

James Goudkamp - Justice Kirby - Interview Transcript

From: Dr Neil Cranston <n.cranston@uq.edu.au>
To: <JGoudkamp@hcourt.gov.au>
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Subject: Justice Kirby - Interview Transcript

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Dear James

Please find attached the revised transcript for the interview with Justice Kirby from last year.

Hopefully, I have picked up all the changes.

Thanks, and best regards

Neil

Associate Professor Neil Cranston FACE FACEL
School of Education
University of Queensland
Brisbane 4072 Australia
Email: n.cranston@uq.edu.au
Tel: +61 7 3365 6425
Fax: +61 7 3365 7199
Website: <http://www.uq.edu.au/education>
CRICOS Provider Number: 000025B

FULL TRANSCRIPT

Interviewee: This is an interview with the Honourable Justice Michael Kirby, Justice of the High Court of Australia, conducted in his Sydney Chambers on 29 November 2005.

Let me begin by suggesting that your fascination with leadership shows a psychological distortion in your life. You are constantly searching for leader figures. But leader figures have caused a great deal of trouble in the world and in history. We have to be very careful of them. In politics, at least, it is basically an anti-democratic notion. Leaders are temporary and they are not to be around for too long. They have to be subject to all sorts of checks and balances. I am, therefore, extremely sceptical about leadership. I want to get to the bottom of your psychological upbringing that has led you into this error of fascination with leaders. What is your answer to that?

Facilitator: I have an academic interest in it because I work in the area

Interviewee: That is what they all say. But I want to know what has really motivated you to single out this issue? You are not alone in this. There are plenty of people who do this. To everyone who comes to me to talk about it, I say the same thing. Be suspicious of leaders and of people who are fascinated by the Fuhrer-principle.

Facilitator: Your sentiments are shared by a number of other people about this.

Interviewee: I hope so.

Facilitator: But alternatively, they are able to identify people who have filled leadership positions that they admire. So can you take a different tack with your thinking and think of people who have been in leadership positions but have done good things?

Interviewee: I am just back from South Africa. I was there to honour the Chief Justice of South Africa who has just retired, Justice Arthur Chaskalson. He was a lawyer in apartheid South Africa: a lawyer who defended people like Nelson Mandela. Indeed, he defended him in his treason trial and saved his life. It is really unthinkable what might have happened in South Africa if Nelson Mandela had not been there. So Nelson Mandela would be one person whose leadership qualities I admire, most especially because of his sense of forgiveness and inclusion and kindness. There are people who, by their personal example, are deserving of respect. On the other hand he had many failings in his leadership, as he now acknowledges. He didn't give enough leadership on the issue of HIV AIDS. His son died recently and he reproached himself, as he has many times since he left office, about his lack of leadership on that issue. I think there are – is it three or five million South Africans who have been infected with HIV? The present President is positively dangerous in his leadership on the subject. This is because he is in denial about the viral causes of HIV. So that's the problem with leadership. It is chancy and it can be destructive and even in a very fine person with good motivation it can be intermittent. Nevertheless, Nelson Mandela, whom I have met a couple of times, is certainly a person who I regard as having rare qualities of example. They were terribly important in South Africa, as virtually everyone there acknowledges, for the transition to their present Constitution.

Facilitator: Is there anyone else?

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- Interviewee: You are getting me into the very thing I am not really all that keen about. Mary Robinson is a person I would name. She was the President of the Irish Republic. Her husband was a Protestant and she was Roman Catholic. My people were mainly, on my mother's side, Protestants from Northern Ireland. Therefore, I am very sensitive to the way in which that issue is handled. She handled it very skilfully in Ireland and was respected on both sides of the border. I think this came about because of the insights that came from her marriage. She was also a leading advocate at the Irish Bar in human rights causes. She was one of the lawyers for Senator David Norris who challenged the Irish laws on homosexuality. She became the High Commissioner for Human Rights of the United Nations. In that capacity, she spoke out courageously on human rights issues. So much so that her term was not extended. She was a clear example of uncynical dedication to the defence of human rights everywhere in the world for everybody and not just politically targeted and popular efforts. She was for the unloved, the oppressed. That is the sort of person that I like and leadership I like.
- Facilitator: What about yourself, because when my colleague, Lisa Ehrich and myself were talking about people that we would like to include in this investigation, we decided we would choose people from politics and law and sports and so on and your name came up very readily. I don't know a lot about the law, but Justice Michael Kirby has a distinction in the law in the Australia.
- Interviewee: That is just because I am on the High Court of Australia now and therefore I am one of the seven. If you are a lawyer or a law student, you have to read what I write. You must get it into your head and apply it in the cases. At least you have to do that where I am not in dissent. If I am in dissent, you can just ignore it, because the legal rules that Judges lay down are, at least in the short run, derived from what the majority writes. That is the legal principle. As for the rest of the community, I think most of them don't really know all that much about what I do as a Judge, because that isn't really understood or known by many citizens. However, over the years I have been in a lot of offices as Chairman of the Law Reform Commission and as a member of various community groups such as the International Commission of Jurists. This has exposed me to lots of audiences. Lots of long-suffering audiences all over the country who have had to put up with me expounding my views over more than 30 years. So I think that is why you get some degree of name recognition.
- Facilitator: But you don't get to be one of the seven unless there are some distinct qualities, so are you suggesting that they are only legal qualities that get you that position, or are there other things?
- Interviewee: Judges don't choose judges in this country. I hope they don't. Therefore it is not really entirely within my knowledge about why, or how, I was chosen. You would do better to speak to Professor Michael Lavarch at Queensland University of Technology, who was the Attorney-General when I was appointed. He could, if he chose, tell you what led to my appointment. I think it is often said that judicial appointment is like a very delicate gavotte which is played with people dancing around the chairs. Then suddenly the music stops and it is a question of who happens to be closest to the chairs. Your brother could tell you about how he was appointed Solicitor-General. It is the process, in the British tradition, of Executive appointment of high legal personalities. The system is fairly robust. It is not as it is now in South Africa where they have a Judicial Appointments Commission. They have public interviews of candidates. Then there is a process of appointment, among short

listed nominees, by the President. However, in Australia it is simply a decision by the Government of the day.

I expect that I was appointed by the Keating Government because I had a long track record as Chairman of the Law Reform Commission. In that record I had been involved in a lot of activities for the reform of the law and its improvement. I then demonstrated, as is the case, that I had concerns about the application of the law to ordinary folks and the understandability of the law to ordinary people. Those considerations and my public involvement in Universities and the like brought me to the notice of the Government. They probably led to my appointment, as well as my long judicial service in the Court of Appeal in New South Wales where I had served for 12 years before I was appointed to the High Court. Now, not everybody who is appointed to the High Court – not everybody who is appointed a Judge – has that sort of background. Most of them are barristers who are simply appointed because they are well reputed as barristers and have a lot of experience in appearing in court. I had a slightly different career path because of my early engagement, for a decade, in the work of the Law Reform Commission.

Facilitator: Can I just take you back to your quite strong negative views about this whole area of leadership?

Interviewee: It is not negative. I am just suspicious of leaders, especially political leaders. It is healthy and democratic to be suspicious.

Facilitator: Can you talk a little bit about that? Why suspicious?

Interviewee: Because I am not a fascist. Fascism, as a political doctrine, was built around the Leader. You saw that in Germany with the Fuhrer. You saw it in Italy with Mussolini. You saw it in Spain with General Franco. You saw it in all the tin-pot dictatorships of Latin-America. On the other side of the authoritarian spectrum you saw it in Russia with Stalin and the authoritarian regimes that mimicked the Soviet model. So the history of the last century, really, was a history that should warn all democrats of the need to be very careful of putting too much trust in leaders.

This is why democratic constitutions are, or should be, full of checks and balances. I am not saying that ours is now as full of checks and balances as it should be. The theory of it is that the government is elected from a majority of the Members in the lower House of Parliament. In theory, government is constantly accountable to the people and Parliament is rendered specifically accountable every three years, at the most, under our Constitution by ballot. However, the reality is that the Members of the Lower House elect a Leader who becomes the Prime Minister. He or she chooses a Cabinet. That group then becomes, effectively for three years, almost completely, though not completely, a kind of autocracy. There are checks that the Constitution appears to provide but doesn't always do so. Indeed, some observers say that the American Constitution, with its separated powers of the President, has more checks in reality than our Constitution. Once they are elected, it puts a Government into what is sometimes called an 'elected dictatorship' for a period. The interval lasts so long as the Government has the support of the Lower House. I think we have got to have a lot more deep thinking about what democracy is and what checks we can put in place. The infantile notion that the fact that politicians have to go once every three years to a ballot box and that everything thereafter is really rendered accountable to the people is ridiculous. This is because the people don't get consulted on all the detail of electoral mandates. Indeed, in the age of Madison Avenue, there is a positive

effort on all sides of politics to simply put out froth and bubble and not really to consult the people, at least in specific detail about the whole programme of the government.

All of this is about political leadership, which is the most important issue of leadership. This is so because it has the greatest influence on human rights and on the economy and the lives of ordinary people. It is in that area especially, that I think it is very important to conceive of checks and balances, whether they are in the legislature or in the courts, or in a Bill of Rights or otherwise, to make more accountable the people who get into the position of leadership power in politics. Experience teaches that this form of leadership can involve a power for good; but it can also be a power for a great deal of bad and even a lot of evil, as we saw in the last century. If we don't learn the lessons of the last century we will just continue to make the same mistakes.

That does not mean that there aren't people in other fields, like the church, who are good leaders. By their example and their teaching and expression, they give inspiration and encouragement and can see ahead and lead other people ahead. Similarly, in non-governmental organisations, to some extent in business, in the courts, and in the bureaucracy, you do get people who have a greater capacity to think about the future and to foresee where things are going. So that form of leadership, by example and by writing, by communication, is not as dangerous as political leadership. Of political leadership I am very suspicious and very cautious. History shows that I am right to be.

Facilitator: You might recall, in early correspondence with you, when you agreed to be interviewed, you sent me a paper that you wrote about leadership probably 10 or so years ago. One of the things I took from that was that you were quite interested in the area of distributed leadership, where a number of people take leadership roles. This area of distributed leadership has become very popular in the theories at the moment.

Interviewee: In theory, but not in reality.

Facilitator: What brought you to it so long ago?

Interviewee: I am interested in history. I hate to boast but in the school leaving exams, I came first in the State of New South Wales in Modern History. I should have been a historian, not a lawyer. In fact I feel very frustrated that I took that wrong turning in my life. I think anybody who lived through the 20th Century and didn't realise the dangers of an obsession with too much adulation of political leaders really must have been on a very heavy dose of – what did I have today in my colonoscopy? What was that stuff?

Facilitator: Valium?

Interviewee: A very heavy dose of Valium. The dose this morning must have caused me to forget the name. But a lot of people spend their lives on psychological Valium. They just aren't paying attention. In fact, things have got worse in recent decades. For example, we don't now see the Governor-General doing the kinds of things that the Governor-General used to do. The head of government has moved in. We have seen at least one State Governor put out of Government House. We see the accumulation of very great power in the Prime Minister by a symbiosis of the media and that office as it has developed. We see the move of key people from the Department of Prime Minister and Cabinet into the private office of the Prime Minister. We see

the reduction in the term of service of senior public servants. To some extent, as in the children overboard inquiry and other cases seemed to suggest, we now see a response of senior public servants that would not have been the response of senior federal public servants, even when I was first appointed in 1974. We see a reduction in the intellectual influence of the media. It now lives by handouts, emailed to them by ministerial officers. We see the effective disappearance of the town meeting face-to-face contact between politicians and citizens. Everything is now controlled and manipulated by electronic and, to a much lesser extent, print media. The interaction of politicians with media really calls the tune on the political issues of the day. We also see endeavours to appoint people to courts to ensure a consistent philosophy in the courts attractive to the government in power.

I am only repeating now points that were made by Paul Kelly in his Cunningham lecture. This was delivered for the Academy of Social Sciences in Australia in Canberra on 7 November, 2005. He portrayed this decline in the other sources of power and thus in the checks and balances since the imperium of the Leader has risen. Paul Kelly said that these developments really began in the Whitlam Government. But they have continued ever since. They are changing the Australian political landscape. I think Paul Kelly may be right in his description. It makes the courts, in my humble opinion, all the more important as guardians of the weak, the vulnerable, the poor, the unintelligent, the unpopular, the down and outs, the dissidents. My concept of democracy is a pluralistic one; a communitarian one in which there is space for everybody, within lawful limits. However, that is a notion that is not presently in the ascendant. Yet it is not a new notion. In fact it used to be the old orthodoxy. During Prime Minister Menzies' time, what I just said to you was the orthodox description of liberal values. The symbolism of the Crown; the entitlements and duties of Governors and Governors-General; the collective role of the Prime Minister; the true accountability to Parliament, which is another thing Paul Kelly pointed out has been reduced; the dual Houses; the interaction between them; and the role of the Public Service and the functions of the courts. These things have been changing. They have been changing in the direction of the leadership principle in contemporary politics. I don't think it is necessarily a change for the good. True democracies find a place for all people. That is what we need to re-build our political institutions. To the extent that, in politics, we are dazzled by the leadership principle, then we merely reinforce this political movement. I think it has gone too far and should be reversed.

Facilitator: Is this an Australian and an international phenomenon?

Interviewee: It may be. I think it is. It may be connected with the technology of modern media and the way modern media thirsts for visual leaders, simplicities and clear majoritarian democracy. A true democracy is one that respects the will of the majority but within the paradigm that protects the rights and dignity of minorities. Many countries safeguard that interaction by having a Bill of Rights which states basic principles by which everybody lives together. We don't have a general Bill of Rights in Australia, though we have some specific rights in our Constitution and also implications in the Constitution derived from the very nature of the polity. However, I do commend to you Paul Kelly's lecture. It didn't say anything new. Yet put it into a very short essay features that we all know of, if we think about them. It really explains why I am not mesmerised by leadership in the political field. Putting it quite bluntly, it has gone far enough. Of course, you need political leadership.

However, it has to be leadership which is shared and is subject to real democratic checks and balances. This is because we have all seen how political leadership, without those checks and balances, can be highly oppressive to minorities and sometimes to the majority as well.

Facilitator: I think underpinning what you are saying, if I am hearing you correctly, is generally strong notions of social justice and leadership.

Interviewee: I suppose that would be so, However, that is nothing surprising. That used to be the ethos of Australia.

Facilitator: I really appreciate your time, so I won't take too much more of it. Just thinking about leaders in other areas other than politics, say, in Australia, not wanting to name names, but are there people who you see out in the community – you talked a little bit about that before – in other areas? What are the sorts of characteristics of these people?

Interviewee: This is the difference between you and me. You are going around constantly asking yourself "Who are these leaders? Why do I love them? What can I learn from them? Why aren't I as good as they are? Why are they always so popular and on top and leading the way with the flag in their hands?" I don't think like that. I just believe, if one has something to give that is different and useful and forward looking, then it will emerge. It can happen at every level.

I go every month or so to have dinner with my partner and a group of volunteers who are working with people living with HIV. My partner lost one of his clients the other day. He died of AIDS. I see these people who are gay and straight; very well educated, the not so well educated; just volunteers; just ordinary citizens. They sit down together and they de-brief themselves. They share their experience and from their discussion obviously there will be some with more ideas. All of this is done privately and then I join them for dinner. Various individuals give a kind of leadership to the group. Similar leadership is offered at every level in some society. It is not oppressive. It is goodness by example.

Amongst Judges it is not easy to impose leadership. Chief Justice Barwick tried to do that when the High Court moved to Canberra. He tried to abolish the circuits by which the High Court regularly visits Brisbane, Perth, Adelaide, Hobart and sometimes Melbourne and Sydney. But the other Justices didn't agree. Just because he was the Chief Justice, he didn't get his way. He also tried to impose discussion about cases with a view to assignment of the writing of the decisions of the court. The other Justices didn't agree. Judges are very independent-minded people. The independence of Judges includes independence from each other. So the judiciary is not like a military operation with a field marshal on top. It is an important part of the very functionality of the judiciary that the Judges should be independent. A good Chief Justice by example, by hard work, by organising facilities and supporting the Judges, can get a lot out of them - more out of them. Occasionally, in a court, you get leadership from somebody who isn't a Chief Justice; simply because that person is more hard working or is more intellectually active or sets the pace with ideas, or is very good in court in asking questions of the advocates. All Judges make different contributions to a court. But in a collegiate court, leadership does not necessarily reflect the formal hierarchy. I have seen that in a number of bodies that I have served on over the last 30 years, including the courts.

Facilitator: Can I just finish by asking you, what would you have done if you followed your love of history? What would you be doing now?

Interviewee: I would probably be studying the Führerprinzip in Nazi Germany and trying to get to the bottom of how such a civilised country, the land of Beethoven and Goethe fell victim to that error. I had a by-pass operation this year and I was confined to hospital. I read books that I probably wouldn't have had time to read otherwise. One of them was "What we really knew" It was about the German people really knew during the Nazi period. So it was interesting to me to try and get to the bottom of the anti-Semitism, because the Nazis built a huge body of law and policy and oppression on the basis of hate of Jews, but also of Jehovah Witnesses, gipsies, gays, communists and other people who didn't quite fit into their notions of German society.

It was very interesting to me to discover that Hitler got very strong support from the Protestant churches, the Lutheran Church. Less so, at first, from the Roman Catholic Church. The support of the Lutheran Church was founded, in part, on a passage in scripture, in Matthew 27 verse 25. At the time of the offer to surrender one of them, Barabbas or Jesus, Pilate washed his hands and he said "I will not have the blood of this just man on my hands". But the Jews in the crowd said "Let his blood be on us and on our children" – that is St Matthew's gospel. It was that little passage that became the religious foundation of anti-Semitism. The hatred of Jews was thought to be based on the Bible. This is where high literalism of religion can lead us into error. You can have great religious leaders; you can have mighty Popes and Pontiffs and Archbishops and they can have charismatic power. They can be highly persuasive. They can be leaders. But they can do an awful lot of damage. We should, therefore, accept leadership where it is good and kind and sharing and concerned for others who are not necessarily like ourselves. But we should be very suspicious of political, religious and other leadership where it disunites and can lead to hate and discrimination against vulnerable minorities. I am not in favour of the latter type of leadership at all.

Facilitator: Thank you so much.

Interviewee: I hope that my scepticism will be a suitable antidote; an anti-venene against any excessive enthusiasm about leadership as such. Leadership, at least political leadership, is a magic potion to be taken with care. Its consequences need to be watched. Those who take it need to be sceptical and to change the dosage often, for sometimes in the past it has been a concoction that has proved fatal.

END OF TRANSCRIPT