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PERSPECTIVES OF THE HIGH COURT

Interview by Daniela Lai and David Shi

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The Hon Michael Kirby AC CMG

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Michael Kirby:

I am Michael Kirby. I am a past Justice of the High court of Australia. I was a Justice of that Court from 1996 to 2009 when I retired. Since my retirement I have been doing many things. I am giving this interview to David and Daniela voluntarily, and I wish them well in their media studies. I am perfectly happy to consent to the interview and the interview will now begin. David will ask the first questions. David?

David Shi:

Alright, well hello everyone. My name is David Shi and today we would like to introduce the Honourable Michael Kirby, former High Court Justice, recipient of the Order of Australia and prominent activist in both human rights and homosexual equality, Honourable Michael Kirby, thank you very much for joining us.

Michael Kirby:

You can call me Mr Kirby. I paused over the label of 'activist'. I wouldn't say I am particularly 'activist'. In fact most of my life I was far too passive. That is, in part, required by the judicial role. However, you can

say what you like, I am just myself. I respond to issues as I see that a response is required.

David Shi:

Alright, thank you very much Mr Kirby. Well during your time in the High Court, you were often called “The Great Dissenter”. What prompted you to take up this role and did you enjoy this title?

Michael Kirby:

I didn't enjoy the title because it is a title imposed by some people, usually conservative people, in an endeavour to disempower the person to whom the title is given. There have been judges in the past who have been called “The Great Dissenter”. Justice Oliver Wendell Holmes Junior of the Supreme Court of the United States was so described. Many of his dissents subsequently came to be accepted as the correct statements of the law. I think I received the title, mainly from media and media on the conservative side, because of the fact that during my period on the High Court I quite often disagreed, especially in the latter years, with the decisions of the other judges. Under our system, the common law system, judges are both authorised and required, if they disagree, to state their disagreeing reasons and to explain why they come to a different conclusion. In fact, that is a very important attribute of transparency in our legal system. So that I think is the reason why I was known as the “Great Dissenter”. In the Court of Appeal, for the 12 years before I was appointed to the High Court, I was the President. My rates of dissent were much lower. I wasn't really, in particular, a dissenter at all. Daniela?

Daniela Lai:

Yes, I was just going to ask a follow up question to that. Interestingly, your rate of dissent, does this affect your relationship with the other judges who agreed with themselves?

Michael Kirby:

I would say that, to give that an honest answer, I probably irritated them from time to time. Just as they, undoubtedly, irritated me from time to time. However, we had an entirely professional relationship. We engaged in social events together. Partners would come along to those events. The partners generally got on quite well with each other. Everybody got on well with my partner, Johan, because everybody likes Johan. It's only me that some people find irritating. But then I find some other people irritating. That is the nature of having a different philosophy and a different approach to the law. Approaching the law not as a formal or linguistic thing but as a force in society which can, where possible, be used to secure justice, justice according to law.

David Shi:

Well you've obviously very open in the past about your homosexuality. Now in your *R v Green* judgement, you basically said that a non-violent sexual advance by a homosexual person should not warrant a violent response. Did your own sexual orientation have an impact on this judgement?

Michael Kirby:

An honest response to that question would require me to say that one can't disengage entirely from one's own sexual orientation. Just as a 'straight' person can't cast that out of their mind when they come to reach a decision. No straight judge is disqualified from sitting in a case of rape of a woman. So no gay judge should be disqualified from sitting in a case concerning an alleged rape and consequent murder or alleged sexual interference and consequent murder of a gay man.

It's just the fact that our judiciary reflects the diversity that exists in our society. The big difference is that, until now, gay judges would generally

keep that a big dark secret. Some still do. But I don't. Therefore, it's not a matter that is secret but a matter that is a part of my reality. But did it affect my approach and the way that I approached the problem? Well it probably made me very suspicious of notions that people should just be able to use violence against another person when they make a non violent sexual approach. If that were done to every straight male who made a non-violent approach to woman and if every straight male was then subject to violence, the cutting of a butterfly pattern by a pair of scissors on their chest and their death, we'd have a lot a dead straight males.

David Shi:

Fair enough Mr Kirby. Well, still in the topic of homosexuality, in a recent survey conducted by the triple J Hack program it was found that next to climate change, same sex marriage is in fact the most important issue that concerns the younger generation and now despite this statistic, both major political parties currently have no plans to implement a same-sex marriage registry. What are your thoughts on all this?

Michael Kirby:

I believe that the key word in your question is "current". Both political parties don't have a plan, as they approach a federal election, the result of which will be known when this interview is published. At the moment we don't know what the outcome will be. In Mr Abbott's answers to the questions about same sex marriage, he simply indicates that it is a matter of definition. That the definition is in an Act of Parliament. And that is the end of the debate. Ms Gillard, in her responses has said that the current definition is the present ALP policy. However, that is a form of code language, I think, for the fact that when the ALP policy changes so will her point of view. Similarly with Senator Wong who is herself in a same sex relationship of course not every same sex person necessarily wants marriage. We are not sure, my partner and I, that we want it. But we do feel it ought to be there for fellow citizens in full equality for those others who do want it. It's a legal status, a civil status It will come in due

course. But it won't come in the present electoral debates. It will come when things have cooled down a bit and people will have a chance to see where the justice of the matter lies.

Daniela Lai:

Given your Anglican religious background, how do you feel about the homophobic comments made by some of the Anglican Church members? I think right now we do live in a current homophobic society and I think that the judgement in *R vs. Green* reflects that. Do you think that this could be changed or how do you feel about it?

Michael Kirby:

I think that some of the older generation are homophobic. I'm not so sure that the younger generation are homophobic. If you are right, that surveys show that the question of same-sex marriage is one of the most important questions before the younger generation, that tends confirm other opinion polls which indicate that homophobia is a feature of old people: such as old judges and old politicians and old bureaucrats and old churchmen. So I'm not going to condemn all church people or all Anglicans. I know that many Anglican people do very good work in the struggle against HIV and AIDS. I also know that many Roman Catholic people work in hospitals such as St Vincent's Hospital in Sydney and show love and compassion and good science for people, many of them gay people, who are living with HIV and dying of AIDS. So I don't think it is a matter of condemning every group. We've got to get out of these stereotypes and judge people on their own individual attitudes. That all said, the fact remains that religion and suggested scriptural texts have been a source of antipathy towards gay people. When we have the science that shows that a small proportion of human beings have this variation in their nature, we have to get over the prejudice. We've got to look again at scriptural texts if we are religious people. We've got to reach a new interpretation of them, just as we did in the scriptural text in *Genesis* that said that the world was created in 6 days. That is not now generally believed, though some religious fundamentalists and literalists

do believe that. But most religions don't believe that now. Similarly, we've got to look afresh at the old texts relating to same sex relations.

David Shi:

Well following the lines of religion, in your TEDxSydney speech earlier this year, you mentioned the role of the "God Botherers" in today's society. Do you think that they will continue to become a problem in today's increasingly secular society?

Michael Kirby:

Well, if we have an increasingly secular society, the "God Botherers" will increasingly be an irrelevant or insignificant force. But secularism in Australian society has come under some form of attack and question in recent years. When I was young it would have been unthinkable for a prime minister to give interviews on a Sunday outside a church. Such an activity would be regarded as alien to the secular nature of Australian society. Yet Mr Rudd did so. Mr Howard and some members of his party were constantly cosyng up to religious groups and lobbies. The so-called Australian Christian Lobby, is a relatively small force but it seems to have a remarkably big voice in the political decisions of the country. So my appeal in my TED speech was that we should all go back to the fundamentals of secularism because that protects us all. It protects all religions and it protects people of no religion. There should be a space for everybody in a free country like Australia.

Daniela Lai:

So, moving back to your legal career as a judge, because you were 'The Great Dissenter', were you ever given death threats or threats from the public about some of your judgements?

Michael Kirby:

No I've never received death threats in Australia. I did receive death threats in Cambodia when I served as the Special Representative of the Secretary General of the United Nations for Human Rights. In that country the Khmer Rouge threatened me with death. Given that the Khmer Rouge had murdered about 2 million Cambodians, one could not take such threats lightly. I took precautions against exposing myself to dangers. I never ate in the outside restaurants. I always had accompaniment of United Nations personnel. I was very careful of my safety. They were serious death threats. But I didn't receive any death threats in Australia. In Canberra I walked to and from work. Anybody who knew my routine could've taken a pot shot at me. In Canberra, in the High Court, we don't even have airport type security. There are no X-ray machines. The High Court resolved to retain an openness. I hope that Australian society would always be like that. That we can have our differences and we can express our differences but we respect the life and limb and integrity of other people and the right to differ. It's very important to uphold to right to differ and for media to give representations of different points of view, so that in the end citizens can decide these matters.

Daniela Lai:

So generally the law seems to be separate from emotions. Have you ever made a judgement where you've let your emotions affect your legal judgements?

Michael Kirby:

I don't know that I entirely agree with your suggestion that the law is completely free of emotion. Human justice is decided by human beings who have human feelings of empathy, understanding, compassion, love, anger and all the range of emotions that humans have that is the nature of human justice. The obligation is to keep your personal biases and prejudices in check. To be aware of your inclinations and to test them to make sure that you're not being unfair to other people in the decisions

that you make. Of course, I had sympathy for refugee applicants and for Aboriginal applicants and for women and the disadvantages that women have suffered in the legal system. And for Islamic people and black people and Asian Australians. I feel that my experience as a gay man, suffering discrimination in my life, made me more empathetic to people who are minorities. If you are a minority you can sometimes feel the sting and you don't like it. That makes you understanding of the way our law has to adapt to reach out to be inclusive of and respectful of all people and all minorities.

Daniela Lai:

So for example, those controversial cases that have received a lot of media attention like the Heather Osland case, I was wondering about that, a lot of people have criticized how she couldn't get an appeal application through and I was just wondering is that because it was technical legal grounds? Is that a case where maybe emotion should be or the sympathy should be greater than technical legal arguments?

Michael Kirby:

The High Court was divided in the Heather Osland case when it came up to the Court on the first of three trips. The first one was an appeal for a retrial of Mrs Osland after her conviction by jury of murder. The High Court divided and 2 justices were in the minority. I was one of the majority of three. I still consider that my decision was the correct decision. I don't apologise for it. My reasons are expressed in the decision. I don't repeat them. But essentially they were to the point that, in Australian society, now we have an organised police force. The solution to violence in a family is not to murder a person and to plan that murder most carefully and to use poison and violence in order to exterminate another human being. There are solutions to the problems of violence which fall far short of that type of action. Therefore, I never had that much sympathy for violence, I'm afraid. When I saw violence as a judge I never had much sympathy for it. I never had much difficulty

in the sentencing aspect of it in imposing rigorous sentences. This is because I am not in favour of people taking the law into their own hands.

David Shi:

So just one final question, how's post judicial life and how's retirement?

Michael Kirby:

I'll let you know about retirement if ever I meet retirement. My life has been busier than ever. I am a member of the Eminent Persons Group which has been established to investigate the future of the Commonwealth of Nations, the family of English speaking countries. I am also a member of the new Global Commission on HIV and the Law, which has its first meeting in Sao Paulo, Brazil in a few weeks. It will be addressing the reforms which are necessary to increase the strategy of combating HIV/AIDS. I've been appointed to the Arbitration Panel of the World Bank in the International Centre for Settlement of Investment Disputes. I am a professor at 12 universities. I give countless lectures and public speeches. I'm invited to go all over the world and do things. I don't have a shortage of activities to perform. And on top of all that, I perform mediations and arbitrations and so I am extremely busy. In fact, I am busier I think than I was when I was a Justice of the High Court of Australia. There is life after the Judiciary. It is, in some senses, a liberation to finish public service and judicial service and to renew your life and do different things and meet different people and mix in a wider circle. That's what I am doing now.

Daniela Lai:

Well thank you so much for agreeing to take this interview today.

David Shi:

And Mr Kirby, thank you very much.

Michael Kirby:

Thank you David and Daniela. And good luck with your profile and good luck with your studies and good luck with your life. The last is the most important. To have a good and full life, full of health, happiness, and if you can find it, love.

Daniela Lai:

Thank you

David Shi:

Thank you very much sir
