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QUEEN'S UNIVERSITY  
INTERNATIONAL STUDY CENTRE

HERSTMONCEUX CASTLE,  
ENGLAND

CONFERENCE ON STATISTICS,  
SCIENCE AND PUBLIC POLICY

DEMOCRACY, DANGER AND  
DILEMMAS

BANQUET DINNER, 20 APRIL 2012

The Hon. Michael Kirby AC CMG

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THE HON MICHAEL KIRBY AC CMG\*

Dr Agnes Herzberg, Sir David Cox, Dame Margaret Anstee, Colleagues and Friends,

*ARRIVAL AT THE CASTLE*

It is a great pleasure to join in a dinner at this historic Norman Castle on the eve of the actual birthday of Her Majesty the Queen, Head of the Commonwealth. In this Diamond Jubilee year, I hope that those few present who do not share the blessing of our admirable Head of State, will forgive me for noting the occasion, in the context of a reminder of the importance of continuities in the world of enormous technological and social change that we have been exploring.

This is my first visit to the Castle and the first time I have had the privilege of participating in this conference series. None of us would be here except for the energy and enthusiasm of Dr Agnes Herzberg. She has been the inspiration for these conferences since the beginning. Someone coming for the first time inevitably feels, at first, a strain. The friendship of the 'regulars' is, however, soon shared with the 'intruders' Agnes Herzberg sees to this. One quickly learns that she is not to be messed with.

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\* Justice of the High Court of Australia (1996-2009). Gruber Justice Prize 2010.

This conference is on the theme, Democracy, Danger and Dilemmas. An international conference was once defined as a meeting in which there are gathered, from all parts of the world, participants who individually can do nothing. And collectively can agree that nothing can be done.

Upon this basis, we can already say, half way through the 2012 conference, that it is an outstanding success. The problems that humanity faces are overwhelming. The solutions are elusive. The financial crisis has piled disaster upon catastrophe. So it is right that, in the midst of the conference, we should join together in these elegant surroundings and share a meal with each other, enlivened by music, good conversation and fine food and wine.

I was uncertain as to how long I should speak on this occasion. Lawyers, as you know, love the sound of their own voice. I ask Professor William Allen, whose keynote address on democracy inspired us at the outset of our conference, as to how long my speech should last. He admitted that he had been attending these conferences over the past 10 years. But he acknowledged that he had slept through most of the after dinner speeches. Accordingly, I have decided to offer one of my shorter speeches. You will be pleased to know that it will continue for no more than one hour and ten minutes. I realise that anything more abbreviated would attract Dr Herzberg's condemnation. This is the penalty statisticians must pay for rubbing shoulders with lawyers in a castle.

When I arrived at the Castle, I immediately knew that this would be no ordinary conference. As I was registering at Bader Hall, Dr Keith James rushed towards me to offer friendly advice on the rules to be observed by newcomers such as myself:

- \* He acknowledged that, as an Australian, I would be given to a certain informality. He told me that, at this conference, too much informality was not enough. I should step it up and it would be appreciated;

- \* Specifically, he warned me never to wear a tie. Dress was of no consequence to Agnes Herzberg and her colleagues. If I wished to, I could come in Speedos for informal attire was *de rigueur*;
- \* When we met in the Castle ante-room, I expected Agnes to descend the grand staircase, in the manner of Bette Davis in the Hollywood movies of the 1940's. Alas, because of the informalities, she appeared in our midst without a grand entrance and I had the pleasure to meet her for the first time;
- \* PowerPoints were compulsory for presentations and I was warned that Agnes Herzberg would be most upset if I were to omit them. PowerPoint was especially beloved by her in an after dinner address because so comparatively rare in that setting;
- \* I was also warned to be indifferent about wearing the conference badges because, although supplied, they were of no real consequence; and
- \* First names were never to be used in the conference, hence their omission from the information on the conference badges. This, I was assured, was the only compromise that our host allowed in the formality department.

### *A SPECIAL GATHERING*

I quickly learned that the Herstmonceux Conferences are atypical of the international meeting to which I have become accustomed. Above all, this has been a conference that is the very antithesis of a gathering of people of like training, background and interests. We have been brought together by Agnes Herzberg in a grand tradition. It is not unique. But it is rare. I have had the privilege of attending three conference of this kind:

- \* *WHO GPA/AIDS*: In the 1980's, when HIV/AIDS first struck, I was privileged to participate in a number of meetings at a facility of the *Institute Pasteur* on Lake Annecy in France, near Geneva where the World Health Organisation is based. On that occasion, our *guru* was Dr Jonathan Mann. Like Dame Margaret Anstee, he was a fine civil servant of the international community. Such was the puzzle and dilemma presented to the world by AIDS, that Mann gathered together Nobel laureates in medicine and science, historians,

epidemiologists and lawyers. Our challenge was to design an immediate response to an unexpected and urgent pandemic, and to do so without a vaccine or pharmaceutical cure. The exchanges were civilised and mutually respectful. At lunch I would sit with Jonas Salk, whose work contributed so much to the eradication of polio. At dinner, it would be Max Essex, Professor of Health Sciences at Harvard University or David Baltimore, a one-time researcher in the Salk Institute, who shared the Nobel Prize for physiology in 1975, at the age of 37. Baltimore's research had been into a strange simian retrovirus which led to his discovery of reverse transcriptase. It was this discovery that assisted the great scientists, Luc Montagnier (France) and Robert Gallo (U.S.A.) in isolating and describing the viral cause of HIV. For this Montagnier himself was later honoured with the Nobel Prize.

David Baltimore's life was a living testimony to the importance of research into pure science. When he was working on the virus in chimpanzees in the 1970's, no one knew about HIV or the practical application that his research would quickly secure. Serendipity, accidents, luck and sheer human curiosity are the secrets of the advancing knowledge of human beings. These are qualities we have witnessed during this conference. Jonathan Mann would always combine the intellectual feast with occasions of music and culture, to lift our spirits and to remind us of the centrality of our humanity.

- \* *Yale Law School:* A second conference of the same kind, for which I was privileged to attend over a decade, during my judicial years, was held at the Yale Law School. It was an annual event addressed to the advancing impact of international law upon the domestic legal systems of the world. Whereas statisticians and scientists live in a global community, lawyers, until now, have lived in their separate jurisdictions. At last, global ideas and necessities are producing global laws. This is what the faculty at Yale were keen to bring home to the judges of final national courts who collected there each September. From the Supreme Court of the United States came Anthony Kennedy and Stephen Breyer. From the Supreme Court of Canada, Frank Iacobucci and Rosalie Abela. From the British judiciary, Lord Woolf and Baroness [Brenda] Hale. Judges from India, Latin America, The European

Court of Human Rights, and of Justice, Japan and many other places brought a cosmopolitan spirit to accompany their sharp intellects.

Each such seminar was marked by a musical occasion: sometimes piano, sometimes voice, occasionally a bus visit to Broadway and exposure to the great American talent in musicals and modern dance. It was a wonderful opportunity and is one of the features of my judicial life that I miss, now that it has concluded.

- \* *Herstmonceux Castle*: But now Agnes Herzberg has come to the rescue. Here again is the mixing of disciplines, cultures and outlooks. Here again is the combination of a musical encounter to lift our spirits. How fortunate we have been to experience the musical offering of Emily Kenway (mezzo soprano) and Belinda Jones (piano). Perhaps this is a feature of all conferences of statisticians. I can tell you, it is not common at most legal conferences. This adds a touch of magic. It appeals to our spirits, as well as our minds. I want to thank Agnes Herzberg for insisting on civilised standards. Perhaps it was the common thread of a cultural tradition, derived from central Europe, that produced this elegant feature in the three conference series that I have mentioned.

Mind you, if Dr Herzberg had arranged for us to be bussed to the theatres of London, there were plenty of offerings there to capture the thoughts that have been expressed during our 2012 discourse on Democracy, Dangers and Dilemmas. We could, for example, have taken in the new performance of *Long Day's Journey into Night*. It would have been a natural base for us after contemplating Keith James's melancholy discourse on the global financial crisis. Or we could have gone to *Mama Mia!* This was an excellent exclamation that came naturally to us after considering the many perils facing humanity at this time. Or perhaps *Singing in the Rain* would have been in tune with the mixture of seasons we have discovered at the Castle this year. Or possibly *Les Miserables*. Its title, at least, was in tune with the feeling that Keith James engendered in us.

## *THE GREAT PUZZLE: DOMESTIC LESSONS:*

Our examination of democracy has certainly shown us the dangers for minorities of unalloyed populism. In my own country, Australia, the courts have frequently been necessary to remind politicians that they cannot neglect minorities. In 1951, the High Court of Australia invalidated a federal law that sought to ban the Australian Communist Party<sup>1</sup>. A subsequent referendum to change the Constitution was defeated. In 1992, it was the courts that upheld the right of Aboriginal people to enjoy their traditional title to their lands<sup>2</sup>. In 2007, a court decision in which I participated, overruled federal legislation that sought to deprive all prisoners the right to vote in federal elections<sup>3</sup>. Australian judges were guided and assisted by earlier decisions, given on the same theme in Canada<sup>4</sup> and in the European Court of Human Rights<sup>5</sup>.

The experience of the courts bears out the experience of our conference. Democracy is usually beneficial. But sometimes it needs a reminder about the rights of minorities. And about basic principles of law, justice and democracy.

## *MULTINATIONAL CORPORATIONS:*

Keith James regaled us the defects in the global financial markets. And how they had harmed the interests of ordinary citizens. As a consequence of the GFC, estimates have it that 27 million workers lost their jobs. 1.5 billion human beings were rendered more vulnerable. 64 million were added to the category of extreme poverty. 1 billion people are hungry every night. Many multinational corporations today are larger and more powerful than nation states. Yet bringing such corporate fiefdoms under appropriate and effective international regulation is a great challenge. We do not yet have the entire answer.

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<sup>1</sup> *Australian Communist Party v The Commonwealth* (1951) 83 CLR1.

<sup>2</sup> *Mabo v Queensland [No.2]* (1992) 175 CLR1; see also *Wik Peoples v Queensland* (1996) 187 CLR 1.

<sup>3</sup> *Roach v Electoral Commission* (2007) 233 CLR 162.

<sup>4</sup> *Sauve v Canada* [2003] 3 SCR 519.

<sup>5</sup> *Hirst v United Kingdom [No.2]* (2005) 42 EHRR 1.

## *INTERNATIONAL AGENCIES:*

The foregoing illustrates the importance of the attempt, in our generations, to build international institutions to supplement domestic democracy. In my lifetime I have served on a number of these. In Cambodia, I had the privilege to be the Special Representative of the Secretary General of the United Nations for Human Rights. Along with Margaret Anstee, I have seen the good work performed by the United Nations which is little known and rarely spoken of in the global media.

More recently, I have been engaged through the United Nations Development Program (UNDP) in attempts to respond more effectively to the HIV/AIDS epidemic. In the contemporary context there is still no cure or vaccine. But powerful drugs prevent early mortality. They restore infected people to employment and to circumstances where they are no longer infectious and able to spread the virus. Yet in the context of the GFC, the funds for these vital national measures are drying up.

In the OECD, in Paris, not strictly a United Nations agency, I took part in the design of international principles to protect privacy in the context of new information technology. The astonishing developments of informatics bring important challenges to our species and to our governments. Often it is difficult for lay politicians to appreciate the problems, still less to see the solutions. The convening of a multidisciplinary meeting, like this, provides an illustration of what is needed in our world. A meeting of minds. An exchange of perspectives. A conversation between different disciplines. Affection and respect for different cultures, and viewpoints.

## *A FEW AWARDS*

Despite the seriousness of the subjects we have examined this year, there has been much good humour at the Castle this year. For this, prizes must be distributed:

- \* To Agnes Herzberg goes the prize for the best statistical humour. Attributed to Rabbi Jeffrey Sachs, it is a very Jewish joke. When asked an answer to the question, how is life in one word, the response was, 'good'. When allowed



two words, it was 'not good'. This, I think, is a humorous way of summing up our conclusions at the 2012 conference.

- \* Janet Hatcher-Roberts deserves a prize for the word picture of the global distribution of condoms full of sprinkles. Which was a novel use for them.
- \* Sir David Cox deserves a prize for three humorous observations, although he protests that they were his deepest and most serious thoughts. First, that he had never known a real dilemma in his life. Secondly, that a politician asked to speak on his pledge for a 'third way' ran out of time in denouncing the first two. Third, that the ancient warning to 'beware the Greeks bearing gifts' had taken on a new meaning in the context of their bail out by the Eurozone.
- \* Zoheir Mansourati (Telus) deserved a prize for being the only speaker in his session that was able to attend the conference.
- \* Frank Berkshire's remarks were full of humour, seriously deployed. He was not a 'bitter man' he said, except when it came to beer. He found new meaning in the name of the Nobel Laureate and African hero, Bishop Tutu. And he won the award for the best humour when he described the contemporary response to the idea of 'one for the road'. It was, he said a lament: "They were the good old days!" It is a lament we must remember, as we part from this dinner on foot.

At the beginning of the conference, Sir David Cox (Nuffield College, Oxford) reminded us of what had been said before. The value of these encounters is not that they provide ready solutions to the dilemmas and dangers of democracy. It is that they ask the right questions. And they demand of us that we endeavour to offer some of the answers that might just be right for our societies and our world.

To Agnes Herzberg, the master spirit of 2012 conference, our heartfelt thanks. We are grateful for the dialogue. For the music and the civilisation. And above all for the companionship that will return to our memories when we are far from here, restored to our daily cares from the precious opportunity to think grand thoughts and to conceive the way ahead for others and for ourselves.

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