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QUEEN'S UNIVERSITY INTERNATIONAL STUDY CENTRE

HERSTMONCEUX CASTLE, ENGLAND

CONFERENCE ON STATISTICS, SCIENCE AND PUBLIC POLICY

THEME: EVIDENCE, EQUALITY AND POLICY

EQUALITY: THE GREAT CHALLENGE OF HUMAN RIGHTS

The Hon. Michael Kirby AC, CMG

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FORMIDABLE WOMEN

For most of human history, women have suffered serious legal, social and personal inequality. It is therefore fitting that we should begin the XVIIIth Conference at Herstmonceux Castle with a reflection on two formidable scientific women, much in our minds today.

The first is the inspiration and organiser of this Conference series, Dr Agnes Herzberg, of the Department of Mathematics at Queen's University of Ontario, Canada. She is the instigator of the concept; the orchestrator of its organisation; and the editor of the fine publications that record our deliberations. Utilising the magnificent venue of this Castle, now in the possession of Queen's University of Ontario. Agnes Herzberg believes in the old university idea of mixing disciplines; tackling hard questions; encouraging dialogue; and mixing these elements with a concoction of civilisation and music. She is the reason why these events are so congenial for the participants and beneficial for the expansion of their minds.

At the XVIth Conference in 2011, our colleague, Professor Jasper McKee (University of Manitoba) penned a magnificent poem which, reportedly reluctantly, Dr Herzberg agreed to publish in the proceedings of the XVIth session. In the poem, titled "*A Ballad for the Ages*", Dr McKee finished with a tribute to Agnes Herzberg which was

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[*] Keynote address of the author at the commencement of the XVIII Conference on Statistics, Science and Public Policy at Herstmonceux Castle, England, 17 April 2013.

[**] Former Justice of the High Court of Australia (1996-2009); President of the International Commission of Jurists (1995-8); Australian Human Rights Medal (1991); Laureate of the UNESCO Prize for Human Rights Education (1998).

probably the source of her modest editorial reluctance. However, the tempo and content of the poem are splendid. It is as well to recall the closing stanzas. They remind me of Alfred Lord Tennyson's poem *Excelsior*, with its insistent rhythms and repeated exclamations. Asking himself how these conferences survive and flourish, the poet declares:[1]

> "How can this be? Is this a spot that time forgot?
> Oh no! Oh! No! Here study blossoms, learning grows,
> And real enlightenment still flourishes,
> At Herstmonceux.
> Statistics, Science, Fact and Public Policy,
> Exist in full integrity within this wondrous place,
> No pressing problem is beyond solution or the pale,
> At Herstmonceux.
> But what of Agnes Herzberg, Mathematician?
> And Heroine of this new modern piece?
> She now bestrides the Conference like a colossus,
> And makes each one a revelation still,
> At Herstmonceux."

We therefore begin a new encounter with a sincere tribute to Agnes Herzberg, without whom it would not happen.

Another formidable woman scientist has been in our mind these past days. I refer to Baroness Thatcher, whose funeral took place at St Paul's Cathedral earlier today. She was a politician about whom views were often divided. So it frequently is with politicians in democratic countries. Her professional success was undoubted. Her many talents were unquestioned.

As Margaret Hilda Roberts, she was unusual for a modern politician, in that she studied science, specifically chemistry. She worked at Oxford University with Britain's only female Nobel Laureate, Dorothy Hodgkin, in Science. At her funeral,

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[1] J. McKee, "*A Ballad for the Ages*" (the Herstmonceux Conferences), in A.M. Herzberg (ed.) *Statistics, Science and Public Policy – XVI Risks, Rights and Regulations* (2012) Ontario, 183.

her grandchildren bore the insignia of two high civil decorations: as a Lady of the Order of the Garter and as a member of the Order of Merit, both very select bands, few in number. But of her honours, the one of which she was most proud was Fellow of the Royal Society (FRS), the accolade of great scientists.

Eventually, Margaret Thatcher was to turn from chemistry to the law. It was as a young barrister that she learned the adversarial skills that would carry her to the top of British politics. She was a controversial figure and would have expected some of the boos and dissents that accompanied her obsequies. However, in the crowds that witnessed her funeral procession, their reflection on, and respect for, her cannot be contested.

Typically, she took a careful part in the preparation of her own funeral. Because Archbishop of Canterbury Robert Runcie had insisted on prayers, at the memorial service that followed the conclusion of the Falklands War, to include prayers for the grieving families in Argentina (a generous act that the Iron Lady rejected), his successor, Archbishop Justin Welby was confined to a final benediction. The pulpit was given to a familiar and friendly voice. The hymns that were sung were largely of Methodist origin. In one of them, to Gustav Holst's mighty theme *I Vow to Thee My Country,* appear the words:

> "The love that asks no questions"

I doubt that Margaret Thatcher knew that love. She was constantly asking questions. So should we all.

Her policies were controversial: privatisation, monetarism, breaking the trade unions and fighting the Falklands War. She was not in favour of equality for sexual minorities. According to her authorised biography, she undermined her predecessor, Edward Heath by spreading suggestions of his homosexuality. And it was her government that introduced Section 28 of the *Local Government Act* 1988 (GB), forbidding a local authority from "intentionally promoting homosexuality or publish[ing] material with the intention of promoting homosexuality". She was not empathetic to the gay minority.

And yet, perhaps there was sufficient science left in her that she allowed the beneficial needle exchange program to be adopted in Britain. Her great friend, Ronald Reagan, a great communicator, did not mention HIV or AIDS in his first term as President of the United States of America. Was it the firm scientific evidence of the utility of needle exchange that tipped the balance? Almost certainly it was not a belief in the basic civil equality of gays and for injecting drug users.

Reflecting on the career of Margaret Thatcher, on the day of her funeral, presents us with a metaphor. Science matters. Too few of our politicians are scientists and few are comfortable with the puzzles of science. This therefore is a fitting time for us to reflect on those puzzles. And to do so in the context of the consideration of the grand theme of *equality* that is central to the age we live in.

OUR TOPICS

Evidence: All rational human decision-making depends upon evidence, information or data. This is so of science and statistics. It is certainly so in the law. Even in politics, evidence is mustered to support or oppose decisions. Advocates will often try to put their 'spin' on the evidence so as to influence the outcome of decisions.

Occasionally, dishonesty injects fraudulent data into the evidence. Sometimes this is done out of frustration, because the decision-maker is happy with the outcome and simply wants "evidence" to back it up. Occasionally, the false evidence is injected to mislead or wrong-foot others. My own feeling this that such manipulation is comparatively rare in scientific circles. Usually, opinions will be destructive not because of the differences in the evidence; but because of different interpretations of where that evidence leads.

As a young lawyer in Australia, I saw many instances of this. In workers' compensation cases, a question would often arise as to whether contemporaneous effort was causally related to, say, a myocardial infarction (or heart attack). Excellent scientific witnesses could be procured who sincerely believed that such events were

always, or usually, associated with effort. Other witnesses were equally certain that such effort never, or rarely, had any significance. Temporal connections for them were purely coincidental. They did not prove a causal connection.

Interpreting evidence, and injecting considerations of judgment and personal assessment, necessarily brings about different conclusions. This will not usually be evidence of fraud or wrong-doing. It will simply be the consequence of different beliefs and experience. Sometimes the conclusion will have a foundation in so called "common sense" or intuition. Sometimes unstated considerations of justice and perceptions of fairness in outcomes may influence the expert opinion.

In the law, many cases arise where problems are presented because of racial or individual differences. Thus, many decision-makers believe that there descends upon judges, on their appointment, a mysterious capacity to tell the difference between truth and falsehood by the appearance of a witness. This used to be a common way of bringing about finality to litigation. However, it was undermined by much scientific evidence. Increasingly, courts today are rejecting, or confining, the significance of judicial assessments of truth telling based on impression.[2]

Sometimes differing cultural habits will affect the evidence. Thus, Australian Aboriginals are frequently under social inhibitions that prevent eye contact. Because, in Anglo cultures, eye contact can occasionally be significant for belief and acceptance of a witness, this cultural feature of indigenous people can occasionally act to their disadvantage. Decision-makers must be aware, or be made aware, of these considerations. They take on a special importance in jury trials where the decision-makers are chosen at random from the community.

Because of the importance of evidence to outcomes, it is right that we will be considering how evidence should be gathered; how it should be tested; how it should be made available to decision-makers; and whether it should be accessible to the community at large.

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[2] *Fox v Percy* (2003) 214 CLR 118 at 128-130 [28] – [42] per Gleeson CJ, Gummow J, Kirby J..

Equality: It is impossible to secure total equality of all human beings. A top scientist or a champion athlete, a gifted singer or a persuasive advocate will all have genetic gifts that are not shared with most of their fellow citizens. Equality is not therefore an absolute requirement. On the other hand, in some activities of life, it is important to seek out, protect and defend the demand for legal and social equality.

In part, the realisation of the importance of this objective has been re-enforced by the experience of humanity during the 20th Century. Events such as the two World Wars; shocking instances of genocide; increasing perceptions of injustice from unequal treatment; and the dangers of weapons of mass destruction all combine to strengthen the efforts of the international community to express and uphold a principle of equality as an attribute of universal human rights.

This principle was given voice in 1941 by President F.D. Roosevelt in his State of the Union Address to the US Congress. He there called for the protection of four essential freedoms which, he said, were essential to human existence. The four freedoms were freedom of speech and expression, freedom of worship, freedom from want, and freedom from fear.[3]

As the Second World War progressed, Roosevelt carried this idea to his colleague-in-arms, Winston Churchill who agreed that it should form the nucleus of the Allied war aims. It was so expressed in the *Atlantic Charter*. It became the core of the objectives of the heroic efforts to overthrow the tyrannies that were afflicting human-kind.

Initially, Roosevelt suggested that the *Charter* of the proposed United Nations Organisation should include a Bill of Rights, just as the United States Constitution did. It proved impossible (as had been the case in 1776 with the United States Constitution) to secure agreement over the principles for such a Bill of Rights in the time available for the creation of the United Nations in 1945. Nonetheless, notwithstanding the death of President Roosevelt in 1945, the Allies resolved to continue the effort to express the universal principles of human rights in a

[3] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania, Philadelphia, 1999, 1.

subsequent document. That document was to become the *Universal Declaration of Human Rights* (UDHR).[4] In a conscious tribute to the late President his widow, Eleanor Roosevelt, was chosen to chair the committee drafting the UDHR. Moreover, the second preamblar statement of the UDHR contained an express implication of the principles that F.D. Roosevelt had proclaimed. And the first preambular statement has asserted the imperative character of respect for the *Principle of Equality* amongst human beings. The previous inequality of entitlement to speak, to hold or reject religious beliefs and to be free of fear and want would not be secured without respect for, and protection of, equality in all relevant respects:

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".

Those words were initially put on a blank page by a great Canadian jurist, Professor John Humphrey of McGill University in Montreal. He was seconded to be Chief of Staff of Eleanor Roosevelt's committee. His was the pen that wrote at least 70% of the text of the UDHR.[5] Canadians can be very proud of the pivotal role of John Humphrey. Just as Australians can be proud of the role of Dr H.V. Evatt, a past Justice of the High Court of Australia, who was President of the General Assembly when the UDHR was adopted without a single opposing vote.[6]

From these optimistic beginnings grew the complex network of treaties and state practice that now express the universal aspiration of humanity to equality and justice. By chance, in the 1980s, I came to know John Humphrey. He and I were both then serving as Commissioners of the International Commission of Jurists. In quiet moments, he would tell me stories of the debates and differences in the early days of the United Nations, at Lake Success near New York. There were, of course, some (particularly from non-European cultures) who questioned the idea that it was possible to declare and protect equality for all people based on any given set of agreed values. The critics warned that human beings derived their views of

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[4] General Assembly Resolution 217A (iii) of 10 December 1948.

[5] Morsink, above, *ibid* 6-9.

[6] The vote taken on 10 December 1948 during the General Assembly of the United Nations was 48 in favour; nil against; and 8 abstentions. See Morsink, (above), 12.

themselves from the societies in which they grow to maturity. In those societies, there are often inequalities. But the United Nations boldly asserted that equality was the goal. Inequality had always to be fully justified and explained. In the language of Article 2 of the UDHR it is stated:

> "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*."

Subsequently, when the broad principles of the *Universal Declaration* were re-expressed in the form of binding treaties (relevantly the *International Covenant on Civil and Political Rights*)[7] the same principle of equality and non-discrimination was adopted in Article 2.1:

> "Every State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*."

It is from these foundational principles that the search for equality between human beings has ventured forth in the United Nations, in nation states and in communities and social interaction. These great principles help to explain the events surrounding the enormously important moves over the past 70 years to end racial discrimination; discrimination against women; discrimination affecting children; discrimination and servitude affecting slavery; discrimination against indigenous peoples; discrimination on the grounds of disability; and, most recently, discrimination on the grounds of sexuality.

Of course, there are voices that are raised to justify forms of discrimination, and derogations from equality, based on religious, cultural or other traditions. However, the past 70 years have witnessed a growing rejection of such notions and a

[7] 999 UN Treaty Series 171 (1976).

discernible movement in the world to establish, express and defend that foundational principle of the equality of all human beings.

Policy: It is one thing to adopt broad statements of principle. It is another to convert these statements of principle into binding treaties of international law and binding rules of domestic law. It is yet another thing, of course, to convert such principles to daily action in society and the world.

Prejudice, hostility, stigma and contempt are often deeply engrained as a result of human social experience. Getting effective responses against such instances of inequality requires changes in law; but also in attitudes. The enactment of laws does not, of itself, alter human attitudes. To be successful in achieving changed attitudes, it is necessary to combine law with education and free speech. Nowadays, the media plays a large part in supporting and re-enforcing notions of equality and substituting those notions for unequal practices inherited from earlier times. Although mass media can sometimes re-enforce prejudice and discrimination, as the experience of Josef Goebbels in Nazi Germany showed, print and electronic media (and increasingly social media available to humanity) can be used to strengthen changes in policy, practice and attitudes.

Achieving change is sometimes very difficult, particularly where powerful and determined opponents to change exist. Some of the strongest opponents to the achievement of full equality for gay people in the world are to be found in religious institutions that rely upon scriptural texts that have not been revised or reconsidered in the light of supervening scientific discoveries and revelations. One can find in Holy Scripture passages that may be interpreted to support discrimination against people of colour; discrimination against people of different races; discrimination against women; discrimination against the disabled and sick; and discrimination against sexual minorities. A major challenge of the current age involves reconciling the universal principles of human rights, equality and the rule of law with the increasing rise of fundamentalist religion.

Most of the changes of policy that must be developed and adopted lie in the hands of legislators. Increasingly, they operate in elected parliaments which are accountable

to the people at regular democratic elections. However, sometimes the judiciary has a role of upholding the principle of equality. In many cases, the judiciary will do this by reference to constitutional charters of rights that assert the centrality of the principle of equality.[8] Sometimes, the judges will make reference to human rights principles stated in legislation enacted by the parliament of their country. The *Human Rights Act* 1998 (UK) is such a measure. So is the *Bill of Rights Act* 1990 (NZ).

Sometimes, however, at least in common law countries of the English speaking world, judges will reach into the principles of the common law itself, in order to find solutions to suggested examples of unjustifiable discrimination between people upon forbidden grounds.

Such a case was decided in 1992 by the High Court of Australia. In *Mabo v Queensland* [No. 2],[9] an indigenous Australian claimed legal recognition of his right to land under the traditional laws of his tribal group. Under the colonial principles normally observed by Britain, where a territory was previously occupied by a civilised people with established laws and rules, it was the obligation of the British colonial authorities to negotiate a treaty with the rulers or leaders of such people, providing for respect for the pre-existing laws. Thus treaties were signed in many former colonies and settlements of the British Crown, including in North America and New Zealand.[10]

When, however, the British contacts were first made with the Australian continent, the authorities did not negotiate such a treaty and did not respect or recognise the laws of the indigenous people. This was because, they concluded, on the basis of their encounters, that the Australian Indigines were uncivilised nomads who had no conventional townships, farming arrangements or land law. The result was that land rights were rejected and denied. This conclusion was confirmed by 19th Century decisions of the Australian courts, re-enforced by a decision of the Judicial

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[8] *Naz Foundation v Union of India [2009]* 4 LRC 838 (Delhi High Court). This was a decision that invalidated the operation of Section 377 of the *Indian Penal Code* in so far as it criminalised adult, private, consensual sexual conduct. The judges invoked the principle of equality in the *Indian Constitution.*

[9] (1992) 175 CLR 1.

[10] *C Orange*, The Treaty of Waytangi, Bridget Williams, Wellington, NZ, 1992, 6.

Committee of the Privy Council in London.[11] In consequence, the Australian Indigenous peoples were deprived of the social, economic and legal control over land that would be protected by the law. This was the position that was challenged in the *Mabo case*.

The challenge was based upon two grounds which illustrate neatly the issues that arise for consideration in this Conference at Herstmonceax. The first ground was a challenge based on *evidence*. Essentially, the refusal of the British administrators to recognise Aboriginal land rights in Australia was founded on a factual premise that their communities had no real interest in, or rules for, the use of land. Subsequent anthropological evidence, produced in the *Mabo case*, indicated that this was factually incorrect. Accordingly, the factual foundation for the principle of law as knocked away, or at least seriously undermined.

But there was an additional consideration. This was a point of fundamental legal *principle and policy*. That principle and policy had emerged in sharp detail by reason of the developments in the United Nations and in the world community to which I have referred. As Justice Brennan pointed out in the *Mabo* decision, if one principle has been clearly established as a rule of universal application in civilised countries since 1945, it was that racial discrimination was outlawed; that no person should be denied legal rights simply because they were of a different race; and that discrimination on that footing could not be justified.[12]

Therefore, on the basis of the need to correct the evidentiary foundation of the earlier legal authority and on the basis of the high policy and principles of national and international law against racial discrimination, it was necessary, and obligatory, for the Australian court to change the direction of the law. The rule of law involved in the case was one of common law; not statutory law. It was one that had been made and declared by earlier judges. What the judges had then made, they could now unmake or remake. This is what the majority of the High Court of Australia were determined

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[11] Anonymous (1722) 2PWms 75; 24ER 646; *Attorney-General (NSW) v Brown* (1847) 2SCR (NSW) App 30; *Couper v Stuart* (1889) 14 App cas 286 at 291. See *Wik Peoples v Queensland* (1996) 187 CLR 1 at 181 per Gummow J.; at 206 ff per Kirby J.

[12] *Mabo v Queensland* [No.2] (1992) 175 CLR 1 at 42.

to do in the *Mabo case.* And the foundation for the Court's action was, in part, new *evidence* and, in part, the application of important legal *principle and policy*.

CONCLUSIONS

Every country has its own principles, policies, law and history. Every nation has its own institutions to grapple with issues of justice and to rectify ancient wrongs. Today, most such wrongs must be corrected, if at all, by elected legislatures. However, some wrongs can also be corrected by the executive government and others can be corrected by the judiciary. Each of the branches of government acts on evidence. One hopes that, ordinarily, sound evidence and rational conclusions inform the political processes. Sometimes, however, it is not so.

To the complaint that changing the land law of Australia was an instance of unacceptable "judicial activism", the defenders of the *Mabo* decision pointed to the fact that no such change had been achieved in 150 years of elected parliaments in Australia. Evidence and policy convinced the judges that they should effect the change. Their decision was subsequently endorsed, respected and carried into operation by an Act of the Australian Federal Parliament. But the principle took effect as a consequence of the judicial declaration of the common law. And that declaration rested on the judicial understanding of better evidence; and on the judicial appreciation of important principles and policy that informed the content of the law.

In this Conference we will explore the role of evidence in informing important decisions; the meaning of the principle of equality as it permeates so many areas of life today; and the function of policy and how it is determined and carried into effect.

There could scarcely be more interesting, relevant and pertinent subjects for our deliberation.

Watching the great pageantry of a ceremonial funeral of Baroness Thatcher, shown on global television, viewers in their millions were made conscious of the strong institutional foundations that exist in the United Kingdom. Those foundations have

been won and developed by centuries of struggle, by which the people of these Islands asserted their entitlement to govern themselves, to live under the rule of law, and to enjoy universal human rights.

The same principles belong to people everywhere. In the current age, the existence of great technological change and of strongly held differences over rights present special challenges that are sometimes difficult to accommodate. We will turn our attention to those challenges. And as Sir David Cox said at the XVIIth Conference in 2012, we may not always agree on the answers. But we will at least ask many of the most pertinent questions. Which is the purpose, and advantage, of gathering as we do at Herstmonceux Castle, at the beginning of Springtime in 2013.