

Interview with Justice Michael Kirby
Leadership
High Court of Australia, 29 March 2004
by Michelle Boyle^{*}, Canberra

Do you see yourself as a leader if you define a leader as one who has a vision and tries to persuade others to that viewpoint?

Over the years I've had lots of jobs at the top or near the top of the various bodies that I've been appointed to. At a quite a young age I was appointed head of a federal agency - the Law Reform Commission, when it was being established. Then I was appointed President of the Court of Appeal of New South Wales. And then I was appointed to the High Court of Australia. So all of these are top jobs. That means that, whether I like it or not, I have held leadership positions. Because they were in the public sector, I regarded that as something not for my own advantage, but for a service of the public. I have rather old fashioned views in that respect. But I don't think you can make yourself into a leader just because you're appointed to positions. It is what you are and what you make of them that matters. That depends very much on your

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genetic capacities, your willingness to work hard, and factors such as chance and luck - of which I've had more than my fair share.

So the answer is in the affirmative. But I'm a bit suspicious of the "leadership" business because I just don't think you can train people to be leaders. They have to be given the opportunities and then they have to find within themselves the reserves and capacity to make the most of those opportunities.

If you had to describe your leadership style what would it be and could anyone in the community adopt your style given that it's within the parameters of being a high court judge?

I believe I am a democratic person. I am inclusive. I'm not particularly hierarchical, although I realise that, in my position, I have to play a hierarchical role. In my leadership positions in the Law Reform Commission and in the Court of Appeal I intimately involved my colleagues in all the decisions that I had to make. I had numerous meetings and structures that would involve them in the decisions. Not just the commissioners, but the staff members in the Law Reform Commission.

And that was your choice to include them, you didn't have to? That was your choice?

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Well, in the Law Reform Commission it was all new. It was all starting afresh. In the Court of Appeal some of the things were not new; but some of them I introduced. For example, I introduced regular weekly meetings with the judges in the Court of Appeal at breakfast. We would meet early one morning. I supplied cups of tea and coffee and lots of raisin toast. The way to the male heart (and all the judges were men) is through their stomach. And that's why I've always fed them up. That made them very lovable because they were so busy eating their raisin toast they didn't see the subtlety of the things I was pushing through with their concurrence. It's partly a matter of gaining the insights and points of view of the people whom you are, "leading". It's also part of gaining their personal trust, respect, and hopefully affection. The bottom line is - it's a matter of associating them with the decisions that are made collectively.

When you say fixing that's getting them to buy in, it's getting them to agree with it ?

Well it's getting them to take responsibility for the collective decisions. A taxi driver from a foreign country recently answered my question what did he think about compulsory voting - which is rare in most countries overseas - by saying he supported it. He said it makes people take responsibility for the government that is elected. They can't simply complain about it and say "well I never

voted for them". "I never voted at all". They have to make a choice. They have to take responsibility. So involvement is something that came naturally to me. I grew up in a family which was very close and involved in each others lives and decisions. I went to public schools where we were given wonderful values of not thinking ourselves better than anybody else, but equal citizens. I therefore don't fall naturally into the hierarchical command structure. I am participatory.

You've said - and I got this from one of your thousands of speeches - "My associates don't write my judgements...I'm far too egocentric and idiosyncratic to allow anybody to write my peerless prose." So I get the sense you have got quite a self deprecating humour. How important is humour in your leadership?

I didn't think that was particularly humorous. I thought that everybody would agree that my prose was indeed "peerless" and would understand that, with all my natural humility, I couldn't permit other people to even attempt it. However, humour is important and it comes naturally to somebody who has Irish genes in them. Humour, passion, literature, and melancholy, in equal mix, are Celtic phenomena.

But humour can't go too far. I'm not very much in favour of excessive of humour in court rooms. I have known judges who are constantly cracking jokes. Partly I think, they do that to relieve

stress and feelings of anxiety on their own part. However, to litigants courtrooms are deadly serious places. They are not places for somebody to be a smart person. They're a place for people to be taking their problems seriously. A little humour can help. Humour amongst colleagues can certainly help in private intercourse. Humour has its place. But there are some things in life, including important decisions, which are serious, solemn and have to be taken as such.

You work tirelessly for justice and in many of your speeches you eloquently - I think - articulate a rational and fresh point of view. Do you feel that enough people follow through on your leadership and turn your vision into reality, to implement change?

And following on from that... how do you manage multiple defeats and the slow progress in changing the law or public opinion about certain things. In other words how do you stay motivated?

Well first of all what other people make of what I say is their privilege. And I make enough demands for acceptance of my viewpoints, which I express, to respect the fact that other people are not going to change me in things that are fundamental to my views, in most cases. Therefore, I have to allow that other people listening to what I have to say, may not agree with me. They may differ quite fundamentally and may not change. If you demand intellectual space for yourself you have to allow it to others.

As to maintaining momentum I don't find that hard. I have a strong sense of rationality. I have a great belief that rationality ultimately prevails, especially rationality based on science and established truth so far as humans can get at truth. In addition, I hold to the view that even if you are defeated there are times when you have to express your view and take a stand. Being a judge that is not an unusual lesson because you learn it all the time. Judges are not there to do the popular thing. They are to do what they consider is right and required by law. And the fact that other people may disagree with it doesn't disturb your psyche in the slightest. They may be right, they may be wrong, but your duty is to do what you think is right. In a sense, that's a great release from the burden that falls on lots of other people who have to try to do what is popular or agreeable or nice whereas I don't have that position.

I have to do what I think is right. So that if you are a judge and a lawyer and if you know the historical emergence of truth over very long periods, sometimes hundreds of years, then you don't lose any sleep that you're not going to see everything established as you see it, in your lifetime. Yet you're not released from the obligation to do what you can to contribute to the cause. So that's where I stand on these things.

A lot of people say to me from time to time 'Oh don't do that; choose your battlefields; don't take a stand; you're bound to be

defeated; people are not going to agree with you; your colleagues won't agree with you; the world won't agree with you'. I don't care. I will say what I think. Some of the things I say will be true or rational or justifiable, and that will contribute to the process. The process is ever ongoing. And we don't always achieve everything we want in life. But we ought to be doing what we can to make the world a better place as we see it, admitting that different people will have a different vision of what is a better place.

In relating your surprise appointment to the High Court you revealed your capacity for optimism.....quote "In life you should never say never. You should always be optimistic....Uncertainty is one of life's blessings." I think you have partly answered this. How do you remain optimistic when informed debate is what's necessary and it's displaced by a diet of Americana and celebrity worship. And I guess some of the things you've stood up onyou know, people are so overworked and parents have barely got time to parent and they're working, people feel they are on a treadmill. How does the great mass of Australia have time to think about some of the issues that you're saying needs debate?

Well I don't care. If they want to think about it that's their privilege. If they don't, that's also their privilege. But that doesn't release me from the duty that I feel to express various points of view. Both in my decisions in the courts and in speaking engagements. Enough must care, because every day I receive two or three or more

requests to make a speech somewhere. And I can't do them all. In fact, I can't do many of them. But there's always plenty of people turn up. Plenty of people want me to talk. So I think you're a bit cynical about the people of Australia. I think the people of Australia don't fit into a nice mould. Sometimes when they're in a bad mood they may not want to hear anybody, least of all their relatives or a judge from Canberra.

Yet on other occasions people do (maybe despite themselves) want to hear alternative points of view. We've always been a bit agin? it and cussed in Australia. This probably goes back to the convicts and the Irish. And therefore there is a stream in Australia that is welcoming to a different point of view. I also believe that, normally, in the long term, we get things right in Australia. It sometimes takes a time, but if we do get them right in the long term it's only because in a free civil society people can and do express points of view and don't give up because the point of view is not immediately accepted.

Tenacity...conviction?

Well I don't know that it's even that. I just think it's a matter of going on saying what you think, acknowledging you may not be immediately right or even, you might not ultimately prevail with your views. Though I think most of the things I speak of will ultimately prevail, because they are based on rationality and on

truth and science. And on justice and fairness and love, as I see them.

Yeah they're pretty good qualities to stand on aren't they. Michael Lavarch describes you as a social progressive although he says on some things you're quite conservative. How would you describe yourself ?

Well it's very hard to catalogue yourself because you don't like to see yourself in a stereotype or a box - not before your time. I think what he says is probably right. In some things I'm conservative. In some things I'm progressive. So what's the news? Most people are like that. Most people have things on which they're conservative. I'm endearingly conservative over the Queen and matters of that kind. People sometimes find that a puzzle. I don't think it's a puzzle at all. I have a slightly anarchistic view about the Crown. I think it's a good system because the Crown is physically absent. We get on with our business and it means we are spared the stretch limo from the president and the first lady and all of that sort of stuff. So it's not a system you would invent. But having got it, you've got to be very careful that you don't replace it with something that is worse.

I think Michael Lavarch was there referring to the position that I took in relation to the referendum on the republic, because that was very close to his heart and to the heart of Paul Keating. I've always

thought it says something about Paul Keating and the bigness of his vision that, notwithstanding this point of difference, which was very obvious, he appointed me to the High Court of Australia. Appointments to the High Court of Australia are substantially made by the Prime Minister, although formally by the Governor General and more formally still by the Cabinet and the Executive Council. But Paul Keating could easily have vetoed my appointment to the High Court. The matter of the republic was very close to his heart, possibly because of his ethnicity. I suppose my position was also affected by my ethnicity. However, it says something about him that he led the Government to appoint me. I also think it says something about me that I took my position, in respect of that referendum, on what would have been a fair estimation at the time that it would kill off any lingering chances that I had of appointment to the High Court of Australia.

Truth will out

Well, I was just doing my thing and he was doing his thing. That is consistent with my view that, in a free society, we shouldn't get furious because some people have different points of view. Sometimes it can be mildly maddening. But we've got to acknowledge that no one has a monopoly on truth. It's why I regard some of the party political differences, which are basically relatively trivial in Australia, as contemptible and really not of any interest to me at all. I know that that's the way the political system has to

operate and how leaders in the political system have to emerge, by being beastly to each other, and shouting and screaming at each other in Federal Parliament. But it is somewhat off putting and it's very unintellectual and uninteresting to me at least.

You've been Australia's leader in influencing the international human rights agenda. Was that a self appointed role? Do issues that you lead on.... choose you or do you choose them and does intuition play a role in the choices that you choose to make a stand on?

First of all, I question the premise that I've been Australia's leader in that field. I think there are lots of others who have; but we won't tarry over that. I don't believe it is self appointed. I believe in the thesis illustrated by Peter Weir's film *The Dead Poet's Society*, Carpe Diem - You have to seize opportunities. Without the opportunities you could be the most brilliant person possible or the most talented person and your ideas or ideals will not appear to influence anyone.

Whenever I met Dame Joan Sutherland I often pondered on how many brilliant sopranos there were in kitchens in Australia. Because, in essence, she's a very natural and unaffected Australian housewife. There obviously are many undiscovered Joan Sutherlands. Similarly with lawyers and people in the world of ideas and political and legal and human rights ideas. There are

plenty of people who could make a big difference. Through a series of accidental chances I went to various international meetings. I happen to be a very good chairman and that was seen very quickly. I can move meetings along. I can digest complex data. I can present it in a synthesised way. I am willing to work extremely hard. I can produce documents very quickly which summarise the point at which we've arrived and thereby help to progress the point further along. This is constantly astonishing to other people. But it's just doing what comes naturally to me. So that, that is what I began to do at international meetings. That got me into various new spheres. Now, as to whether I just cunningly sat there and chose themes which I could see coming on the horizon, that's not my style at all. I'm not a politician, I don't have anything personally to gain from this. It's partly accidental. I never really gave much thought to privacy protection. But then I was sent to a meeting in the OECD in Paris on data protection and privacy protection. And that got me into that subject and into international activities more generally.

I was interested in AIDS because I've lost a lot of friend to AIDS. That motivated me to get into that field. I have been involved in lots of things at the beginning. And I've been lucky in that. But mainly it's been by chance and taking the opportunities that are presented to me. Sometimes I've influenced the way organisations see issues. For example, in the International Commission of Jurists, when I was President, I tried to steer the commissioners into new

spheres not the traditional spheres of human rights. New spheres such as biotechnology, computers and human rights, AIDS and human rights and human sexuality and so on. Occasionally, that led to resistance in some quarters. For example very distinguished African human rights lawyers, didn't really want to get into the human sexuality issue. But I pressed on and ultimately they agreed and could see the point. You've got to respect other people's stages in their particular intellectual journeys. So I have sometimes pushed things forward. But that has just been taking the opportunity at the time at the moment. Carpe Diem. Stand on the table.

What do you think you will you be turning your attention to next or will it be just a matter of opportunities presenting themselves.

I'll be turning my attention next to the Special Leave Books. I'll be reading them until about 10 o'clock tonight.

I was thinking more big picture judge

The big picture?. Well I think I'll probably continue my this office in the High Court until I'm 70, which is the constitutional retirement age. After that various things may turn up. Before I was appointed here I was President of the Court of Appeal of the Solomon Islands. That might be something which will be restored. International human rights activities are ever ongoing. Because of my

experience and talents in that area something might turn up there. I don't lose too much sleep about what will turn up. In my life something's always turned up. Because I'm quite an able person. People tell me that that's very immodest to say so. I just think it's stating a self evident fact. Brilliant actually. But not too easy to live with!

You've been described as being open and honest about the fact that there's no right or wrong answer in some cases. In that context you have to make a judgement to interpret the common law in a way that's relevant to contemporary lives. Do you think there's scope for judges to take more risks in making judgements that reflect social values? And if so should they be doing it more?

Judges have been doing it forever. They've always been doing it. The question is whether they should be candid about what they are doing and whether they should have recourse to a wider range of materials. In the past, judges often decided points of difference and ambiguity and uncertainty by reference to their Sunday school lessons and ethical principles they had learned at their parents' knees. Well I do that too. I had wonderful parents. Very good and continuing lessons from my father. And good Sunday school instruction. And belief in good values. So I do that. But I've also reached into a wider range of data than most judges have, particularly in the field of international human rights and also in the

field science and technology. This is something new in my case and I feel a need to share my insights with others.

Judges are much more candid now. If you look at the judgements of the High Court today, they do reveal discussion of policy questions which, in the past, was often missing from the text although not missing from the judicial evaluation. The judges of the past were quite as clever as the judges of today. Privately, they would have had exactly the same discussions. But it then wasn't generally considered appropriate or necessary or even relevant to reflect the policy choices candidly and reasons.

I just happen to think that that is our duty. Not everybody agrees with the extent to which I go. But few judges nowadays believe that you can solve a problem of constitutional meaning or statutory meaning by reference to words alone. Only occasionally, some words are virtually enough. Therefore, you do get differences of view about such questions. Others do it their way. And I do it my way.

You have spoken lovingly about the High Court's great dissenter Lionel Murphy. Many of his views have since become legal orthodoxy. Do you think a minority voice is a sign of leadership?

I don't think of it that way. I think it is my duty to express my true opinion. Indeed, I often go into my chambers in a case where I haven't already written an opinion, with opinions from other

Justices, and I say to myself: “ Michael, Michael, you are writing too many dissents. Stop it. Try to agree. Have a hot cross bun and a nice cup of tea and see if you can agree”. Then I read the opinions and I find either I don’t agree with the result, or I don’t agree with the way it’s reasoned. Then you have to make a choice. If you don’t agree with the way it’s reasoned there may be ways by which you can make suggestions. And often, I have to say, my colleagues will agree with those suggestions. They are not locked into their own way of expressing things in a way that some judicial colleagues in the Court of Appeal were. However, sometimes a disagreement at the end of the journey is much more fundamental. I believe it would be quite wrong for me then not to express my disagreement. I believe it would be a negation of my judicial duty. So I do express my disagreement. Now, had I been appointed by Mr Hawke’s government at the time of the first appointments there during the so called Mason court (with Chief Justice Mason, Justice Deane, Justice Gaudron, Justice Toohey) I don’t think I would have been in dissent. Certainly, not so often. They were different times in the High Court of Australia. Different from now.

What inspires you...is that a frivolous question ?

No it’s not a frivolous question. Love of fellow human beings. Of an appreciation of justice. A feeling that I have a duty and an opportunity, within the law, to do what I can to prevent the pain and misery and sense of awfulness that injustice can cause. A healthy

appreciation of the limitations of my function and indeed of the degree of injustice in a country like Australia. Normally, injustices will, one way or the other, be cured. I have always thought that at the heart of human rights and respect for human dignity is love. Most people are rather embarrassed talking about love. I'm not particularly embarrassed talking about it. I think it is the well spring of the sense of fairness, justice, equity. It's so because, if we are just to other people it is because we love other people enough to recognise in them, elements of our own life: reflections of our own humanity. We should do unto others as we would that they would do unto us. The golden rule lies at the heart of all the world's great religions.

What's the source of the wellspring of your compassion?

I don't think I'm specially compassionate. When I have to, I can do the hard things of the law as well as the next person. I don't have any difficulty in applying the criminal law to people who are violent or cruel. There are such people. Thus, it's important in the age of the civil libertarian response to terrorism, to remember that terrorists are not good people. They are people who do not generally engage in logical debate. They are often violent people and often rather authoritarian people. So that I'm not particularly compassionate to people of violence.

However, as to my general feeling of empathy for others it probably springs from the love in which I grew up in my family. It also springs from my religious upbringing, which was a belief in the religion of Jesus which is founded on love and reconciliation and forgiveness. It also grows out of my sexuality as a person who has unjustly suffered discrimination - legal, social and otherwise - and a realisation that all is not good in the world. There are lots of things including in the law, that are unjust. One of the big problems is getting women in the women's movement to see that there are issues other than women's issues. Similarly people in the gay movement seeing that there are things other than gay rights. People in the ethnic communities seeing there is something else other than ethnic community.

Everybody has their drum to beat. And it's important that those who beat drums should realise that there are other drums. Often the problems of discrimination and injustice and lack of fairness are shared. This is something you have to understand: to empathise with the injustices of others. Keeping an open mind and your ears open to learn about other peoples lives, experiences and the injustices that they suffer or have suffered. This is the path of wisdom.

What judgment are you most proud of?

People ask me that and I don't think of life like that. That is to assume that I'm like a film director creating these little contributions to human happiness. I just don't think in those terms. I just try to do my best in every judgement as it comes along. I endeavour to be completely candid. I am so busy doing one after another that I don't really think of them as separated. It's interesting when I come upon a problem, in a later judgement, and I find that there's some judgement that I wrote long ago in the Court of Appeal or even in the High Court that I've completely forgotten. And I then read it. I find how consistent my views then were with what I am thinking about the case in hand. This goes to suggest, either that I'm a stubborn old mule who doesn't change in any way, or that I have (as most people do) a world view that sees problems within a structured and reasonably well thought out way of solving the problem. That's why when people say, "Well, look at all those dissents", I think back on my time in the Court of Appeal. It's true there was a level of dissent there by conventional judicial standards, although I was the President. However, it wasn't anything like the level of dissent at the moment in the High Court. That again suggests that the level of dissent is a function of those from whom you are dissenting.

It would not be denied that the High Court of Australia at the moment is quite a conservative place. That is the natural outcome of the political process. That, in turn, is exactly how the Constitution is intended to work. I make no complaint. I have no

grievance about it. It's just that it would have been easier for me had I been around in an earlier time. But this was my dharma. This is now my function and role. It's not something to be particularly proud of. It would be nicer and easier by far to be in the majority. One thereby immediately influences the state of the law. But it just not my function. I don't shirk from that function. I simply perform it as my understanding of the law, and my conscience, require.

Your capacity for constant work has obviously contributed to your impressive list of achievements. But aren't you worried that you're missing out on some nice sunny days?

Not really. I'm engaged in some - objectively - quite important and interesting issues. I am involved in countless community meetings and bodies. I'm engaged in international activities which are stimulating and interesting. And I'm meeting people all the time which is what interests me.

When I was a youth I went to Cronulla Beach in Sydney trying to become the equivalent of a surf lifesaver. I can still hear the Beatles melodies ... "Will you still need me will you still need me when I'm 64". Now I am 64, 65, and I'm still not able really to suntan. Therefore, it was completely hopeless to try to pretend that you're something that you're not. Having lovely sunny days at the beach might be something that most Australians want. But it's not really something that interests me very much now.

I once gave a lecture on judicial stress. A commentator, a judge, gave his answer. He said that his wife had told him to stop complaining about the stress, to pick himself up off the ground and to count himself lucky that he goes into work where everybody bows and scapes as he enters and spends his life solving interesting puzzles.

It's as if my life has been assigned to sitting at the scrabble board and constantly working out answers to curious and interesting puzzles. So I never complain. Justice Mason said, before I was appointed to the High Court, 'he's the uncomplaining Michael Kirby'. That is true. I do never complain. Never complain. I don't complain about my life or my dissents, about my colleagues or the work, because I'm basically very fortunate. I've been very lucky in my life - lucky in my family, lucky in my partner, lucky in my jobs, lucky in my opportunities. And I don't think this leadership business is really a big thing in my life. I've just gone on doing what I enjoy. And doing it to the best of my ability. So that I've never sat down there and puzzled: Can I be a leader? Can I be a good leader? It's just not my motivation.

When you make a mistake do you suffer emotional angst and if so how do you overcome it ?

First of all I try not to make too many mistakes. It's my colleagues who make mistakes. Or my partner who makes mistakes. Now at home, I never dispute that I was in the wrong. Never. I never have. It's the reason why, 35 years on, my partner and I are still going fine. People who never admit they are mistaken must be very rigid personalities. And people who never admit it at home.... they create all sorts of problems for themselves, particularly if it isn't so important that you assert that you were not mistaken. Sometimes even if you are not mistaken, in your own viewpoint, you've got to see that somebody else may think you were mistaken. You have to try to understand another point of view. That's basically what a judge should always do - try to understand the other person's perspective. I've been doing the judging business for a long while now. So I'm pretty well trained in doing that.

Sometimes the love of family and friends is more important than asserting your rightness. Which not a lot of people do. Pride is a terrible enemy of human relationships. But so far as work is concerned I have sometimes recognise that I have been incorrect. I don't have a problem with that. When I was reversed in my time in the Court of Appeal I would sometimes acknowledge that I'd made a mistake. I've done that publicly. It's no skin off my nose. That's just part of the judicial process. I've sometimes accepted that there is a different point of view and that in the hierarchy, either in the Court of Appeal, or in the High Court, that's how it pans out. At other times I've thought, well, that's your opinion and you have the

right for your opinion to prevail. I think I'm right but I can't prevail here and now. I'll get on with the next problem. I don't lose too much sleep. In fact, I don't lose any sleep. None at all. I'm a good sleeper. (Generally I'm so tired, exhausted from reading my Special Leave books, which is what I'm going to attend to now).

Which leaders of the past and the present do you admire and why?

Well this is hagiography. And I'm not deeply into this. But of the leaders I have met, there are some people whom I admire. Nelson Mandela, for his sense of destiny and forgiveness, and reconciliation. Mary Robinson who was President of Ireland and later United Nations High Commissioner for Human Rights, for her sense of passion, her flair, her attractiveness in presenting ideas, for her stubborn courage. Jonathan Mann who was the first director of the Global Programme on AIDS, for his indefatigability, for his strong sense of equity, his high intelligence in seeing the cross over between human rights and an effective strategy against HIV/AIDS at a time when there were no medicines or vaccines or the normal paraphernalia. Martin Luther, in the past, because he stood up against the whole world for what he thought was right. There are many others. Many people who are not famous - who do good and kind and brave things for others. They are leaders too - models for us all.

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