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A LAW UNTO THEMSELVES

INTERVIEW

THE HON. MICHAEL KIRBY AC CMG
INTERVIEWED BY BARONESS HELENA
KENNEDY QC

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Helena Kennedy:

The Honourable Michael Donald Kirby is not your ordinary run of the mill judge. In a profession that is most commonly marked by conformity and deference to legal precedent, Michael became known as the “great dissenter” during his 13 years in the Australian High Court. Which is actually Australia’s Supreme Court. Voting against his fellow judges, in a remarkably high percentage of cases. I know you probably want to put that aspect of his reputation in context. But during his time on the Bench he repeatedly did the one thing that judges are not supposed to do. He expressed his personal views outside the courtroom. Over the years he spoke publicly on an enormous range of social, political, scientific, economic, religious and humanitarian issues.

Without ever bowing to pressure to conform, Michael rose to become one of the most respected legal figures in Australia, with a towering reputation internationally. And then he revealed that he was gay. Admitting to being in a long-term same-sex relationship which stretched back to before the decriminalisation of homosexuality in his home State of New South Wales. Campaigning for gay rights in an innately socially conservative country has

become a key challenge in his life. And brought him into conflict with politicians, the church and even his fellow judges. More recently he has taken on the equally daunting task of fighting for human rights in North Korea.

HK: Michael, over the years you have been described as too conservative, too radical, a monarchist, a parliamentary supremacist, a populist, a nationalist, an internationalist, religious, secularist, a humanist, ...

MK: It makes me exhausted. I had no idea I had been accused of so many crimes!

HK: Will the real Michael Kirby please stand up?

MK: Well that is the secret of this broadcast. We are going to reveal all. The whole sordid story.

HK: At university Michael, you did all sorts of things. You got friends off charges for evading their train and bus fares, we have been told.

MK: Yes, and many of them rose to be judges. Shocking isn't it! Shocking!

HK: Later as a lawyer, you defended students who had been arrested for staging protests against various things. You were the sort of Atticus Finch of the New South Wales civil liberties scene.

MK: I was, I was lovely in those days.

HK: *Your brother David, who also went on to become a senior judge, says that your family always had great expectations of you.*

David Kirby:

“It was assumed by all of us that Michael would go far. Indeed we all thought that he would ultimately be Prime Minister. We are still getting over the disappointment that he only managed to make it to the High Court.”

HK: *So getting to the highest court in the land was, sort of second best was it?*

MK: Well, I never really never got involved in party politics. But probably, if I had not been gay, I may have done so. But it really was not feasible if you were gay. Unless you were prepared to be completely dishonest and pretend. Really, I was not into that. I thought that was pretty pathetic. And very early in my life, at the ripe old age of 30, I found Johan, my partner and so we became a couple in the suburbs. Some judges said to me later on; “Oh you should have told me, I thought I was your nearest and dearest” and “it was so shocking, you know I am such a humane person”. Well most of them I was not so sure. But in any case, in the end we resolved that we would be completely open and if people had a problem, it was their problem and they had to get over it.

HK: *In the end, you have been together for 40 odd years?*

MK: 45 years.

HK: *I have to ask, in the beginning, why did you go into the law? What was your motivation for going into law?*

MK: There are two theories. One is, I said when I was about 7, that I wanted either to be a bishop or a judge. So one theory was that I was into fancy dress. I therefore had to get into a job where that was possible. But the other it was a process of elimination. The things I was really good at at school were English, modern history, verbal sort of things. And the things I was not so good at were things relating to science and mathematics and getting your sums right and so on. So for the congeniality of getting into a job where you were actually paid for the gift of the gab, that seemed to me to be heaven. And so I found the law.

HK: *Yes, that was the appeal for me too. But in that long period, that long, long lasting judicial career, you really did make many decisions where you actually gathered the reputation of being the great dissenter.*

MK: Well, it was a reputation really cemented in the period that I was on the High Court of Australia. Actually, if you look at the period in the Law Reform Commission, I was the Chairman of the Commission, I never dissented and we all got on well and we decided things almost always unanimously. So, that was not a period as the great dissenter. Then when I went to be the President of the Court of Appeal of New South Wales, my level of dissent was quite ordinary and average and what happened was I was appointed to the High Court of Australia, the Howard Government came into office. Generally speaking, in Australia, I do not know if it is true in the UK,

conservative governments are much more careful in their appointments of judges. They know how important the values of judges are, especially in the higher courts, for their decisions and they appointed, and said they were appointing, capital “C” conservatives who would be capital “C” conservative judges. Here I was a sort of a relic of an earlier time. What was I to do? Was I just to tag along with the others? No way. I was going to give my honest opinion. One of the great achievements of the English legal system is the right to dissent, and indeed the duty to express your sincere and genuine view. Not to do a trade-off with your colleagues. You give me this one, but I’ll give you the next one, but to give your honest view. The people out there know that the judges may sometimes be conservative. But at least you are getting their honest opinions and I think that is a very great strength about our legal tradition.

HK: *And you are talking about the common law tradition which we exported with colonialism. And so when you talk about the English system, you are talking about that.*

MK: By contrast, to the civil law tradition, where in most of the civil law countries, the judges cannot dissent. The judges on the Le Conseil Constitutionnel in France cannot dissent. Indeed, they had a debate whether they should want it, and they said “no, we do not, we like that everybody has to say the same thing”.

HK: *It was partly linked to a greater understanding of injustices that the Aboriginal community had experienced and so on. Many of the issues seemed to be about liberty and freedom. I mean things about, you know,*

locking people up, detaining people after they had served their sentences, because parliament had wanted judges to do that. The figures I have seen given is that you gave a dissenting opinion on nearly 40% of the matters in which you participated. You did have that sense of independence of mind, and you did say it as your saw it. Would that be right?

MK: Well, I think there is a lot of truth in that. What is surprising I insist that the other justices did not see that there was more room to express differing opinions. It is hard work writing an opinion in so many cases, where you either do not agree with the reasoning, or you do not agree with the reasoning and the outcome. It is hard work, and it adds to your labours. But as I conceive it, it is your duty, if you do not agree, you either bite your tongue and pretend you do agree, which is something I would never do. Or you get your pen out and start working on explaining why you do not agree.

HK: *And this often the hard course to do it that way.*

MK: Why doesn't it happen as much in England? I mean I do not want to turn this around into an interview of you Baroness, but I mean there seems to be a much greater willingness to go along, or to show some sort of restraint even though it involves pretending you are agreeing with something really you in your heart of hearts you do not agree with.

HK: *That is an interesting question, and it may be rather, perhaps because of our proximity to Europe, we are becoming more inclined to looking for consensus that maybe people do not like stepping out of line. They kind of*

feel an urge towards creating this unity of opinion and that a divided court sends out poor messages. It may be about that.

MK: It may also be about the relatively stable source of the people who are appointed to the higher judiciary in the United Kingdom. The fact that so many come from Oxford and so many come from social backgrounds which are very common now. In Australia, I think that is less so and certainly in my own case, it is less so. My entire education was in public schools, that is to say...

HK: *State schools?*

MK: the local schools were provided in the universal public education system that was introduced in the 1880s across the whole continent of Australia. One of our great achievements. And 70% of Australians are educated in those schools and yet, virtually during the entirety of my service on the High Court of Australia, I was the only justice whose education had been entirely in the State School system and if you appoint people from private school backgrounds and from Oxbridge and from an experience in life of big commercial cases, where they are mixing with the big end of town, then you would be surprised if a person stood out and occasionally disagreed and had a different view about liberty. If you add to the ingredients my sexuality, which had taught me at a very young age, the law is not always just. Law is sometimes seriously unjust. And it is sometimes seriously unjust and oppressionable. I mean you have a view that this is ridiculous, and one should do within the law what one can to make it more just and more rational. That is what I tried to do. I fear that maybe in response to my opinions I

galvanised a sort of conservative reaction and that might have been an unfortunate, certainly unexpected or undesired, consequence.

HK: *It is interesting, there are people who would say, 'why should it be a woman or being a gay man, or being a person from an ethnic minority, why should they judge any differently? Some people would argue they do not.*

MK: Some do not'. And indeed we both know women judges who are struggling to be as tough on things as the males. And to be seen as such. So that gender does not necessarily make a difference and sexuality, I have known lots of gay judges, most of them are not open about their sexuality but really members of the inner sanctum of the club. But in my case, I think I was affected by the fact I had at home every night, I went home through my whole public life, my partner Johan. Now Johan is from the Netherlands. He does not share the Anglo Saxon view about a 'good chap' and respectability. And when I would discuss cases with him, he would say "does the law say that!" and he would be shocked and horrified. That at least made me think again. Often I could do nothing about it. I want to make it absolutely clear that if the law was clear, the law was constitutional, I conceded it was my duty to obey the law. I was not there as a sort of a Scarlet Pimpernel who was changing things on the run. I do not agree with that at all. I do not think that is right. But I do admit that my background, my experience, my education and my sexuality have an impact on your values and values are critically important. The higher you go in the judicial ladder the more important are your values because in the spaces that are left in the ambiguities of law statutes and in the spaces that are left in the common law, that is where value matters and they can be decisive.

HK: *When you declared publicly that you were a gay man, on the one hand you were obviously greeted by those in the gay community and many people wanted that kind of openness, but you were confronting deeply ingrained prejudice. John Dauth, the Australian High Commissioner, he is now retired, but he was a great diplomat, who himself is openly gay, spoke to us about the effect you had.*

John Dauth:

“Coming out in the way in which he did was a real act of bravery by Michael and flew in the face of quite deeply ingrained social prejudice. But he chose to speak out in a very considered and careful way. And in a sense gave real respectability to the gay community.”

HK: *Many people did say it did make a huge difference to the general public and to attitudes in Australia. Did you feel that at the time?*

MK: I hate to say this, but it was really my partner, Johan, who said, “How long are you going to be in public office?” He is very, very, blunt. The people of the Netherlands are not at all courteous like we are! They are very in your face. And so I would come home from a hard day at the office, and I would sit down, and I would want my piece of fish and he would say, “How long are you going to be in public office? We owe it to the younger generation to stand up.” And I would say, “Oh no, no I have got another 20 years and I am going to do this and that. And he would say, “No, no we have got to be much more open and honest.” We were honest in our own circle. Lawyers knew. Lawyers are great gossips.

HK: *What about the press? What about the tabloid press?*

MK: The game was a game of do not ask, do not tell. If you played that game, you would be left alone. And that is something, which in the end, we were no longer prepared to play that game.

HK: *But your stands on gay rights did bring you into confrontation with the churches.*

MK: Yes, but you know, my partner is totally opposed to religion. He says to me at night, "I cannot understand that one of the most intelligent people in this country can take any of that stuff seriously."

HK: *He is talking about you!*

MK: He is talking about me. And I having been brought up as an Anglican, I was brought up in the marvellous liturgy, I was brought up with the beautiful music and the marvellous ceremonies and I am perfectly comfortable in the simple Sydney Diocese, Protestant, Anglican tradition. Which by the way, can be pretty intolerant and on the whole, I am quite happy about being an Anglican. Which of course, causes great grief on the part of some Anglicans and other Christians. And other religious people. They think it is outrageous that a person who is homosexual and associating themselves in their own words with the church. That is just me.

HK: *But one of the awful moments for you publicly was when a Senator, Bill Heffernan used Parliamentary privilege to accuse you of misusing your car entitlements as a judge to pick up young men and so on. And it was all lies. He didn't, from what we understand, he did not know that, and the evidence turned out to be forged. The stuff he was relying on. He had to apologise. But it must have been a pretty awful time for you.*

MK: It was but on the other hand, that unless I had sort of cerebral incident, and had quickly forgotten, confused myself or that I had done these acts, I knew that it was all rubbish. And so I was sitting in a case about effluent. It was a big case about the law of negligence and about poo in the Brisbane Waters, North of Sydney. People got sick from the oysters. So the question was who was liable. So I just sat on in this case whilst this story unfolded for a week until some of the politicians who were alleged to be on the same docket of the official cars began to look at their diaries and found they were overseas, or they were interstate or somewhere else, so the who shabby story came unstuck. But it was not pleasant.

HK: *And it was homophobia, and it was an attempt to bring you down wasn't it?*

MK: Yes, definitely. But it was done in retaliation, I think... people could stand you being gay in Australia at that time. They could tolerate that. They could put up with it, so long as you were silent and deeply, deeply, ashamed of yourself. Well, we weren't ashamed of ourselves. We had been together, at that stage, for 40 or 30 years or so. And therefore that gives you some strength you know in your life. When you have a loving family, a very

supporting... my father was still alive, and my brothers and sister rallied round. We got through it. But it wasn't nice. Though the outcome of it I think ironically has been quite different from what was intended by the good Senator because people could then begin to see that this is what madness and homophobia leads to. I mean it is only 4%,5% or 6% of the people in every country are sexually oriented in a different way. Well, get over it. It is not such a big deal. And it is about time we got rid of all these stupid laws and discrimination and just let people get on with their lives.

HK: *Michael, you are regularly described as being a judicial activist. Now we lawyers know that is a slur when it is produced to attack judges. Are you a judicial activist?*

MK: Well when there is a need for some activism, I'll give as good as the next judge. I mean, every judge... where did the common law come from? It came from those books and they were books dealing each generation, each decade, each year with some new problem that had not arisen before and the judges by a process and analogous reasoning go back to the old case and they would find the principle and they would try to adapt it and stretch it. That is the whole way the common law developed and to say that the common law is without any degree of activism is a complete denial of its history.

HK: *It will come as a surprise to some people who are listening that, imagine that somehow there is this neutrality and there is some sort of objectivity and there is some way of reaching a decision. Which is not about bringing values into the process.*

MK: I am sorry, they have to be told. I mean, when judges go in and hear a case and they come out, whether they are conservatives or if they are liberals and there is a spectrum of opinion, when they come out, they go straight to the jugular in their little discussion with each other in the anti-room of the court. And they go straight to the judgments. They will list cases really about 'dot dot dot' to fill in the space. The 'dot dot dot' is about the big issues of principle which is raised by the case. And if judges of a final court, or even judges of an intermediate court, an almost final court, do not do that. In my opinion, they are not doing their job properly.

HK: *You have not eschewed the public eye. For example in 2007, you alongside a hip hop artist, you performed a rap about W.B. Yates poetry. And so you know it was kind of unusual judicial conduct.*

MK: I do not see why. Do not all the judges do a rap every now and then?

HK: *I would like more judges to do that. But we have not seen much of that here yet. But there are people who think that that somehow runs against the dignity of the Bench.*

MK: Well, I was always conscious of the dignity of the Bench. And I was always very conscious of party differences. I never commented on those matters. And even today, and I am no longer a judge, because I was a judge of the highest court, so I steer clear of party differences and I think that is a rule of prudence which judges should observe. But I do not think it is inconsistent for judges, for example, as now, I am not a judge, now that I

would have given this broadcast if I was a judge. To explain to citizens, citizens have a right to know how judges have to decide cases and the complexities of it. And the naive superficialities of the explanation that judges should just apply the law. Judges of our tradition have the right and duty to give meaning to law and they are independent. It is my proudest boast that in my 34 years as a judge, I never once got a phone call from a Minister to tell me how to decide a case. I never had pressure applied to me by any external force. And it is the same here in the UK. That is a wonderful thing. It was preserved. But it doesn't mean that judges are a value free zone. They have values and it is very important they should be honest about it and open about it.

HK: *Michael you have now much more into the international terrain and you are very active in the International Bar Association on the Institute of Human Rights and I have a great privilege of working with you there. But you also recently worked for the United Nations. You were appointed by the Human Rights Council there to inquire into the human rights abuses in North Korea. And you wrote recently a very powerful report condemning the conduct of this totalitarian state and its gross human rights violations. There are commentators, well there is certainly one in Australia, who was saying, that you know, what do you think that this going to achieve? And that it is rather kind of ... there is an innocence about it all, thinking that is it really worth him doing this sort of thing?*

MK: Well fortunately, he is not going to be taken out and shot like Uncle Jang was. We are now people who different points of view. He had a view and he is entitled to his point of view. But his point of view is just plain wrong.

I did not have the luxury to say “Aw, I am not going to touch this because it is political. I am going to leave this because I do not want to upset North Korea”. That is the political game. That is the game that politicians and diplomats and others are paid to play out and are accomplished in doing. But that was not our responsibility. We just had to make findings and reach conclusions and that is what we did.

HK: *Was the evidence some of the worst you had ever heard?*

MK: Definitely. I mean I sat through so many murder appeals and cases of cruelty, violence and abuse. But all my experience had not prepared me for the sheer horror of the state that was revealed in North Korea and I have to admit to you that I thought I was a pretty tough old nut but on three occasions I just wept because of the stories of the victims and the unforgiving society and that is what we have to change if we are serious about universal human rights. It’s what we have got to address and change.

HK: *Geoffrey Robertson, the Australian born, but British practicing QC says this about you Michael:*

“He had two qualities that were remarkable for a judge, firstly he was a law reformer he cut his teeth on law reform. He was head of the Law Reform Commission. And secondly, he was gay and he came out. That gave him the perspective of a minority group. It gave him a real visceral understanding of how law and non-discrimination law in particular was important for different groups of people. So, I think those qualities marked him as someone who was particularly able to bring

the law into the 21st century and into a position where it could better advance human aspirations.”

HK: *Michael, I always remember over a glass of wine, you saying to me, love is at the heart of good lawyering. Love is at the heart of good judging.*

MK: Yes, and love is certainly at the heart of human rights. I mean, do we rabbit on about human rights of other people. Including the case of say North Korea. People we have never met and will never know and do not even know we are working their human rights. It is because we know enough about ourselves and our lives and our relationships and the things that are really important. When we get into bed at night, and we are putting our head on the pillow and we are all alone with our thoughts, the things that are really important are our closest loving family. Our partners and our parents. That is why we respect human rights and others because we know it is so important to ourselves not to be the subject of hostility and discrimination. And not to be the subject of violence and wrongdoing. That is why I have always thought that Eleanor Roosevelt was a very well-placed woman to help write the Universal Declaration of Human Rights. She knew what love meant and I think that is what human rights is fundamentally about. Love for one another.

HK: *Michael Kirby, thank you very much.*