Michael Kirby

The question should be asked whether Michael Kirby is the great dissenter, or does one agree with him and call him 'reactionary'?[1] While on the bench it is true Michael Kirby was known as the great dissenter having disagreements in constitutional cases in 2004 at a rate of 52%, which is the highest in the history of the High Court and an average of 40% of dissenting judgments on cases overall.[2] Kirby has said that on their on statistics tell little and to understand his rate of dissent it is necessary to to examine what his disagreements have been about and to consider who he has dissented from. He added that 'there have always been divisions … and different philosophies ….(with) many dissenting opinions have ultimately been adopted as good law'.[3]

In an interview with Monica Attard[4] Kirby stated that he had been hurt being called a 'judicial activist' and that it is 'code language' for being a person who will decide cases in a way that activists don't like. Adding the reason for this is that as a judge he is transparent when making decisions and using principals that are in his case often principles of international human rights law. In order to understand Kirby's rate of dissent, it is necessary to examine what his disagreements have been about and consider who he has dissented from. Kirby explains 'there have always been

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1 Tom Arup, *The Age*,3 February 2009, http://www.theage.com.au/national/call-me-a-reactionary-says-departing-high-court-judge-20090202-7vr9.html

2 A Lynch and G Williams, "The High Court on Constitutional Law: The 2004 Statistics", unpublished paper delivered to a conference, Sydney 28 February 2005 reported *Sydney Morning Herald* 18 February 2005, p9

3 The Hon Justice Michael Kirby AC CMG, James Cook University, Judicial Dissent, http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_feb05.html

4 Monica Attard, ABC Sunday Profile, 27 November 2007 http://www.abc.net.au/sundayprofile/stories/s2100123.htm

divisions, reflection the different philosophies and perspectives of the office-holders' and that throughout the High Court's history, many dissenting opinions have ultimately been adopted as good law. Cases heard before the full bench of the High Court are likely to test the boundaries of existing law, and raise opposing, though no less valid, views of the law.[5] The rate of dissent, if seen within its context, it is relatively small. He goes on to say… '*in the highest court of a nation, selecting these cases out from the whole mass and morass of litigation, of their nature these are going to be matters on which men and women of good will and experience in the law, who look at the values of the law, can disagree*'.[6]

Being a great advocator of human rights Kirby was in the dissenting judgment in the case of *Al-Kateb v Godwin*[7] where the case was about Al-Kateb who was a stateless person, was to be held in a detention centre indefinitely. The majority agreed that this was lawful and not unconstitutional. Kirby and the two other dissenting judges (Gleeson CJ and Gummow J) stated that the *Migration Act*[8] should not be interpreted as such. Having different constitutional interpretation views from some of his peers, and frequently relating to the principals of human rights. In this case he stated that ""Tragic' outcomes are best repaired before they become a settled rule of the Constitution."[9]

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[5] Bold Enough: Justice Michael Kirby. *Sunday Profile* 12/2/2007 http://www.abc.net.au/local/stories/2007/12/02/2106109.htm

[6] ibid

[7] [2004] HCA 37

[8] *Migration Act 1958* (Cth)

[9] Quote at top of page 7 or wiki doc

The majority decision in *Al-Kateb* was decided in contrast to the interpretation evidenced in *Calwell*[10], representing a backward step by the High Court. It should be mentioned that such a decision was made by the majority, despite intervention by the Attorney-General and the Human Rights and Equal Opportunity Commission.[11] Kirby J found the majority to have "flawed" reasoning this giving insufficient protection for human rights[12] and called for greater protection of rights through the implementation of an Australian Bill of Rights.[13] Kirby has also stated that the interpretation is based on context as the touchstone of modern constitutional and statutory interpretation.[14] His enduring value to constitutional law is to fight for our human rights and as such is trying to stop *'Australia is isolating itself from the rest of the developed world'*,[15] and in doing so he is trying to ensure that Australian citizens will one day receive the protection of internationally recognised rights that are currently being denied.

In the case of *Shaw v Minister for Immigration and Mulitcultural Affairs*[16] the applicant, Shaw came to Australia as a small child in 1974 on a transitional (permanent) visa which, unless revoked according to law, permitted him to remain in Australia indefinitely however in 2001 he was deemed to have a "substantial criminal record" within the meaning of s501(7) of the Act and as such did not pass the

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[10] *Koon Wing Lau v Calwell* (1949) 80 CLR 533. This was discussed at length by Gummow J in *Al-Kateb v Godwin*, above n 1, at [87] and [89].

[11] Curtin, above n 6, 357.

[12] See *Al-Kateb v Godwin*, above n 1, per Kirby J at [179].

[13] C Boyle, "Executive Detention: A Law Unto Itself? A Case Study of *Al-Kateb v Godwin*" (2005)7 *University of Notre Dame Australia Law Review*, 126

[14] See *Al-Kateb v Godwin*, above n 1, per Kirby J at [175]. See also M Kirby, "Liberty, Terrorism and the Courts" (2005) 9 *University of Western Sydney Law Review*, 31.

[15] D Malcolm, "A Human Rights Act for Australia" (2006) 8 *University of Notre Dame Australia Law Review*, 19.

[16] (2003) 78 ALJR 203; 203 ALR 43

character test[17]. Kirby expressed that the Minister for Immigration and Multicultural

Affairs should not have the power to deport the applicant under the guise of an 'alien'[18] whereas the Minister believes that under the *Migration Act*[19] that he is entitled to deport the applicant from Australia. Kirby believed that the minister's actions were not sustained by any valid federal law as the minister only had discretionary power to cancel temporary visitor visas[20] and specifically excludes British citizens. The enactment of the *Australia Acts* in 1986 represented an important constitutional moment whereby persons arriving as immigrants ...were not "aliens" and as such they cannot be deported ...[21] Further he says that '*only this Court can say when such a moment of constitutional change arrived. The Parliament could not do so. Nor did it purport to do so by introducing the statutory concept of citizenship*'[22] and most importantly that ...Australia must accept the applicant as an Australian and a "subject of the Queen". This status protects from expulsion a person with a bad criminal record such as his, on the basis that, doing so, acknowledges constitutional recognition and protection...[23] This case represents a need to interpret the constitution as it should be interpreted and the writer does agree with Kirby J's

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17 (2003) 78 ALJR 203; 203 ALR 43, p19

18 *The Commonwealth Constitution of Australia* 1900, s 51(xix)

19 *Migration Act 1958* (Cth)

20 *Migration Act 1958* (Cth), s 7(1)

21 (2003) 78 ALJR 203; 203 ALR 43, p37

22 cf Horrigan, "Paradigm Shifts in Interpretation: Reframing Legal and Constitutional Reasoning" in Sampford and Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions*, (1996) 31 at 35; Meagher, "Guided by Voices? – Constitutional Interpretation on the Gleeson Court", (2002) 7 *Deakin Law Review* 261 at 269-270, 280.

findings as it is appears blindingly obvious that there is a clear date where constitutional change occurred it could be said that this dissenting judgment is not one of enduring value but one that is simply clear cut.

Wurridjal v The Commonwealth of Australia[24] was a controversial judgment in particular whether the issue for

'decision is not whether or not the approach of the majority is made on a basis less favourable because of aboriginalty. It is concerned with the objective fact that the majority rejects the claimants' challenge to the constitutional validity of the federal legislation that is incontestably less favourable to them upon the basis of their race and does do so in a ruling on a demurrer. Far from being 'gratuitous', this reasoning is essential and, in truth, self-evident. The demurrer should be overruled'.[25]

Kirby argues that any dimunition of the rights of indigenous people over their land needs to be viewed with suspicion due to Australia's history and that the intervention occured without genuine consultation with indigenous people. Furthermore arguing that the acquision of land was not done on 'just terms'.[26]Such an acquision ... in property belonging to traditional Aboriginals,.. (S)uch interest are, or may be, essential to the identity, culture and spirituality of the Aboriginal people concerned.[27] Taking a stand on 'just terms' meant that the acquision should proceed in a just and

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[23] (2003) 78 ALJR 203; 203 ALR 43, p37
[24] [2009] HCA 2
[25] *Wurridjal v Commmonwealth* [2009] HCA 2, 215
[26] *Wurridjal v Commmonwealth* [2009] HCA 2, 307
[27] *Wurridjal v Commmonwealth* [2009] HCA 2, 308

fair way. In particular, given the history an acquision should only go ahead with proper consultation. The majority concluded that the leases did constitute an acquisition for the purposes of s 51(xxxi)[28] If had it not it could create a mockery of the *Land Rights Act.*[29]

Fardon v Attorney-General (Qld)[30] is a case regarding the separation of powers in Australia. Queensland passed legislation relating to sex offenders, allowing the Supreme Court of Queensland to continually detain a particular class of prisoner to protect the community. In this case the applicant was held in prison after his sentence expired. The majority[31] found the law valid while Kirby in dissent regarded the law to be invalid looking to the substance of the law rather than intention finding it was evidently a punitive law which relate to the principles of double jeopardy and retrospective punishment. Although Kirby is again protecting the human rights of Australians, but as far as enduring value to the constitution is concerned when the applicant was finally released in November 2007 he reoffended and was returned to prison. The majority were correct in finding the law valid offering protection to Australians at large.

To his credit, Michael Kirby has attempted to be a positive power for good insofar as it affects Indigenous Australians. From cases involving the power of federal authorities

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28 *The Commonwealth Constitution of Australia* 1900

29 *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*

30 (2004) 210 CLR 50

31 Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ

to hold a stateless person indefinitely in detention[32] to the power of federal officials being able to potentially to expel British subjects from Australia as 'aliens',[33] also the power of State Parliaments to engage judges in the indefinite detention of prisoners who have completed serving their prison sentences,[34] as well as the constitutionality of the legislation enabling the Northern Territory intervention[35] the above mentioned cases will be discussed in this essay relating to Kirby's dissenting judgments and whether Kirby has an enduring value to constitutional law.Overall the judgements show that Michael Kirby's enduring value is that he has added considerable strength in dissent to the protection of our human rights and may perhaps one day be considered obiter dictum in future lower court cases.

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32 *Kateb v Godwin* (2004) 78 ALJR 1009; 208 ALR 124
33 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 78 ALJR 203; 203 ALR 43
34 *Fardon v Attorney-General (Qld)* (2004) 78 ALJR 1519; 210 ALR 50
35 *Wurridjal v Commonwealth of Australia* [2009] HCA 2