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The Hon. Michael Kirby AC CMG

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Michael Kirby*

STUDENT DAYS

I first met Roderick Pitt Meagher in about 1962-63, when I was President of the Sydney University Students' Representative Council (SRC). He was then the Fellow of the University Senate elected by the Undergraduates. In that office, he had as little as possible to do with the SRC. He regarded us as a group of riff raff - a rabble. For our part, we regarded him as an insufferable toff who was full of himself.

A portion of my campaign to win a second term as President of the SRC in 1963 was to force Roddy Meagher to report to the SRC on the happenings of the (then closed) University Senate meetings. Under a lot of pressure exerted by me with dogged Ulster persistence, he ultimately agreed to report to SRC meetings on Senate business and to work more closely with the SRC. His agreement to do this led us to drop our proclaimed intention to petition the Visitor (the State Governor) to have him removed from

* Justice of the High Court of Australia 1996-2009; President of the New South Wales Court of Appeal 1984-1996.

office on the Senate for neglect of the student interests that we claimed he was elected to represent. His view was, and remained, that he was a Fellow of the Senate whose misfortune it was to be “elected by the undergraduates”. But he was in no way their representative or delegate. At most, we struck an uneasy compromise.

A less auspicious initial beginning to our relationship that was to last 50 years would have been hard to imagine. Still, on 26 November 1962, according to the Council records, I reported to the SRC that "Mr Meagher proved extremely cooperative and discussed in full the relevant parts of the Senate Agenda with [me]”. At the next meeting I reported that "the present arrangements … are working moderately well". I cannot think that this insistence on cooperation would have endeared me to him. Things heated up later when "I … told him that, if he is not able to attend in person at [SRC] Council meetings, he is to report in writing". The imperious tone of my presidential reports, was pitched at the angry students whom I had worked up into a lather of rage about R. P. Meagher's indifference to the injustices of our plight. It worked. I was, exceptionally, elected to a second term as President of the SRC (1962-1963).

Later, I fixed my sights on Meagher’s position on the University Senate. By then, Roddy Meagher had concluded that the new breed of students did not deserve him. He resigned and was first replaced by Peter Wilenski – a man with an intellect equivalent to

Meagher's, but without the hubris. And in 1966, when Wilenski departed for Oxford University, I replaced him. Needless to say, I was most dutiful in reporting to the SRC. I attended all their meetings. Indeed, in 1969 I took my new-found partner, Johan van Vloten, to a SRC meeting. "A bit childish, isn't it?", he asked, looking puzzled. And then I knew it was time to move on. Just as Roddy Meagher had done five years earlier.

I was admitted to the New South Wales Bar in 1967. My first chambers were on the 8th Floor of Wentworth Chambers close to his (and to our common mentor H. H. Glass QC). They were approached through the swinging door between 8 Selborne (where he was) and 8 Wentworth (where I was). I later moved to 12 Wentworth. We had little professional connection in our years at the Bar. In December 1974 I was appointed to the Australian Conciliation and Arbitration Commission as a Deputy President. He did not send me a letter of congratulations. Good riddance was, almost certainly his reaction on hearing the news.

However, I was soon seconded to chair the Australian Law Reform Commission (1975-84). This coincided with his service as President of the New South Wales Bar Council. He did not change. He treated law reform with unalloyed contempt and especially the ALRC which he reportedly regarded as a "federal menace".

COURT OF APPEAL

On my appointment in September 1984 as President of the Court of Appeal, Meagher QC, by now a very fashionable and busy Queen's Counsel, reportedly lamented about having to go over to the twelfth level of the Law Courts Building to appear before "those three communists" (Priestley JA, McHugh JA and myself). However, one of my first dissents in the Court of Appeal was in the case of *Brian Cassidy Electrical Industries v Attalex Pty Ltd*[1]. The case was argued by Russell Bainton QC, but reportedly he did so on the basis of advice earlier given by R. P. Meagher QC. I upheld the objection of the claimant to the special preference being given by judges to so-called "A list liquidators". In agreement with the Meagher opinion, I held that this judicial practice was inconsistent with the discretion granted to the judiciary in general terms by the *Companies (NSW) Code*. However, on 20 November 1984, Mahoney JA and McHugh JA upheld the A list arrangements which had prevailed since the early 1960s. I dissented. Meagher sought me out on a number of occasions after that decision to tell me that my opinion had been "perfectly correct". As, indeed it was. The proposal to challenge the "A list", created by the company law judges, was "bold". But my application of basic principles of administrative law had apparently impressed Meagher. Rightly so because, with respect, his advice had been correct as a matter of legal principle. Never mind the practicalities urged by the supporters of the “A” list.

[1] [1984] 3 NSWLR 52.

Over the ensuing five years, Meagher QC appeared before me in the Court of Appeal many times. Without doubt, he was one of the best and most effective advocates we saw in the Court. Courageous, almost to the point sometimes of foolhardiness, he would select limited issues to argue – sometimes only one. In that way, he made things easy for a busy court, working under pressure, thirsting for easy pathways to a conclusion. His advocacy was the total opposite to dramatic. Like Dyson Heydon was later to do, he clung to the podium and looked up at us, the judges, fixing us with his baleful stare. He made every case and every point seem so simple. So clear and so logical. There was really only ever one correct outcome. And it was the one he was urging.

Sometimes the points Roddy Meagher argued were technical and occasionally they seemed very unjust to me. An example is *Bay Marine Pty Ltd v Clayton Country Properties Pty Ltd*[2]. In that case, he took the point that a contingent creditor could not appear on an appeal as the representative of an insolvent company, even with the purported approval of the company and in its interests. The majority (Samuels JA and Mahoney JA) upheld Meagher's objection to the appearance before us of the company, except by an admitted lawyer. The company had no assets to retain a lawyer. That was the claimant's very complaint. Either we heard him or we heard no-one. I dissented strongly. I invoked the residual powers of the Court to ensure that rules of court were our servants to help us – not

[2] (1986) 8 NSWLR 104.

our master. The case illustrates the different approaches to law and justice attractive respectively to Meagher and to me. As an advocate or judge, he was not much concerned, in my experience, with substantive merits if a legal point could be discovered that decided the case readily. This was never my approach to law or to judging. I took seriously the promise in my oath of office to "do right". Law and justice are twin obligations; but Roddy Meagher usually felt that the justice of legal rules was the greatest justice there could be.

The day in 1989 that John Dowd, as Attorney-General for New South Wales in the Greiner Government, invited Roddy Meagher to join the Court of Appeal as a Judge of Appeal, he came to talk to me. Indeed, he made the telephone call to the Attorney-General, accepting the invitation, from my Chambers. I encouraged him to accept. I knew that he and I would have philosophical differences. However, I certainly respected his intellect, his scholarship, his advocacy, his legal writing and his international reputation as a lawyer of high talent. I believed that his appointment would enhance still further the reputation of the Court of Appeal. And so he was appointed a Judge of Appeal from 31 January 1989. He filled the place left by the elevation of McHugh JA to the High Court of Australia.

Judges who come onto courts with an established hierarchy generally adjust their attitudes accordingly. Meagher JA quickly

became a judicial colleague who was quite congenial. He was always a "clubable" man. He obviously enjoyed the meetings that the Judges of Appeal held at 8.30am on Friday mornings, each fortnight, to review the reserved decisions and generally to consider the court's business. He enjoyed the regular lunches we arranged, either in each other's chambers or, on Tuesdays, in the Law Courts Judges' Dining Room, often with guests whom I had invited (academics, diplomats, High Court, Federal or other judges, overseas visitors and so on). He was intellectually engaged with the world and specially enjoyed the luncheon company of academics and visitors from disciplines outside the law. He was invariably quick with his draft reasons. But they were sometimes so brief that they did not seem to me to address all of the parties' arguments. As at the Bar, he was continuously looking for the shortest cut to the decided outcome. Generally, he did not struggle to re-express or re-define the law. Still he had a very quick mind, apparent both in court and in conferences. He got on particularly well with Hope JA, Glass JA and Samuels JA. He could be extremely amusing in conversation. He was a character. His great gift was to say something completely outrageous but to keep a completely straight face whilst doing so. He was an inveterate leg-puller.

In his comments in and out of court, Meagher JA was constantly criticising Brennan J in the High Court for writing separately. I detected a co-religionist's impatience with the philosophy that was emerging from the Mason Court and sometimes from Justice

Brennan. Roddy Meagher might have been empathetic to Aboriginals; for his family came from outback New South Wales. However, if so, he did his best to disguise it carefully. He sometimes made racist remarks, the more surprising because so socially incorrect ("politically incorrect" he would have said). Especially so for one of the most senior judges of the State of New South Wales.

The law reports show that, more often than not, Roddy Meagher simply agreed with my draft reasons as President; and he did so soon after I distributed them. Whereas others, where they agreed substantially, might add a gloss, or write separately and say so, he normally simply said "I agree". We sometimes wrote joint reasons together, comparatively rare in those days in the New South Wales Court of Appeal. *Marsland v Andjeclic [No 2]*[3] is an instance. Sometimes he agreed emphatically: *Galea v Galea*[4]. On a few occasions this was reciprocated by me: *General Credits Ltd v Wenham*[5]. Clearly, Meagher JA's legal philosophy placed the greatest store on simplicity and consistency in legal principle. He hated a number of innovations and made his distaste very clear. These included so-called "plain English"; legislative drafting; use of parliamentary materials[6]; and resort to a "purposive" construction[7].

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[3] (1993) 32 NSWLR 649 at 651; (1993) 31 NSWLR 162.

[4] (1990) 19 NSWLR 263 at 283.

[5] (1989) 18 NSWLR 571 at 576.

[6] *Monier Limited v Szavo* (1992) 28 NSWLR 53 at 67; *Polycarpou v Australian Wire Industries* (1995) 36 NSWLR 49; Combwood Pty Ltd v Baulkham Hills Shire Council (1995) 36 NSWLR 200; *Nikolovsky v GIO of NSW* (1992) 28 NSWLR 549 at 561; *Hooper (Aust) Pty Ltd v Combatti* (1989) 18 NSWLR 235 at 247.

[7] *National Employer v Manufacturers Mutual* (1988) 17 NSWLR 223 at 242.

He was forever denouncing the incompetence of Parliamentary Counsel. Because in my law reform days I had come to know and respect many of them – federal and state – I always distanced myself from such remarks, both orally in court and, where necessary, in written reasons.

When he offered such opinions or expressed views in court that I regarded as going over the top I would intervene. Sexist comments, in particular, provoked me to disassociate the Court of Appeal and myself from his remarks. I sometimes thought that he made such remarks simply to goad me into action. I always rose to the bait, keeping a vigilant eye on the record. And on the public appearance of the judiciary on display in our court room, as we sat together.

On one celebrated occasion Meagher JA accused me of indulging in a "rodomontard"[8]. I had to look the word up in a dictionary to see if I had been insulted. It turned out to mean a 'vainglorious brag' or 'boaster'. It was apparently a Saracen word, imported into English by Thomas Babington Macaulay. The "attack" by Meagher JA made a few newspaper headlines at the time. I was not in the slightest upset. His humour was sometimes precious or abstruse. But it was also often very witty and original. It livened up the day until it was deployed to hurt people who could not effectively answer back. Only then did I remember the advice of a great Canadian judge (eventually appointed to the Supreme Court of

[8] *Videski v Australian Iron & Steel Pty Ltd*, Court of Appeal (NSW), unreported, 17 June 1993. For earlier remarks, see *Askarou v Nominal Defendant* (1989) MVR 491 (NSWCA).

Canada and later as United Nations High Commissioner of Human Rights) Louise Arbour. Speaking at a judicial conference that I attended in Quebec City, she said: "I never allow anyone to give voice to discrimination in my court. Never a witness. Never an advocate. And never a judicial colleague". It was advice that I agreed with and observed.

Sometimes I felt that Roddy Meagher would sacrifice almost anything for humour or fun. He occasionally mimicked Oscar Wilde. He even once played Wilde in a public performance of book reading. A little humour can be beneficial and useful in court. But I learned in my earliest days at the Bar that most litigants do not regard a court case as funny in the slightest. Perhaps Meagher JA was saying witty things because he was bored with the work. Much of it, in truth, was of little intellectual challenge or stimulus to his brilliant mind. Occasionally, I thought (doubtless unfairly) that he embraced a particular conclusion just to be perverse. Where he dissented from my reasons, there would not infrequently be a sharp little dig at my view of the law, the facts or legal values[9]. Despite occasional flashes of brilliance, in written reasons, or more usually orally during argument. I never considered that Meagher JA, as a judge, attained the dominance and intellectual heights that his extraordinary talent had promised. He was a remarkable student, scholar and advocate

[9] See e.g. *G & J Shopfittings v Lombard Insurance* (1989) 16 NSWLR 363 at 377; *Carrol v Mijovich* (1991) 25 NSWLR 441 at 455; *Smith v The Queen* (1991) 25 NSWLR 1 at 24; *Tomakarkis v Sheriff of NSW* (1993) 33 NSWLR 36 at 58; *Troja v Troja* (1994) 33 NSWLR 269 at 300; *Price v Ferris* (1994) 34 NSWLR 704 at 714; *Sydney CC v Reid* (1994) 34 NSWLR 506 at 521; *Breen v Williams* (1994) 35 NSWLR 522 at 569; *Forgeard v Shanahan* (1994) 35 NSWLR 206 at 226.

– but a less successful judge. He was not willing to expend the energies necessary to succeed in that most ungrateful of occupations.

A new problem arose by the 1990s. He would occasionally fall asleep on the bench. Very occasionally he would snore. This created a particular challenge for me, because I was generally presiding[10]. Various measures were deployed to meet the challenge: asking him a question; dropping books near him; bumping his papers; getting his tipstaff to move his chair. However, such was his preparation before the hearing and his razor-like quickness of mind when it was engaged that he could invariably quickly get back on top of the issues. At 12.40pm, five minutes before the usual adjournment hour, he would often let it be known that "The court is hungry". The curial sleeping was doubtless a health problem. It was by no means infrequent.

In the days we sat together we often found common interests to explore during the breaks. Like Justice Heydon, Roddy Meagher was very knowledgeable about history. His technique of judging meant that he had a lot of spare time to read books of history, poetry and literature which is what I would usually find him doing whenever I walked into his chambers, as often I did. During argument I would sometimes pass him a cartoon that I had drawn, portraying the judges or counsel in the case. I had the presentation of his own

[10] This has since been examined by the High Court of Australia in *Cesan v The Queen* (2008) 236 CLR 358 at 386 [90] per French CJ, 383 [119]-[120] per Hayne, Crennan and Keifel JJ.

portly profile, morning dress and wing collar (never a jabot) down to a precise style. Roddy Meagher was very knowledgeable about drawing. He said that he liked my efforts and especially the presentation of Handley JA - always drawn with a halo; to signify his holiness. He declared that he was collecting these cartoons; but somehow they were discarded or stolen. A priceless treasure of the draftsman's art was lost to history[11].

As the years passed and we continued to sit together in the Court of Appeal, Roddy Meagher seemed to show less engagement with the cases. But he always got his work done and on time. He told me that he was sorry when, in February 1996, I left the court to go to the High Court. He cautioned me: "Whatever you do on those other things, always follow the Russian on matters of property law". By this he meant to follow Gummow J who was, of course, not Russian at all[12]. Property law was what mattered most to Meagher. Perhaps if the Court of Appeal had had more of it, he would have been more engaged with its work.

We had different points of view. Still, I believe that each of us, in our own way, recognised the lack of certainty in many legal problems and the legitimate space for different viewpoints. He sometimes pretended to believe in total certainty and the formal legal rules that

[11] R. Meagher and S. Fieldhouse, *Portraits on Yellow Paper*, CQU Press, Rockhampton, 2004, 42.

[12] Contrast, *ibid*, 84.

he espoused. But he was far too intelligent to really believe his own propaganda. And he was, after all, a pupil of Julius Stone[13].

LOOKING BACK

After I left the New South Wales Court of Appeal, Roddy Meagher published a book containing and illustrating a lving tribute to the art of his late wife, Penny Meagher, who had died in 1995[14]. He gave me copy of the book in 2001 inscribed simply "Love, Roddy". I still treasure it. In 2004, in *Portraits on Yellow Paper*, published with drawings of the subjects by Simon Fieldhouse, he authored a book on his friends and colleagues. It included a portrait sketch and a (generally favourable) note on me[15].

In 2006, two years after his retirement from the Supreme Court he came to Canberra for lunch in my Chambers in the High Court Building by Lake Burley Griffin. Although I knew that he had fallen out with Gummow J, I invited them both. I hoped for a reconciliation. Sadly, the air was frigid. There were deep currents of emotion that I did not dare to explore. He declined every effort to repair the breach although Gummow J, who had once been one of his closest friends, acted throughout the luncheon with forbearance and perfect manners. It was a sad occasion.

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[13] Helen Irving, Jacqueline Mowbray and Kevin Walton, *Julius Stone: A Study in Influence*, Federation Press, Sydney, 2010.

[14] *Ibid*, 59-60.

[15] *Ibid,* 39-42.

So how did we get along? The answer is, on the whole, quite well. Partly, because we were obliged to work together and we were too consciously professional to indulge in excessive tantrums. Partly, because a mutual regard grew up over the years of our judicial propinquity. Partly, it was a result of our shared interests outside the law (such as history and a disdain of sport). Partly, it was because it was my job as President to promote a collegiate atmosphere in the Court so I made it my business to do so, as far as I could. Sadly, I was not to have a similar influence in the High Court which, during my time, was usually frigid as the Court of Appeal had been warm. Partly, it was because he was quite traditional about hierarchy and he arrived in the court at a time when I was generally successful and effective as President and liked, or at least respected, by many at the Bar. Partly, we both basically endorsed the view that civilised people can agree to disagree and respect each other's right to hold radically different opinions.

Roddy Meagher was generous with gifts at birthdays, holidays and other occasions. He urged me (without success) not to be so stingy with artists and, like him, to become a patron of the arts (at great profit to himself as it has turned out). In recent years, every now and again a disparaging remark of his about me would be brought to my attention. In a 2007 comment for Richard Ackland's much read, but little purchased, newsletter *Justinian*, for example, he declared that my talents were "much exaggerated". In the end, our relationship became a kind of Mexican standoff. He could not

change me. I could not change him. His brilliance and erudition normally redeemed his faults and foibles. Working with him in the Court of Appeal was quite an experience. I am very glad that it was vouchsafed to me.

However, like many professional relationships ours never really blossomed into a deep friendship. Too many differences in values and life's experiences for that. But, in its heyday, it was cordial, mutually teasing and often quite enjoyable. Judges normally have little or nothing to do with the appointment of their colleagues. That is why they should not feel guilty if they do not love each other. Sometimes, throwing them together in a small institution creates an explosion (as with Starke, Evatt and McTiernan in the 1930s High Court[16]). Sometimes, it leads to simmering dislike and icy coldness (Barwick and Murphy). In most cases there are ups and downs. Rather like a family really.

We were two members of the same judicial family. And we reflected faithfully the two different communities from which we had sprung and which had nurtured us. He from the Roman Catholic South of Ireland. I from the Protestant North. But as anyone who visits the Emerald Isle quickly discovers, there are not many fundamental differences between the two communities, under the skin. Both are Irish. And after the occasional clash and noise and fury and anger, what was left behind was sufficiently similar to give each an

[16] Clem Lloyd, "Not with Peace, but with a Sword! The High Court Under J.G. Latham" (1987) 11 *Adelaide Law Review* 175.

understanding of the other's strengths and also, of course, the weaknesses.

I was in Geneva for the United Nations Development Programme's Global Commission on HIV and the Law on the day of Roddy Meagher's funeral at St. Mary's Cathedral in Sydney. I was chairing a large session of what Roddy would doubtless have regarded as paid up members of the 'chattering classes'. That night, I walked by the lake thinking of him. And I repaired to John Calvin's little church, now Anglican, in rue Mont Blanc to say a prayer for him. Rest in peace my judicial brother. Your brilliant, sometimes angry and unfulfilled spirit can now be still.

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