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UNIVERSITY OF SOUTHERN QUEENSLAND  
TOOWOOMBA, QUEENSLAND  
GRADUATION CEREMONY 7 APRIL 2017

OPTIMISM IN 'OUR MISERABLE 21<sup>ST</sup>  
CENTURY'?

The Hon. Michael Kirby AC CMG

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*BREATHING THE AIR IN TOOWOOMBA*

I begin by paying respects to the University, to all present and to the indigenous people of this beautiful part of Australia. Those special people lived here for millennia in harmony with nature prior to the arrival of the explorers and settlers.

There is a special provenance in beginning with the First People. It goes beyond mere formal recantation of polite formulas. Here, in Toowoomba, in the wartime years, a great Australian, Sir Gerard Brennan, was formulating his values and approach to life. At Downlands College, it did not take him long to conclude that racial prejudice had to be repaired in Australia. Repair them he did in one of the greatest decisions of the High Court of Australia: *Mabo v Queensland [No. 2]*.<sup>2</sup> Until 1992, our legal system had operated on the premise, later shown to be false, that the Aboriginal people had no interest in land and were

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<sup>1</sup> Nicholas Eberstadt, “Our Miserable 21<sup>st</sup> Century”, *Commentary*,  
<https://www.commentarymagazine.com/articles/our-miserable-21st-century/>.

<sup>2</sup> (1992) 175 CLR 1.

entirely nomadic. When this was shown by anthropologists to be wrong in fact, the truth cried out for change.

How easy it would have been to write the formulaic decision refusing change in the courts. Yet Justice Brennan from Toowoomba was made of sterner stuff. He knew that there would be no long-term improvement in the conditions of Aboriginals in Australia until their economic stake in the country was radically improved. This demanded recognition of rights to traditional lands that had not already been passed in law to others. He upheld Aboriginal land rights. He and his colleagues rejected continuance of the old law, as contrary to the fundamental principles of Australia's common law. Those fundamental principles rested, he said, on the universal values of civilised countries. This meant no more deprivation on the grounds of race.

With the *Engineers Case* of 1921; the *Banking Case* of 1948; the *Communist Party Case* of 1951 and the *Tasmanian Dams Case* of 1983, this was one of the truly existential decisions of our highest court. And the central reasons were written by Justice Brennan: the teenager who grew up in this city and imbibed its beauty and sense of egalitarianism and fairness.

I am not here speaking of lawyers' secret business. *Mabo* was a case for *all* citizens. Like the others I have mentioned it spoke to the nation, to define the type of country and society we really were. The decision was attacked, of course. And it has not proved wholly transformative. Yet it was an important step on the way to justice and equality in our law. And I ask you to mark that it was not a step taken by elected parliaments in one of the oldest parliamentary democracies in the world. It was

taken by unelected judges, marching to a different drum. They were there to serve *all* the people: not just the *majority*. I conjure up in my mind, as I stand here, the young Gerard Brennan, walking along footpaths of Toowoomba, waiting anxiously for war news. And also waiting for his encounter with history that would help Australians be a better people, under the law.

All citizens should answer such a call with equal resolution. Whether they are in law, in business, in new technologies and whether they are university graduates or not. They should do so when the demand for equality before the law comes from women. From Asian or Arab Australians. From Australians who are Christian, Muslim, or non-religious. From Australians towards our refugee applicants. Or from those who are gay. Equal justice under law means just that. No irrelevant distinctions. No second class status. Equality in the eyes of the law.

Gerard Brennan was not the only notable lawyer to come from these parts. Because the Darling Downs are one of Australia's richest agricultural regions and enjoys one of the nation's most diverse and prosperous economies, with a unique setting but proximity to governmental power, the Downs have produced a disproportionate share of leading citizens and top judges.<sup>3</sup> Queensland as a whole has made many notable contributions to the legal profession. The present Chief Justice of Australia, Chief Justice Kiefel, is also a child of Queensland. She is the first woman to hold that position in 113 years.

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<sup>3</sup> Thomas McCawley, born Toowoomba 1881 was Chief Justice of Queensland, famous for *McCawley v The King* (1920) AC 691 concerning the *Colonial Laws Validity Act* (Imp), s. 5. So was Justice Timothy Carmody born Millmerran, 1956; CJQ 2015-16. Sir Gerard Brennan born in Rockhampton 1928 was Chief Justice of Australia 1995-8.

Every lawyer knows that this year is also the 150<sup>th</sup> anniversary of the birth of one of the greatest lawyers of the last century, the Queensland born Lord Atkin.<sup>4</sup> He should be known beyond the legal enclave. In the highest court of the United Kingdom he wrote probably the most influential decisions of the last century, *Donoghue v Stevenson*.<sup>5</sup> It revolutionised the law of negligence. He also wrote a stirring dissent in *Liversidge v Anderson*,<sup>6</sup> demanding that the rule of law remained in full force when the bombs were falling on London in 1941. It is a dissent that was later held to be correct law. The judge was vindicated.

In my humble view, such vindication of dissents should be more frequent. Including in Australia. There is a place for formalism. There is a place for dissent. New ways of thinking are the means by which fresh ideas renew our society. They do so in business. They certainly do so in technology. They need to do so more often in the law. Anyone who thinks everything in the law is good and fine and right needs to read the *Mabo case*. Our country, in the law and everywhere, needs more fresh thinkers. It needs those who challenge the status quo. We are too complacent. A university education is a challenge to shake our minds and to send us forth to give leadership see things anew.

### *OTHER THANKS AND PRAISE*

There are others who must be thanked and praised on this occasion. They include my fellow graduates, in all the disciplines who come forth

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<sup>4</sup> See PDT Applegarth, “Lord Atkin, Principles and Progress (2016) 90 *Australian Law Journal* 711.

<sup>5</sup> [1932] AC 562 at 578-579 (HL).

<sup>6</sup> [1942] AC 206 at 220 (HL). Atkin was also a strong believer in a scientific approach to the judicial function, basing it on analysis of evidence rather than mythical judicial capacities in discerning truth telling. See *Fox v Percy* (2003) 214 CLR 118 at 128-9 [30] citing *Société d’Avances Commerciales (Société Anonyme Egptienne) v Merchants’ Marine Insurance Co. (The “Palitana”)* (1924) 20 LIL Rep 140 at 152 per Atkin LJ.

today to receive their degrees. This is the moment that rewards them for all those sleepless nights; for the gallons of coffee; for the nervous torture at examinations; for the worry of it all. For everyone who starts on the journey to this moment, at least one and sometimes more fall aside. It is not an easy journey. Sacrifices are made. Perils are faced in the eye. So today, there can be celebration, praise and endless selfies. But also, I suggest, thought for those who never made it. They are our brothers and sisters and fellow citizens too. With large achievements come obligations. Obligations of leadership and sensitivity for others. Service for the community. In addition to praise for the graduates we should all praise our teachers. Starting with the first day at infants' school, which I ask you now to remember. That is where we began the journey of formal education. Specially for our university teachers who taught us that learning by rote is not enough. Ours is the obligation to question and to make leaps of imagination and embrace of creativity.

Beyond our teachers, there are our beloved parents, partners, siblings and friends without whom we would never make it to a day like this. I would never have made my career and life without my partner of 48 years, Johan van Vloten. There it is. I would not have said that a few years ago, in case it upset those who wanted me to pretend away the realities of this world and of our human natures. Well, that pretence is over. I am glad and proud that University of Southern Queensland, on special days, flies the rainbow flag at its entrance. This shows that this is a place of justice and equality for women, for people of all races, indigenes and gays. No one is left out. No one will be wilfully left behind. So let us praise and honour all those who brought us to this moment. And let us resolve to push further the boundary towards

equality for all human beings. Fundamentally, that objective is based on love for one another. This is a principle common to all the great religions and philosophies that we have learned about in this place.

### *IS THIS CENTURY MISERABLE?*

Finally, I must leave you with a larger thought. That, you see, is what happens when you enter the university environment. Since my retirement from the High Court of Australia, I have not been pruning the roses. My life has been full of busy activities, mainly pro bono and generally under mandates for the United Nations. Lawyers, but also business people and specially those in information technology need to be nimble. To be quick to embrace new opportunities. When they are younger they must do it for money and in the market. As they grow older they must do it to repay the many gifts they have received.

One of the most interesting tasks for me has been to chair the Commission of Inquiry of the United Nations on Human Rights Violations in North Korea.<sup>7</sup> This was a mandate that took me to Washington DC last week.<sup>8</sup> Next week it will take me to Boston, with more will follow.<sup>9</sup>

The puzzles of North Korea, and the dangers, are too numerous to explore on this occasion. The shocking abuses of human rights were illustrated vividly, earlier this year, by the murder in Kuala Lumpur of the half-brother of the Supreme Leader, Kim Jong-nam. Their nuclear weapons tests and their long range missiles vividly illustrate the new

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<sup>7</sup> United Nations, Human Rights Council, Commission of Inquiry on Human Rights Violations in the Democratic People's Republic of Korea, A/HRC/25/CRP.1

<sup>8</sup> A meeting on security and human rights in DPRK of the American Enterprise Institute, Washington, 27 March 2017.

<sup>9</sup> For the Clough Lecture at Boston College, Boston, USA on 11 April 2017 on DPRK – a Jurist's View.

perils of the present moment in human history. Those perils certainly include the risks of deliberate actions. But also the risks of mistakes, accidents, misunderstandings or irrational passing rage, hatred or vengeance.

These dangers have come upon humanity and the very moment when there is greater uncertainty than there has been for a long time. The British vote for Brexit. The United States election of the outsider, Mr Trump. The impeachment and removal of the President of South Korea. The new boldness of Russia and China. The foolhardy actions of Kim Jong-un: whose nation is the only one that has performed nuclear tests in this new century.

At the conference in Washington, one of the speakers was a brilliant demographer, Dr Nicholas Eberstadt. He has written a worrying analysis. It has nothing immediately to do with the Korean Peninsula. It is titled “Our Miserable 21<sup>st</sup> Century”.<sup>10</sup> It analyses the fundamental reasons for the election of Donald Trump. It ascribes this to the rapid disappearance of 10 million employed jobs in the United States, a loss falling heaviest upon the poorly educated white communities. They are angry. Global forces make it difficult for them to find easy and short-term solutions.

None of the graduates today will be exempt from the same forces and dangers. Only 6% of adults in Australia now end up in the careers they wanted when they were younger.<sup>11</sup> That is why it is vitally important to

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<sup>10</sup> As 1 above.

<sup>11</sup> See L. Keen, “The Seven Job Clusters Where your Job Lives”, *Australian Financial Review*, 24 November 2016, 3, referring to the report commissioned by the *Foundation for Young Australians*, analysing 2.7 million job advertisements and proposing seven job clusters allowing flexibility and mobility.

secure education that has the capacity to adapt and change. It is why technology that drives most of the changes is at the heart of the challenge. It is why business must be quick to change. And even the law must embrace more wholeheartedly the challenge of change.

The writing of change is on the wall. In February 2017, H&R Block, the global tax advisers, announced in the United States that they were enlisting the cognitive computing engine, IBM Watson, to do the analysis of tax returns; to apply the tax law more accurately, quickly and inexpensively than human experts can do. So the graduates on this happy occasion should mix and mingle outside with their separate discipline.<sup>12</sup> Business will need law. Law will need business. Yet everyone will need information technology. But everyone will also need the protection of human rights, the rule of law and international peace and security. We are all in this together. Despite the dangers and uncertainties, this is still a moment for optimism. And to the graduates of today passes the baton to create a better country and to build a better world.

In the earnest hope that we will all rise to our challenges I conclude with words of praise and thanks to this university. This is the 10<sup>th</sup> anniversary of its Law School; the 25<sup>th</sup> anniversary of its formation as a University; and the 50<sup>th</sup> anniversary of its foundation as an institute of higher learning. We know the challenges. In the place of injustice, we will strive for justice. In place of poverty, we will strive for equality and

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<sup>12</sup> A. Moscaritolo, "H&R Block Enlists IBM Watson to Find Tax Deductions", *PC Magazine* (retrieved 14 February 2017). See also D. Livni, "Lawyers are being Replaced by Machines that Read", <https://qz.com/893576/lawyers-are-being-replaced-by-machines-that-read/>.

opportunity. In the place of the old ways we will embrace the new technology. And we will not forget that human rights involve human love. And no machine, however clever, will ever be created to share in that emotion of love that binds our species together. Love is vital for all of us and for the biosphere and its survival.<sup>13</sup> We should embrace love too.

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<sup>13</sup> D. Browne, “What we can Learn from the Mabo Lawyers”, *Law Society Journal* (Victoria), Issue 24, July 2016, 90-91.