

"His Honour's Honour"

Dorian Wilde

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BY DORIAN WILD
PIX: STUART SPENCE

HIS HONOUR'S HONOUR

The most visible judge in Australia today is feeling out of sorts with the media. We have transgressed, he says. We're trivialising important events. We're turning news into entertainment.

His Honour Mr Justice Michael Kirby, President of the NSW Court of Appeal, says it in such grave tones you feel he should be wearing a black cap and intoning a death sentence: "You will be taken from here to a place of lawful detention, where you will be hanged by the neck until you are dead. May the Lord have mercy on your soul."

Hanging is not really Mike Kirby's style. He thinks it's barbaric, and quite rightly so. But, when it comes to the sins of the media, you feel he'd like to do something; perhaps pillory a few journalists and give proprietors a couple of hours in the stocks.

"I was in Madrid in January, and while my country was on fire," he says, meaning the NSW bushfires, "all I heard about on TV was Mr Bobbitt's penis and a fight between two ice skaters of whom I'd never heard." He shakes his head in despair.

Michael Kirby is a rarity. A senior practitioner in a profession which typically shrouds much of its workings behind a blanket of stifling secrecy and shrinks in the face of the media spotlight, Kirby has made a career of making himself hugely accessible.

As chairman of the Australian Law Reform Commission 20 years ago he would think nothing of spending hours on the phone with any number of journalists on a Sunday afternoon, explaining various points of his myriad reports and how he had reached his conclusions. A rare judge indeed.

Even now, in the grand and rarefied atmosphere of the Court of Appeal, he writes widely, learnedly and with clarity on a range of legal and social issues. If there were more judges like him, simple souls like you and me might understand the law a bit better.

"The community is entitled to know what is happening in the third branch of government - the judiciary," he says with startling frankness. "This is a way of telling people what is happening.

"When I joined the Law Reform Commission it was emphasised the commission should use the media in talking about the law." He smiles and adds: "It is sometimes asserted that I took a throw-away suggestion with a trifle too much enthusiasm."

We're sitting in his chambers in the Supreme Court building in Sydney. He has pulled off the grey horsehair wig he wears in court and is munching morosely at a biscuit - a secretary brought a plate in with a silver service of orange pekoe tea.

His desk is empty but there's a wide river of files, books and reports that starts in a corner and flows across the floor, spilling across a couple of Afghan rugs. He looks at it every now and then; he could be working on it until midnight.

The media, he doesn't mind telling you, has been really getting his goat. He especially didn't like the way reporters pursued eminent judges last year after their comments about women in rape trials, and about some women saying "no" but meaning "yes."

"I don't approve of journalists following judges along the street with their microphones and cameras whirring. That is to add a new terror to judicial life," he says, adding that if people don't like a judge's comments and decisions, they can always appeal.

"What worried me a little was the trivialisation of the issue. The media was attempting to deal with gender attitudes by isolating two or three judges as if they were the real baddies.

"Probably, they (the judges) were no worse than any other people of their generation and background and quite possibly reflected the views of many people in the community."

It's an oddly reactionary statement for Kirby, because it's so out of character. In just about every other aspect he is a thorough-going liberal, happily battling governments of all colours when it comes to the injustices of the law.

He campaigns energetically in the cause of human rights and AIDS, and talks publicly about condoms being available to prisoners, and a needle exchange program, too. In speaks publicly against Tasmania's anti-sodomy laws. He calls repeatedly for a reform of drug laws.

"Why do people have to go to jail for using the drug Ecstasy and why do I have to impose very heavy sentences in those cases?" he asked publicly in April. You don't get too many judges doing that.

Opening Melbourne's first community legal centre for people with queries on HIV/AIDS recently, he defended the rights of sex workers, drug users and

homosexuals, saying governments should stay out of people's bedrooms and private lives. How many judges go that far?

To call him a workaholic would be an understatement; he's in his chambers at 5.30 every morning. Other early risers, in their offices at 7.30, are sometimes bemused by having him on the phone, demanding: "I've been trying to get you. Where have you been?"

He seldom reads fiction, has little time for TV except for the news and loves *Rumpole of the Bailey*. "It's rather accurate," he says. "We have a little bit of that in Australia - in fact, a disturbingly large number of similarities."

He lives in a large, secure apartment overlooking Sydney Harbour and relaxes with Mahler and cassettes of Shakespeare's sonnets, which he also plays on a Walkman on overseas flights.

Unmarried, he revels in privacy and makes a point of having dinner with his family once a week. Other than that, it's work. In *Who's Who*, under an entry 16cm long, he even lists his recreations as "work."

He entertains at home and is said to be witty, considerate and charming; the perfect host. Indeed, on one occasion, when he invited me to lunch in his chambers, he made up a salad on the spot: salmon, lettuce, tomato, dressing. He'd brought in the ingredients that day.

Happy to address meetings of doctors, scientists, businessmen and university convocations, he is ceaseless in prodding State and federal politicians into overhauling our out-of-date laws. In laws governing surrogacy and the medical profession, he says there is much to be done.

Doctors carry a heavy burden when they withhold medical treatment and let deformed or retarded babies die, he says. Although this is a widespread practice, doctors risk charges of murder or manslaughter as the law stands today.

The advancement of science and the way the law must adapt to handle the changes is one of his favourite subjects. Earlier this year, Kirby was invited to Perth to address an international conference on the human genome project - the project whereby "bad" cells, such as those contributing to epilepsy and Down syndrome, can be eliminated.

The guest speaker had dropped out at the last minute and Kirby was an inspired replacement. When his court rose, he caught the plane west, gave his address and received a standing ovation.

"I think they were just being polite," he says. "They were in a pickle and they needed help. They prob-

ably admired my heroic physical effort in going there and coming back on the Midnight Horror."

Kirby also has the ability to enrage. After one case last year, when he criticised changes to workers' compensation laws for turning the clock back to the 19th Century, the NSW Premier, John Fahey, was livid.

"If a judge wishes to make some comments of a political nature, perhaps he should consider standing for Parliament and dealing with the system through the parliamentary process," snapped Fahey. There aren't many judges who cop that sort of broadside.

The Premier's comments still rankle. "I resented that deeply," says Kirby, his rich baritone suddenly filled with bitterness. "I thought that was an outrageous statement to make. My comments were made in the course of a judgment of the court.

"What I did on that occasion was simply what had been done in many other cases, and that was to call into notice an apparent injustice of the law as it affects ordinary citizens. I would be doing less than my duty to the people if I didn't do so."

He is chairman of the International Commission of Jurists in Geneva and president of the Australian branch, and is a member of Amnesty International. His work with the Commonwealth Secretariat on Judicial Conferences took him to Malawi in February to deliver the closing speech.

As if that's not enough to fill in a day, in addition to his work in the busiest appeal court in Australia, he's also the UN Secretary-General's special representative on human rights in Cambodia, chairman of the OECD special group on security information systems and a former chancellor of Macquarie University.

He's a Companion of the Order of St Michael and St George and a Companion of the Order of Australia. In 1991 he received the Australian Human Rights Medal - our highest award for humanity. And he is one of the few judges to list his home number in the phone book.

Barry Jones, federal president of the ALP and former quiz king, says Kirby has one of the sharpest minds in Australia. "He should have been appointed to the High Court," Jones wrote in *The Bulletin* in an article on Australian intellectuals.

"But his intimidating intellect and extraordinary range of knowledge has been held against him. In a conservative profession such as the law, breadth of knowledge can be grounds for suspicion."

He is very much a self-made man. A product of State schools, he didn't rely on his parents' money to buy him a private education, as is common among Austra-

lian judges and QCs. This is as well, because his mum and dad had none.

One of four children who all went to university (two brothers are lawyers and his sister is an oncology specialist), Kirby was singled out for special attention at primary school after soaring in an IQ test.

He went to Sydney's Fort Street High School, a selective school long recognised as a crucible of intelligence. Pure chance - and a sense of squeamishness - saw him choose law.

"I didn't want to cut up frogs," he says. "I went into the mortuary of Sydney University Medical School and I found it such a terrifying experience I was plunged into vegetarianism for quite a while.

"My education had left me grievously wounded in mathematical skills but strong in Gilbert and Sullivan. Having ruled out medicine, there was only teaching, the church and law to choose from.

"I decided I didn't have the patience to become a teacher and didn't have the piety to be a bishop. So that really only left the law, and that's where I have remained."

He's 55 and single, and it shows. One day in February, Kirby was one of the lunchtime guests of Governor-General Bill Hayden at Admiralty House. A sweltering day, as the Sydney summer so often brings, Mr Hayden suggested the men remove their jackets. Kirby alone refused.

Says another guest: "He said he had a hole in his shirt. We all said: 'Don't be silly. Who cares. Come on, take your jacket off,' and when he did he had an elbow poking through a hole in one of the shirt sleeves.

"Gerard Henderson (director of the Sydney Institute and a special columnist with *The Sydney Morning Herald*), said: 'For goodness sake, Michael. We'll pass the hat round if you like'."

What gives friends and colleagues their biggest cause for concern, however, is not the state of Kirby's shirts but the way he is such a Queen's man. For someone so liberal, so progressive - even radical - in his views, his decision to side with the monarchists in the republican debate has left some friends truly puzzled.

"It's mystifying," says Barry Jones. "He has what I call the Revolving Door Theory of the constitutional monarchy. His attitude seems to be that when Queen Elizabeth is on our side of the revolving door she is ours, and when she is on the other side she is someone else's.

"His other attitude on the republic is what I call the Empty Room Theory. That's when a proponent for

the constitutional monarchy says: 'Let me show you what it's all about' and they sort of throw open a door to show you, and you say: 'But there's nothing there.' And they say: 'Yes, isn't it wonderful!'"

Another observer says: "It's as though he's dazzled by all the trappings of royalty: the glitz and the glamour. It's odd because he's not like that in anything else."

It's the only time in the two-hour interview that Kirby shows any sign of irritation. "I haven't become a monarchist; I'm a constitutionalist," he says, clearly peeved.

"I'm sorry if some people are disappointed, but the one thing you'll get from me is honesty - not private advantage, not manipulated opinion for popular consumption. You get my genuine view."

Kirby's view is that for all its faults, Australia's constitution, with the Queen represented by the Governor-General, has given us a good system of government and we should be careful about changing things that don't need changing. It sounds simplistic, but that's it in a nutshell.

He has other views on the subject. "I don't believe we should be diverting our attention to something that is potentially so divisive," he says.

"We should be concentrating on things that can bind us together: the reconciliation of the Aboriginal people, the provision of a more just society in economic terms, true concern about the long-term unemployed, greater investment in our education system and the promotion of human rights in our region."

He says we have a very mature system of government, even if we do have an absent foreigner as Head of State. "I just think there has not been sufficient appreciation of the advantages of our constitution. Under it we have achieved in Australia a degree of harmony, progress and mutual tolerance that is really almost unique in the world."

Not surprisingly, given Kirby's earlier views, the media also gets a kick on this issue. He says the media's one-sided coverage of the ongoing debate caused his alignment with the group Australians for Constitutional Monarchy.

"I really resent the media hype on this issue," he says, now highly indignant. "The intolerance of the other point of view, the unwillingness to allow an alternative viewpoint. That really offends my sense of justice."

Kirby has been on the Court of Appeal for 10 years - the same period that he was with the Law Reform

Commission. There are times, in the interview, when he gives the impression that he wouldn't mind another career change. Again, he is nothing if not forthright.

"Life in the law, though stimulating and very worthwhile, is not as interesting to me in the long-term as some other things I do: my work with the International Commission of Jurists and my work for the UN in Cambodia.

"I'm perfectly content (on the Court of Appeal) but lately my life has turned to international activities ... but I don't think it's necessary to constantly agonise over what will come up," he says, closing the subject.

"I think worldly ambitions are so insignificant. As you get older they become less important. What is important is doing something that is interesting and worthwhile, and I have plenty of opportunities to do that."

He pauses and adds: "Who knows what the future has in store?"

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