LAW AND JUSTICE IN AUSTRALIA: ROOM FOR IMPROVEMENT

THE HON JUSTICE MICHAEL KIRBY AC CMG*

I CAUSE FOR CELEBRATION

I congratulate the Law School of Queensland University of Technology upon its many achievements. The School, now approaching its 30th year, is entering a new phase. It can no longer be described as young. But it is not venerable or stuck in its ways.

QUT must carve out its own special contributions to the study and teaching of law in Australia. This means identifying new approaches and cutting edge topics that will give the graduates of this School an advantage that goes beyond the situation of its campus in the city of Brisbane and the supposed bias of its courses towards practical utility.

The message I bring is that the best lawyers are those who question received wisdom. They are the ones who look beyond the words of texts; question the current legal orthodoxy; keep their minds open to new thoughts; perceive the growing expansion of law beyond local jurisdiction; and are always alert to law's abiding mission as an instrument of justice.

I know that the QUT Faculty has long boasted a strong commitment to excellence in instruction and originality in research. My last address to this dinner occurred in 1997, soon after my appointment to the High Court of Australia.[1] Since that time, the QUT Law School has marked up many notable achievements. Added to the curriculum has been the compulsory subject of Theories of Law (jurisprudence) whose absence I saw as a weakness in the former curriculum. The School has achieved notable success in mooting. And to its already strong Faculty have been added two leaders who will undoubtedly help members of the School to make new and important achievements in the challenges ahead. In order of their appointment, I refer to Professor Brian Fitzgerald and the new Dean, Professor the Honourable Michael Lavarch.

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* Justice of the High Court of Australia. This article is the text for a speech delivered at the Queensland University of Technology Association of Law Students (QUOTALS) Annual Dinner, Brisbane, 3 September 2004. Parts of this address are derived from an address delivered on 11 August 2004 to the Law Societies of Flinders University and the University of Adelaide, South Australia.

1 M D Kirby, 'Teaching Australians Civics: QUOTALS Dinner Speech, 15 August 1997' (1997) 13 *Queensland University of Technology Law Journal* 149.

Professor Fitzgerald has already established his credentials as one of Australia's leading scholars and teachers in the field of information technology and the law. On numerous occasions, I have had cause to use his writings in my judicial reasons.[2] I have even learned to overlook his interest in sports law.[3]

My life is forever bound to that of Dean Lavarch. For it was he that offered me the appointment to the High Court of Australia. At the time, he was the Federal Attorney-General and had already been responsible for the appointment to the High Court of my colleague, Justice Gummow. I was then serving as President of the New South Wales Court of Appeal.

On 12 December 1995, in my Chambers in Sydney, I received a telephone call at 9am from the office of the Federal Attorney-General. It asked where I would be at 6pm that evening. I indicated that I would be attending a meeting of the Users' Committee of the Court of Appeal. I hastened to add how anxious I was, as President of the Court, to ensure that the Court was a user-friendly place for litigants and practitioners. The contact seemed unimpressed. 'All we need to know is where you will be', he said. Justice Deane's appointment as Governor-General-designate had been announced. The vacancy on the High Court was well known. The consultations with the States had taken place. I knew that, once again, my name had gone forward. I therefore knew what the call was about.

At 6pm on that day, I was sitting in the judges' conference room of the Supreme Court, with Justice Gleeson, then Chief Justice of New South Wales, other judges and the representatives of the Bar Association and Law Society. As it happened, my brother, Donald Kirby, a solicitor was present, sitting opposite me as one of the representatives of the Law Society.

At 6.10pm my Associate, Nick James, entered the room. This was unusual. Associates rarely intruded into such an inner sanctum. I saw him hand a small yellow sticker to the person sitting closest to the door. It moved its way from hand to hand in my direction. It seemed a long time coming.

As my brother describes it, when I looked at the sticker the blood drained from my face for it told me that my life was about to change. It invited me to telephone the Federal Attorney-General urgently. In some disorder, I collected my papers, returned to my Chambers and telephoned Michael Lavarch. 'I have the honour to invite you to accept appointment as a Justice of the High Court of Australia', he said. There was a pause. But it was not a lengthy pause. I did not, for example, ask the salary and conditions of the position. I simply said: 'I accept. I will do my best'. I hope that he, and the people of Australia, feel satisfied that I have kept that promise and the other commitments made by me at the swearing in ceremony on 6 February 1996 in the No 1 courtroom in Canberra.[4]

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2 See, for example, *Dow Jones Inc v Gutnick* (2002) 210 CLR 575 referring to B Fitzgerald and A Fitzgerald, *Cyberlaw* (LexisNexis Butterworths, 2002) 122, 124, 186, 187. See also the references to *Cyberlaw* at 625-626 [113]-[114]; 627-629 [118]-[119].

3 B Fitzgerald and J Harrison, 'Law of the Surf' (2003) 77 *Australian Law Journal* 109.

4 M D Kirby, 'Swearing In and Welcome Speech at the High Court of Australia, 6 February 1996' (1996) 70 *Australian Law Journal* 274.

In what was to be one of his last acts as Federal Attorney-General, Michael Lavarch welcomed me to the Court as first law officer of the Commonwealth, on behalf of the government and people of the Commonwealth. Because our lives were intertwined in this special way, it is proper that I should pay tribute now to him. Not only did he make many achievements as Attorney-General, he shepherded the Law Council of Australia through a difficult time of significant changes in his function as Secretary-General. It can be said with confidence that he will be innovative, creative and competitive. His experience and character will usher in an important new phase in the life of this Law School.

II ACHIEVEMENTS OF THE LAW

It is natural that law teachers and law students, as well as practitioners and judges, should seek to identify the qualities of their profession of which they feel proud. Such qualities exist. When, at times, we become disheartened by this or that outcome of the law, it is important for us to remember the strengths of our discipline, for they are many.

They include the unbroken history of constitutional stability stretching back to colonial times and lasting, without interruption, to the present age. The *Australian Constitution* belongs wholly to the people of this independent country. It is our responsibility. Only we can change its text.

I would also mention the creation of representative democracy in Australia. Even in the darkest days of war, we have maintained our commitment to democratic governance. At this time, Australia is in the throes of a federal election. Peacefully we elect our governments and, from time to time, change them. There is no violence. The election is conducted with high professionalism. Its outcomes are decided at the ballot boxes and accepted or, if contested, determined quickly in courts of disputed returns.

The judges of this nation are independent of the other branches of government, and of private influence and of each other. Officials are generally uncorrupted and institutions have been created to keep them so.

In our judiciary, judges are bound to express their true opinions according to the law. This means that in appellate courts, disagreement is not hidden in a false pretence of unanimity. Through dissent, our law often advances as novel ideas, once heterodox, become accepted and become established legal doctrine.[5]

The provisions of s 75(v) of the *Constitution* represent one of the few truly novel inventions of the founders. That paragraph permits any person claiming that an officer of the Commonwealth has acted in breach, or neglect, of jurisdiction and powers, to come directly to the High Court of Australia for relief under the constitutional writs. The delays that attended the resolution of the lawfulness of the conduct of United States

[5] See for example on s 92 of the *Constitution Buck v Bavone* (1976) 135 CLR 100; compare *Cole v Whitfield* (1988) 165 CLR 360. As to the implied freedom of political discussion see the reference to the early decisions of Murphy J in *Ansett Transport Industries (Operations) v The Commonwealth* (1997) 139 CLR 54, 88 and *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 581-582. See H P Lee and G Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 393.

officials in the naval base at Guantanamo Bay, in Cuba[6] could not, I believe, have occurred in Australia. If the officials concerned are 'officers of the Commonwealth', an expression widely defined by the High Court,[7] the challenge to the lawfulness of their detention could have been before the High Court within a matter of days.

We can also be proud of our institutions of legal education and of law reform. These bodies, and the scholarship in the law for which they are responsible, greatly influence the contemporary Australian judiciary, and contribute to its work.

The special features of the Bar in Australia are also a source of justifiable satisfaction. The existence of a legal profession independent both of government and of the judiciary, is an important protection for freedom. The fact that most of our judges are chosen from the independent Bar is a reason for the strong tradition of judicial independence that we enjoy in Australia. Judges are not trained, out of law school, in government colleges and promoted by government decrees. Typically, they come from the independent profession. They do not regard themselves as public servants. This independence of mind is something we must always be careful to preserve.

The willingness of members of the Bar and legal practitioners in law firms to perform *pro bono* work has been a feature of the Australian legal profession all my life. It helps assure access to the courts for many who would otherwise not be able to afford a lawyer. In the High Court, we have seen this in many refugee cases. The Court has frequently paid tribute to the assistance so given.

I applaud the growing open-mindedness of practising lawyers in Australia to the opportunities that exist beyond our jurisdiction, in the region and the world. The lawyer who graduates now will have greater opportunities to serve the wider cause of legality and constitutionalism than was possible in my youth. The building of a world founded on principles of law, and the rule of law, is an important assurance for peace, security and the defence of human rights. Fortunately, Australian legal firms have realised this. They are now playing an active part especially in the Asia-Pacific region. Law schools, including QUT, must play their part in reaching out to the region and offering legal education services for countries where the law is at an earlier stage of development.

When I was at Law School, this is the point at which a speaker in my position would resume his seat. Speaker and audience would be enveloped in applause and a miasma of self-congratulation. But now, things are different. At least they are different for me. I hope they are also different for the QUT Law School.

III DOING THINGS BETTER

At a recent judicial conference in Fiji, the after dinner speaker was Ratu Epeli Ganilau, until recently the President of the Great Council of Chiefs of the Fiji islands. He began his talk with a quotation from the famous speech of the Reverend Dr Martin Luther King Jnr delivered at the Lincoln Monument in Washington on 28 August 1963. It was

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6 See for example *Hamdi v Rumsfeld* (2004) 72 USLW 4607; *Rumsfeld v Padilla* (2004) 72 USLW 4584; *Rasul v Bush* (2004) 72 USLW 4596. See generally 'Term in Review' (2004) 73 USLW 3049.

7 See for example *The King v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389, 399.

in that speech that Dr King proclaimed 'I have a dream'. Like every Australian, I remembered snatches from the speech. But I had never actually stopped to read it, beginning to end.

Ratu Ganilau seized my interest by reading a section at the beginning of the speech that I had never heard. It involved a metaphor with an allusion to the moral bankruptcy of a nation that denied true equality in the law to all of its people:

> In a sense we have come to our nation's capital to cash a check. When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir …[W]e refuse to believe that the bank of justice is bankrupt. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation. So we have come to cash this check … a check that will give us upon demand the riches of freedom and the security of justice [in] … the fierce urgency of now.

As the words 'the riches of freedom and the security of justice' played on my mind, I too had a dream. I dreamt that I had awoken 10 years before my appointment to the High Court of Australia on the invitation of Michael Lavarch. I had awoken in the exciting time when Chief Justice Mason presided in the High Court. When Justices Brennan, Deane, Toohey and Gaudron were there, in a period of the Court's history alert to serious injustices and awake to the traditional recuperative capacities of our law to right significant wrongs.

I dreamt that I was there when the High Court decided the great case of *Dietrich v The Queen.*[8] That decision reversed the unjust holding in *McInnes v The Queen.*[9] It upheld the effective right of persons facing serious criminal charges in Australia to the provision of legal counsel, if necessary by the state, if they could not otherwise afford it, so that they would be properly represented in their trial. This effective right was found in the common law and in defence of the integrity of the work that courts and judges are obliged to do. There has been criticism of the decision in *Dietrich.*[10] However, the notion that judges should preside over serious criminal trials where accused persons, otherwise than by their choice, are not properly represented by a trained lawyer, involves a concept of law as a charade and mere formality: not as an enterprise of substantive justice.

In my dream I was there in the time that *Mabo*[11] was decided: correcting the historical error of *terra nullius.* And *Theophanous*[12] and the other cases that found the implied freedom of communication necessary to the effective operation of the representative democracy created by the Constitution. And later *Kable,*[13] which offered protection to

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8 (1992) 177 CLR 292.

9 (1979) 143 CLR 575.

10 For example, J D Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 110, 119. See also the dissents of Brennan and Dawson JJ in *Dietrich* (1992) 177 CLR 292, 315, 338; compare, M D Kirby, 'Judicial Activism? A Riposte to the Counter-Reformation' (2004) 24 *Australian Bar Review* 219, 227.

11 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

12 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106. See now *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

13 *Kable v Director of Public Prosecutions (NSW)* (1997) 189 CLR 51.

the independence of State courts, inherent in their constitutional capacity to be vested with federal jurisdiction.[14] And all the other cases where doctrines of law and equity were re-examined with a view to clarifying and modernising laws when they were shown to be encrusted with unthinking dicta and outmoded rules.[15]

It was a happy dream to be a member of the High Court at such a time. A judicial life of concurrences and agreement is easier by far than a judicial life of dissent and disagreement. The burdens are lighter. Typically, the personal comradeship is easier. Those days will come again to the High Court in the inevitable cycles of the law. They will not come during my time.[16] But of this we can be sure from our knowledge of the law and its rhythms - they will come again when the time is right.

A *Women in Law*

> [T]here is something that I must say to my people who stand on the warm threshold which leads into the palace of justice. In the process of gaining our rightful place we must not be guilty of wrongful deeds. Let us not seek to satisfy our thirst for freedom by drinking from the cup of bitterness and hatred.

I have a dream that women will play their full and rightful place in the law. Women – not just a woman – will take their seat in the High Court. In August 2004, two women were appointed to the Supreme Court of Canada. This brings the numbers of women judges of that distinguished Court to four – four out of nine, including the Chief Justice. In the United States Supreme Court, it is two out of nine. In the House of Lords one out of nine. In the High Court of Australia there are no women judges since the retirement of Justice Mary Gaudron.

In my dream, women in the future will be there at every level of the law: on the Bench, at the Bar, in government and in legal partnerships. A woman brings a different life's experience to a court as to any other institution. It is a legitimate and important experience to bring to influence the work of a final court.[17] Women sometimes see aspects of legal problems to which men are blinded by their experiences.

I dream that more women will rise at the central podium before the Full High Court to present cases. Advocacy is not a skill that is determined by gender. Yet the number of women with 'speaking parts' has remained small, and remarkably stable, in my years on the High Court. About eight or nine each year presenting a major case.

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14 *Australian Constitution*, s 77(iii).

15 For example, *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7; *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107; *Rogers v Whittaker* (1992) 175 CLR 479; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; *Bryan v Maloney* (1995) 182 CLR 609.

16 See for example *Attorney-General (WA) v Marquet* (2003) 78 ALJR 320 and *Al-Kateb v Godwin* (2004) 78 ALJR 1099, 1136 [193].

17 See for example *U v U* (2003) 211 CLR 238, 240 [2]; compare R Bader Ginsburg, 'Remarks on Women's Progress at the Bar and on the Bench' (2004) 89 *Cornell Law Review* 801.

Recently, in life and not in dreams, a case argued in Adelaide saw leading women counsel on each side of the record. One of the juniors too was a woman.[18] For once, the tables were turned. There was only one man at the Bar table in the Banco Court in Adelaide in that case. I dream of the day when this is not a matter for comment; when advocates are briefed and judges chosen solely on their gifts of talent and intellect – when gender has been wholly banished from the equation.

B *Aboriginals and Justice*

> We must forever conduct our struggle on the high plane of dignity and discipline … [W]hite people … have come to realise that their destiny is tied up with our destiny and their freedom is inextricably bound to our freedom. We cannot walk alone.

I dream of a legal system that brings true justice to the indigenous people of Australia. Despite *Mabo*, and the efforts of many parliaments, governments and of the courts, the law of Australia has often failed the Aboriginal people. It did so for nearly 200 years by denying them recognition of their claims to title in their traditional lands. We stood by and could offer no help when many of them were taken from their parents and given to others.[19] To this day, the conditions of housing, health, education, employment and opportunities in life are much lower for indigenous people than for other Australians. The only legal statistic in which Aboriginal people come out on top, in per capita terms, is in their rates of arrest and imprisonment.

At the High Court Centenary Conference in October 2003, Noel Pearson, the respected Aboriginal leader and lawyer, told the assembly that Australian courts, after *Mabo,* had generally failed the Aboriginal people who are now forced to look elsewhere for greater justice.[20] It was a sombre message, bluntly delivered.

Dr King was surely right to say that the freedom of all of us, in the majority community, is inextricably bound up with Aboriginal freedom. I have a dream that the law is not barren. That it can sometimes still yield justice to indigenous Australians in their cases. Law can be a shelter and a support in the quest for true equality in our Commonwealth without which 'peace, order and good government' will sometimes seem an empty vessel.

C *Prisoners' Dignity*

> I am not unmindful that some of you have come here out of great trials and tribulations. Some of you have come fresh from narrow cells. Some of you have come from areas where your quest for freedom left you battered by the storms of persecution and staggered by the winds of police brutality. You have been the veterans of creative suffering … knowing that somehow this situation can and will be changed.

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18 *Kamleh v The Queen*, reserved, 11 August 2004. Ms P M Powell QC with Mr C J Caldicott appeared for the appellant. Ms W J Abraham QC and Ms S McDonald appeared for the Crown.

19 *Kruger v The Commonwealth* (1997) 190 CLR 1.

20 N Pearson, 'Land is Susceptible of Ownership' in P Cane (ed) *Centenary Essays for the High Court of Australia* (LexisNexis Butterworths, 2004) 111, 124.

At a time when, with near unanimity, the Federal Parliament has diminished the rights of persons sentenced to imprisonment to vote in the coming federal election,[21] I have a dream that, under law, prisoners will be treated with full dignity as befits their status as human beings and (in most cases) citizens of the Commonwealth.

So far, the decision of the High Court in *Dietrich* simply guarantees the rights of prisoners at trial. Prisoners are not assured of legal representation on appeal. In many States of Australia, when unrepresented, prisoners are not brought to a hearing in the High Court to speak to the Court, as all other litigants presently can do in support of an application for special leave. The Court has denied requests for orders obliging custodial authorities to bring them to a place where they can be heard by the Court. It has said that prisoners have no such right as they have not yet engaged the Court's appellate power. They are not yet a party to proceedings in the Court.[22]

For me, such decisions constitute a serious departure from the principle of true equality before the law, as envisaged by our *Constitution*. I have a dream that such unequal and discriminatory treatment will have no place in Australian courts of law in the future.[23]

In *Muir v The Queen*[24] I said:

> Prisoners are human beings. In most cases they are also citizens of this country, 'subjects of the Queen' and 'electors' under the Constitution. They should, so far as the law can allow, ordinarily have the same rights as all other persons before the Court. They have lost their liberty while they are in prison. However, so far as I am concerned, they have not lost their human dignity or their right to equality before the law.[25]

Winston Churchill famously remarked that one can judge the civilisation of a community by the way it treats its prisoners. By that test, we in Australia, are sometimes found wanting. I dream that this will change for we are assessed in such matters, as lawyers and as citizens and as human beings.

D *Refugees and Law*

> I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character. I have a dream today.

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21 *Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Act 2004* (Cth) s 3, Schedule 1 para 3 amending s 93(8AA).

22 *Collins v The Queen* (1975) 133 CLR 120; *Milat v The Queen* (2004) 78 ALJR 672.

23 See *Muir v The Queen* (2004) 78 ALJR 780, 785 [28].

24 (2004) 28 ALJR 780, 784 [25]. The reference to 'electors' must now be read subject to the recent amendments to federal electoral law.

25 Compare *Gibbons v Duffell* (1932) 47 CLR 520, 535 (Evatt J); *Raymond v Honey* [1983] 1 AC 1, 14 (Lord Bridge of Harwich) and see M Finnane and T Woodyatt, 'Not the King's Enemies: Prisoners and the Rights in Australian History' in D Brown and M Wilkie (eds), *Prisoners as Citizens: Human Rights in Australian Prisons* (Federation Press, 2002) 81, 100.

I dream of fewer refugee cases in the High Court of Australia. We have accepted international obligations to receive and protect refugees.[26] Yet often their path to acceptance is a very hard one.

I have a dream that I will not again have to explain to such people their need to demonstrate 'jurisdictional error' – not least because I am not fully sure myself about exactly what that opaque notion means.[27] It is an elusive legal will-o'-the-wisp. It is painful to attempt an explanation for those for whom it is crucial and who assert that their lives and bodies are in danger if they are returned to their country of nationality.

I dream of fewer children in mandatory immigration detention in Australia under this nation's laws.[28] I also dream of true independence of the members of the migration tribunals who decide such cases, so that they will not be subject to any apparent pressure of short-term appointments to reach conclusions unfavourable to applicants for protection.[29] I have that dream today.

E *International Human Rights Law*

> I have a dream that one day this nation will rise up and live out the true meaning of its creed – 'We hold these truths to be self-evident, that all men are created equal'.

I dream that the day will come when the use of the basic principles of international human rights in the elucidation of Australian law will no longer be remarkable or even controversial.[30] When it will be accepted by judges everywhere in Australia that this is the context in which our national law now operates. When it will be realised that it is as relevant to us to look to the jurisprudence of universal rights today as it is to open the old books of English case law when we are searching for basic principles.

I honour the wise and learned judges of the English courts in centuries gone by. They still have much to teach us in Australian law. But so have the wise and learned judges and contemporary writers in the field of universal human rights. Sometimes the basic principles and all the scholarship cannot alter the clear requirements of Australian law.

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26 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954). See also *Migration Act 1958* (Cth) s 36.

27 See *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194, 226-228; *Re Minister for Immigration and Multicultural Affairs; Ex parte A* (2001) 185 ALR 489, 495 [27]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Holland* (2001) 185 ALR 504, 509 [22]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 123; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 439-440; *Re Minster for Immigration and Multicultural and Indigenous Affairs; Ex parte S 190/200* (2002) 191 ALR 569, 575 [19]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S 20/2002* (2003) 198 ALR 59, 64 [122].

28 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 78 ALJR 737, 764 [150].

29 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 131 [131] n 186; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 citing M Crock, 'The High Court and Judicial Review of Migration Decisions' (2000) 24 *Melbourne University Law Review* 190, 216 n 130.

30 See *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 78 ALJR 1056; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 78 ALJR 1156; *Coleman v Power* (2004) 78 ALJR 1166.

When that is so, our duty to the *Australian Constitution* and the law is clear. I made this point recently in *Minister for Immigration, Multicultural and Indigenous Affairs v B*:[31]

> [Universal mandatory detention] is expressed in clear terms in [the Act]. Those sections are constitutionally valid. In the face of such clear provisions, the requirements of international law … cannot be given effect by a court such as this.[32] This court can note and call attention to the issue. However, it cannot invoke international law to override clear and valid provisions of Australian national law. The Court owes its duty to the *Constitution* under which it is established. Pursuant to the *Constitution*, all laws made by the Parliament of the Commonwealth are 'binding on the courts, judges, and people of every State and of every part of the Commonwealth'.[33] Those laws must be obeyed and enforced wherever they are valid and their obligations are clear and applicable. They cannot be ignored or over-ridden, least of all by this Court.

But in many cases that come to Australia's courts the law is uncertain. The *Constitution* is ambiguous. A statute is unclear. The common law has gaps. In such cases, it is the judicial obligation to make choices. Lawyers must help judges to make wise and lawful choices. I dream of the day when resolving the choices by reference to the principles of human rights, and international law more generally, will be a matter of course; a commonplace taken for granted because our law must operate in a world of growing legal and human interdependence.[34]

F *Legal Education*

> I have a dream that one day every valley shall be exalted … The glory of the Lord shall be revealed, and all flesh shall see it together. This is our hope. … With this faith we will be able to hew out of the mountain of despair a stone of hope.

I dream of legal education in Australia which will be strengthened by an appreciation that law is not just words or rules or statutes or regulations. That law has a deeper meaning and purpose. I dream that legal education in this country will always include the teaching of human rights, so that lawyers come to the profession equipped with an understanding of the contemporary moral under-pinnings of their vocation.

I dream of a restoration of legal history to its proper place in every law curriculum.[35] His deep knowledge of legal history is a reason why Justice Windeyer remains one of the judges of the High Court most read today, decades after his years of service and death. In the understanding of history, we can perceive the broad streams or the law. We see how legal rules have been developed. In history, we can witness the fundamental concepts of justice that pass from generation to generation. These are the topics that must be taught not as occasional adjuncts to the words and rules. These topics and jurisprudence (however named) help us, as lawyers, to reflect on what we are doing; and why we are doing it.

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31 *Minister for Immigration, Multicultural and Indigenous Affairs v B* (2004) 78 ALJR 737, 768 [171].

32 *Re Kavanagh's Application* (2003) 78 ALJR 305, 308-309 [14]-[20]; compare *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262, 284-285.

33 *Australian Constitution* covering cl 5.

34 *Al-Kateb v Godwin* (2004) 78 ALJR 1099, 1128-1136 [152]-[193].

35 M D Kirby, 'Alex Castles, Australian Legal History and the Courts', in *Australian Journal of Legal History* (2004), forthcoming.

G *Media Treatment of Law*

> With this faith [we] will be able to transform the jangling discords of our nation into a beautiful symphony of brotherhood.

But how do we bring the message of law to the nation? It is not merely through the learned pages of the law reports. Equally it is not through the coverage of our work in the contemporary media. The modern press, radio and television, for the most part, are shamefully neglectful of the activities of the law: the subjects of the third branch of government in Australia. They ignore its great controversies. They trivialise its serious business. They personalise its disagreements. Sadly, media today often thrives on causing jangling discord within our nation and ignoring the constructive ways in which the symphony of democracy operates, including in the courts.

Within recent days an important case was decided by the High Court and hardly noticed in the media. In it the Court divided 4:3. Gleeson CJ, Gummow J and I dissented to the conclusion that the *Migration Act 1958* (Cth) could be interpreted to permit indefinite detention of a stateless person whom it had proved impossible to remove from Australia to a country of nationality despite his request. Constitutional considerations affecting the power of the Federal Parliament and the Executive Government to withdraw liberty from a person indefinitely were considered by the Court. The case was clearly important for individual freedom in Australia. The outcome was described by one of the majority (McHugh J) as "tragic".[36]

If 'liberty' is one of the chief concerns of all governance, the decision in this case was objectively one of profound importance. Yet the coverage of the decision in the media was very limited.[37] Instead, in the days that followed that decision, the media occupied itself with gusto over the travails of the then Governor of Tasmania. On any view, the significance of a decision about the power of the Federal Government (without judicial authority) validly to detain people in Australia indefinitely was far more important than the largely media-created spectacle of a State Governor's departure from office.

I dream of an Australia that is aware of the large issues decided in its courts, and especially in the High Court. That is alert to the values and principles that are at stake. That has a media that communicates these issues to citizens. A media that occasionally lifts its eyes from self-generated entertainment. How can a country truly respect the law, and the rule of law, if it is ignorant of the serious issues that engage the courts? How can a true republican form of government operate in the service of the people of the Commonwealth, if the people are kept in woeful ignorance of the work of the judicial branch of government?

H *Pro Bono and Legal Aid*

> With this faith we will be able to work together, to pray together, to struggle together, to go to jail together, to stand up for freedom together, knowing that we will be free one day.

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36 *Al-Kateb v Godwin* (2004) 78 ALJR 1099, 1107 [31]. See also 1130 [162].

37 There were notable exceptions: see Editorial, *The Canberra Times* (Canberra), 9 August 2004, 12; Editorial, *The Age* (Melbourne), 9 August 2004, 12.

I dream also of better services for those who have genuine cases to bring to resolution. The decision in *Dietrich* has addressed the problem of serious criminal trials. But it has done so at the cost of legal aid in many other areas of the law, including family law and civil claims.

I dream of a day when court procedures will be changed to make it easier for self-represented litigants. Our system of law is strong and independent when you can get to it with equality of arms. But without legal representation, our system of law is a minefield for the untrained, whatever may be the objective merits of their cases. Lawyers cannot wash their hands of the defects of the system that they help to create and operate. I dream of a legal profession that rejects shallow self-satisfaction. That is self-critical and conscious of the needs for change. That is always striving to make equality before the law a living truth; not just an empty boast.

I *Protecting All Minorities*

> And if [our country] is to be a great nation this must come true. So let freedom ring … from every hill and molehill. From every mountainside, let freedom ring.

In Australia there are still those who thirst for freedom. There are still minorities who suffer unjust discrimination: who quest for equality before the law.

I have known these things for a long time. When I was growing up, my grandmother remarried. She married a communist. For our family, the *Community Party Case*[38] was not only a gigantic defensive of the rule of law under the *Australian Constitution*. It was a case that closely affected one of us, in his person, his dignity and rights. You do not forget the lessons that you learn at the age of 11.

And as a member of a sexual minority, I have tasted discrimination and irrational hatred. It is less visible today. Amongst young lawyers it has, for the most part, disappeared. But elsewhere it still exists. It still affects people's legal rights. These things make one sensitive to injustice. They stimulate dreams of days that will come where there is no inequality in things that should be the same.

Most of us are a member of some minority or other, or of some disadvantaged group. I dream that Australia's law, in keeping with the times, will be truly committed to equal justice for claims that are equal. Most particularly, it is my dream that young lawyers, who will soon take their place in the Australian legal profession, will have a real commitment to the principle of 'equal protection under the law'. That their eyes will be freed from the prejudices and attitudes of the past and vigilant to wrongs, wherever they appear in law's discipline.

IV LAW'S ASPIRATION

Law is not just an ordinary occupation. It is not a mechanical job. It is a vocation committed to justice. It is one fundamentally dedicated to the principles of human dignity and human rights. We cannot always deliver on the promissory note to that effect. Sometimes, indeed, the cheque is dishonoured by Australian law. But as

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38 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

lawyers and citizens we have choices. And when it is possible and lawful to do so, we should take the path of justice and equality. Then we can say, with Martin Luther King:

> When we let freedom ring, when we let it ring from every village and every hamlet, from every state and every city, we will be able to speed up that day when all God's children, black … and white … Jews and Gentiles, Protestants and Catholics, will be able to join hands and sing in the words of the old Negro spiritual, 'Free at last! Free at last! Thank God Almighty, we are free at last!'

Such freedoms do not come from hoping for them. They do not arise solely from dreams and aspirations. They come about through growing social awareness and action. Sometimes the law has a part in encouraging greater freedoms. Usually that law will be made by Parliament. But sometimes it will be expressed by the courts. There, lawyers will have an important role to play in shaping the law. That is what a law course at a fine university such as this is designed to teach.

I congratulate the QUT Law Faculty and QUOTALS. The future of Australian law depends on people like you.