorised judges in *Candler v Crane, Christmas & Co* [1951] 2 KB 164, 178.

6. At p 222.

7. At p 256.

8. Kirby's contributions to the development of individual areas of law are analysed in the voluminous *festschrift* published on his retirement as a Justice of the High Court: I Freckelton & H Selby (eds), *Appealing to the Future: Michael Kirby and his Legacy* (Sydney: Law Book Co, 2009).

9. At p 209.

Directional signposts in the form of headings, numbered lists and cross-references were extensively used (perhaps a bit too enthusiastically at times). His sentences were generally short and crisp. Many judges quickly saw the advantages in Kirby's style and sought to emulate it. An entire generation of law students is grateful to Kirby for spearheading this shift.

A feature of Kirby's life that dominates everything else in it is his chronic and extreme workaholicism. Professor Brown's biography refers to Kirby's work ethic periodically.¹⁰ But references to it are often implicit and do not really give it appropriate weight, perhaps because Professor Brown never really had the chance to see Kirby working in chambers. Between 2005 and 2006, I was one of Kirby's judicial associates. This post permitted me to observe closely his punishing routine. I was shocked at the schedule he maintained. His isolation in the High Court at this time, which is eloquently described by Professor Brown,¹¹ meant that his judicial workload was oppressive. However, this did not prevent Kirby from publishing significantly more papers in law journals than most academics. His chamber work and judicial sittings were punctuated frequently with gruelling international engagements. He would often leave Sydney late on Friday and return on an overnight flight on Sunday morning (whereupon he would come directly to work). There was never a reprieve. Hours that most people would regard as completely unsustainable were the norm for Kirby.

Perhaps the most riveting chapter in the biography is that concerning Senator Bill Heffernan's homophobic attack on Kirby.¹² Kirby had felt the cruel sting of discrimination on the basis of his sexuality throughout his adult life.¹³ But this slur was of a different nature owing to the fact that it was made in Federal Parliament. Everyone now knows that Heffernan's attack on Kirby was utterly without foundation. However, Professor Brown, who conducted significant research on the issue, reveals in intricate detail Heffernan's astounding 'leaps of logic'¹⁴ that led him to the erroneous conclusion that Kirby had abused his government car entitlements. Professor Brown also catalogues the numerous failings on the part of the government to resolve the crisis. His damning conclusion is that senior members of the government either implicitly approved of Heffernan's attack or 'supported an environment in which destructive mavericks roamed free, unchecked by any due process or competent administration'.¹⁵

10. See, eg, pp 91, 133, 191–2, 196.

11. See ch 17.

12. See ch 15.

13. At p 176, where it is revealed that Kirby's sexual orientation was raised in an attempt to stymie his appointment as President of the New South Wales Court of Appeal.

14. At p 329.

15. At p 347

One of the many merits of Professor Brown's splendid biography is its accessibility. It would have been much easier for Brown to write a biography of Kirby for consumption by lawyers alone. Fortunately, however, he took the time to ensure that his book could be enjoyed by laypersons too. It is relatively free of legal jargon. Aspects of the legal system with which most non-lawyers would be unfamiliar but which are essential to grasp in order to understand Kirby's life are patiently explained. In stark contrast with a Kirby judgment, the biography is devoid of footnotes, which would have been distracting and off-putting to outsiders. It also moves at a good pace. Although a staggering amount of material was made available to Professor Brown,¹⁶ he avoided getting bogged down in the detail. The upshot of writing such a readable biography is that Brown has made a very significant and much needed contribution to public understanding of the judiciary.¹⁷

Some enigmas regarding Kirby are left unexplained. One of the most intriguing is why Kirby succeeded in capturing the public's eye to the extent that he did. A judicial career is not one that usually offers celebrity status. It would not be particularly convincing to argue that the spotlight was shone on Kirby because the opinions that he espoused were radical. This is because, not infrequently, the views that Kirby expressed were moderate or even conservative, as Professor Brown observes throughout the biography.¹⁸ Nor can it be plausibly contended that Kirby was of such public interest because he was a cut above his brethren intellectually. Other judges rivalled Kirby's formidable mental prowess. Moreover, the public is rarely interested in individuals solely due to their cognitive abilities. Many intellectual giants in the judiciary are unheard of by laypersons. However, it is arguable that the answer lies in the fact that Kirby is an unusually gifted communicator. He is remarkably adept at impressing upon others the importance of the points that he is making. Probably also influential in this respect is Kirby's uncanny knack of making people with whom he engages feel significant. Each year, Kirby writes literally thousands of warm letters to people he had only met fleetingly. In these letters, he expresses genuine interest in, and respect for, the recipients' work and views. When talking with Kirby, one senses that you enjoy his undivided attention. And even when Kirby is addressing a crowded lecture theatre, he makes you feel as though he is talking directly to you.

16. Professor Brown notes that the materials included over 117 metres of records held by the National Archives of Australia: at p 447.

17. Biographies of Australian judges are shamefully few in number. In addition to Professor Brown's biography of Kirby, other excellent biographies of members of the Australian judiciary include P Ayres, *Owen Dixon* (Melbourne: Miegunyah Press, 2003); P Burton, *From Moree to Mabo: The Mary Gaudron Story* (Perth: UWA Publishing, 2010).

18. Brown writes that, '[f]or decades the illusion that Kirby was a radical progressive had been largely a figment of media imagination': at p 376.

Postscript

Since this review was written, Michael Kirby published a short book¹⁹ in which he describes episodes in his life that were particularly meaningful to him, several of which he had not spoken about before. It is a private story of the public man. Like Professor Brown's biography, it glistens with insights into the character and mindset of one of Australia's most significant figures.

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19. M Kirby, *A Private Life: Fragments, Memories, Friends* (Melbourne: Allen & Unwin 2011).