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A FEW WORDS WITH JUSTICE MICHAEL KIRBY

THE AUSTRALIAN CONSTITUTIONAL MONARCHY & ITS LIKELY SURVIVAL:
A Review of The Honourable Justice Michael Kirby's Views on
Republicanism by Nicki Bourlioufas

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By Paul Conner, Nicki Bourlioufas, Marianna Tuccia, Susan O'Toole, Gabrielle Martin (and other people at table).

After his speech Hilarian asked Justice Kirby a few questions about the important and not so important issues. His Honour spoke of the Constitution, stretch limos, spa baths, his parents, his 54th birthday, and of chocolate and condensed milk (both of which are too fattening!).

Hilarian: Did you or will you use the impressive spa bath in your hotel room? (During his speech His Honour explained that he was staying in a particularly lavish hotel room at the Hyatt Hotel with an impressive spa)

Kirby: Absolutely!

Hilarian: What did you have for dinner tonight, the beef or the fish?

Kirby: I ate the fish because I'm a Piscean.

Hilarian: Did you eat your dessert (chocolate mousse)?

Kirby: No it was too fattening (His Honour spoke of his reluctance to stretch his waist line any further!)

Hilarian: Do you have any aspirations towards the H.C.A.?

Kirby: I've probably upset too many people. I've always said what I think. To me sitting on the High Court is not as important as my own integrity.

Hilarian: What advice do you have for students?

Kirby: Remain idealistic. Remember our mission is for justice under the law. Work to make our system more available to ordinary people. A German judge said of our legal system: 'you have a Rolls Royce system of law and we have a V.W., but who can afford a Rolls Royce?'

Hilarian: Do you think a Bill of Rights is a good idea?

Kirby: I once thought that a Bill of Rights might be a good idea. But now I believe that we should'nt give judges too much power because they are predominantly male, white, middle aged and conservative.

Hilarian: If more women were on the bench would you change your mind?

Kirby: You would then have to look at the ethnic make-up of the bench.

Hilarian: How can we best acknowledge indigenous Australia within our constitutional arrangements?

Kirby: We need to change the Constitution. It would need a new component which would ensure that our indigenous people have a right to self-determination. We could start by implementing the report of the Australian Law Reform Commission on Aborigines. (what date/title?)

Hilarian: For many young Australians the Union Jack and the monarchy represent symbols of the British Empire, and indeed of nationalism, and hence tend to be repulsive. Does'nt the republican debate mean something more than merely nationalism?

Kirby: The Empire has not existed for some time. Essentially you are speaking of form rather than substance. Our system has evolved in an Australian way. The Australia Acts give us absolute autonomy.

Hilarian: What about the point that the Queen can't adequately represent Australia given the British agenda in the European Community, i.e., when she goes to Europe she represents the British, not us?

Kirby: We have the Governor-General for that.

Hilarian: How is the republicanism debate distracting?

Kirby: Essentially there are more important issues which are calling for our attention, issues which are more pressing than the republicanism side show. We have a million unemployed and that is bad for the self-respect of those affected. There is the issue of access to education and to the legal system. The global crisis of AIDS. The reconciliation with the Australian Aborigines. All more pressing issues.

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Justice Kirby is clear on the Republican debate: our constitutional monarchy should be retained. At a recent Dinner held by Society of Labour Lawyers, Justice Kirby presented his views, surprising many. The thrust of what he said was that our Constitution works as it is and that it did not need 'fixing'. By way of an initial attempt at persuasion he quoted the fact that our constitution was one of the sixth oldest constitutions operating in the world!

Justice Kirby identified three personal issues that were of relevance to his views: his ethnicity (Irish); his religion (Anglican); and his age (fifty-four years). Justice Kirby stated that these elements permeated his views on the debate (and needless to say they did!).

Justice Kirby stated that the republicanism debate is legitimate, but that it needs to be examined in terms of what is in Australia's best interests. In doing this, his Honour examined the republicanism issue on two levels. First he examined the arguments of Realpolitik. Justice Kirby said the certain considerations were relevant. First, constitutional change via s 128 of the Constitution is extremely difficult and therefore unlikely given Australia's constitutional conservatism. Second, the current debate is divisive and detracts from more important national issues, namely reconciliation with and proper provision for Australian Aborigines, an accessible legal system, the reduction of unemployment, and equal opportunity to mention some. Third, Justice Kirby stressed that Australia is already an independent country; that the legislative, executive, judicial and administrative links to the United Kingdom have already been severed by the Statute of Westminster Adoption Act 1942 (Cth) and the Australia Act 1986 (Cth). Moreover, the Australian common law has illustrated this independence, His Honour quoting the celebrated Spycatcher litigation [see (1988) 165 CLR 30 (H.C.A.) and (1987) 10 NSWLR 86 (C.A.)]. Fourth, Justice Kirby suggests that Australian republicans are simply playing with names, substituting nothing more than a President for the Governor-General; the system of government advocated by republicans 'remains fundamentally that of a constitutional monarchy'.

Justice Kirby then went on to examine the republicanism debate upon its principles. He identified three arguments of principle for retaining a constitutional monarchy. One, the essential thrust of republicanism is nationalism, namely outdated populous politics of the 19th Century kind! And His Honour clearly harboured a dislike of populous politics, equating them with fascism. Second, if a presidential system were adopted, Justice Kirby believes the President would hold greater powers than the current Head of State. A President would inherit the prerogative powers currently vested in Governor-General and, as Justice Kirby contends, be far more likely to use these powers which have not traditionally been exercised by the Governor-General. Further, Justice Kirby thinks it unwise to replace the Head of State with a politician (which is a surprising point given that since

Australia's first Australian born Head of State, Sir Isaac Isaacs, most Governors-General have been politicians). And finally, His Honour stated that our present constitutional arrangements function well.

But whether one is convinced that the current republicanism debate is simply about 19th century nationalism, and not otherwise a desire by Australians to escape imperialism entirely, or that it detracts from more important issues (the premise being here that debate on our constitutional monarchy is mutually exclusive with debate on other national issues) is unclear. But what is clear is Justice Kirby's reverence for the constitutional monarchy. And that such reverence will not be displaced by nationalism/republicanism. Indeed, Justice Kirby was clear in his views. Our constitutional monarchy is not something to be unnecessarily messed with. And the republicanism debate is an unnecessary distraction given that the present system works well - in other words, 'if it ain't broke, don't fix it'.

*The Honourable Justice Michael Kirby is President of the Court of Appeal, Supreme Court N.S.W.