3099

THE ANGLO-AMERICAN LAWYER MAGAZINE

AUSTRALIAN CONSTITUTIONALISM

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The Honourable Michael Kirby AC CMG*

1. *Choosing Law: Philosophy of Law: Theory and Practice*

MK: I received an excellent school education at public schools in Sydney, Australia. Public schools educate two thirds of Australia's school children. They teach civic values of democracy; rule of law; and scholarship. Their foundation is expressed in colonial legislation of 1870. Public education is 'free, secular and compulsory'. I won scholarships that provided free university study in faculties of Arts, Law and Economics at the University of Sydney. At the Sydney Law School in 1960 I was taught jurisprudence (legal values) by a great scholar, Professor Julius Stone. He was a legal realist. He taught that the law must be constantly changing and reforming to meet the problems of changing times. He taught that judges' values inevitably affect their decisions. They should be acknowledged and justified rather than hidden in a mythology that judge-made law was always totally 'objective'.

2. *Dissenting opinions: Justifying contrary views: Justice Scalia and others*

MK: It is true that I wrote dissenting opinions more frequently than other Justices of the High Court of Australia (HCA). However, the statistics need to be understood and not exaggerated. A most important function of the High Court of Australia, as

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the nation's highest legal and constitutional court, is to grant special leave to appeal to the many litigants who seek it. On those decisions, there was rarely dissent amongst the Justices. If those statistics are included, my rate of dissent was not excessive and can be understood in context. Because virtually all cases now coming to the HCA require special leave, normally this will not be granted unless there has been a dissent in the lower court or if the matter is seen as controversial and important.

In other courts on which I served, in the ALRC, and in many UN functions, I was not 'the great dissenter'. My level of dissent in the HCA can be traced to the importance and controversy of the issues that usually come to the highest court of a nation. But also, the appointment to the court of Justices who, like the government that appointed them, were conservative and rather traditional in outlook – at least in my view. In all independent final national courts, there are judges who are more 'liberal' than others. In the USA, liberal justices of the Supreme Court are generally, but not always, appointed by Presidents who are Democrats; and 'conservative' justices are appointed by Republicans. Australia has had a long run of conservative governments. In May 2022, a Labor Government was elected. It may be expected to endeavour to select appointees, who generally speaking, may be more 'liberal' in their general legal and personal values. This is a healthy feature of democracies. It means that the outlook of courts frequently changes over time. Justice Antonin Scalia, whom I debated in Australia and New Zealand, could only be appointed by a Republican administration. Justices Ginsburg and Breyer could probably only be appointed by earlier Democrat Presidents. The scramble to 'get the numbers' in the United States Supreme Court was evident when Justice Ginsburg died in the last weeks of the Trump administration. Whilst such phenomena are not so evident in Australia (partly because of the lack of a constitutional Bill of Rights) they do exist.

As a former chair of the ALRC, and an active participation in civil liberties groups on my earlier legal practice and at the Bar, it could be expected that I would generally favour a 'liberal' or 'reformist' attitude to judicial decision-making. But this was certainly not simply applying politics from the judicial seat. It was no more than reflecting deep legal and social values in judgments. We can pretend that differing judicial values do not exist. But one English law lord (Lord Reid) rightly said that this was a 'fairytale'. In the law, we need to be honest and realistic, especially if we are judges.

3. ***Lord Denning; history of dissent: reconsidering dissent***

MK: It is true, that on some issues, Lord Denning was 'liberal' and early in his judicial career he wrote many dissents. Some of these came, over time, to influence later judges and the trend of their decision-making. This was not universal. Sometimes, dissents sink like a stone. However, the right and duty of judges in appellate courts based on the English traditions of the common law, is to express their honest opinions in every case. Certainly, this is so in final courts that are not *bound* to apply earlier precedents.

This is not the tradition of the civil law, inherited in many countries including in France and Germany. Those who prefer preserving the right to dissent point out that it encourages honesty and truthfulness. Judges in final courts are not performing their duties 'on automatic pilot'. On some issues (rights of women, minorities and religion) Lord Denning was conservative. Likewise in my own case, colleagues always told me that I was most conservative on the application of the common law of contract. I had the simple belief that contracting parties should fulfil their promises. I regularly resisted the importation into the bargains struck by business

people (who neither expected nor deserved it) the interference of the conscience of equity.

4. ***Judicial and personal views on politics: Deciding cases with political consequences***

MK: The HCA is politically independent of government. So are all other courts in Australia. It would be shocking and futile for politicians to interfere indirectly in judicial decision-making, at least outside the appointment process that belongs, in Australia, to politicians. In my 34 years as a judge of various courts in Australia, I never received any improper pressure, however subtle, from politicians or others outside the court, to attempt interference in my judicial decision-making. Corruption in the judiciary of Australia has been almost totally absent. Judges have very little personal contact with politicians and most like to keep it that way.

Sometimes the HCA has struck down, as constitutionally invalid, highly political legislation, often disallowing laws made by the governments that appointed them. The clearest example of this was the 1951 decision which declared that legislation of a newly elected conservative government, dissolving the Australian Communist Party, was invalid under the Constitution. This was based upon constitutional implications not a Bill of Rights: *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193. This decision was a majority opinion where the court divided 5:1 to reject the enacted law in question, although the government had secured a mandate for it at a recent federal election. Two of the majority Justices had then only recently been appointed to the HCA by the conservative political party. I cannot say that every judicial reasoning of political importance evidences total

political neutrality. However, except in the most general way, political alignment does not ordinarily control judicial decisions of the HCA.

5. ***Unanimous and dissenting judgments: Value of unanimous decisions***

MK: The *Australian Financial Review* (AFR), like most work of journalists, delights in oversimplifying complex issues. There is sometimes a value, if it can be achieved with intellectual integrity, in endeavoring to secure unanimous opinions. This was achieved by the Supreme Court of Canada in an important case that concerned the constitutional procedures in Quebec to validly terminate its links with Canada and the other province of Canada's federation. See *Reference Re Secession of Quebec* [1986] 2 SCR 217 (Supreme Court of Canada). In Australia, we have not had any issue where unanimity was so important, such that individual Justices would feel obliged to abandon their personal professional views for the sake of agreement with the majority. I never felt that our disputes were of that character.

However, occasionally rulings on constitutional questions can be strengthened by unanimity. This occurred in Australia in a matter which, for a decade, had been hotly contested in the courts. I refer to the implication, drawn from the democratic character of the Australian Constitution and its institutions, that the Parliament could not validly impose restrictions on free discussion and debate deemed essential to ensure public awareness discussion of political issues. After several cases of disagreement, the HCA found a formula for upholding the implication, notwithstanding the absence of any express provision in the Australian Constitution that guaranteed such expression or free media: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. However, even this hard-fought achievement has recently come under reconsideration in the HCA. The same may likewise prove to

be the case in the United States with the attempt to override the law of abortion, as expressed by an earlier Supreme Court in *Roe v Wade* 410 US 113 (1973). In India, after several ups and downs in consideration of the constitutional validity of Article 377 (sodomy) of the *Indian Penal Code* (IPC) in such decisions as *Naz Foundation v Union of India* (2009) 4 LRC 828 (Delhi HC); reversed *Koushal v Naz Foundation* (2014) 1 SCC 1 (SCI) and finally restored *Johar v Union of India* (2020) 1 LRC 1 (SCI). The unanimous decision at the SCI in 2020 helped to finalise this debate in India. Nevertheless, the Supreme Court's reasoning has not been followed by the Court of Appeal of Singapore in respect of the *Singapore Penal Code*, s 377A. Generally speaking, judges of final courts and beyond their independent right to express their own opinions, if necessary, in dissent. See Rohinton F Nariman, *Discordant Notes*: *The Voice of Dissent in the Court of Last Resort* (Penguin, India, 2021).

6. *Bills of Rights: Parliamentary democracy: Unpopular decisions*

MK: Australia does not have a comprehensive, still less a constitutional, BoR. In 1901, when the Constitution was adopted, it was believed that elected parliaments were the best protectors of universal human rights. Whilst this may generally be so, experience has taught that sometimes legislatures are neglectful of the rights of particular citizens, including minorities. Over time, this has certainly been the case in Australia in respect of Indigenous peoples; women; racial minorities; and LGBTIQ citizens. That is why most modern constitutions, drawn up after 1950, have included express provisions amounting to a BoR.

In Australia any such fundamental constitutional rights must be derived, by a process of reasoning, from the language contained in the general provisions of the

Constitution. This was the challenge that faced the High Court of Australia in *Mabo v Queensland [No.2]* (1992) 175 CLR 1. Indigenous People in Australia had, for more than two centuries, been denied recognition of the legality of their land rights. This approach to the law had been upheld in their earlier decisions by the Judicial Committee of the Privy Council and the HCA. The common law principle of *terra nullius* was overturned in *Mabo*. In part, the Justices, led by Justice F.G. Brennan (who died recently in May 2022) drew upon the principles of universal human rights to afford a principle of racial equality under the laws of Australia. Sometimes, similar reasoning has upheld provisions that were unpopular with some politicians and citizens. One such instance involved upholding the right of incarcerated prisoners: *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1. Prisoners, even whilst incarcerated continue therefore to enjoy certain rights as citizens and as human beings. Even when politicians (supported by many other citizens) do not understand and support such rights, the courts should do so. In Australia, voting in federal, State and Territory elections is not only provided to all citizens aged 18 years or older. It is also compulsory. Thus, following the HCA decisions in the prisoner cases, custodial institutions throughout the country are obliged to provide opportunities to vote for prisoners serving sentences of fewer than 2 years imprisonment. Legislatures may occasionally march to the drum of populism. Courts should adhere to principles that are more lasting.

7. ***Separation of powers and the courts in Australia***

MK: In the Australian Constitution there is a separation of government powers; but less extensive than in other countries. Indeed, because the executive government (Prime Minister and Ministers) must be elected to, and chosen from, Parliament, the separation of the executive and the legislature is not a feature of the Australian

Constitution. In the case of the separation of the judicature from the other branches of government (legislature, executive, military and bureaucratic) is an implication derived by reasoning from the Australian Constitution and history; not an express provision. This principle has been regularly upheld and is strict so as to safeguard the independence of the judges: *R v Kirby ex parte Boilermakers Society of Australia* (1956) 94 CLR 254. Only courts may exercise the judicial power in federal matters. If something more than the formal application of the law to the facts is involved, it must be tribunals and other officeholders who decide the matter. They are not subject to the protections and obligations of the judiciary. This has sometimes led to conflicts at the borders of governmental powers.

8. ***Judicial review: Adequacy of common law: UK after Brexit***

MK: As in the United States Constitution, the Australian document does not expressly provide for judicial or constitutional review as such, to determine the constitutional validity of other laws when challenged. However, that remedy was derived as a necessary implication from the text and functions of the courts. This is the way we delineate federal power from state power or judicial power from other sources of law applicable to States or Territories and other constitutional norms; *Marbury v Madison* 5 US (1 Cranch) 137 (1803). Early in its life, the HCA acknowledged the application of constitutional review as inherent in the Australian Constitution: *Ah Yick v Lehmert* (1905) 2 CLR 593. This principle is never now questioned today in the Australian context. It is well entrenched and a source of many challenges in cases coming before the HCA.

9. ***Usurpation of judicial power and popular opinion***

MK: Generally speaking, Australian citizens have supported the independence and powers of the courts. Even when an individual or group has been stigmatised by legislation, the courts have upheld the right of constitutional challenge and sometimes determined the challenge against the wishes of Parliament and/or the Executive Government. The *Communist Party case* (above) was a clear instance. Federal legislation to ban the Australian Communist Party, which had been enacted, was challenged in the HCA. One of the grounds for invalidity, upheld by the Court, was that the statute purported, in its Preamble, to recite the dangers and wrongdoings of international communism and thereby to assure the grant of power to the Federal Parliament to implement the prohibition. In 1951, the HCA by 5:1 declared that the Parliament could not 'recite itself into power'. That decision greatly upset the Menzies government of the day, fresh from its election, in which it had sought and achieved a mandate in 1949.

The Government therefore took this decision to a referendum of the people, designed to overcome the decision of the HCA. This referendum was voted upon throughout Australia in September 1951. That was only a few months after the HCA decision. The attempt to win express federal power for the proposed ban had been rejected by the HCA. Subsequently, the people voting at the referendum confirmed this outcome. The Government did not secure a majority of the national vote; nor a majority of the vote in the States of the Commonwealth. The communism referendum therefore failed. In the result the government failed in its attempt to ban the Australian Communist Party. There have been other instances. The fact that the HCA had overruled the ban on communists was a substantial argument that persuaded the people of Australia to support the court's decision.

Media, including newspapers, frequently attempt to influence the outcome of constitutional referenda. They did so beneficially in 1967 when the Australian Constitution was reformed by a national vote of more than 90% of the electors to insert, amongst the governmental powers enjoyed by the Federal Parliament, a power to enact laws specifically with respect to Aboriginal people. However, in 1999 the Australian media had also strongly supported, almost without dissent, the proposal that Australia should change its type of government from a Constitutional Monarchy to a Republic. Because a majority of the people was suspicious of such a change, it failed to secure a national majority at the referendum, held for that purpose. It also failed to gain a majority in a single State. In the result, although media can try to influence political opinions and decisions, on changes to the Constitution Australia has been very cautious about enlargement of federal powers. Thus, Australia is still substantially governed under a federal constitution drafted in the 1890s and sometimes thought by 'experts' unsuitable to the problems of today.

10. ***UK common law after Brexit***

MK: In Australia, in the past 50 years, since I was taught law at the Sydney Law School, there has undoubtedly been a big shift in the elaboration of law expressed in statutes enacted by the Federal, State or Territory jurisdictions. In Australia, statutory change and elaboration have has diminished the influence of the common law, although its principles are still referred to in challenges as to the meaning and validity of the Constitution and parliamentary legislation. Until 1986, with relatively few exceptions, most judicial decisions in Australia were subject to supervision by the Judicial Committee of the Privy Council in London. Until about 50 years ago, Australia shared a final court with Ceylon (later Sri Lanka) namely the Privy

Council. That link began to diminish after the 1970s in Australia and in consequence of the *Australia Act* 1986 (UK and Aust). Lord Denning once declared that the tide of European law was coming in for English law. Except as it was derivative from the developments of the English common law, this was never the case in Australia. If European law came into Australia, it was often by the direct impact by analogy of the European Court of Human Rights or the European Court of Justice. That source of law has now been terminated, in the case of the ECJ. Recently, it has also been under challenge following the decision of the Johnson Administration in the UK to withdraw from the jurisdiction of the ECHR jurisdiction. This will be a loss to Australia if it happens. Sometimes the decisions of the ECHR have been very useful in influencing Australian cases concerned with universal questions of human rights. This was so in the decision of the HCA upholding the rights of prisoners to vote in elections. It will be another indirect loss suffered as a result of the UK decision to embrace Brexit. The Brexit decision invoked a rare but strong statement from the UK Supreme Court, obliging the UK government to secure parliament any approval to authorise legally the withdrawal of the UK from the European Union. From the point of view of Australia, it is hard to perceive any advantage that Brexit has afforded to Australia. Indeed, many Australians are doubtful that the overall consequences of Brexit has been favourable for the UK.

11. ***Judicial review and constitutional foundations***

MK: The power of, and access to, judicial and constitutional review are not expressly spelt out in the Australian Constitution. However, it is strongly implied therein. In a written constitution it is necessary to have an authoritative 'umpire' to decide the validity of laws subject to the constitutional instrument. This is why the judicial power in Australia has a foothold in the implications to be derived from the

text of the Constitution about the expressly stated powers granted to the Federal Parliament. In Australia, as in the USA, the balance of lawmaking powers remains under the Constitution with the States and Territories, except in so far as the Federal Parliament has enacted a valid federal laws having impact on sub-national laws. The need for such a judicial "umpire" is rarely questioned given that the only alternatives would be provision of the power of review to the Federal Parliament itself (which would have a perceived interest in supporting its own proposed federal legislation); or for resolution of contests by the people of Australia (who have proved notoriously reluctant to amend the text of their constitution) and it would in any case a hopelessly cumbersome way of evaluating legal validity given the expense and delay of securing decisions by this means.

12. ***Amendments to the Australian Constitution including by Referendum***

MK: The Australian Constitution was deliberately made very difficult to amend. This was because, although Australia was initially largely settled by migrants from the UK, it inherited many of the values then observed in the UK. These included the notion that parliament was supreme in expressing the sovereignty of the people expressed in parliament. Although the monarch is often described as the 'sovereign' of Australia, the way in which the Australian Constitution was adopted by procedures of colonial referendums in the 1890s, led to the judicial development of implied constitutional notions that the *people* of Australia must now be viewed as the true sovereign: *McGinty v Western Australia* (1996) 186 CLR 104, 485-6. Over the 121 years of the Australian Constitution, the text has been subject to 44 formal referendums to change its text. Only 8 have been successful in achieving a change by the constitutional majority. As explained, that majority in Australia requires not only a majority of the overall vote; but also a majority in a majority of states. This

"double majority" requirement has led to Australia sometimes being described as 'constitutionally speaking, a frozen continent'. Yet sometimes these obstacles have saved Australia from changes that nowadays most Australians would regard as undesirable so far as the rights of the people are concerned.

Notwithstanding this resistance to formal amendment, many changes in the understanding of the Australian Constitution have been adopted following judicial decisions, including by the HCA. Within a repeated context, concerning the rule of law as the most basic constitutional norm in Australia (see *Plaintiff s157 of 2002 v The Commonwealth* (2003) 211 CLR 476 at 513 [103]), this very principle has endorsed constitutional decisions that surprised some people and annoyed others. Yet when courts, especially the HCA, have decided a constitutional controversy, the judicial ruling tends to be accepted. It has always been obeyed.

Just the same, many rulings of the HCA on particular constitutional words, or on ways judges should approach constitutional construction (see *Amalgamated Society of Engineers v Adelaide Steamship Co – Engineers Case* (1920) 28 CLR 128; (1921) 29 CLR 406), the authority of the HCA has been accepted and upheld even where it has followed an initially unpopular decision. The ruling in *Mabo [No.2]* (1992) was initially unpopular in political and business circles. However, with the abolition of the 'White Australia' policy concerning immigration, the adoption of a more beneficial approach to the equality of Aboriginal People has been a distinctive feature of judicial reasoning over the past 40 years. In fact, the HCA has played a significant role in educating the Australian population about the problems of racial and other discrimination that existed in earlier Australian society. This has extended not only to rights of First Nations People as in *Mabo*. But also discrimination affecting the rights of women; non-Caucasian migrants; and LGBTIQ people (in the

Commonwealth v Australian Capital Territory (2013) 250 CLR 441, where the HCA held that marriage equality was available to sexual minorities under the federal power in respect to 'marriage'. That power was unanimously held by the HCA to be applicable to homosexual people in the Commonwealth. The court did not follow the approach of Justice Scalia and other Justices in the United States Supreme Court, of confining constitutional language to the 'original intent' of the Constitution at the time of its original adoption. In Australia, the very nature of a constitution, as a statement of principles and powers intended to last for decades or centuries, has been viewed as a powerful reason for rejecting the "original intent" approach. Instead, most Justices of the HCA have adopted a "living tree" approach. This has involved giving language, drafted in the 1890s; and adopted into law by the Imperial Parliament in 1901, a meaning that is applicable to the time in which the issue for decision calls for judicial decision and where that decision is expected to operate.

13. ***Fresh dialogue on the Australian Constitution***

MK: Constitutional dialogue is a continuing process in Australia, as in more countries. This is so even if some provisions appear to be immutable. Such provisions would probably include the rule of law itself; the separation of judicial power; and the rejection of 'original intent' constructions. Formal amendment by the referendum process is clearly extremely difficult to achieve. Yet sometimes that obstacle has been overcome (as in the Aboriginal referendum in 1967). Yet occasionally, the impediment has arguably been wise (such as the defeat of the *Communist Party Dissolution Act* of 1950 by judicial decision and a subsequent referendum rejecting formal amendment).

At present, there is a lively discussion in Australia about incorporating in the Australian Constitution provisions designed to honour and respect the rights of the First Nations Peoples (Aboriginals and Torres Strait Islanders). The newly elected Australian Government received an electoral mandate on this issue in its recent successful electoral campaign in May 2022. The new government has promised action on this point within 3 years. Although it was not mentioned in the recent election campaign, the issue of a republic versus constitutional monarchy has also now been raised by the new government. However, action on this proposal has been postponed for at least 3 years. It may be later postponed still further. Most observers believe that the prospect of Australians voting for a republic during the lifetime of Queen Elizabeth II is remote. Although possibly paradoxical, many Australians consider that constitutional monarchies tend to be more stable and successful systems of government. They argue that they put a check on the powers and ambitions of politicians; reduce the force of nationalism; and play a useful role in establishing not what the monarch does, but in the type of people whom the monarch keeps out of the position of head of state. Ceylon and Sri Lanka, having earlier been governed as a constitutional monarchy and now a republic of evolving forms, would no doubt have views on this issue.

Australians need to become more familiar with constitutional reform, despite the double majority requirement necessary for formal amendment. On the other hand, in its actual operation, for the most part, the Australian Constitution of 1901 has operated within a capacity for renewal with the assistance of the courts and generally providing mostly a benign and stable government (with the assistance of constantly changing judicial and national values).

Within recent days of the preparation of this paper, a family of Sri Lankan immigrants without valid visas have been released from 4 years of compulsory detention in Australia. They were afforded bridging visas by the new Minister and released from federal custody to widespread acclaim and relief. They have been welcomed back to Biloela, a small town in remote Queensland. They even received a civic reception. They witnessed the strong affirmation by the local community that they were welcome, had jobs; enjoyed rights to schooling for their children in public schools, like mine; and enjoyed the general fruits of a peaceful land.

Australia is a land which is still coming to terms with its often-racist past. A measure of credit for this development rests with the judiciary. Judges have sometimes felt able, within the current law, to help to rescue Australia for its better angels. Racism and hostility were often marked features of earlier times. Racism is present in all nations, and to some extent, amongst all peoples. However, in Australia the role of the law ha sometimes proved protective. I hope that this will remain the case; and will be enhanced by the adoption of a long delayed national statutory charter of fundamental human rights.

Because of my own sexual orientation, I naturally welcome all moves that encourage a multicultural, caring, welcoming and kinder society. When I was a judge, I reflected these values where appropriate; although it was sometimes rendered impossible by the clear expression of valid but harsh laws (see *Minister for Immigration v B* (2004) 219 CLR 365 at 426 [174] – [176]. Where there is no possibility of valid judicial re-expression of the law, a judge must apply the text.

Yet sometimes there are, what my teacher Julius Stone taught, “leeways for judicial choice”. When that occurs, judges and lawyers need to consider whether they should

grasp the 'leeway'. As a great judge from Sri Lanka, and my friend, (Justice Christopher Weeramantry) taught, the exercise of a leeway for choice can sometimes secure guidance from the principles of international law, especially by reference to universal human rights law. Nationalism and pride in our own institutions, should never blind judges and lawyers to the law's serious imperfections. Or from the system of law that lies in wait for discovery containing the universal principles of fundamental human rights (*Al-Kateb v Godwin* (2004) 239 CLR 562 at 629 [190]-[191].

Those principles are shared by all civilized people who sometimes (but not always) include judges and lawyers. All of us have much to learn from the law in countries beyond our own shores. We must open our minds to these possibilities. See M.D. Kirby, "The role of the Judges in Advancing Hunan Rights by Reference to International Human Rights Norms" (1988) 62 *Australian Law Journal* 514 at 531 and Dr Nihal Jayawickrama.[1] In law, the search for legislative reform and re-expression by judicial exposition, are never fully at rest.

[1] "The Judicial Application of Human Rights Law: National Regional and International Jurisprudence", Cambridge Uni Press, Cambridge, 2002.