

INTERVIEW OF JUSTICE MICHAEL KIRBY

BY CLAIRE LOW

JOURNALISM STUDENT AT THE UNIVERSITY OF CANBERRA

MONDAY 5 SEPTEMBER 2005

CL: I am talking to High Court Justice Michael Kirby.

RADICALISM ON THE BENCH

Some people consider you to be quite a radical Justice, and think that you must be something of a thorn in the side of conservatives. How did someone such as yourself come become appointed into quite a conservative arena?

JK: Well first of all I would dispute that I am a radical judge, or a thorn in the side of conservatives. If people think that, that's their entitlement. But that's not how I conceive of myself. I see myself as quite conservative in some respects. I have a deep commitment to the rule of law, which is conservative. I have a strong commitment to the principles of law. I am still an observer of my religious upbringing, and that is quite conservative nowadays. I did not favour the change of the Australian Constitution to establish a republic, believing, as I do that the constitutional monarchy is (especially with an absent head of state) quite a successful system of government. So, I am not particularly radical, by the standards of radicals. In fact, I am rather tepid in radicalism.

As to how I got appointed, I had served at the time of my appointment to the High Court in 1996, for 20 years in various judicial positions. I'd served for more than ten years as President of the New South Wales Court of Appeal. That is a very busy appellate court. Plenty of lawyers and judges had the opportunity to see my work in that court. I was appointed by the Attorney General in the Labor Government, Mr. Lavarch. But I hope and expect that my appointment was on the basis of my legal experience, which was at that stage very substantial.

IDENTITY CARDS AND TERRORISM

CL: The Australia ID card has recently resurfaced in the media. I understand you were once quite outspoken about it. What are your thoughts on it as a supposed anti-terrorist measure?

JK: I'd have to see exactly what was proposed. The argument against having a universal identity card is that once you have it, all sorts of officials will demand, and probably get, the right to stop people and demand that they produce their card. The way this happens can be seen if you are a tourist in Europe, not travelling in the upper echelons but travelling in the poorer student-like echelons. Once I travelled overland with my partner from India to England. At one stage we returned our Kombi van to Genoa for shipping back to Australia. I then hitchhiked for the first time in my life from Genoa back to the Netherlands where my partner's family were. In the end, we gave up hitchhiking because it wasn't very successful. So we travelled by rail. That put me into railway waiting rooms. And both in Switzerland and in Germany, I was constantly harassed by officials demanding the production of my identity papers.

That is something we don't have in Australia. And until now, they haven't had it in Britain. It's been a feature of most English-speaking societies that you go about your life without being troubled by officials. As to whether we need some new protections to respond to the dangers of terrorism, I would have to be convinced that giving everybody an identity card would be an effective way to make that response. It would seem to me that there would be other more effective and well-targeted strategies to take.

Essentially, the struggle against terrorism is going to involve the use of intelligence, rather than harassing lots of old ladies and gentlemen in railway waiting rooms. So as a citizen, I remain to be convinced. If, however, it was enacted by the Federal Parliament and if it was valid, of course I would enforce it. But I am not sure that would be a well-targeted response to the dangers of terrorism. And it would certainly have a downside from a civil libertarian point of view.

A BILL OF RIGHTS IN AUSTRALIA

CL: Certainly. To continue in this thread about terrorism, in light of the new ASIO bills which seem to take away a number of rights, supposedly to protect people, do you think that more than ever we need another Bill of Rights to make sure these new ASIO powers aren't abused?

JK: First of all some of those ASIO Bills, now Acts, may be challenged in the High Court of Australia. Accordingly, I don't want to say anything about those pieces of legislation. However, as to whether we need a Bill of Rights, I have been ambivalent on this subject over the years. When I was at law school, we were taught that it was impossible to declare the rights of the people in a relatively brief document, because of the fact that under our legal tradition, people have every right, unless that right is specifically and lawfully taken away. However, the position now is that Australia is virtually one of the only countries in the world that doesn't have a charter of rights. That doesn't necessarily mean that we are wrong. But it does indicate that we need to consider whether or not everyone else is out of step. I believe we will see much more debate about this in the years and decades ahead. The innovative Bill of Rights legislation adopted in the ACT may well be examined by other jurisdictions in Australia to see how it succeeds.

There is discussion on the subject in Victoria at this time. Mr Bob Carr who was the foremost opponent of it in New South Wales, has departed the scene. So it's likely that we will have a lot of debate on this subject in the years ahead.

The main argument for a bill of rights is that it helps to prevent taking away of fundamental rights by oversight or overreach of legislation. It also assures all people equality before the law, which isn't always assured by legislation that is sometimes passed in the heat of the moment. So they are my reflections on the subject. But my views are still being formed.

RIGHTS OF SEXUAL MINORITIES

CL: Certainly, certainly. Where do you stand on homosexual marriage and do you think homosexuals have their rights adequately provided for under law?

This again is a matter that may come to the High Court. I saw a report that some kind of challenge was being contemplated or legislation of the States is being proposed and that might lead to the matter coming to the courts. Therefore I don't think that I

should comment on the matter too deeply, in case the matter subsequently comes to the court.

Surveys of homosexual people in Australia indicate that very high proportions of them are not particularly interested in marriage as such. One survey I saw, published in the *Alternative Law Review*, a law journal, indicated that 87% of gay people in Australia said that marriage was not a high priority for them. That may be because Australia is a less religious society than the United States and perhaps Canada and other countries where this has been a high priority.

However, homosexual persons and groups make a point that there is a distinction between weddings and marriage. Weddings being matters that could be the subject of decisions by religious groups and churches and faiths, but marriage is a civil status to which various legal rights and duties attach. So that it seems to me that this is an issue which is still evolving.

Certainly, there are disadvantages for homosexual people, in steady relationships, from the point of view of equality of rights before the law. There are many such disadvantages and they exist throughout Australia. Some of them have been repaired by specific legislation. But all not of them. That is why many homosexual people in Australia are contending that there should be either be rights of marriage (as distinct from weddings) or rights to civil relationships which are equivalent to marriage. The point being made by many of the supporters is that you don't *have* to get married. Many heterosexual people now don't get married. But if you wish to there should not be discrimination against people on the basis of their sexual orientation.

However, that's a viewpoint and I haven't formed a firm personal view. My partner of 36 years has said that marriage is not important to him. Having survived our relationship for such a long time without the formality of marriage this is not a high priority for either of us. By the same token, there are distinct legal disadvantages that attach to our relationship as compared to marriage or even de facto heterosexual marriage status in Australia. So those inequalities would seem to need repair. Whether in Australia the repair should go down the track of marriage is another question.

KEEPING IN TOUCH WITH ORDINARY PEOPLE

CL: Some people consider that Justices of the High Court are possibly a bit out of touch with the common people. Do you think this is the case, and what steps do you take to ensure that you're in touch with common people, and therefore able to look after their legal rights?

JK: I wouldn't like to comment on my colleagues. You'd better ask them if they feel they are out of touch with common people. As to myself, I don't feel as if I am out of touch with common people. In fact, I think this is something I distinctly share in common with Prime Minister Howard. I put it down to the fact that both of us went to local public schools and public high schools back in the 1940s and 50s and were educated side by side with other young Australians from all kinds of parental backgrounds, on a basis of total equality and civic friendship.

I went back to my primary school, which was Strathfield North Public School in Sydney, in August 2005. I went back with my brothers and with my father. It was a very enjoyable day. It brought flooding back memories of the circumstances in which I was educated which was circumstances without any privilege, except the privilege

of education. And the selective education that is available in New South Wales for some students. I think it's those features that put me in touch with Hill's hoist and I don't feel in the slightest out of touch with ordinary people. I go to the supermarket. I wheel my trolley. I watch the telly. I work very hard. Perhaps it is work that keeps me out of touch to some extent, but I don't feel that I am unsympathetic to the perspective of ordinary folks.

HIGHLIGHTS OF JUDGING

CL: And in your career in the High Court, what would you consider to be a highlight?

JK: I consider every day a highlight. I know it seems a bit odd, but every case I find interesting and challenging. Every application for special leave to appeal has some issue in it that is the perspective of justice from the point of view of the person who brings it. So I don't single out any particular case. I just decide the cases as I see them. I call the shots as they are presented. The one thing we can be sure of in Australia is that all judges give their honest and uncorrupted opinions. That isn't so in every country; but I believe it is so in this country. You can criticise the judges and you can criticise their opinions. Their opinions have to be given in public and they are published, available, and nowadays are available on the World Wide Web.

So it's an open and transparent system. It's a good thing that ours is a country where the judges are not corrupt and are not to be bought by powerful interest groups or individuals.

CONSTITUTIONAL CHANGE

CL: If there were one law or statute that you could change, what would it be and how would you change it?

JK: I think the Constitution needs some updating. Every constitutional case that I deal with takes me to look at that document. Most Australians have never looked at their Constitution and those who have looked often find it a bit boring. Many of the provisions in it are now out of date because they include provisions to handle the transition from the colonies to the Commonwealth. And, therefore, there's a lot of tidying up that could be done in the Constitution and no doubt a lot of substantive changes that could be made. For example: it never mentions the prime minister and doesn't mention the federal cabinet. It doesn't mention the State cabinets. Its mention of the State parliaments is very limited. It doesn't refer to local government in Australia. There are therefore things in the Constitution that could quite easily be removed and there are things that are not in the Constitution that probably ought to be there. Perhaps a bill of rights in one of them. However, I am not holding my breath on this subject because, after 104 years of federation, the record on amending the Constitution is not encouraging.

WOMEN ON THE BENCH

CL: Do you support the suggestion the more women become appointed the High Court Bench?

JK: I think it would be a good thing if we had some women at the High Court. At the moment we have none. However it may be that, with Justice Michael McHugh retiring on the first of November 2005, that we will get a new justice who is a woman. Certainly, since Justice Gaudron retired nearly two years ago, the absence of a woman has been noticed. It has been noticed by me. A woman is not just a man who

doesn't wear pants most of the time. A woman is a person who has a whole of life experience that is generally different from that of a man. A woman is also commonly more sensitive to disadvantage in the law, and inequality in the law. A woman will often perceive injustice to vulnerable groups more clearly, because women have been confronted themselves with injustice.

I think a reason for my sensitivity to justice to vulnerable groups, whether on the grounds of gender, Aboriginality, sexuality, or ethnicity is because I have myself suffered discrimination in my life. If you never suffer it, you are not so sensitive to it. But I think most women are perceptive of this feature of society and that is why it's good to have some of them around. In Canada there are four judges of the final court, including the Chief justice, who are women. In New Zealand, the chief justice is a woman. There is no reason why women should not be appointed. There are plenty of women who have the experience and talent to be justices of the High Court of Australia. I would expect that before I leave this post in 2009 that there will be at least one and I hope more women justices on the High Court. But under our constitutional arrangement, it's entirely up to the government of the day to appoint the judges and not the judges themselves.

I happen not to agree with the idea that judges should appoint judges. That would be too much of the old boys' club. But it is necessary to have experience and to have stamina to be a judge of the High Court. It's a constant, gruelling life. I spent the whole of last weekend, as with most weekends, working on an urgent case that has to be handed down before Justice McHugh leaves. It meant getting into my Sydney chambers at 6 am on both days and working for 15 hours on both days. Unremitting concentration. Not many people do that in our society. But the judges of the High Court have to.

CL: Who do you think is a likely successor of the space on the bench available in November?

JK: I wouldn't like to say that because my nomination of somebody might turn out to be the kiss of death.

COMPULSORY RETIREMENT

CL: Did you agree with the constitutional change that required judges to retire at a certain age and would you prefer to retire at a time of your own choosing?

JK: I did agree with the constitutional change and I believe the age of 70 is a fair crack of the whip. The advantage is that judges are not hanging on hoping that a government of their philosophical persuasion comes along to replace them with somebody as excellent as themselves. And it means that you get more turnover in the court, and therefore that you reflect intergenerational change of attitudes. In a way, that doesn't tend to happen if the court is made up of a whole lot of old fogeys. Already, if the court is made up of people in their sixties, that would be viewed as most citizens in Australia as a group of old fogeys. But the fact that we all have to go at the age of 70 and that there is no arguing against that is a formula for renewal, which I support.

CL: Thank you. I think that takes care of all of my questions and I won't take up any more of your time.

