

INTERVIEW BY SUSANNA LOBEZ

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Justice Michael Kirby

Susanna Lobez: In almost 22 years as a judge, eleven on the New South Wales Court of Appeal, Justice Michael Kirby has been outspoken on a wide range of issues. Next week he takes his place on our High Court and may be more circumspect about speaking out on certain topics. But today he speaks to The Law Report about law, the universe, optimism and everything - well, almost everything.

Michael Kirby: I loved my time on the Court of Appeal. It is the busiest appellate court in Australia, it has tremendous variety of work. Every day to me was exciting - maybe I shouldn't have been excited by some of the more tedious work that some people think boring... I bear some grudges -

Susanna Lobez: Please share those with us.

Michael Kirby: (laughs) Well I may yet have a time to share them with others, but there are a couple of cases which I thought were reversed in the High Court where... I felt the wounds. I suppose that's natural, and it's a good thing that I go to the High Court knowing what it is to be reversed. But I suppose if I were to single out one, it would be a case that came up very early in my days in the Court of Appeal, Osmond's case, about the question of whether the common law had developed to a point of requiring administrators to give reasons for their decisions.

In some parts of Australia, in the Federal sphere, statute requires it, but there's no statute in New South Wales that is of general application that requires it, and the question was whether the common law had developed to a point that it would say that, if you are the person who is given power by parliament, and if you're an administrator, and if you decide a case that is serious and affects a person's rights, you should have to give reasons for it.

With Justice Priestley I felt that the common law had developed that far; I referred to a number of other Commonwealth jurisdictions, jurisdictions of the Commonwealth of Nations that

had so held. Justice Glass dissented, and the High Court upheld his dissent. It is one of the relatively few cases that caused disappointment, but there it is, and it may well one day come up for review.

Susanna Lobez: What about decisions that you've had to deliberate on while on the Court of Appeal that caused you anguish - did you lose sleep over any decisions?

Michael Kirby: Again, perhaps I should say that I did. But the work in the Court of Appeal of New South Wales is so intensely busy that if you agonised, you'd be like the centipede - so worried about which leg to move, you'd end up not moving any of them and you'd never move. To be honest, I didn't lose any sleep.

I worry about cases, and I think about them, and I'll talk about them with my colleagues and with my staff. But when the matter is decided, I can really put it out of my mind and get on with the next case, because the next case is there demanding full, total, complete attention. You do your conscientious best, you strive to be legally right, and if possible to get the just result and then move on to the next problem.

A judge who can't make up his or her mind is a positive menace. Such people, however well-meaning, really don't do the cause of justice any good. Judges who delay too long the delivery of their decisions, judges who agonise in the courtroom and can't make up their mind - now I don't mean by that that it's not a good thing for a judge to be reflective and anxious and concerned - I hope I'm all of those things, but you've got to make up your mind, that's what people expect of you, that's what you're commissioned to do.

Susanna Lobez: The High Court's Justice Daryl Dawson suggested publicly last year that lawyers and the legal profession are in some danger of losing their souls; and the law certainly comes in for enormous criticism, and public faith in the law seems to be at a bit of a low. Do you still have faith and optimism in the law?

Michael Kirby: Absolutely. Otherwise I would get out of this; I could not be a judge in a system which did not deliver justice in the overwhelming majority of cases, was not conformable to the rule of law, and was not made up of people who, like myself, have an idealism about their mission.

I believe that most people go into the law at the beginning as idealists. I believe they feel that there is something in this vocation, ... that they can help to secure justice, and I think that's almost as wonderful and honourable as the health care professions, and it is a noble occupation, and I'm proud to be a member of it.

Susanna Lobez: Do you think, though, that perhaps some of the sweeping reforms that are proposed to do with the profession might be having an effect where that nobility of purpose is lost in the mists?

Michael Kirby: Yes, I think there has been a decline in some of the idealism in some quarters. For example, I've been shocked in some cases where I've seen the actual bills, and the billable hours approach, which is quite different to the one that I grew up with. In my day there were very high levels of pro bono work in the legal profession, and the leaders of the Bar were always the leaders in the big cases - for the Council for Civil Liberties, and for the other causes - for Aboriginal Australians.

Now we've introduced a more regular system of public assistance and legal aid, which is desirable, but I hope there'll never be lost that element of dedication to worthy causes, particularly of the disadvantaged. We've got to remember our soul and our dedication to justice under the law.

Susanna Lobez: You've been publicly critical of governments here and overseas who try to curtail judges' independence - why is it so important?

Michael Kirby: Well it's important that people should go to a court to have the decision of an independent person. I've been a judge for 22 years, and never once have I had a telephone call from a minister to tell me how to decide a case. No-one has ever muscled me, no captain of industry has ever taken me aside in a lift and told me that this or that decision would be pleasing, for some powerful tycoon or interest, or media baron, or other interest.

Now that is the essence of justice: people would not trust others to reach their decisions in their disputes if they were not sure that this person will do their conscientious best to find the law, to apply it to the facts, and to strive for the just solution. If there is manipulation, or if a person who is the decision-maker is looking over his or her shoulder, then you don't have justice as we expect it.

And I have to say to you, that in many of the countries of the world that I've seen - and I've travelled I think more than probably most other Australian lawyers, and have seen very closely the legal and judicial systems of other countries - that is simply not the common standard. In that respect, we in Australia are the beneficiaries of something that's truly wonderful, and that we must preserve and defend and extend.

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Susanna Lobez: There certainly are tensions between the courts

and legislatures here in Australia. Sometimes it even seems like it's a kind of competition for power, where the courts will make a decision, and then the legislature will trump it by enacting a statute which overturns the decision in effect. If the legislature purports to be acting on behalf of the voting majority, are the courts then partisan on behalf of individuals and minority groups?

Michael Kirby: Well, obviously, the ultimate say in a democracy, under the Constitution, should be had by the people's representative in parliament. To be honest, I'm a parliamentary person; I support the notion that, generally speaking, a parliament of hundreds of people is more likely to reflect the variety and diversity and modernity of the view of the people than will be an institution, however educated and civilised and erudite, of a court. But there are some matters in the Constitution whereby, under the Constitution, the people have put certain areas of power beyond parliament's control, and where that is so, it's for the court to uphold that, or they have limited parliament's control - again it's for the court to enforce that.

Susanna Lobez: If courts take a stand which is against majority opinion, does that mean that the courts aren't being democratic, or is that part of a broader view of democracy?

Michael Kirby: Well we used to, I think, consider democracy in a very unsophisticated way. We used to think of it as purely the majority vote at a particular time. But increasingly it's been seen that majority votes can sometimes be terribly oppressive, or can be the captive of particular waves of populist opinion. Terrible wickedness has been done in the name of majority votes from time to time. Not over the long haul, but transient majorities whipped up can do terrible wrongs.

And that's why the third branch of government in the courts, the independent courts, play a part in enforcing abiding constitutional values and in ensuring that fundamental freedoms are protected - against transient majorities, unless the transient majority within its constitutional power in parliament makes absolutely abundantly and pellucidly clear its intention to override the rights of others.

I believe that this is what happened when the majority in parliament in the '50s enacted the Communist Party Dissolution Act, and the High Court of Australia struck that down. That was one of the absolutely central moments in the history of our Commonwealth, and the High Court was tested and proved itself as an important guardian of our freedoms.

But, generally speaking, if parliament for example considers that a court, having said something, got it wrong, then I'm in no way offended by parliament saying 'Well we will enact a law that overturns the court decision', and, so long as that law is

constitutional, it is the duty of the court to be faithful and to give full effect to the will of the people in parliament.

It's another brilliant symbiosis between the elements of change and the elements of continuity in our Constitution, which are very important for our liberties, and which the High Court of Australia stands guardian of.

Susanna Lobez: There's been discussion, in respect of the changing dynamic nature of our institutions, about a Bill of Rights. Now doesn't that boil down to who the people - we the people - who they should see as their champions, whether they should look to the judges, or whether they should look to the politicians? Does it depend on whether you're in the majority or in the minority - is that the simple answer? Or is there something else in the Bill of Rights argument?

Michael Kirby: Well I am I suppose a typical Australian lawyer, who's come the path of most other lawyers in the country. I started as extremely dubious about Bills of Rights, indeed antithetical to them, and over time I've wavered, but I now tend to believe that there is a value in having - if we can get it - a Bill of Rights that state our fundamental freedoms and put them beyond political football matches. I say that because, first, I believe that would be very useful in educating our citizens. If anything has come out of current controversies about our Constitution, it is that, overwhelmingly, the people are pretty ignorant about our constitutional arrangements, and that is a pretty unsure foundation for our polity; it would be better if children in their schools, citizens, and new citizens coming to citizenship could know what the basic rights and obligations of Australians, under the Constitution, were.

Another pragmatic argument is, it seems to me, that it would be preferable that fundamental rights should be stated by the people and accepted and endorsed by the people, than that the burden should fall upon judges, protective of liberties, to find those rights by implication in the Constitution, where undoubtedly it was not the intention of the founders to write them in there.

So that for various practical reasons, and perhaps somewhat reluctantly, I have tended lately to believe that it would be a good thing if Australia could reach agreement, as Canada and New Zealand and other countries have quite recently, to establish a Bill of Rights. But I'm not holding my breath for that, because the history of constitutional change in Australia has been one of profound conservatism, perhaps because, in their irritating wisdom, the people have generally been rather reluctant to disturb what is still basically one of the freest, and certainly one of the justest, societies in the world.

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Susanna Lobez: This is The Law Report, with Susanna Lobez on Radio National, and you're listening to a feature interview with Justice Michael Kirby, about to take his place on the High Court.

In the absence of a Bill of Rights, judges are put in a position where they 'find' rights which are implied in the Constitution that may not have been contemplated by our founding fathers. So how do judges perceive community values - are they in touch? And how should they relate to the public?

Michael Kirby: I think we should start with the fact that judges are citizens too, that they live in the real world, they have lots of people who will give them their value system and test their value system, and that's as it should be. They've got for the most part, children and grandchildren and lots of people to keep their feet on the ground. And it's a sad judge who doesn't have people who will be extremely critical of the judge. I've certainly got a whole family and many friends who are extremely critical of me. And it's not only friends who've been extremely critical of me.

Now it would be a wrong thing for a judge to pander to a particular passing fancy, or to read the editorials and to try to shape opinions in order to fit in with the latest conceptions of political or other correctness. I'm completely opposed to that. But it is true that judges, over time, tend to reflect community values, simply because they are members of the community, and community concerns.

Take for example sexist expression: twenty years ago this was a virtual non-issue. Fifteen years ago people began to talk about it, and I was in the Law Reform Commission at the time, and I saw the importance and symbolism of it, and so I changed my title from 'Mr Justice' to 'Justice' and I began to use gender-neutral expressions. This has been an education process for me, and it's one of educating your mind, and I think this is a process that's going on at many levels, on many issues for judges, as of other citizens. But judges should be in advance, in the sense that they should be aware of these things, they should be alert to them because they have responsibility and expectations that they have to fulfil.

Talking about issues, reaching out, engaging the community in debate about the law and the justice system is a proper role of judges today, and I think many judges believe that, and I think you can see the changes that have come over our institution.

Now if we look down the track, the question is: What is going to happen? What will be the developments in the next century? And I'm by no means saying that it won't be a feature of the next century that judges will explain their decisions through the

electronic media to the community. After all, we've moved beyond the pen and the printed press, in which the judge's reason and decisions are now recorded, and there's no inherent reason why they should not be recorded and explained in a way in which most people get their information.

So we've seen some changes, Watch This Channel!

Susanna Lobez: So on the one hand there's the judge, of necessity being a person apart somewhat, not actually going out there and explaining his or her decisions to the public directly - is there also sometimes a feeling of the loneliness of the long-distance judge, that you are doing all this in the interests of society as best you can, and yet there's that communication gap or separation?

Michael Kirby: Well, I can't speak for others. I think there is an element of loneliness in a judge's position. I believe that is part of a community expectation and it is what judges of our tradition get used to. And I don't think judges should be out there on the hustings, urging the support of their particular views in particular decisions that they reach. I've mentioned Osborne's case, but that's safely back in, I think, 1985, so I think there can be debate about issues, and that's a legitimate thing; judges forever have been going to law conferences and talking about issues of general legal policy. But as for the loneliness, I think that is part and parcel of what it is to be a judge. You can't be too close, particularly to litigants, because otherwise the appearance of justice would be lost.

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Susanna Lobez: One of Michael Kirby's missions is to stimulate public debate, and his interests range far and wide. For instance, the human genome project. On TV recently he debated vigorously with opponents of genetic research, who fear it may lead to eugenics, or genetic reductionism. Michael Kirby embraced the clash, and stuck to his realistic, optimistic guns about the good that may come from the genome project.

Michael Kirby: On the human genome, it's a very very big issue. I mean it's not talked about enough. We may actually be on the very brink of a change of our species. There can be few issues more important than the possible fact that we are on the brink of a complete potential change of the human species to some new super-species. Now that's something we all should be talking about. And I think I would be failing in my duty if I didn't take a part in that debate - it wasn't a bad thing that in that debate there was a really strong difference of view. One of the sad things I've seen in Australia, in my connection with universities, is there is a bit of a tendency to blandness, and I'm an anti-bland person; I'm for people saying their point of view, and saying it clearly, and arguing for the persuasion of their fellow citizens to a point of view.

Susanna Lobez: I wonder whether your optimism came from the fact that you believe legal safeguards can really make sure that science works for good rather than evil?

Michael Kirby: Well partly my optimism comes from the fact that the very course of history that has produced the human genome has also produced the United Nations, the UNESCO Committee on Bioethics, the International HUGO, Human Genome Organisation Committee, on which I serve, and that it is now part of the wonderful moment in legal thinking that we've reached that we're beginning to see our many problems can only be solved at a global level, or a regional level, and that the old notion that we're all enlocked in our little jurisdiction - not Australia, but in New South Wales, Australia or in Victoria, Australia - that we're now at that critical moment in history when lawyers suddenly have to grow up and see that we are part of a much bigger fabric.

Even if you have absolutely different legal systems and quite different institutions for enforcing law, you can nonetheless find common ground, and we've got to remain optimistic, because the alternative is that we just throw up our hands and say, 'Well it's all too hard and we'll just leave the scientists to take us where they will.' Now that is an abandonment of the rule of law, and I don't believe it will happen.

Susanna Lobez: Or: 'It's all too hard, let's impose fairly rigid laws that try and prohibit it happening'?

Michael Kirby: Yes, well, that's the easy, immediate solution, though of course rigid laws imposed on a global technology will generally be completely ineffective, as we've seen in a number of instances.

Susanna Lobez: Does the optimist and the pessimist in you ever have trouble reconciling?

Michael Kirby: I don't have too many moments of pessimism. Perhaps I'm starry-eyed, but I've been in hard-nosed public jobs for 22 years, and when I look back on what can be achieved, and when I look forward to what I hope will be achieved, I remain an optimist. And I remain an optimist about human rights because I've lived to see the fall of the Berlin Wall, I've lived to see people in many countries rejoicing in human rights, and the tide of history I believe is in favour of it. There will be interruptions, and there will be impediments, and there will be evil and wicked people, but I believe that the rule of law and human rights are the way of the future.

Susanna Lobez: Well your human rights work certainly has taken many forms. What should be done when the human rights of

various groups or individuals are in conflict - is that a balancing exercise for judges? For instance, I do see a tension in Australia between the rights of children under the United Nations Convention on the Rights of the Child, and the rights of parents to keep their children and to parent the way they want to.

Michael Kirby: Funny you should mention that, because I think the hottest moments that I had in the Law Reform Commission related to a report which we did on the ACT Child Welfare Law, and in that report the question came up as to what extent parents could control access of their children to contraceptive advice, and to sexual advice. And this was in the time pre-AIDS. And the Law Reform Commission, guided, I should say, by some decisions of the Supreme Court of the United States which struck a balance very defensive of the integrity of children and of their rights to be separate; the Law Reform Commission took a rather - for the time - forward-looking approach about the child's rights to have access to sexual advice and protection. That was really the hottest moment in my ten years in the Law Reform Commission, because the editorials came down like a ton of bricks on the Commission. Nowadays, with the new problem of HIV/AIDS, I don't think what we said is in the slightest controversial.

There is a need in a free society for some people occasionally to press out, to express their point of view, to be criticised, and sometimes to accept that they will get it wrong. But the drift of opinion and the development of views in a free society is generally - in my experience - in the right direction. And that is what has happened in the area that you've just mentioned.

Susanna Lobez: And will continue to happen, no doubt.

Michael Kirby: But not to the point that you remove entirely from the life of a child the wondrous support and loving kindness of their parents.

Susanna Lobez: On the assumption that's what they're getting.

Michael Kirby: Yes, and of course we know, and sadly in the courts we see, those who don't get it. But let's not lose our sight of the fact that out there there are still wonderful parents, as my parents are. And we shouldn't sort of 'down' parents because of the failures. There are bad priests, there are bad judges, and there are bad parents, but the overwhelming majority of each category are good, kindly and right-thinking people.

Susanna Lobez: You've mentioned in the past, Justice Kirby, that your academic study and achievements have to a degree meant that you sacrificed the opportunities of a young life, and that you were in fact "never young". Now, of course that's not true, and as you speak about your parents we are reminded of that, but what kind of

youthful experiences and adventures would you go back and pick up if you had the opportunity?

Michael Kirby: Well, I'd have more fun. All I really did in my life was to study and to work towards academic and professional success. And I think that was a mistake. Gareth Evans rather unkindly said that, in my university education, I concentrated on quantity rather than quality, because I kept on getting degrees at Sydney University in order to justify my life as a student politician. But, perhaps there in the High Court, just pondering and looking at Lake Burley Griffin, and looking at the magnificent new Parliament, I'll sort of get lots of new ideas for having more fun, if there is fun in Canberra.

Susanna Lobe: You had, I think, a special respect for the late Justice Murphy, and I remember you speaking at one stage with some delight about the fact that his heresy had, in some instances, become orthodoxy, and that the things that he'd proposed and thought about had finally - a decade or more later - been a little bit more accepted by other members of the judiciary. Is he the judge that you most admire?

Michael Kirby: Certainly I admire him greatly, and I knew him as a human being - warm, generous, interesting, interested - interested in science, an internationalist. He was gregarious, he loved fun, he was always at parties. I was always soberly working away there, studying the books. So it really was rather odd that we got on so well together. He saw something in me that he liked, and we got on well together.

And it is a terrific thing in our system that you can dissent. I mean that also is not universal: in most civil law countries, which are about a third of humanity, the judge can't dissent. Now what an awful thing it would be for a person like Lionel Murphy, or me, or most judges of this country, if you could never dissent. It would mean you'd have to hide your conscientious, serious view in the opinion of the majority, with which you might be profoundly in disagreement.

So it is a good thing that a lot of his judgements have come to pass. I admire him greatly, I admire other judges greatly, and I will seek to emulate the best in all of them.

But I hope some of my own dissents, including some in the Court of Appeal, may also likewise become orthodoxy where now they are sometimes seen as heresy. Maybe occasionally I might be able to give that a little nudge myself. I'll be remembering all those past dissents, and of course in some cases I will myself have changed my mind, and I will have reached a view that I was wrong. I sometimes reach that view.

And I've often asked myself why do I dissent more than other judges, and I suspect it's because I've had a different life's experience, a different world view, different philosophy, different tenderness to minority views and to disadvantage. I will just continue being me, and I will continue to have these differences.

But the law in the High Court is a marvellous thing, because it requires the working of the minds of seven extremely experienced and dedicated Australians, and that is now a privilege for me to participate in. I'll be doing my very best.

Susanna Lobez: Justice Michael Kirby, congratulations on your appointment. Thanks for talking to The Law Report.

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Susanna Lobez: Justice Michael Kirby's music selection for this week were from Mahler's Adagietto in the Fifth Symphony; from the Solomon Islands, where he worked this month, and of course Gilbert & Sullivan's 'Trial By Jury' fading out. Glad you joined me for The Law Report this week. I'm Susanna Lobez. Tune in next week for more on law.

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