

THE COLLEGE OF LAW
SYDNEY, 23 NOVEMBER 2005
SPRING GRADUATION CEREMONY
THE COMMONWEALTH STAR OF LIBERTY
The Hon Justice Michael Kirby AC CMG

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OLD MEN'S NOSTALGIA

It is the fault of old men (and perhaps old women too) that they tend to live in the past. It is such a comfortable world. The awkwardness, embarrassment and self-doubts tend to be forgotten in a miasma of nostalgia about the good old days.

The great Irish poet, W B Yeats warned about listening too much to old men, as you now have to do. The warning certainly applies to old judges:

"An aged man is but a paltry thing,
A tattered coat upon a stick, unless
Soul clap its hands and sing, and louder sing
For every tatter in its mortal dress,
Nor is there singing school but studying
Monuments of its own magnificence"¹

* Justice of the High Court of Australia.

As a monument of my own magnificence, I am happy to share it generously with the graduates of this College. They are embarking at this graduation on their future. For a person of my age, the future is less certain. My father, nearing ninety, advises his children not to buy any more long playing records.

I was recently reminded of the transience of legal magnificence. Justice Michael McHugh reached his seventieth birthday at the beginning of this month. We had worked together, with only a short interruption, from the time we were both appointed judges of the Court of Appeal, within a month of each other, late in 1984. Suddenly, the removalists were at the High Court. His personal books were packed. His familiar pictures were taken off the wall. The CD player, with its never-ending stream of Bach Cantatas was put away, ready for a new home. In little more than three years, I thought to myself, the same fate will befall me. All that effort and energy in the service of the law and the judiciary will suddenly come to a constitutional full-stop. That is how it is in our profession, at least for those plucked from private practice to join the judiciary, there to exercise part of the governmental power of the nation. Suddenly, the power is gone. All gone. Symbolically enough, a feather-duster lay on Justice McHugh's old desk, in his empty office. It symbolised time's inexorable march.

¹ W B Yeats, "The Tower - Sailing to Byzantium" in W B Yeats *Collected Poems* (1987 reprint, Macmillan, 217).

For young lawyers at the brink of their careers, the images are quite different. I know because I have been there. Especially in the spring days of graduation, it is impossible to think forward and contemplate the end of one's career. Where will you all be when you're sixty-four? Well, I can tell you.

Some will, in Rumpole's words, have got their "bottoms on the bench". "Trotters in the trough" he described it in his bitterer moments. Some, like Tom Hughes QC (who turned up at Justice McHugh's last sitting to bid him farewell) will still be practising as barristers. Some will be working as lawyers in the big and small legal firms that bring the law to people with problems. Increasing numbers will be working in the public service, in legal aid and in private corporations. Some will be working in international tribunals and United Nations agencies or for the Foreign Service. A handful will have become beachcombers - worse still, like two of my co-graduates - wine correspondents for newspapers. On the statistics, one may have been struck off the roll - make sure that this is not you. A few noble types will become law teachers to spread the word of the rule of law to the next generation. Some will have given the law away completely. Occasionally, I meet law graduates amongst Qantas stewards. Four weeks ago at the United Nations Office in Vienna, I met a graduate of this College planning a move from UNCITRAL to a position in the International Court of Arbitration.

The opportunities for lawyers today are so many. Half of those who graduate in law do not even enter the legal profession. Our discipline promises remarkably rich pickings and, generally, much job satisfaction. I congratulate the graduates on their achievements. I thank their families and supporters for seeing them through to this moment of justifiable self-satisfaction. I hope their lives will be full of happiness and success, whatever course they follow. My message to young lawyers is simple: Remain optimistic. Remain idealistic. Law is not an ordinary job. It is made special by its commitment to justice. This is what gives law a moral dimension. Never forget that special feature of the vocation you now enter. Of course, law often fails. But failures should only encourage us to try harder.

REMAINING IDEALISTIC

I never really had any other view of law. Call it naïve or marshmallow as you will. I was always optimistic and idealistic about law's functions. I still am.

Forty-three years ago, when Chief Justice Gleeson and I graduated together in this city, we both became young solicitors. He went to the Bar a few years earlier than I. I received my first judicial appointment before he. Through all those years, the work has been demanding, absorbing and the clients and the litigants pressing with their problems. A six or seven day week became the

norm. With the privilege of the exercise of judicial power came obligations of disciplined service that still continue.

But people ask me: How can you remain idealistic? Have you not seen so many defects in the law and in society that you now feel cynical about the law? Or at least sceptical about law's capacity to deliver justice to ordinary folks?

These are fair questions. My decade in the Australian Law Reform Commission in the 1970s and 80s certainly taught me the many defects in the rules and procedures of the law. I have no illusions about the defects. I realise, better than most, that ordinary people cannot generally afford a day in court - or even a visit to a lawyer, in a palace of glass and marble, to ascertain their rights. Our system has many of the qualities of a Rolls Royce - perfect, but only if you can afford it.

Yet for all that, legal aid has expanded in my lifetime, especially in criminal trials following the High Court's decision in the *Dietrich* case². Specialised aid bodies and many individual lawyers support worthwhile cases without charge. *Pro bono* work has become a much more common feature of legal practice than it was forty years ago. Law Reform Commissions and like institutions continue their vital activities aimed at improving the law. Judges are

² *Dietrich v The Queen* (1992) 177 CLR 292.

now more transparent about the reasons for their decisions. The discredited mythology of "strict and complete legalism"³ has been all but abandoned. In appellate courts lawyers worth their salt analyse statutes and past decisions but also add submissions on legal principle and policy to help the courts to reach a just and lawful result. The mysteries have given way to greater candour and realism.

There are, it is true, decisions (including some in which I have participated) which disappoint me and which I think are wrong. Cases upholding prolonged powers of preventive detention by the Executive⁴. Cases expanding the powers of military tribunals⁵. Cases denying prisoners full and equal rights before the courts⁶. Cases dismissing moves towards equality in the franchise⁷. Cases diminishing the accountability to effective parliamentary scrutiny of governmental appropriations⁸.

³ Swearing in of Sir Owen Dixon as Chief Justice (1952) 85 CLR xi at p xiv.

⁴ cf *Al-Kateb v Godwin* (2004) 78 ALJR 1099, 208 ALR 124; *Baker v The Queen* (2004) 8 ALJR 1483, 210 ALR 1; *Fardon v Attorney-General for the State of Queensland* (2004) 78 ALJR 1519, 210 ALR 50.

⁵ *Re Colonel Aird; Ex parte Alpert* (2004) 78 ALJR 1451, 209 ALR 311.

⁶ *Muir v The Queen* (2004) 78 ALJR 780; 206 ALR 189.

⁷ *Attorney-General (WA) v Marquet* (2004) 217 CLR 545.

⁸ *Combet v The Commonwealth* [2005] HCA 61.

For me, these and many other decisions are disappointing. But even disappointing decisions never shake my belief that, in the end, in Australia, we eventually work our way to just laws and fair procedures. We generally correct legal wrong turnings.

I learned that lesson for the first time when I was just twelve years old. It has never left me. In 1951 the High Court in the *Communist Party Case*⁹ struck down as constitutionally invalid the federal law to dissolve the Australian Communist Party and to impose civil restrictions on communists. Because my grandmother's new husband was a communist, the law had a specific and frightening reality for our family. The decision of the High Court and the decision of the Australian people in the subsequent referendum, were a marvellous affirmation of civil liberties, pluralism, diversity of viewpoints, the rule of law and restraint on governmental power. I have always kept that decision before me. I have never ceased to cherish its values. And to believe in them.

I remember, a little later, how the law affecting Aboriginal Australians began to change - most notably in the decision of the High Court in the *Mabo Case*¹⁰. When you hear attacks on the Mason High Court, pause to think, if you will, how diminished our country would have been if that Court had not reversed the factual

⁹ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, see esp 187-8, 193.

¹⁰ *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

and legal errors that had denied rights to land to the indigenous people of this nation¹¹.

In my lifetime, I have also seen many changes in the opportunities available to women - including women lawyers. The appointment of Justice Susan Crennan to replace Justice McHugh has restored a female voice to the High Court, which was missing after Mary Gaudron retired. Of course, there are still glass ceilings and other obstacles in the legal profession and in legal rules that unfairly burden women¹². But we have begun an irreversible journey towards correcting them.

The White Australia Policy has been dismantled and we have rid ourselves of the dictation test that was used to enforce that policy and to reinforce racist prejudice. True, our country, like many others, sometimes exhibits xenophobia. We see that occasionally in attitudes to refugee applicants. But we have also seen a great shift from the legal policy of exclusion on the ground of race to the national commitment to multiculturalism. I pay tribute to the politicians of all the major political parties, who brought these changes about in our law.

¹¹ P H Russell, *Recognising Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism*, Uni of Toronto, 2005.

¹² See eg *U v U* (2002) 211 CLR 238.

When I was embarking on my legal journey, laws still criminalized homosexuals and bisexuals in a way that we can now see as an affront to science, truth and basic human rights. All of those criminal laws have now been swept away in Australia, the last of them, in Tasmania, with the help of a United Nations treaty¹³. There remain discriminatory laws on this score. And there are still discriminators. They are the usual suspects. But I believe that the remaining unjust laws on this subject will also be changed. That is the nature of our country and the character of its legal system.

Courts and parliaments in Australia are in a constant dialogue striving, for the most part, for rationality, justice and pluralism. We have, until now, cherished the belief that democratic governance is a temperate and moderate form of government with many checks and balances to save it from extremes. A belief in the majoritarianism of parliamentary votes, sustained by nothing more than triennial visits of citizens to the ballot box, with uncontrolled power thereafter, is an infantile conception of a modern democracy¹⁴. Lawyers know that the reality is more complicated and more nuanced.

¹³ cf *Croome v Tasmania* (1998) 191 CLR 119. The reference is to the *International Covenant on Civil and Political Rights*, Art 17.1 considered in *Toonen v Australia* (1994) 1 Int Hum Rts Reports 97 (No 3).

¹⁴ cf A F Mason, "Democracy and the Law. The state of the Australian political system:", *Law Society Journal* (NSW), November 2005, 68; G E Fitzgerald, "Unjust laws an abuse of Power", *Australian*, 4 November 2005, 14.

THE COMMONWEALTH STAR

Lawyers also know that we cannot assume that the moderate features of the past will last forever. In living memory great and civilised nations have lost their democratic and law-abiding character. Vigilance is therefore constantly required to preserve Australia's liberties. Because of their greater knowledge about legal history and institutions, and of the fallibility of legal processes, lawyers have a special duty to raise their voices and act as they can whenever they believe that the fundamentals of the Constitution are endangered by extreme laws or governmental actions out of harmony with our liberty - respecting traditions.

Some critics will show impatience when lawyers warn against departures from time-honoured rights. But lawyers see the cases of excess close up. They know the mistakes that are sometimes made by officials. Their training makes them sensitive to injustice. This is why lawyers, more than most, have an obligation to speak up for civil liberties, even when other voices fall silent in the land.

All Australians should keep the star of the law before them. It is a national icon. We should never cease to take our bearings from that star. The star is on our flag. It is the seven pointed star of the Commonwealth. That star tells the world about our Constitution. It is a charter that holds in balance representative parliamentary democracy, sustaining the will of the majority and also the independent courts which protect everyone, including minorities.

That star reminds us every time we see it of our temperate and libertarian traditions. It is our duty to preserve those traditions. Think of this the next time you see the Commonwealth star on the Australian flag. It is the Commonwealth star of liberty and we should keep it so.

These are solemn words. Yet this is an occasion for joy and celebration. Yeats put pontificating old judges in their place. In the same poem that I have quoted, he said¹⁵:

"That is no country for old men.
The young in one another's arms, birds in the trees -
Those dying generations - at their song.
The salmon-falls, the mackerel-crowded sea,
Fish, flesh, or fowl, commend all summer long."

I commend to the graduates all summer long, and throughout their lives, joy and personal fulfilment and happiness. I beckon them forward into their lives in the law. I hope that they will be as fulfilling as mine has been. And my closing words are the same as those I opened with. Remain optimistic. Remain idealistic all your days. Make the most of the achievement marked by this graduation. Resolve here and now to render the law and its profession stronger, truer, braver and more just for your participation in it. Never doubt that each one of us can make a difference. Make it happen. Make a difference.

¹⁵ Yeats, above n 1.