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TRANSCRIPT OF
RADIO
INTERVIEW WITH
D. CARRICK

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Damien Carrick: Judges are, of course, flesh and blood like the rest of us. But in their professional role, it is demanded that they detach themselves from their personal views.

Now recently at an event jointly organised by the Law School at the University of Sydney, the Law School at Monash University, and the Sydney Writers' Festival, I hosted a conversation with four people who've thought an awful lot about judicial values.

Here's some of that lively conversation. Now I should warn that the microphone of one of the speakers, Michael Kirby, wasn't working, but he's still very clear and I'm confident you'll agree that this is a very illuminating discussion.

[Applause...]

Damien Carrick: This afternoon, we're going to be asking, judicial values: should judges just apply the law, or should they bring their own values to the task?

To discuss this question we have four fantastic minds. From Germany, we have Bernhard Schlink; he's best-known as an author. His most famous book is *The Reader*, but he's also a former judge of the Constitutional Court of the Federal State of North Rhine, Westphalia. And he's also a professor of law at Humboldt University in Berlin, and Cardozo University in New York.

We also have Michael Kirby, former Justice of the High Court of Australia. He holds the record for being the longest-serving judicial officer in Australia.

We also have Reg Graycar, barrister and professor law at the University of Sydney, and Justin Malbon, law professor at Monash University.

[Applause...]

In 1992, the High Court attracted enormous criticism after the Mabo decision, and later after the Wik decision, for appearing to change the law to suit the personal values of unelected judges. That was the criticism. And judges during the Nazi regime, and during the South African apartheid era, were criticised for being accomplices to grotesque regimes. So what should judges do? To what extent should they apply their personal values to their judicial tasks?

Michael Kirby, I'd like to start with you: in your time on the High Court, were there cases where your personal values drew you to a preferred outcome, but your duty to interpret the law as it is, led to the opposite conclusion?

Michael Kirby: So far as my personal opinions and the law is concerned, well obviously my role as a judge was to give effect to my understanding of the law and the Constitution, and certainly there were cases during the course of my 13-year service on the High Court, and earlier in the Court of Appeal, where I had to give effect to opinions which I certainly wouldn't have reached if I had a free hand, if I'd been a legislator deciding the matter in parliament.

One of the cases that comes to mind is the case of the Minister for Immigration against B. Now that was a case where the challenge was to the locking up of children in the middle of

Australia simply because they'd arrived with their parents as refugee applicants in this country. And the argument was put to us, 'Well read down the requirement to put the children in detention camps, because they're children, and the Act doesn't specifically refer to them as children, and therefore say the Act applies to adults, but not to the children, it's a reading down process which is quite an orthodox sort of way in which you approach statutory interpretation.

There were two problems with that approach which I would have been willing to consider. Problem number one was that the provisions of the Act did contain a very specific provision about searching children in detention, and that rather indicated that parliament had turned its attention to the issue of detaining children. Problem number two was that the Commonwealth laid before us the parliamentary debates and records which indicated that the Attorney-General's Department had specifically drawn to the notice of the parliament that if it went ahead with detaining children, it would be in breach of the Convention on the Rights of the Child.

So once I had these two factors, I was sailing towards a decision where I would read down the Statute in a very orthodox, judicial way, that two icebergs loomed up. And one of them was the iceberg of the provision of the Act, the other the iceberg of the record. So I couldn't give effect to the reading down. I couldn't read it down, I just had to apply detain any person to a child as well, and that was my decision and I gave that effect in my orders, and so that was an outcome which I wouldn't otherwise have liked to come to, but as a judge I had to, because we live in a Rule of Law society.

Damien Carrick: Well for a case to get all the way to the High Court, by definition the answer isn't clear-cut, so a judge's role is to interpret the words of the law, of the statutes or the precedents, and surely you can't help but interpret the law, the words, through the prism of your own values, in those not clear-cut cases.

Michael Kirby: Well you're stating this to me as if you're astonished that should be the case; the words are ambiguous, especially the English language, very ambiguous, and therefore you have to give construction and therefore you have to draw on your own values. And Professor Schlink, in one of these articles that I read, says 'It is not true that there is only one answer to a constitutional case.' Almost always there are at least two or maybe more answers, and the puzzle and the obligation and the privilege of the judge is to try to work out what is the answer, and then you give convincing reasons as to what the answer is.

Damien Carrick: Well Bernhard Schlink, let's come to you. You come from Germany, a country where under the Nazis — and I guess more recently in East Germany — judges operated in an environment of unjust laws. And I'm interested to hear from you what you would understand as a judge's responsibility, perhaps their duty, on the one hand to stand firm to their own values, and on the other, interpret the law as it actually stands.

Bernhard Schlink: Well as Justice Kirby, I have doubts whether there is a law that just stands, that we can take and apply. But back to 1933, when the National Socialists came to power, they actually didn't change the law in a big way. Only later they added some racial statutes, but they took the law as it stood, and encouraged, or pressured judges to interpret it or even distort it, now using National Socialist values. National Socialists in their legal theory fought legal formalism, legal positivism, and demanded judges to become more political, to bring more National Socialist political values into the law. So it wasn't positivism requiring

them to adhere to National Socialist law, and then maybe their own good values rebelled against it, it was rather the other way round: those judges who stuck with the traditional formalist and positivist interpretation, 'were more immune against National Socialism than those who advocated freer use of values.

Damien Carrick: So when the Nazis came to power there was a spectrum of responses from judges on the bench: some ideologically rolled over, some stood firm. What happened to those who stood firm?

Bernhard Schlink: Well who stood firm had also several options. They could leave the Bench, and some did, and became practising attorneys, and some judges became partisans of the system, so using the new language, they still tried to administer as much justice as possible. So there were areas where it was more easy to avoid the National Socialist ideology and others where it was less easy. But it was nowhere really easy. So even if you are in the area of Family Law, and it's about parental care, the wellbeing of the child, where is a child best being taken care of? Of course in the National Socialist family rather than in one that isn't. So there was really no area that was completely immune against this ideological infusion.

Damien Carrick: Justin Malbon?

Justin Malbon: It seems to me that what is required of courts is to be vigilant at the outset, and I think Michael Kirby said that in an earlier judgment, or a speech at one earlier occasion, in which he said we should react sooner, rather than later, when we see real threats to our system, because otherwise, as you say, if you allow that to happen and this to happen and you turn a blind eye to this breach of a fundamental right, and you keep allowing that situation to develop, then it will be too late.

Damien Carrick: Bernhard Schlink, moving forward to contemporary Germany, do you have a debate on the extent to which judges should include their own values in their decision-making process?

Bernhard Schlink: We have a constant debate about our federal Constitutional Court who is a very powerful court, who decides cases of true political importance. And the debate since the '50s is, is the court too political, is it going too far? Should it use more restraint? And actually it uses less and less restraint, just enjoys its power. But as far as judicial values go, I think we are at a point, after having discussed it for a long time, where we agree of course judges bring their values, personal values, political values, they also bring their moods and their tempers and their anger, whatever; and what matters is whether all of this translates into good legal reasoning.

Damien Carrick: Is that debate about what translates into good legal reasoning, is that informed by Germany's experience of totalitarianism? When you're talking about issues, of, say, public order or civil rights, do people have at the back of their mind the echoes of the 1930s and '40s?

Bernhard Schlink: Oh yes. Again and again we have the Federal Constitutional Court and other courts mentioning this interpretation of the freedom of expression is to be understood before the background of the Third Reich. And yes, we have references like this again and

again. But the special topic of values, to what extent is a judge allowed to bring his values or her values into his decision-making, that's a different discussion.

Damien Carrick: Michael Kirby, at what point would you bow out of the process? What would be your breaking point? What would be the point where you would think, 'I don't want to be involved in this thing any more'. You've never probably had to be in that situation.

Michael Kirby: We never got to that point in Australia, and I don't think we ever have. We've had really wonderful and brave decisions in the High Court in Australia, and I'm thinking particularly of the Communist Party case in 1951 which disallowed the law which had been enacted with a full parliamentary mandate. It's often most important that the courts will speak logics and unpopular minorities, so we never got to that point in Australia, and therefore I didn't have to face it. It's not an unusual question. In Zimbabwe when UDI was declared, the court in Zimbabwe had to decide whether or not it would refuse to take the oath to the new constitution. Similar things are those recently in Fiji where the judges would take a commission for a coup-led government, and some judges said, "We will, because we think it's better that we're there to protect as many of the rights as we can." It's a matter of course of judgment and assessment, but I think a point would be reached where you would say "I will not be a servant in this system, it's offensive..."

Damien Carrick: I'm Damien Carrick and you're listening to The Law Report on ABC Radio National and Radio Australia. Today, the edited highlights from a forum on judicial values which was recently recorded at the University of Sydney Law School.

Reg Graycar, the issue of values and judges, it's an important one for you. Why is that?

Reg Graycar: I think this whole point of are there people who are value-free and then there are people with values is completely a myth. And one of the reasons that I guess I've been so concerned about it is that I've developed a great interest in the ways in which, for want of a better word, outsider judges are challenged as being not value-neutral, not impartial, and perhaps I could share with you something that I read recently in *The Nation*, it's not my poem, it's by Calvin Trillin; for any of you who are *Nation* fans, he's the deadline poet in *The Nation*.

Sotomayor...

Damien Carrick: Perhaps you should just explain.

Reg Graycar: Oh, sorry. Sonia Sotomayor is a justice of the Supreme Court of the United States, but on 3 June when this was written, she was a nominee for the position, and as I'm sure many of you are aware, she's the first Latina woman justice on the United States Supreme Court. Now notice how I had to use all those adjectives to describe her, because of course if she were just a white male judge, we wouldn't have to attribute adjectives to her. So shall I start again? OK.

The nominee's Sotomayor,
Whom all good Latinos adore
But right-wingers tend to deplore.
They'd like to show Sonia the door.
Her record, they say, heretofore

Reveals that beliefs at her core
Would favor minorities more:
She'd hand them decisions galore,
Because of the racial rapport.
Whereas white male judges are, as everyone knows, totally neutral.

Michael Kirby: I mean since that was written and before Justice Sotomayor was confirmed, she backed off the three things she was being attacked on. She said 'I would not allow my Latino, it's completely irrelevant.' Well.... And secondly she said, 'I would simply interpret the Constitution, I would not take values', and thirdly she said, contrary to her earlier statement, 'I would never take international law into account'.

So she backed off all these things, because of the very peculiar, highly political system of confirmations in the United States of America. I hope that nobody thinks that's something we should introduce into our judicial appointments in this country, because it leads to frankly just plain dishonesty. Judges are forced to say they wouldn't do things, simply because otherwise they won't get confirmed in the sort of entertainment environment at the appointment of Justices of the Supreme Court of the United States.

Damien Carrick: This issue of judicial values was faced quite squarely in a decision of the Supreme Court of Canada, I think it was RDS. Reg Graycar, tell me about that case,

Reg Graycar: Well it was your common-or-garden Children's Court case, not the sort of thing that usually attracts much scholarly attention. There was a young African-Canadian youth who was being charged with the kind of assault police resist arrest etc. There was a white police officer who gave evidence, and nothing would have ever come of this had the African-Canadian judge simply said, which she found, that the matter was not proved beyond reasonable doubt. But she then added some comments along the lines of 'well I'm not saying the police officer lied, but on the other hand he may well have, and you can understand that given the prevalent attitude of the day.' And so there was a very big furore, it was appealed to the Nova Scotia Supreme Court, the Court of Appeal, and then it went to the Supreme Court of Canada.

Damien Carrick: So she was commenting in the courtroom on her understanding of police and their attitudes towards minority kids.

Reg Graycar: Yes. And this is in a province where there had recently been a Royal Commission into the policing of minority peoples in Nova Scotia. It was a very well-known phenomenon that there was, shall we say, disproportionate policing of indigenous and African-Canadian kids in that province. But she was challenged by the prosecution for bias, and that was the issue that went all the way to the Supreme Court of Canada.

Basically, what the majority judges said was 'Judges are never neutral, they can never be neutral, but what they have to be is impartial. They have to be able to bring to their judging an open mind, basically.' And so they really set out to kind of disabuse us of this myth that people go into court, tabula rasa, without their backgrounds, without who they are, without the baggage that they bring. And they made the point that in a multiracial, multicultural society, obviously judges are and should come from diverse backgrounds. What they have to do though to be impartial is to approach issues with an open mind to retain the ability to be surprised. And it was a really nice way of explaining that concept of the absolute centrality of

impartiality, but not confusing it with what I call the empty mind syndrome, that somehow or other an open mind means an empty mind, because no-one has...

Michael Kirby: Every day of mine on the High Court was a surprise.

Damien Carrick: Did you come to your duties on the High Court with an open mind? Did you come to every case with an open mind?

Michael Kirby: I certainly hope so. I mean you're not sitting there just dispensing palm-tree justice, and I had differences from my colleagues in the High Court, but I never doubted that they were giving effect to genuine, conscientious, learned and scholarly opinions of their own. Independent judges. We should be proud of that in this country.

Damien Carrick: Bernhard Schlink, did you always come to every case that you ever heard with an open mind?

Bernhard Schlink: I hope so.

Damien Carrick: Did you ever, like Michael Kirby, come with values which might steer you in one direction and an outcome which the law required you to make in another direction?

Bernhard Schlink: Oh yes. Oh yes. I would have liked the case to be decided in one way for political grounds, and the law just didn't allow this, it had to be decided in the other direction.

I would like to add one point. I think we all agree that the law hardly ever can be just applied as it stands, it has to be interpreted. And interpretation means it doesn't have enough content as it stands, to solve the case. So we have to add content. We don't draw the meaning out of the words, we bring them, to a certain degree, in to the words. And there of course are values, the openness of our minds, our biases, but even our moods and our tempers, play a role. And I wouldn't underestimate the disciplining role that the standards of legal reasoning, the standards of interpretation play. And it's not just the law as it stands, or values, open mind, closed mind. No, standards of legal interpretation, standards of legal reasoning play an important and a disciplining role in all of that.

Damien Carrick: Justin Malbon?

Justin Malbon: Well our two former judges have talked about the law will block their personal values. And this point was confirmed for me as a junior barrister when I went on a country circuit, and I represented this child who was doing all sorts of horrible things, and this was on circuit out in the country, which — the advantage of circuit is afterwards you can often go and have drinks with the judge, so that's very pleasant. It's a wonderful advantage. Usually 'with brown-paper bags. Of money. No!

And so I appeared before this judge and represented this child, and as I say this child was a horror, and so I put the case for minimisation of the sentence, suspension of the sentence and so on, and the judge dealt with it very carefully and in fact handed down a suspended sentence far beyond what I'd asked for and he gave much more than I expected. But anyway, drinks later on in the evening and the judge was talking to a group of people and he said, 'Oh, I had this horrible, horrible kid in front of me today.' And he said, 'You were representing

him.' and he said, 'He was a terror, I felt like vomiting all over him.' And I thought wow, that was what was going on in your head.

So there he was, up there, thinking what a terror, I'm going to lock him up for ever, that's what he wanted to do, yes, but I just couldn't believe the disconnect between what the judge was thinking and what he actually did in his role as a judge. But it's interesting, we've also said, you know, we're all in heated agreement that it's not possible for a judge to do their task without infusing it with their values, but in fact there's an awful lot of judges that still retain the pretence that they are acting completely value-free, they're called textualists, or legalists, and their claim is that they simply read the text, and in some kind of mechanical fashion, as if you could substitute them for a fairly elaborate computer, they come up with this lovely values-free judgment.

Bernhard Schlink: They still exist?

Justin Malbon: They still exist.

Bernhard Schlink: I have never met anyone.

Justin Malbon: They still exist, and you can still read about them.

Bernhard Schlink: You can read about them? But do you meet them?

Reg Graycar: I think it's telling that 15 or 20 years ago there was someone at this law school who tried to develop a program where you could just predict the outcome by feeding everything into the computer, and nobody does that any more. And I think that time has passed. I'd like their names and addresses, frankly.

Michael Kirby: I think there's a spectrum of opinion between those who are fairly open to understanding of their own motivations and feel it is very important for them to own up and be as candid as they possibly can and explain it. Those who say 'Well that way lies danger', because then you lend yourself open to attack, and I think that difference does exist. It's a spectrum of opinion within the judiciary and it's a legitimate matter on which styles of writing opinions and explaining them differs among a college of individuals.

Damien Carrick: It isn't only the media and it isn't only politicians, and it isn't only litigants who criticise judges and say that they're value-laden. You often have judges throwing the mud at each other. Justin Malbon, there have been a lot of cases of that.

Justin Malbon: Yes, the pin-up dude is Justice Scalia, of the United States Supreme Court. I have mixed feelings about Justice Scalia. First up, it's probably very difficult to agree with a lot of his values; he's extremely conservative and he brandishes that flag quite happily. And I like the way that he writes very succinctly and quite powerfully, but you do have to question at times whether he does use such intemperate language in his judgments, that you wonder whether he's just going a little bit too far.

And I'll just give you some examples. In one judgment, he accused his fellow judge, now this is just to show how polite and tame the High Court of Australia is, but he once accused a fellow judge, Sandra Day O'Connor, who's an extremely smart judge, of holding 'irrational views in her judgments, that cannot be taken seriously'. In another case, he said 'Seldom has

the opinion of this court rested so obviously upon nothing but the personal views of its members', so that's another good swipe at the court. And another time he accused the court of being 'the most liberal court...' this is his own court by the way...'this most liberal court which has embarked on a course of inscribing one after another of the current preferences of the society and in some other cases the counter-majoritarian preferences of societies as a whole, into our basic law.'

Now just to indicate what he means by that, at a speech that he gave, he decried the fact that the court was now making decisions that preserved liberties under the Constitution including the right to abortion and the right to homosexual sodomy (as he described it) and he says, basically suggesting that those two laws were good, 'because they were rooted in the tradition of the American people by being criminalised for over 200 years'. So you know he's no blushing violet when it comes to his opinions.

And in another case he said, (which was the Guantanamo Bay case which he took a very strong attack at the majority on) he said, 'What competence does this court have to second-guess the judgment of Congress and the President on this point?' (namely Guantanamo Bay) 'None whatsoever. But the court blunders in nevertheless.'

So as I say, it's good to have candour and certainly relative to other judges, Justice Kirby had more candour I think, probably when it comes to candour you win the prize in the whole history of the High Court, but I guess with people like Scalia, you wonder whether there are limits.

Damien Carrick: We've been discussing the question, should judges justify the law, or should they bring their own values to the task, but is this really the right question we should be asking in the first place?

Justin Malbon: Well I guess it's from this panel, I think everyone's saying that it's a bit of a nonsense to imagine that dichotomy.

Damien Carrick: Would you please help me thank all our guests.

[Applause...]

Damien Carrick: Bernhard Schlink, Michael Kirby, Reg Graycar and Justin Malbon, thank you very much.

[Applause...]

Damien Carrick: That's the *Law Report* for this week. Thanks to producer Anita Barraud.

Now as well as the program you've just heard, we'll also be posting on our website audio and a transcript of the full, unedited forum.

Guests

Michael Kirby

Retired judge of the High Court

<http://www.hcourt.gov.au/speeches/kirbyj/kirbyjbio.html>

Bernhard Schlink

Author and Retired Judge of the Constitutional Court of North Rhine-Westphalia, Germany

http://en.wikipedia.org/wiki/Bernhard_Schlink

Reg Graycar

Professor Law, University of Sydney

<http://www.law.usyd.edu.au/about/staff/RegGraycar/>

Justin Malbon

Professor Law, Monash University

<http://www.law.monash.edu.au/staff/jmalbon.html>

Further Information

[Judicial Values: Should Judges Just Apply the Law, or Should They Bring their own Values to the Task? 27 August 2009](#)

The Sydney Writers' Festival in conjunction with the Julius Stone Institute, the Sydney Law School, and Monash University present a forum on judicial values.

Publications

Title: *Guilt about the Past*

Author: Bernhard Schlink

Publisher: University of Queensland Press, 2009

ISBN 97807022371

Title: *The Reader*

Author: Bernhard Schlink translated by Carol Brown Janeway

Publisher: Vintage, 1999

ISBN-10: 0375707972

Title: *Australian Export : A Guide to Law and Practice*

Author: Justin Malbon and Bernard Bishop

Publisher: Cambridge University Press, 2006

ISBN-13: 9780521613958

Title: *The Hidden Gender of Law*

Author: Regina Graycar and Jenny Morgan

Publisher: The Federation Press: Sydney (2nd ed, 2002)

ISBN 9781862873407

Title: *Through the World's Eye*

Author: Justice Michael Kirby, speeches selected and edited by Charles Sampford, Sophie Blencowe and Suzanne Condln

Publisher: The Federation Press, Sydney 2000
ISBN 1 86287 347

Title: *Appealing to the Future: Michael Kirby and His Legacy*
Author: A collection of essays edited by Ian Freckelton, Hugh Selby
Publisher: Lawbook Company, 2009
ISBN 9780455226682

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