

547

Address by the Hon. Justice M.D. Kirby C.M.G.
Chancellor

CEREMONY OF CONFERRING OF DEGREES

WEDNESDAY 2 MAY 1984, 2 PM

OUR FLAWED LEGAL SYSTEM

May 1984

(AFTER THE PRESENTATION OF GRADUATES)

CONGRATULATIONS TO GRADUATES

This is a day of graduations. It is the second in the current series of graduation ceremonies. Not only are the new graduates graduating. So am I. Mind you, having completed two ceremonies I feel already to be something of an 'old timer'. And that makes me feel more at home as a Chancellor. My initial image of a University Chancellor was Sir Charles Bickerton-Blackburn who held the office of Chancellor of the University of Sydney to his 93rd year. As I told the ceremony this morning, our discerning Vice Chancellor, offering me this post, warned me (ever so gently) that Macquarie did not expect quite such protracted service. But I warn the Vice Chancellor that I am warning to the job. Fifty years a Chancellor would surely make the Guinness Book of Records.

Having a Occasional Speaker at a graduation ceremony is a tradition. Like many University traditions it is, I am afraid, somewhat irrational. The last thing the graduates want to hear is a scholarly dissertation. As far as most of them are concerned, they have done the exams and they simply do not have to put up with another lecture. If the occasional speaker has anything to say, they ask, why does he not put it down in writing and hand it out?

The parents and friends may look on the Occasional Address as something of an interruption to the photographs and the proper sharing in the pride of the occasion. Certainly, this public ceremony is partly designed to acknowledge the very real contribution to education in our country made by parents, spouses, friends and family.

So far as the staff is concerned, these world-weary denizens of academe have generally seen it all before. Absent an Einstein with a potent formula, there are not many public speakers who can say something which is rigorous, relevant and interesting in the ten minutes allocated to the hapless Occasional Speaker.

I come to this University as Chancellor after many years as a Fellow of the Senate of Sydney University and a member of the Council of the University of Newcastle. You will forgive me, therefore, if I say that I have few illusions about this address. Over the years I suppose I must have attended at least 50 ceremonies such as this. Fifty times the Occasional Speaker has risen in his place to address the assembled throng. It is a sobering thought as I stand before you today, as Chancellor, that I cannot call to mind a single utterance of the 50 distinguished speakers. Not one item of distilled wisdom. No aphorisms. Not a single gest or pearl. Chancellors and other Occasional Speakers do well to bear in mind the transiency of Occasional Addresses.

LAW, ECONOMICS AND MODERN LANGUAGES

My difficulties are compounded by any attempt to construct an address at once relevant to lawyers, economists and modern linguists. I suppose it would be possible to address you on the economic arguments for the use of simpler language in legal expression. Some of you will know that the Federal Government has initiated an examination of the major government publications to ensure that they are made 'comprehensible'. A special team is reviewing government forms, including the notorious taxation Form S which most of us will shortly face again. The Special Minister of State, Mr Mick Young, has estimated the real cost of Federal Administration of inefficient departmental forms as amounting to tens of millions of dollars a year. He asserts that the simpler the form, the fewer the mistakes and the less time that will be spent processing government business.

Certainly, there is plenty to talk about in the context of gobbleydegook in the law, obscurity and the latest target : 'sexism'. Increasingly, I am receiving letters as 'Chairperson' of the Law Reform Commission, even though the Federal Parliament in its 1973 un wisdom, obdurately describes me as a 'Chairman'. Chancellors, at least, are sexually inexplicit!

But the topic of legal language would, I fear, be of little interest to the students of modern languages other than English. Even if I told them of the Lord Chancellor who punished a particularly prolix pleader by requiring him to cut a hole in his pleadings — and to walk around Westminster Hall wearing them as a warning — I doubt if more than a passing interest could be raised.

Addressing the lawyers and the economists alone would be an easier task. The interaction between law and economics is now much more plainly perceived. University courses are being developed for the joint study of law and economics, including in Australia. A leading writer on the topic in the United States, Professor Richard Posner, has written a book on the economics of law. At the Chicago Law School he became the legal equivalent of Professor Milton Friedman. Doubtless this fact did not harm his selection by President Reagan and his appointment to the United States Federal Court of Appeals. In that Court, as earlier in the Law School, Posner is stressing cost-benefit analysis and opportunity costs in evaluating claims such as constitutional violation of due process.

In Australia too, we are now increasingly alert to the costs of justice:

- . The work of the Law Reform Commission on the reform of debt recovery laws requires us to examine the redesign of antique procedures to supply remedies more apt to the age of electronic fund transfers, credit cards, computerised credit bureaux and so on.
- . The work on insurance law reform required the Commission to balance the economic costs of reforming insurance law and the benefits, including indirect and intangible benefits, that would be achieved by securing greater equity between insurers and insured.
- . In considering whether class actions should be introduced in Australia, specific study is being made of the costs and benefits of such a radical change in legal procedures. Of course, it is always easier to identify and quantify costs than to articulate and put a dollar value on intangible benefits. How, it has been asked, does one value a park or an historic building or satisfied consumers that may be protected by class action litigation?

LAW AND ITS DISCONTENTS

Driven in despair by the irrelevancy of these remarks to the graduates in linguistics and the superficiality of two minutes on cost-benefit for the students of economics, what can I say to my fellow lawyers alone? Last week I saw an essay by Derek Bok, President of Harvard University. It was the 37th Annual Cardozo Lecture delivered by Bok in November 1982. Bok proudly described himself as a 'fugitive' from the legal profession. For he had wandered into that most Byzantine world — University administration. He speculated that his erstwhile lawyerly colleagues regarded him 'rather like an astronaut who had disappeared into the void on some exotic journey'. I hope the Vice Chancellor and his Deputies are enjoying this analogy. Bok said:

As you carry on, happily immersed in your legal careers, some of you must have thought that it would be amusing to contact me and ask how your planet looks from such a great distance.

The answer that came back must have been a little unsettling for his audience of the Bar of the City of New York, as they sat there, doubtless awaiting nostalgic words of regret for a lifetime missed in legal pursuits. Bok said:

Our legal system reminds me of our health care system 20 years ago. At that time, the medical care offered to paying patients was rapidly becoming more complex, more sophisticated and more expensive as well. Quality medicine was available only to the well-to-do or those who happened to be covered by an adequate prepaid plan. Millions of people with modest incomes could not afford decent care; they visited doctors much less often and their mortality rates were distinctly higher.

Bok acknowledged that as in medicine there was much in the law that represented 'a triumph of the human spirit':

- . the steadfast defence of individual freedom and civil liberties;
- . the constant elevation of reason over prejudice and passion;
- . the protections afforded to some minority and disadvantaged groups.

But, as in medicine before universal insurance, the law was a different thing to the very rich (who could afford it) or the very poor (who could get legal aid) and the great mass of the population in between:

Access to the courts may be open in principle. In practice, however, most people find their legal rights severely compromised by the cost of legal services, the baffling complications of existing rules and procedures and the long, frustrating delays involved in bringing proceedings to a conclusion. From afar, therefore, the legal system looks grossly inequitable and inefficient. There is far too much law for those who can afford it and far too little for those who cannot. No-one can be satisfied with this state of affairs.

Strong language! But do these words written for the United States, by an academic and a self-confessed refugee from the legal profession, have relevance in Australia? Do his other charges have relevance for us?

- . That efforts at reform quickly die from inertia or from the opposition of vested interests.
- . That the cumbersome legal system has an inhibiting effect on entrepreneurship, creativity and progress.
- . That the cream of the intellectual community can be seduced by high incomes into law rather than to engineering, agriculture and other 'creative' vocations.
- . That lawyers resist change because of a steadfast and unquestioning faith in intricate procedures, particularly in the adversary process with its elaborate and expensive methodology.

These are harsh words by Bok. Sadly many of them apply in Australia. Every lawyer graduating today, indeed every graduate and every citizen should reflect upon them. We should reflect upon what our community can do, by procedures of fundamental reform, to assure a juster society. Reform is needed for the great mass of the population for whom laws in the books and rights on paper may often be empty promises offered by an unconcerned society. The professionalism of the lawyers graduating today will be evidenced, in part, by concern with reform, especially law reform.

A REMINISCENCE

I close these remarks with a personal reminiscence. It is about a Macquarie person related to my family by marriage, who will be well known to many students of Modern Languages graduating today and doubtless to others in this University. I refer to Dr Elisabeth Hervic. Because her daughter Marie-Line married my brother, I came to know this fine scholar and teacher at Macquarie University. Her life was not an easy one. She grew up in Occupied Europe. She saw several members of her family, including her father, taken away by the Army of Occupation. Yet under the most difficult of conditions, she continued to pursue her studies in the University of Paris originally as a dentist. She was first appointed to the staff of this University in 1972 in the French Department. She died a young woman in December 1982 after a long and valiant struggle. She was, as University News said, a gentle sensitive person and a respected and dedicated teacher. She was a splendid friend of this University. Her life deserves to be celebrated.

In fact, her life and her contribution to this University are a constant inspiration to me. In a sense, they help to put things in balance. We can, and must, criticise our system of laws and government. We must never be complacent. Yet in comparison to tyrannies (past and present) we have many blessings. All of us, of the generations of Peace who have received University degrees, deserve congratulations and applause. But if we learn nothing else in Universities, we should learn that we are citizens of the wider world where there are many, including many students, much less fortunate than we. Some like Elisabeth Hervic did, are studying under terrible adversity. Their determination to acquire and pass on scholarship and civilisation should encourage all of us to be worthy of the ideal and obligation of a University education. We are all of us trustees for the future.

In this spirit and hope I congratulate the graduates and their families once again. In the tradition of the University, the Administration always gets the last say. So I will now invite the Registrar to make an announcement. And after that, I declare that these public proceedings of the University are closed.