KIRBY: THE INTERVIEW

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Michael Kirby is widely regarded as one of Australia's most interesting and dynamic jurists. We recently questioned the newest High Court judge about his views on life, the universe and everything.

Did you always want to be a High Court Judge?

No I didn't always want to be a High Court Judge. If I had my life again I think I would be a Professor of History, or perhaps a scientist working in the area of the human genome project. The work of the law, as Justice Glass used to tell me in the Court of Appeal in New South Wales, sharpens the mind by narrowing its focus. It is important for lawyers, especially today, to have a broader focus, and to see the developments in the world that are happening.

Could you briefly outline some of the highlights of your career?

My career has been unusual. No other Justice of the High Court has come to office in quite the same way. It involved being a solicitor, a barrister, a judge of the Arbitration Commission, then Chairman of the Law Reform Commission for a decade, and then a judge of the Federal Court, then President of the Court of Appeal in NSW, which is the busiest appellate court in Australia. So I've had an unusual life, and the truly interesting and fascinating parts of it have included my work on international bodies. It seems immodest to talk about them, and indeed I notice in the last edition of *Hilarian*, for I read everything (Whoops!) there is reference to the fact that I, newly entered in the sandpit of the High Court, could only speak of other sandpits. This was a perceptive comment and there is an element of truth in it. I am proud to be a justice of the High Court of Australia, but I look beyond it.

How do you find that the public relates to its courts?

I can't really speak for the public. It is in the nature of the office that you are removed, and are expected to be removed, from the public. I suppose my link with other bodies gives me some link with public opinion. I believe that the public of Australia still respects its judges, and it should, because I've been a judge now for 22 years and I know a very large number of the judges in Australia, some of them very well - though sometimes their philosophies are different from mine, and mine from theirs. I know that as a group they are extremely hard working, very serious about their duties, conscious of the fact that they carry on their shoulders a tradition of 800 years, and anxious to serve in an honourable, lawful and proper way. So when I go to other countries for the United Nations, it sends me back every time with a real appreciation of how, with all of its faults, our judicial system is, as Chief Justice Brennan said a noble institution, and one in which young lawyers can be proud.

What is the behind the scenes process behind a ruling and is there any lobbying?

I'm told that in Chief Justice Barwick's time, he sought to get greater discussion among the Justices about the decisions which stood for judgements. I understand that that was counter-productive. So vigilant are judges in general, and High Court Justices in particular, of their own integrity and the duties of their own conscience, that attempts to dragoon them, or pressure them into a particular decision, or even to lobby them, would almost certainly fail. As I understand it, the attempt of Chief Justice Barwick, laudable though it was, floundered on the rock of judicial independence, and on our Australian traditions. There is of course discussion amongst the justices, but it isn't formalised in the same way as, say, the US Supreme Court. There, the judges formally discuss their points of view and then vote. If there is a majority, including the Chief Justice, he or she appoints a judgement writer. If the Chief Justice is not in the majority, then the senior judge in the majority assigns the writing of the judgement. We don't have that system in Australia. Perhaps we should have more consultation and new techniques. In the Court of Appeal in New South Wales, we did have a technique which I thought was useful, which was that the President assigned the writing of the draft to any judge of the Court. That was a tradition I inherited from President Moffat when I started in the Court of Appeal. But that is not the tradition of the High Court. It is a different court, and it is a final court, and the justices are vigilant as to their independent duties and rights.

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Given the fact there are seven justices of the High Court, on controversial issues this can lead to seven different approaches from a given set of facts. Do you think that that number of judges creates a bureaucratic shield that, in some cases, is at the expense of the clarity of justice?

I certainly agree that multiplicity of opinions can dimin-

ish clarity. Where possible I think judges should strive for a single opinion, or maybe a single majority and a single dissent. But that has not been our tradition and it would be very hard to introduce it. The history of the High Court has sometimes, in the past, been one of fierce disagreements, for example the Latham High Court. But although clarity is an important goal, it is not the only goal. The common law tends to advance by diversity of opinions, and the question that has ultimately to be asked is what can you do if judges want to write their own opinions? There is nothing that either the presiding judge, the chief justice, or any other judge can do, because each of them hold an independent, constitutional commission. If they agree to the result but not in the reason, or if they feel it is their duty to express a different idea to lay down a thought for the future, then there is no power on this earth that can stop them. It is a good thing that nothing can stop them, because that is the ultimate guarantee of the independence and integrity of the High Court of Australia.

What's your perception of the new generation of law students and practitioners?

Well, I'm not one of those old fogeys that think that everything was better when I was young. I consider that young advocates and law students today are more honest about the process of legal decision-making. They are more responsive to questions that judges, such as myself, will ask about the policy questions that lie behind choices in borderline cases of statutory and constitutional interpretation, or analogous reasoning from slightly inappropriate common law decisions. In the past the common law rested on the foundation of declaratory theory - the rule was there and all you had to do was to find it. But that theory was exploded by Lord Reid in 1971, and it is now really believed by only a few senior lawyers. The challenge of the new generation of lawyers is to find a new theory that will ensure integrity of decisions and consistency to the development of the law, whilst at the same time acknowledging honestly the fact that decision-makers have choices in a certain proportion of cases, and therefore help the judge to make those choices in a way which is conformable to legal authority, legal principle and legal policy. They are the three indicia in which it is legitimate for judges in our tradition to look.

Why has it taken women so long to reach the upper eschelons of the judiciary?

I think it is a product of the history of the legal profession. At the beginning of the century women were not even allowed into most law schools around the country. That was ultimately changed, but then there were various social and cultural inhibitions to the entry of women into law. When I was at Sydney Law School there were I think three women out of about a hundred students. Therefore, looking at my generation the pool is not very big. Thus, it is a natural result of the entry at that time that there are not many women of my age available to be justices. It is really a question of what will happen in a decade or two. I have no doubt that at that time there will be a bench that will reflect the law schools of the seventies and eighties which saw as many, if not more, women graduating in law. The question of women on the bench is not as big a question as whether that presence will change the character of the practice of the law. Will the women of the seventies and eighties, when they find their way in great numbers onto the bench, simply act out the same role as the male judges of the past, or will they bring a new character to the role of a judge in Australia? My hope is that women will bring new qualities. Perhaps there will be a reduction in the macho aggression which has been a feature of our male dominated profession, and there will be more exploration of the intuity of judgment, and reconciliation that it is usually the lot of women in society to provide. By saying this I don't mean to sereotype women; women are as diverse as men. But women normally bear the burdens of society and have to carry the burdens of families and problems. I think that they have special and additional qualities to bring to the role of a judge.

Despite Australia's relatively small population we still have a rather eclectic law in many ways. As a result, perhaps, we have a eclectic admission requirement to practice law. What's your view on a National Admis-

sions Body to standardise entry to the legal profession?
I favour that, and I believe it is already happening. There is the Priestly Committee under Justice Priestly of the NSW Court of Appeal, which is standardising the core subjects for legal entry. The decision of the High Court in *Street v Queensland Bar Association* is itself a key that unlocks the door of a national legal profession. The forces of economic pressure are pushing us, even those who are reluctant, towards a national legal service and the forces of international legal opportunities of the provision of legal services to Asia and the Pacific are such that the internal national pressure is being elaborated by international pressures. We should seize the opportunity to tap the great market in legal services in Asia and the Pacific. Our institutions are what give us respect in the Asia-Pacific regions - our language and our institutions. There is going to be, in the explosion of their economies in the next century, great opportunities for Australia in the fields of education and legal services. I only hope that the legal profession has the imagination to respond to this.

You have spent a lot of time working with the UN and the international community. What have your experiences taught you that are relevant to your position now?
They have taught me that the law of any one country must now come into harmony with the growing international law. When I was at law school, I was taught that international law was up there in the clouds, as rules between sovereign states. But nowadays, both in areas of private law, to deal with the contractual, technological and other interconnections of state, and also of international public law, dealing with human rights, there is a very great expansion in the content and role of international law. Suddenly we municipal lawyers are living in an age where we must find the reconciliation between these. That is a tremendous challenge to us. The easy solution is to say that we in Australia should have nothing to do with it, and that we should ignore it. That would be an anachronistic approach, but sadly, it would be all too typical of lawyers. Instead, led by the High Court, the Australian legal profession is encouraged to look to international legal principles. We do so in the expansion of the sources of the materials which are available to us in the development of our common law. We now don't only look to English authority, we look to a whole eclectic treasure house of the common law in so many countries. We do so by looking into the areas of private law, notably in the decisions of the European Court of Justice in Luxembourg, but also increasingly we are looking to international human rights questions to illuminate; not to bind, but to help us reach principled decisions here in Australia. That course, which I have advocated for a decade was embraced by Justice Brennan in *Mabo*, in which he said that the impact of the International Covenant on Civil and Political Rights would bring its force to bear on Australian law. I agree with that view and I believe that it is a natural development in the age of international telecommunications, global problems, and global opportunities.

Does criticism really help to change the law?
I'm convinced it would. Quite often in the Court of Appeal I had cases cited to me where I had said this or that, and I came to the view that I was wrong. I would always admit that I was wrong. I think good judges do that. They don't pretend there's a critical distinction when it is artificial. The honest path of the law is to keep an open mind, to be sure that if you make mistakes that you acknowledge them.

High Court judgements are long. Any chance of a summary paragraph?
In fact I think in judgement writing style it is a good thing to state at the beginning of the judgement to state what it is about. I usually endeavour to do so at the beginning of my judgements unless I'm diverted by such a brilliant aphorism in a judgement that I read on the way that I think that is an arresting way to capture the attention of the reader. What you're looking for is a summary in the nature of a headnote, or press release. The High Court doesn't do this, but we do now provide key words when the judgement is delivered. Whether anything else should be given will no doubt be considered by the justices at some stage. As to abbreviating the judgement itself, I think it all depends on the complexity of the issue. If you are cited lots of cases, when giving your judgement it is hard to ignore those cases in the pursuit of brevity. This can lead to the view that you didn't consider the argument or you couldn't distinguish the case. However, brevity is still the soul of wit, and I shall try where appropriate to observe that thought!

Is there anything you would like to pass onto law students?
Chief Justice Renquist in a recent speech referred to what he saw as the growing commercialisation of the legal profession, in the context of the current legal professions capacity for time-charging, of the growth of mega firms, of the reduction of the notion of service beyond money. My own view is that it is when justice is achieved that the law becomes a noble profession. My advice to young lawyers is to remain optimistic and idealistic. When young lawyers cease to be optimistic about the quest for justice we have a problem on our hands. A number of commentators suggest that the American disease of the commercialisation of the profession is eroding its quest for justice. Surveys conducted by the Law Foundation of Victoria reveal amongst young legal practitioners a growing sense of disillusionment. I hope that it will be the aim of Adelaide to carry on the high tradition of the law, to be advocates of the tradition of independence of judges, who are inevitably the leaders of the law, and to remain optimistic and idealistic, as I am.