"THE ESTABLISHMENT FIGURE THAT THE PRESIDENT OF THE COURT OF APPEAL SHOULD BE"

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JUSTICE KIRBY:

"THE ESTABLISHMENT FIGURE THAT THE PRESIDENT OF THE COURT OF APPEAL SHOULD BE " ?

In a recent speech at the National Ideas Summit (reproduced in The Bulletin) the former Science Minister, Barry Jones, named Justice Michael Kirby as one of a "discouragingly few" 13 intellectuals in Australia who are "generally recognisable as contributors to the public debate." There were no other judges on Jones' list - and only one other lawyer (Sir Zelman Cowen). According to Jones, thirteen out of seventeen million is "not a very impressive figure," especially as most of those on his list were retired or nearly so.

Justice Kirby is not like other judges. He admits that this is so. Blackacre asked him whether it pleased him that the perception was that he was not in the mould of an establishment judge. He replied, "It is the fact. It is neither a matter to be pleased about or to be ashamed of. My experience has been quite different. The fact that I came to this office via nearly a decade in law reform inevitably gave me a different perspective of the function of an appellate judge from that of any other judge in Australia.

"That experience was tremendously valuable to me. I'm not saying it's a better experience than the equivalent time spent labouring away at individual cases as a barrister. But, I believe it did help me to see the whole mosaic of the law as it fits together. It did make me more conceptual about the law than I was and than many practitioners are, because they are simply solving, day by day, individual cases. The work of law reform made me try to see the way the pieces fit together and I still try to do that in my work as a judge.

"That is just my life and it's different. I think it is a strength of the judiciary that it absorbs people from different backgrounds. Justice Nygh, for example, appointed to the Family Court from a Law School, followed a pattern which is very well established in North America but which hasn't been a feature of this country. Justice Neaves of the Federal Court and Justice Mary Finn, recently appointed to the Family Court, came from backgrounds as government lawyers. And I believe we are going to see more people coming from diverse backgrounds and not just from the Bar. The Bar remains a place of tremendous discipline and of day by day work at the coal face of legal principle. It has been the traditional source of judges and doubtless will remain so during my lifetime.

"But variety is the spice of the Judiciary."

Justice Kirby's decision to do law came about in the following way: at the Summer Hill Opportunity School he was administered a vocational test which determined that he "would have been an absolutely splendid bridge engineer". However, the young Kirby "wrote down that I wanted to be be a judge or a bishop. One way or another I displayed thereby that I was determined to get into fancy dress and that I didn't have a great deal of modesty. Doubtless that is the reason why I went into the Law rather than the Church, where humility is, of course, at a premium. It is not at a premium in the Law...I hope I have become more humble since".

Fort Street High School was also influential: "I went to Fort Street. Fort Street was a school of lawyers. Not a week went by at the school that we had drummed into us the famous lawyers of Fort Street. Dr H.V. Evatt, Sir Garfield Barwick, Sir Percy Spender, Sir John Kerr as he later became, and since then, Mr Wran, Mr Dowd and many,

many judges... The school was a school with a big long legal tradition and that, together with the fact that my strengths were in English and History rather than Mathematics really defined where I would go".

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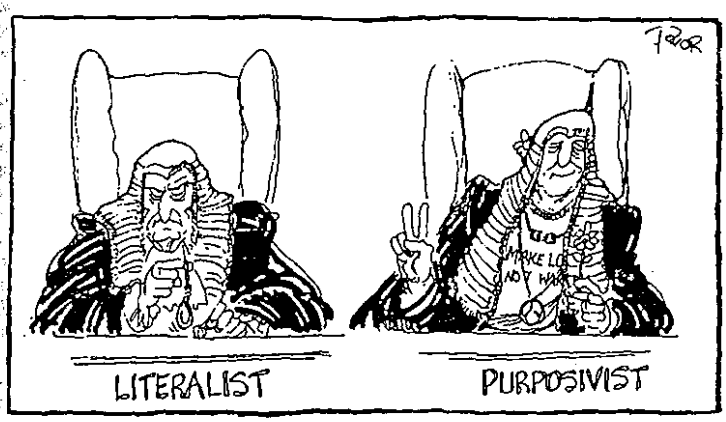
One of the more remarkable things about Justice Kirby is the copious amount of extra-judicial writing and speaking he does. He says that he has "numberless invitations to 'go to community groups, universities, institutions to address them. Australian audiences are infinitely tolerant." Apparently he accepts a fair number of these and he is an interesting speaker. Some of these speeches, especially the ones of a legal nature, are published in journals. Justice Kirby also publishes articles about a range of other things: his career in law, law reform, other judges and current issues. His articles often reveal recuring themes of thought. His writing style shows a person who is articulate and interested in a wide range of current questions. His articles are researched and footnoted thoroughly.

Time will no doubt be the best judge of Justice Kirby's contribution to New South Wales law. But at the moment at least he is seen as something of dissenter; if not yet a "great dissenter" (only time will tell that), then at least a regular one. He says of that "Well, the figures are there in the Court of Appeal Annual Review and its true to say that in the first few years I was dissenting more than most but I believe that in the last Annual Review it was revealed that Justice Mahoney dissented in nineteen decisions and I in sixteen decisions in the course of the year. Now that is high by the standards of the Court of Appeal. It's high by the standards of the judiciary in Australia, except for Justice Murphy, I suppose. But if one looks at the total number of decisions in which judges of the Court of Appeal join during the year then its perhaps more relevant to stress the number of cases in which people of different philosophy and experience in the law, background, interests and attitudes *agree* rather then disagree. By international standards, especially the standards of the United States, the levels of dissent are relatively low."

"I have to question "Am I becoming the establishment figure that the President of the Court of Appeal should be?""

"And my own view, as expressed in a recent article on the Writing of Judgments is that dissent is the duty of a person who doesn't agree, either in the result or the reasoning. It's burdensome to have to write your own differing way of expressing a decision or to write a view that is contrary to that of your colleagues. Life is easier if you agree. But if you don't agree it is your conscientious duty to express your opinion. I think it was Justice Cardozo who said, a dissent appeals to the next generation by the power of ideas to your notion of where law or justice leads in the particular case. So I wouldn't overemphasise the dissents but they are a very important instrument of the common law and its development".



Justice Kirby said that he wasn't demoralised by the fact that he was often in the minority. He said, "I express my point of view. I do so honestly. I don't doubt the honest opinion of my colleagues. I have now sufficient humility to understand that I may be wrong. I never concern myself with the fact that I'm in a minority because I have done my best to express my opinion and to do so as persuasively and if necessary as powerfully as I can.... It doesn't demoralise me in the slightest that I dissent more than other judges. And now that I have been overtaken by Justice Mahoney I have to question "Am I at last becoming the establishment figure that the President of the Court of Appeal should be?".

Aspects of Justice Kirby's life and views are covered elsewhere (as mentioned above) so we decided to confine this article to a detailed record of his views on a few areas. We wanted to ask him about his judicial method, especially in view of the fact that he dissents more often than most judges. Justice Kirby said firstly that while nobody in the law exactly inspired him, he was "inspired by the notion that we have an opportunity to do justice according to law. That has a dual aspect. "Justice" is a search as ancient as humanity - fairness, equity and principle in the relationship between people and people and society. It's also a striving after a moral goal and that attracts me. "According to law" is the definition of the Rule of Law, which is one of the fundamental principles of our society. It is to assert that we live by rules and not by whim and not by political dictat".

We mentioned to Justice Kirby that we found it a little difficult to reconcile some of the comments he had made over the years, and that presumably "justice according to law" was quite distinct to "strict and complete legalism". He agreed and gladly answered Blackacre's impertinence by saying "...because the Common Law, as its history demonstrates, is constantly moving and developing. And therefore when we ask "What is the law according to which justice must be found?" we can sometimes find the answer in simple legislation or a simple, obviously applicable and binding legal authority. But frequently, because language is ambiguous, both legislation or case holdings are ambiguous. Frequently nowadays, with new problems of technology or the like there is no case on the matter or a case which is but a distant relative. Therefore there are, as Professor Stone taught when I was at the Law School, "leeways of choice". Every lawyer and every magistrate or judge (or tribunal member for that matter) has those choices. They are, I imagine, more obvious at the appellate level because you often have to weigh and decide between critical policy choices. But it is not a slot machine justice that I believe in or that I administer. Nor is the law so easily discovered as by syllogistic reasoning - find the law, find the facts, apply the law to the facts and come to the conclusion. In finding the law or finding the facts there is opportunity for honest choice and honest difference between different people who conduct the same search".

"People who believe in fairy tales are welcome to believe in them."

In view of that we asked, was strict and complete legalism possible at all? Justice Kirby replied, "It depends on how you define it. I have already said that sometimes there is a statute that is completely clear or there is a High Court authority that is binding and absolutely plain. Then the result follows automatically, as in a slot machine. But those cases would be, I suppose, five percent of the cases that have to be decided, no more than ten percent, at least at the level of the Court of Appeal. There are difficult questions where there is a choice. Therefore, it is vital that we expose, at least amongst ourselves, what we are doing and the policy reasons which lead us to one decision or another. To that extent I don't believe in strict and complete legalism. Indeed, I don't think many people, since Lord Reid denounced that theory twenty years ago, have believed in it. Lord Reid said that there was a time when people believed that the common law was to be found in Aladdin's Cave if only you had the magic password. He said that that was a fairy tale. People who believe in fairy tales are welcome to believe in them. But the actuality of the law, in the great bulk of the cases to come to the Court of Appeal, is not so simply discovered. It is necessary for people like me to expose honestly and candidly the reasons that lead to one choice or another. And to wrap it up and dress it up as if it were a slot machine operation is either self deceptive or deceptive of the profession and of the public".

The teachings of Julius Stone are, of course, highly relevant to this topic. Justice Kirby has written elsewhere of them. He said to us "Professor Stone was in the succession of Dean Pound from the Harvard Law School, a legal realist. At the time he was appointed to the Chair of Jurisprudence at Sydney University the declaratory theory held sway. It was the theory that provided the intellectual underpinning for the notion of strict and complete legalism. Sir Owen Dixon, one of the finest judges in the history of our country, said frequently that if there were no pre-existing laws then the law for him would have lost its meaning and purpose. His purpose was simply, by processes of deductive reasoning from past cases or principles or the application of a pre-existing statute, to declare what the law *was*. Stone taught how many leeways for choice lie in that operation. I think Stone's teaching was the intellectual impetus for the Australian acceptance of a more realistic approach to the task of lawyering at every level but particularly of judges, and most particularly appellate judges.

"Now, it has to be done with some care. I am sure that ninety five percent or more of the community believe in the declaratory theory and in the pre-existing law, which is only there waiting to be discovered. To that extent judges have to be careful that they don't by too unsubtle adventurous activity in the field of law making exceed their proper function, throw off the old principles and go off on some legal frolic of their own according to their own idiosyncratic opinions. That's certainly not the view of the law that I take. Nor is it the view that Stone taught. There are principles, there is honest, deductive and analytical reasoning. But even when one accepts those, different people of complete integrity can come to different conclusions. We see that quite often in the Court of Appeal. People shouldn't be suprised about this. It has been going on for as long as the Common Law existed. It's the reason why the Common Law of England exists and flourishes in more than a quarter of humanity, after the sun set on the British Empire. It is because the Common Law is so adaptable, so creative and yet so stable. It is this interaction of stability and creativity that gives it its strength. But a lot of people underestimate the creativity and overestress the stability. In a time of rapid social change and technological change and changes in perception of morality and of ethics there is a greater role for creativity in the Common Law".

Finally, we asked Justice Kirby what life held after the Court of Appeal. He replied that "Once one is appointed to a judicial office the convention is that one has no ambitions. Therefore I will stay at my crease here batting away and interesting myself in a number of activities, particularly international activities. Candidly, I don't see myself serving here for the next twenty years, which is what will happen unless I resign earlier. I don't think anyone should hold a position for so long. I don't think it's good for the institution. Nor is it good for the individual. Institutions, like persons, are enlivened by new blood and new ideas, particularly at the top of the institution. So I imagine my life will change. But where it will go is in the hands of the future".

M.C.

Kirby, Kirby, everywhere,
It really makes one think

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