INTERVIEW WITH KIRBY J

BY

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FOR

BAR NEWS

Q. *May I start by asking you what you miss most about the Court of Appeal?*

A. I miss the collegiality. In a sense, the daily re-configuration of such a busy court into benches of three judges requires a daily renewal of friendships and professional cooperation. There was a lot of community life with the Judges of Appeal. There was a sharing of the huge workload. I also liked presiding in the Court. Immodestly, I think I was quite a good presiding judge. You get used to that after more than a decade. Above all I miss the personalities. I came to know them all as friends. It is quite a wrench to sever my connections with them.

Q. *And Justice Meagher?*

A. In some ways, especially him. He mischievously feeds the rumours of a deadly enmity. I hate to shatter the illusions of your readers, but actually we are the closest of friends. The Bench and Bar daily demonstrate that you don't have to agree with a person's cause or philosophy to get on well with them. Meagher JA and I share a love of things outside the law - he is one of the best read, wittiest, quickest, most civilised people I have ever known. Actually, he's a secret feminist. Until now, he has just kept his real opinions in the closet. After his recent prolonged visit to the shrines of Eastern Europe, he has come back with quite dangerously radical views. On my departure for the High Court he even presented me with a plaque to the memory of V.I. Lenin which he had bought in Bulgaria suggesting that I would need it where I was going. What did he mean, do you think?

Q. *Who would try to second-guess Justice Meagher? Judge, there seems to me to be a great gulf between the way the High Court approached deciding cases yesteryear - with a legalistic approach - and what seems to me to be very much a policy basis of decision making. The extremes are*

illustrated by the remarks of Sir Owen Dixon when he took office as Chief Justice in 1952 that he would be sorry if the Court became anything but highly legalistic, and the other represented by the almost naked policy-making of Mabo. Do you have a view about whether the High Court in particular, or any court, should be following one position or the other?

A. I don't think we can stereotype either the "old" High Court of Sir Owen Dixon's time or the "new" High Court of the *Mabo*[1] case. *Mabo* raised some very important, novel and interesting questions. But all of the Justices reasoned to their conclusion by legal means. It is true that judges are more open and candid today than they were in earlier days. But policy was always there. Justice Deane in *Oceanic Sunline Shipping -v- Fay*[2] encapsulated it by saying that where we reach a point in a decision and the law is not clear then we look to the three guideposts of the law: decided authority, legal principle and legal policy. In Sir Owen Dixon's time the High Court of Australia was subject to appeals to Privy Council. For that reason the legal authority that was ultimately laid down by their Lordships in London had a greater part to play in the troika for it was outside the High Court's ultimate local control. But policy was always there, particularly in constitutional matters. The big difference that has come about in our lifetime in the law, yours and mine, has been the greater candour. In fact that candour really began in England. It was encouraged by that great Scots lawyer, Lord Reid, who said that if you like to believe in fairy tales you could continue to believe that no decisions of policy ever intrude into court decisions at the highest level[3], but if you are honest you will acknowledge that, in some cases, choices have to be made. That is when courts have in the past, do at present and will in the

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1 (1992) 175 C.L.R. 1.

2 (1988) 165 C.L.R. 197, 252.

3 (1972) 12 J.P.T.L. 22.

future look to legal principle and legal policy as well as decisional authority.

Q. *May I explore a little further what you mean by legal policy. It seems to me that it can often merely be a dignified description for a statement by a judge of his personal position on a matter, frequently embroidering it with statements to the effect that he believes he is reflecting some community view. Would you care to delve a little deeper into what we might legitimately label legal policy and what merely becomes an idiosyncratic statement by a judge?*

A. Well, the common law has been built over 800 years by judges. Judges reach into past decisions to try to find guidance for the solution of current problems, many of them quite novel and different from those previously faced. They reason by analogy. No past decision will ever exactly parallel the present problem. Reasoning by analogy allows a degree of flexibility because of the way the human mind approaches the new problem. The common law is full of expressions that permit judges to give application to their views of what is "reasonable" or what is "public policy" or what is "fair", what is "just" - so that this is nothing new. This is the very reason that the common law has survived for 800 years and flourishes in a quarter of humanity. I think we were burdened by living in a period of legal teaching that celebrated the notion that there was no policy. You and I were effectively taught by some of our teachers, but not all, that not only was that what was, but it was what should be. Now, we have come to an appreciation of the fact that there are other sources such as legal principle and legal policy. And that because judges have always had them in mind when reaching decisions, it's much better to flush them out, encourage candid discussion about them, than to bury them in language which pretends that they don't exist. So I think that it's entirely appropriate that judges should be honest. It's appropriate that they should be candid. And this being the way of the common law, it's natural

that it should be there for the dialogue between bench and bar. Otherwise we will pretend that for every problem there is an exactly applicable precedent and that analogous reasoning permits of one only logical result. In almost 12 years in the Court of Appeal I learned very early, under the instruction of Justice Glass, that virtually every case of statutory construction that came to the Court of Appeal could legitimately, and with powerful arguments, be decided either way. Similarly I've learned that many, many cases in the common law can properly be decided either way. Many cases depend upon what emphasis you put on particular facts. And if these choices exist, it's better that we be honest about them. Particularly that we be honest about them to ourselves and to the Bar because only by doing that will the dialogue be an honest one which will produce results that are convincing.

Q *There will be occasions when the legitimate application of that process leads to a result which is in fact, unintentionally no doubt, out of accord with what the community is looking for, and it is of course open to Parliament always to step in. Is it your experience that you have known judicial processes which are impliedly if not expressly taking refuge in the proposition that they will make a decision and Parliament can clear it up?*

A I don't think that is the way judges in Australia think. Certainly it's not the way judges with whom I've worked think. Judges know better than most that Parliament will not "clear it up" in most cases. Parliament, I hate to say this, is not always interested today in the nuts and bolts of the law. The obverse side of the coin is the assertion that you can just leave every problem of the law to Parliament and Parliament will fix the problem. My 10 years in the Law Reform Commission, before I joined the Court of Appeal, persuaded me that for many problems of law reform, Parliament is simply not interested. So what we need is a symbiosis between the creative element in Parliament which should have the dominant role, but also creative element in the judiciary which

will fill the gaps that are left by Parliament wherever that can properly be done in a case which presents and which gives the opportunity for the achievement of a just and lawful result.

Q. *Is it in your view legitimate to suggest that, just as we were taught a generation ago that there was no such thing as policy in common law decision-making, perhaps the pendulum has swung too far the other way and that there is insufficient regard to the guidance of precedent. Do judges unshackle themselves from it and pursue what they regard as the true way?*

A. Obviously there is a balance to be struck between strict adherence to past doctrine and the development of doctrine for new circumstances and new challenges. The history of the common law has been one of periods, often prolonged, of stability and reinforcement of principle and then periods of very rapid growth. I'm thinking, for example, of the time of Lord Mansfield, the time at the end of last century of the great codes and the law that gathered around them. It's been the privilege of contemporary Australian lawyers to live through a period of rapid expansion of legal doctrine. We will probably mirror the past history of the common law. We will consolidate, strengthen. But it is just a mistake of the mind to pretend that the common law ever stands still. I've been in the dusty plains of India. I've been in the back-blocks of Malawi and Jamaica. In every little town there is a court-house which is doing its work in much the same way as we do in our courts in Australia. It is a humbling thing to see how the common law of England has adapted so brilliantly to changing circumstances, in the hands of different cultural traditions. It flourishes because of its malleability and adaptability. For generations we were locked very much into the values and perspectives of English Law Lords. We threw off that connection. Yet for a decade and more afterwards, and still in many minds, it remained a controlling force. But it was natural and, in a sense if you

look at these developments historically, inevitable, that when the mind was released from that connection there would be a period of creativity. I say that not meaning to imply that the connection to English law was not overwhelmingly to our advantage. I agree with what Justice Hutley wrote about that[4]. Our link with the Privy Council rescued us from being a south-seas provincial backwater of the common law. It made us part of a great world mainstream of legal thinking. But, finally, we have now severed that link. It was a natural development that we would then have a period of readjustment as we adapted rules that might have been suitable for earlier times in another places to what was suitable for Australia.

Q. *I'd like to turn to a different topic, although ultimately it's related. There will inevitably be error in judicial decision-making and, equally importantly, there is often a perception of error, especially in the disgruntled losing litigant. You have been very prominent in requiring that appellate doors are as open as it's possible to make them, subject to obvious limitations to keep out cases that simply have no business at appellate level. Would it be right to say that that has been one of the really central aspects of your approach to judicial office at appeal level?*

A. Well, I believe in access to justice. For example, I don't have the feeling of impatience for litigants in general, litigants in person in particular, that is quite frequent in our profession. My own background and life's experiences have made me sensitive to the rights of everybody to come to the law for equal justice. The rule of law means ultimately that people can do that. But at the level of the appellate courts, and particularly the level of the High Court of Australia, you have to find a balance between access to justice and the human capacity of the very few people who occupy the ultimate decision-making positions. The High Court of

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4 (1981) 55 A.L.J. 63, 69.

Australia simply could not have survived had it continued to absorb the work flow that came to it formerly as of right. Something had to give. Either the Court had to become like European courts, a body sitting at home or in their chambers deciding matters mostly on paper. Or, if it were to continue the open administration of justice by the oral adversary tradition inherited from England, it had to cut down the flow. The latter was the choice that was made[5]. And still the High Court of Australia absorbs a bigger workload than most of the other final appellate courts. A compromise has been struck between the special leave system which puts a gateway and a filter but with the continuity of the oral tradition of unlimited argument. I believe that that compromise, like all compromises, is open to re-examination from time to time. Perhaps we should move to a system whereby more is done on paper, more severe time limits are fixed, so that more people can get to the justice of the High Court of Australia. But that is a matter which is under the constant review of the Justices of the High Court.

Q. *There seems to me to be a fairly deep question of principle which is not immediately visible in all of this. It's illustrated by one of the very last cases on which you sat in the Court of Appeal. It was what appeared to be an everyday application for leave to appeal from a decision of a Judge granting an extension of time to sue under the Motor Accidents Act. It took a turn in which the majority, of whom you did not form one, took the view that as a matter of policy, in effect, that kind of application, independent of its individual merits, would not be entertained. You wrote, if I may say so, a persuasive contrary opinion to the effect that it was an abnegation of the rights of litigants that it should be dealt with in that particular way. Now, that case is the subject itself of an application for special leave to appeal to the High Court which has yet to be heard, obviously it can't be the subject of any particular comment, but it does*

5 See (1991) 173 C.L.R. 194.

raise the problem that in any filter system of the kind that you've spoken of, you have a great tension between whether you will not hear the case because a supervening policy is going to control you, such as whether it's important enough and whether you will not hear the case because, looking at the merits of that particular case, it doesn't seem to involve any question that should go higher. Granting that that choice is inherent, although often concealed, would you express a view about whether you have a preference for a choice based on what could be described as a wide principle, such as general importance, or whether that should give way to the idea of looking at the real merits of the instant case.

A. The position is somewhat different in the High Court from the situation I faced every Monday in the Court of Appeal in the Motion List. In the High Court, the attention must be fixed upon the importance of the issue that is sought to be ventilated in a special leave application. It's of the nature of such an application that you have to consider, amongst other things, the potential significance of the point to be argued for the whole of the country. Although that is not a universal criterion, it's obviously an important one to get through the gateway. Already I've had to be reminded, ever so gently, by my colleagues that I am no longer sitting in the Court of Appeal where my task overwhelmingly was to endeavour to do justice in the particular case. My task now is to deal with special leave applications by different criteria. That is what is "special" about such leave. I have to confess to you that as I listen to the eloquent persuasiveness of the Australian Bar in such applications I would probably let at least 50% of the cases through and would find marvellously interesting the consideration of the points that are sought to be argued. Yet my colleagues are right. We simply could not cope, on present work systems, with the workload that would then ensue. This of course has quite significant implications for the nature of the workflow of the High Court and indeed for the kind of court that the High Court is. When its jurisdiction was litigant chosen it was, to some extent, a

different court than it is where its jurisdiction is judge chosen. That is just a feature of a system which was introduced for survival's sake. It won't change significantly, I think, during my service. However, we should keep our minds open for the possibility of other systems. One of which might be that, at least in some cases, appeals are dealt with on written argument. I got a feeling on the last special leave list I heard from Brisbane by video link that at least two cases would not have required for a just and lawful conclusion much more by way of oral argument than the argument we heard in the half hour in the special leave application. It is wonderful to see barristers focussing so acutely on the real issues because of the time limit. My impression is that they do so even more so on video link than they do in oral presentation. One possibility which I raised at a legal convention 15 years ago is that one could supplement special leave type argument with draft judgments, prepared by the parties, which set forth the way in which a point should be resolved consistent with the legal principle urged by each side. For my own part, I am by no means mind-closed to the idea of new techniques of decision-making. We should all of us be concerned with access to justice. We should focus on ways in which we can adapt current techniques to providing greater access, not just to the chance of justice but to the judicial determination of cases by all courts, including the High Court of Australia.

Q. *May I press you a little on one of the inevitable outcomes of such a system? That is, the occasions which must arise from time to time where no point of general importance can be adumbrated but the decision below looks as though it was manifestly wrong and has caused injustice. Now the perception of practitioners is that that case won't get special leave and so the theoretical ultimate court of appeal for the citizens of Australia is closed to them. Could you give me a view about that?*

A. Well, one of the rather honeyed barristers in the Brisbane special leaves said in the video link, mournfully, "I must now mention some facts. I

know that that is said to be the kiss of death in a special leave application". The facts were very critical. Special leave was not granted. But it isn't true that the High Court is indifferent to justice. The High Court is made up of judges who are sworn to justice. It's just that they have to keep their eyes on the workload of the Court and on the range of cases that possibly can be dealt with. Quite often the Judges have said, including in special leave applications that I've sat on, that cases will be brought up not because they raise any particularly novel point, but because there is a feeling that a classical point of our law has to be made, again, with clarity to ensure that justice according to law is achieved. You will remember the series of cases on the limitation on appellate intervention when primary judges have made findings of fact based on court room impressions[6]. The High Court specially said that it was returning to the re-expression of that principle because it saw symptoms, as it was implied, of rebellion on the part of appellate judges, one of whom on occasions was myself. Such cases do get through the gateway. I have to say to you that the justice of the case is never irrelevant to me, never.

Q. *Now I no doubt will form one of a very large number of people - there's an academic sub-industry devoted to the task - trying to work out whether you, in your appointment to the High Court, will take a States' rights position or a centralist position. For the same reason as you will be able to take part in exercises involving legal policy, it must be the case that you have at least some personal position - you're an Australian citizen conscious of the tension between those things. What can you tell us about it?*

A. I will just decide the case as judges should, on the arguments put to the bench in open court. Of course, I have my philosophy and my approach

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6 eg. Abalos -v- Australian Postal Commission (1990) 171 C.L.R. 167, 178.

to the solution of problems. In the nature of things I have not been exposed in my judicial life to date to a large number of constitutional cases. We've had some in the Court of Appeal. But not a great number. In the High Court, already I've sat in a large number of constitutional cases. Virtually every week there are cases that concern the construction of the Constitution. I will just go on doing what I've been doing in the past, deciding the matter in hand on the basis of my understanding of the decided authority, legal policy and legal principle that are raised by the case. One of the interesting questions presented by constitutional decisions of recent years, particularly on the question of the implications of the Constitution, is that of the consequences of that development for the *Engineer's*[7] case. The *Engineer's* case, in a sense, turned its back on what had, until then, been the implications derived by the earliest Justices from the Federal nature of the polity. *Engineer's* asserted that if the power was there in the Federal Parliament, then the consequences of the exercise of that power for the Federal/State polity had to give way in giving effect to the grant of legislative power to the Federal Parliament. One of the unexplored questions, it seems to me, when you return to implications, is what are the implications of the Federal nature of the Constitution that must now be given their place? I expect that we will see lots of argument about that in the years to come. It never seemed to me to be a particularly novel doctrine that you look to implications in the Constitution. Some people have found it shocking. But every lawyer knows that every document, whether it is a constitution or a contract or a will, has words, context and implications. Why one should exclude implications from a constitutional document, which necessarily is brief and terse in its expression, has never struck me as convincing. Given that there are implications, the question may be: what is the implication from the Federal nature of the Constitution for each matter in contest? That is something which may challenge the *Engineer's* doctrine - an

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7 (1920) 28 C.L.R. 129.

unexpected consequence of the revival of constitutional implications.

Q. *That proposition introduces the obvious in one sense, namely that between a court's apparently legal process in deciding a constitutional point and the judgment there lies the introduction, in effect, of politics - not party politics of course - but politics in the sense that a judge's personal perception of the way a Federation should work or the balance of relationships between the central power and members of a Federation must inevitably be introduced. My question therefore is this: what is the theory by which we conclude that a Judge in your position is qualified to bring to bear that kind of "political" judgment?*

A. The Constitution is inescapably political. The Constitution establishes the High Court of Australia as the Federal Supreme Court of this country. It envisages the appointment of a limited number of lawyers as the justices of that Court. They have a constitutional, and in that sense political, function to perform. That is the nature of our political system. It cannot be escaped. The obligation has to be shouldered by each new Justice. It is just part and parcel of our political system, established by the Constitution.

Q. *Does it follow that in your view, because inevitably in the sense I've tried to use the term politics comes into it, a bench of the kind of which you are a member ought to be chosen in a way that produces internal balances or is that a factor that simply should be ignored on the basis that the justices make their way to your bench because they are the best or among the best of the lawyers in the land?*

A. I think that's a question for other people to answer rather than myself. The Justices of the High Court, when they get to the Court, are not completely free agents to give effect to their political whims or their consitutitional visions. They work within a framework of the

Constitution and of legal authority on the Constitution. I was reading a wonderful passage in an opinion of Justice Windeyer recently. He is always a Justice who rewards re-reading. He quoted from an American authority which suggested that we should always remain open, with each new generation, especially in constitutional cases, to new insights because of the formal inflexibility of the Constitution and the changing perception of its language and of the system it introduces[8]. That is what the Justices have done in the past. That is what I will do during my service.

Q. *May I turn away from that to ask you a question or two about an area of the law that perforce is new to you, at least at appellate level, namely criminal law. Now, are there any particular views or ambitions that you bring to a court in which you will now from time to time be looking at important questions relating to the criminal law of the country?*

A. First, it's not true that this is entirely novel for me. In the Court of Appeal, by the prerogative process, we exerecised quite a lot of judicial review of criminal cases. In more recent times the Judges of Appeal, including myself, sat frequently in the Court of Criminal Appeal. I did my fair share in that work. So I'm not unfamiliar with the criminal work of the High Court. A strength of the High Court in recent years has been its return to quite a lot of work in the field of criminal law. It tends to be a field that gets looked down on by the legal profession. That, in part, is because it doesn't tend to be an area where there's a lot of money to be made. Therefore, it doesn't tend to have the fashionable reputation of other parts of the law. But it certainly is the area of the law that the citizens think is the most important and the citizens generally are not wrong in these perceptions. So I will be looking forward to my work in that area. If anything could be said, it is that Justice Wood's work in the

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[8] *The Queen -v- Phillips* (1970) 125 C.L.R. 93, 115.

Royal Commission has borne out the wisdom of the High Court's steady but inexorable move towards the position finally adopted in *McKinney & Judge -v- The Queen*[9] where, after a number of earlier attempts to instil the need for warnings in judicial instruction to juries about the use of official evidence, the High Court ultimately took a very resolute position. At the time it seemed to some to be rather radical. In the light of recent revelations, it would seem to have been entirely justified. It was a natural legal development in the process of step by step evolution of a new legal principle. *You* might say it was pure policy and judicial invention. *I* would say it was in the high tradition of the common law: fashioning and developing principles for different and new problems in society in a way that best served justice. Anyone in any doubt about this should reflect upon the need for such principles that have been revealed in recent times.

Q. *Now I'd like you to give us, if you will, bearing in mind our readership so to speak, any quite specific hints or observations that occur to you about the way we, as advocates, should be going about our tasks, particularly in the High Court obviously but, if you think it appropriate, in the court you've just left.*

A. I put on paper my thoughts about appellate advocacy in a speech that I gave to the Australian Advocacy Institute. It has been published in one of the latest parts of the *Australian Law Journal*[10]. So there's no point in repeating what I said there. But I stumbled recently upon something that Sir Owen Dixon wrote about advocacy. He laid greater emphasis than I had upon looking at the court. I mentioned it in passing. But as I sit there in the High Court, no longer in the central chair which I occupied for more than a decade in the Court of Appeal, I realise how important it

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9 (1991) 171 C.L.R. 468.

10 (1995) 69 A.L.J. 694.

is that the advocate, however difficult it is in that great courtroom, should try to speak to every member of the court and to try to capture their attention. It is not an easy task. But where it is done well, it is a very fulfilling day both for the advocate and for the judges.

Q. *Is there any area of the law that you are, so to speak, itching to get your hands on and do something about that either rankles with you, nags you because you think it's gone wrong, or that you feel could simply be improved for the benefit of the citizenry.*

A. When I sat in the Court of Appeal I was sometimes shocked by the sensitivity of some judges who were subject to the Court of Appeal's review. Myself, I never thought it was a particularly distressing thing to be reversed. The judge who never does a bold thing and who dresses up every decision in terms of the impression of witnesses, will immure his or her decisions from appellate disturbance. But the judge may not do justice and almost certainly will not contribute to the development of legal principle. Over the years there are only two cases that I can think of in the Court of Appeal which disappointed me when I was reversed. One of them was *Osmond's*[11] case on the right to reasons for administrative decisions. The other was *Quin's*[12] case which was relevant to judicial independence. For the most part I simply accepted, on occasion, that I had been wrong; on occasion, that the matter was arguable and that perhaps I hadn't given enough weight to some issue of principle or policy that was revealed in the higher decision; and on occasion that that was just the opinion of the highest bench in the land and I could take it or leave it, but that it was binding on me. So I don't approach my new role with any agenda. I will just decide the cases on their merits with my best endeavour to find and apply the law, and to do justice. Every day I will be

11 [1992] 3 N.S.W.L.R. 447; (1986) 159 C.L.R. 656.

12 (1988) 28 I.R. 244; (1990) 170 C.L.R. 1.

highly dependent on barristers. Justice Brennan once said they are the ministers of justice[13]. They are the indispensable co-actors in the great drama of justice. Without them our courts simply could not function.

May I thank you for the time and of course on behalf of this august publication, wish you well for the future.

13 See also A.T. Kronman *The Lost Lawyer - Failing Ideals of the Legal Profession*, Harvard University Press, Cambridge, Mass, 1995, 109ff.