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JUSTICE AND JOHN LENNON

An interview with the Hon. Michael Kirby
By Chris James and Christoph Liedermann
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The Hon. Michael Kirby AC CMG

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AN INTERVIEW WITH THE HONOURABLE MICHAEL KIRBY

BY CHRIS JAMES AND CHRISTOPH LIEDERMANN

*“...No need for greed or hunger
A brotherhood of man
Imagine all the people
Sharing all the world
You may say that I'm a dreamer
But I'm not the only one
I hope someday you'll join us
And the world will live as one”*

John Lennon, *Imagine*

Q: During your time on the High Court, you presided over many decisions that generated controversy and notable differences in opinion, including amongst the Judges of the High Court itself. Do you think it is a good thing to encourage such differences of opinion and debate amongst the Judges? Or is it better to keep a more collegial attitude?

Kirby: I think a collegial attitude is generally desirable. Certainly, during my time as president of the Court of Appeal, we operated mainly in that way. But in the High Court there are procedures for recognising different views. I took part in many decisions that generated differences of opinion. The issues in the High Court are often controversial and involve values on which lawyers will differ. And not all the collegiality in the world should wash away the honesty and transparency of these differences. One of the strengths of the Australian's justice system is the way it supports and protects this honesty and transparency.

Q: Are decisions stronger if they are decided collegially? Does it perhaps weaken the court's ruling if you can see the differences in opinion?

Kirby: I don't think you should pretend to collegiality if there are genuine differences. If you paper over the cracks, the trouble is that anyone intelligent (which should mean most lawyers) can see what you are trying to do. Such behaviour will not advance the development of the law. Having said that, you should certainly try to find common ground.

The very nature of the Constitution means differences of opinion will arise. An example is the *Getup* case recently, where the court was divided; though of course we have yet to see their reasoning. Such is the nature of constitutional litigation. If they were not difficult issues they would not usually be brought before the High Court.

Q: You mentioned the recent case of *Rowe* (The 'Get Up' case) as one where the Court was divided. Are there any other specific examples of when debate strengthened/weakened the final decision of the court?

Kirby: There have been so many it seems difficult to single any particular case out... There was such a decision in *Roach v Electoral Commissioner*. The High Court ruled by majority in that case on the disenfranchisement of prisoners. But there was some division. In the end *Roach* led to the *Getup* case. One case will tend to lead to another in any case. Parties always try to 'push the envelope' in developing areas of law to their advantage. Particularly the Commonwealth, I must say.

Q: Do you think the current bench of the High Court is more collegial or divisionary?

Kirby: They tend to produce more court decisions I think. And collegial decisions are desirable if they can be secured. In my own time in the Court of Appeal, there were many collegial decisions. But the very nature of cases that come to the High Court tends to make them borderline, because they generally require special leave to appeal. It is not surprising that there should be differences of opinion, because the judges will not necessarily agree when they disagree over principle. When we have collegial opinions, it can make life easier. But it can sometimes deprive the legal system of genuinely differing opinions. I am for collegiality generally. But I am also not for decisions that paper over differences, or fail to see the differences that properly exist.

Q: Do you think the High Court should express its' own opinion on legal matters? Should they take what has been described as the 'social activism' approach (as I am sure you are aware) and actively seek social justice?

Kirby: When High Court justices are sworn in they swear to do justice. The Court should do right by the people. To do 'right' is to do justice. A court that does not do justice will violate a core part of its mandate. The purpose of judges is to face the dual quandary of the legal system: to seek just outcomes, but to do so within the parameters of the law. I am neither for the rigidity of unreflective decisions applying literal applications, nor for those that ignore the law and substitute the judge's own 'palm tree' justice. The legal system tries to seek justice, but justice must be found within the law.

Q: How do you think the current High Court justices perform in this role?

Kirby: I cannot give opinions on the current Justices. They have enough on their plate without retired justices like me giving out opinions on their performances! But I do not doubt the honesty and integrity of other justices. I have always respected the opinions of the other justices, as they respected mine. I never personalised the differences in opinion, though personal life and experiences can affect our own perception of problems. Of course, we cannot be naive and think that every legal issue has only one solution.

Q: On a slightly unrelated topic: Do you think the Courts play an important role in allowing other to express their opinions; specifically with regards to free speech?

Kirby: The High Court has generally taken a very strong stand on the right to free speech, especially in *Lange v ABC*. That case marked an important protection of the right of Australians to express their views on political and economic ideas. The court has been attentive to that entitlement since. Also in the cases of *Roach* and *Getup*, the Court acted to protect the rights of citizens to express their views through use of the ballot; which is really the most fundamental expression of political opinion. We don't have a bill of rights in Australia, and have no first amendment. We are not as extreme as the Americans on the matter of free expression. We believe it is very important, but is not the only value. Australians also value others such as the right to privacy, dignity, reputation, and the right to have parliamentary free speech. There are other rights to be balanced against unrestrained freedom of expression.

Q: You mentioned the bill of rights. Given that the Rudd Government did recently make an inquiry into the possibility of an Australian Bill of Rights, how do you see Australian law progressing in that area?

Kirby: Well Mr. Rudd said that the decision to reject a statutory bill or charter of rights would be reviewed in 2014. It is unclear what the position would be if Mr. Abbott became Prime Minister, though he seems to oppose any form of bill of rights. The future of such a bill is unclear and uncertain at this moment. I do not believe there is a high likelihood of us getting a bill of rights any time soon. And that will leave us as to only western country without one. We trust parliament to protect our rights. Yet in the way we have sometimes treat Aborigines, boat people, prisoners, and so on indicates that we do not have an unblemished record. So I think some protection for universal human rights would be useful. The *Mabo* decision (that is, *Mabo No.2*) did feature some discussion of the protection of human rights. The question is whether we should have this consistently, not as an exceptional case. We don't have it in Australia at the moment, and not for the foreseeable future.

Q: How important is it for people (and particularly up-and-coming lawyers) to have an open mind to these issues?

Kirby: If law students don't have an open mind even before they graduate, it would be very bad. Of course it is important we keep our minds open. Most law students come from higher income families, and most have attended private schools. I myself did not. I attended public schools. Asking those more privileged to imagine the world through the eyes of those disadvantaged is sometimes a big ask. But it is something a lawyer must do. A lawyer sometimes has to be a kind of actor. A lawyer must step into the shoes of the competing parties, and be able to assume the point of view on other side of record, and pursue it with ingenuity and vigour. You have to be able to imagine. Perhaps we should all be taught John Lennon's song (*Imagine*). And how important it is to keep an open mind.

Q: Any advice to give to young law students who will (hopefully) read this?

Kirby: Oh, I think I have given too much advice over the years. You should not be over-burdened by my opinions. You have enough to get on with! Make up your own minds. But keep them open to new and challenging perspectives of law and justice.
