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KING'S COLLEGE LONDON

THE DICKSON POON SCHOOL OF LAW

SATURDAY 26 OCTOBER

INTERVIEW WITH

THE HON. MICHAEL KIRBY AC CMG

INTERVIEWER: DR ELOISE SCOTFORD

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Q: Michael Kirby, thank you very much for talking to me today about some of your experiences as a Justice of the High Court of Australia. There are some notable statistics about your time as a judge: you retired in 2009 then as the longest serving judge in the Australian judicial system, your dissenting rate in the Court's judgments was also notably high (around 40%, depending on what baseline you adopt) [thanks to Michael Kirby for correcting these statistics]. You have also had an active role as a jurist beyond your judicial function. You have sought to explain and comment on your role as a judge within a broader social context, both whilst as a sitting judge and after retirement. Today, we are hoping to capture a sense of your experience as a High Court judge from your perspective, looking beyond on the statistics and some of the more formulaic descriptions or critiques of your time on the Court.

A: As a point of clarification, my dissenting rate depends on what you take as the base. If, for example, you include all of the cases that had to be considered in special leave applications, which is an extremely important part of the work of a Justice of the High Court of Australia, my dissenting rate was miniscule. On those matters, which numbered thousands, there was virtually no disagreement between the Justices. We knew the types of cases that were suitable for special leave and those that were not. The rate of 40% that is spoken of concerns (I think) constitutional cases in late years. It is inevitable that in constitutional

[*] Justice of the High Court of Australia (1996-2009); President of the Court of Appeal of New South Wales (1984-96); Chairman of the Australian Law Reform Commission (1975-84).

cases there will be, and perhaps should be, greater disagreement because that is the most important and central function of the court. And it depends on what period of time you take in measuring the rates of dissent. I think the concentration on the level of dissent was an endeavour by some commentators, particularly in the popular media, to inflict disempowerment on my decisions. I am therefore not very happy about that use of it. However, the duty of judge of our tradition is to state his or her own opinion on the law and to do so honestly. More surprising than my rate of disagreement is the lack of disagreement amongst other Justices, given that you do not get cases into the High Court of Australia, generally, except by the process of special leave. And such leave is not granted if the law is clear and if there is no legitimate ground for a difference of view. Therefore, I think you can exaggerate the disagreements that existed. But some degree of disagreement is inevitable, proper and healthy.

Q: That leads on to the question I wanted to ask you – how would you describe the cases and kinds of legal questions that end up being heard by the High Court of Australia?

A: To some extent, that is defined by the criteria for the grant of special leave. The considerations that are relevant to the grant or refusal of special leave were explained by me in a very useful article published in the University of New South Wales Law Journal.[1] It analysed the type of considerations that the court has identified. They include: the difference of view in the intermediate appellate courts in Australia on the particular issue in question; the existence in the particular case of a dissenting opinion which highlights and clarifies a serious matter for consideration; the existence of an apparent or possible arguable injustice in the case; the amount of money at stake (which was the traditional, statutory provision which pre-existed the universal special leave system); and (in practical terms) the interests of the Justices in a particular area of the law.

[1] Michael Kirby, 'Maximising Special Leave Performance in the High Court of Australia' (2007) 30(3) *UNSW Law Journal* 731.

If you contrast the type of work that the High Court of Australia does today with the type of work it did when it had criteria of the amount at stake in the case – the traditional Privy Council criteria – then you see that nowadays relatively few contract cases get to High Court of Australia. Relatively few cases involving wills and estates get there. Most High Court cases concern legislation, because that is now the principal source of law. Indeed, most of the cases concern federal legislation. That is also possibly because of the interests of particular Justices who sat at the gateway and refused or granted special leave. So these are the type of considerations that influence the admission or rejection of cases into the court. But, in deciding on those matters, there was relatively little disagreement because, over time, you get to recognise a case that is a type of High Court case. Although there were occasional differences, and they were then often expressed, mostly the Justices agreed on whether or not a case was suitable for special leave.

Q: In the context of those being the cases that end up in the High Court, what did you see you role as a Justice of the High Court?

A: My role, in accordance with my oath (which I think was the ninth such oath that I had taken in my life) was:

- To decide the cases before me with impartiality and independence. That independence includes independence from other Justices;
- To be courteous in listening to cases;
- To be inquisitive, so that due process was extended to the parties and to the barristers, so that they knew what was going through your mind and that you didn't sit there, like a sphinx, but you opened your mind to the advocates so that they could influence your decision if they could; and
- To remember that behind lawyers, with their different levels of competence, were litigants who trusted you, as one human being with a commission, to decide the case and to do so impartially and

fairly and with a full appreciation of the relevant principles of law and of the facts of the matter.

Q: What is the role of values in applying legal principles, and interpreting legislation and the Australian Constitution?

A: That is a very important question. In fact, values profoundly influence the way in which a judge approaches the resolution of a case. This was taught to me in my own years at law school by Professor Julius Stone. Some judges like to think that their values are irrelevant and that they play no part in their determinations. I never thought that and, from law school days, I knew that I had to be conscious of my values and had to reveal them so that they could be the subject of submissions and criticism and engagement with the advocates on behalf of the parties. If you look at the types of cases where there were disagreements, cases like *Garcia v National Australia Bank* (1998) 194 CLR 395, over the special privileges of married women in relation to contracts. If you look at the cases concerning prisoners' rights, *Roach v Electoral Commissioner* (2007) 233 CLR 162. If you look at differences in a case such as *Wik Peoples v Queensland* (1996) 187 CLR 1 about aboriginal rights. In all such cases you can see some patterns in the matters upon which disagreement existed and those patterns point to values.

I was always more conscious than most of the fact that law was an imperfect instrument of social control. As a young man, I myself had been the subject of the injustice of the law, because the law told me that, as a homosexual person, I was a criminal. Therefore I never had a starry-eyed, dream-like attitude towards the law. I had sceptical and critical view of the law. My duty was to apply the law, and if it was clear and constitutionally valid, I applied it, even where I disagreed with the outcome. But where there was a margin, or a leeway, for choice (as Julius Stone described it), I would try to expose my values as relevant to the case. I would endeavour to reach a conclusion that was consistent with legal principle and doctrine, but also, so far as I could make it, just and well informed on the facts and merits of the case.

Q: Do you think there are too few judges on the High Court of Australia?

A: For a country with a population of only 23 million, I don't think that 7 is too few. Physically, there is room on the bench of the number one court [High Court] for two more justices, which would put us in the same league as Canada and the United States of America. The United States of America has a population more than ten times the size of Australia. Thus, if you look at it in terms of the workload per capita of the population, then the High Court of Australia serves the people of Australia very well and comfortably. Maybe you should reduce the number of justices and not increase them. So I don't know that a case is made out for an increase in the number of the Justices.

There is probably a better case that the High Court should do more, that it should take more cases, that it should decide more matters. If you look at the pattern of the number of cases coming to final courts – the House of Lords (now the Supreme Court in the United Kingdom), the Supreme Court of the United States, the High Court of Australia - they've all fallen off in recent times. The workload of the judges in the Court of Appeal in New South Wales (where I served for thirteen years before moving to the High Court of Australia) was much greater than that of the High Court of Australia. Some of that workload was routine. But many of the cases went on to the High Court of Australia and were quite difficult and important matters. We were a very happy court in the New South Wales Court of Appeal. I cannot say the High Court of Australia was, during my time or was typically during its history, a happy court. I am not sure exactly why that is; but it may have something to do with workload. When judges are busy, and the great machine is humming away with the technical skill and energy of a Rolls-Royce, then everybody seems to be able to get on well together. You are so busy that you do not so readily allow ego to intrude into the relationships between judges. You just get on and do your work. That was really what the New South Wales Court of Appeal did. It was a very hardworking, energetic and congenial place.

Q: What would you identify are say the three most important cases in which you gave judgment in the High Court and why?

A: Well, that is a question I am often asked, and I think it is a really rather misleading question. I may have been naïve, but I found many of the cases important and most of them of great interest. People ask me, repeatedly, what was your most important decision? What do you think is the most interesting case? Well, I liked them all!

Q: I've got another and perhaps better question: why do some particular constitutional cases have a high public profile and others less so. The two cases that I would put against each other to demonstrate that, which I as a lawyer think are equally important, are the much celebrated case of *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (or equally *Wik*) in the native title context and a case like *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 which is more technical but very fundamental constitutionally. So the question is: why do some cases have a very high public profile and others not?

A: Well, you have answered your own question from the point of your interest. But there would be lots of other questions. I would possibly choose a case like *Green v The Queen* (1998) 191 CLR 334, which related to the so called panic defence in the murder of a gay man – the murder of the only man who had been kind to the prisoner. Or the case of *Roach v The Electoral Commissioner*, which related to a matter very controversial in the United Kingdom at the moment, of the right of prisoners to vote in elections. So it all depends on your perspective and what things are important to you in the law and in life. For me, the vulnerability of little people and their protection by the law, and the capacity of the judges to be sufficiently empathetic and understanding and to see them as having entitlements in the law, these are matters that are important to me. But I agree with you, that both of the matters you mentioned – *Mabo* and *Wik*, and *S157* – were important cases. The first

because it did involve a particularly vulnerable group that had been denied full legal equality without too much questioning by the Australian legal system for 175 years. And the other because it restated and emphasised the principle of the rule of law and the duty of the High Court of Australia to respond to judicial review with vigour and to resist to the attempts of the Parliament to cut such relief down. Fortunately, in a written constitution, a federal constitution, and with the provisions in section 75(v) of the Constitution, that is something the High Court can and does insist on. It does so with a unanimity that is very pleasing, because it is central to the role of the Court as the guardian of the Constitution and of the citizens, (and non-citizens) of Australia.

Q: You have often drawn on international human rights law in deciding cases, like *Al-Kateb v Goodwin* (2004) 219 CLR 562. Did you see international human rights law as a strong source of authority for your reasoning, or as something else?

A: I saw it as a source of inspiration, guidance and, where relevant, of authority. Professor Ian Brownlie, late of Oxford University, had a very good insight. He pointed out that, in the modern age with the great proliferation of international law and the growth of international legal principles, we are never going to have enough international courts and tribunals to service that law. That being the case, Professor Brownlie made a point, which is comprehensible to Australian lawyers, domestic/ municipal courts are in a sense exercising an international jurisdiction by dealing with matters where international law has some relevance to the case. That is the way that the interface between municipal law and international law is likely to develop in the future. Young people generally see this; older people may not. They grew up in a time when international law was the plaything of princes. They maybe hostile to the role of international law. Somehow we have to reconcile the growing body of international law with the municipal legal system. Younger people, younger lawyers, in Australia I think understand this. That was a perception I gained as a result of participating in the Bangalore series of

judicial colloquia,[2] with judges from all over the Commonwealth of Nations. It is a pity that some of my colleagues on the High Court of Australia did not get out and about a bit more and, did not engage with the academic community and with the international law community. Generally they did not. They were rather self-satisfied. Most of them thought that Phillip Street, Sydney, Australia was probably the centre of the earth. Well it's not. The world has moved on and the courts have moved on. I thought that this insight was something in relation to which I could add value to the High Court of Australia. I'm sure I'll be vindicated on that (and on many other things).

Q: Finally, you're here at King's College London this weekend to meet with an eminent group of legal academics and jurists to discuss the law and climate change, including climate change litigation. What do you see as the particular challenges for judges, or indeed the law, in dealing with cases that have climate change aspects?

A: As I said at the very interesting seminar at which you presided last night, it's a great pity there weren't some more judges there. There was a judge from the Hoge Raad der Nederlanden (The Supreme Court of The Netherlands). However, otherwise there were no other serving judges present; and I'm not a serving judge now. I think that's a pity because: a) it's a very interesting subject; b) it's an extremely important subject; and c) there is work for lawyers and courts to do. The work of lawyers is not the most important work on the subject [of climate change], which has to be done in legislatures. Still, there will be an increasing flow of cases on this subject as its significance for humanity becomes clearer. Certainly yesterday at the meeting of the Expert Group on Climate Obligations and law – which is working on some guidelines in the area – we were shown that the statistics relating to the climate change impact of greenhouse gas emissions. It is an extremely serious matter. It's a serious matter for Australia, with its huge costal

[2] Michael Kirby, 'The Australian Use of International Human Rights Norms: From Bangalore to Balliol – A View from the Antipodes' (1993) 16(2) *UNSW Law Journal* 363.

borders. It is a matter that is existential to many island states and countries that are low lying such as Bangladesh and Tuvalu. Climate change is going to affect hundreds of millions of fellow human beings. Therefore it is a great privilege to be involved in discussion of such matters.

It would be a good thing if judges of final courts were made aware, or made themselves aware, of these developments, because these developments are the background against which judges have to decide many cases, most of them infinitely less important than the matters that I have been discussing at King's College London School of Law this weekend. As a judge, I always went to as many academic conferences as I could. I like academics; I was a bit of an academic myself, or a frustrated academic. I enjoyed the interplay of dialogue and new ideas. I like the stimulus of new ideas. The [interplay between previous understandings of law and new ideas] is central to the role of a judge. Particularly so in a final court; but also of other, intermediate, appella