LA TROBE UNIVERSITY, BUNDOORA, VICTORIA

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OCCASIONAL ADDRESS, GRADUATION CEREMONY

FRIDAY 23 MAY 1986

OF JUDICIAL INDEPENDENCE

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The Hon. Justice M.D. Kirby, CMG*
President, Court of Appeal, Supreme Court, Sydney
Chancellor of Macquarie University
(as delivered)

CONGRATULATIONS TO GRADUATES

The graduation address is a particular species of public utterance. It is marginally less elevated than your average sermon. It is definitely shorter than a University lecture. It must be more lively than a judicial sentence. And it is definitely more up market than that most discredited of public utterances - the book launch.

There is only one basic rule: the rule of brevity. Anyone who has sat through as many graduation ceremonies as I, will know the transiency of occasional addresses. I cannot for the life of me remember who delivered the address at any of the ceremonies at which I graduated. I recollect that the Governor was present at one - the Vice Regal presence indelibly stamped on my memory by the recall of having to acknowledge him, as well as the Chancellor and the Dean. Fifty times I have seen the occasional speaker rise in his place to address the multitude. It is a sobering thought, as I stand here before you today, that I cannot call to mind a single utterance of any of my oratorial predecessors.

There are some things that have to be done. First, I must congratulate the graduates. What began at a kindergarten many years ago comes to full flower in this ceremony. It marks a watershed in the lives of the new graduates. If their minds wander off, they should travel down the years - recollecting the class rooms, the smell of chalk, the school games, the companions now gone their separate ways. No degree is achieved without sacrifice and self discipline. The community acknowledges all the effort, at a ceremony such as this. Latest UNESCO statistics show that, on the path to this precious moment, each graduate has consumed, on average, 27 tonnes of coffee beans, 408 gallons of ball point oil and half an acre of best Tasmanian pine forest.

The parents, friends and companions are here because they too deserve acknowledgement. In many cases they have shared the sweat and tears.

This is also a great occasion for the University. La Trobe is an institution very similar to Macquarie University. It has links with the past; but it is trying to do things in a novel and foreward looking way. If our citizenry want to know why our economy continues its meloncholy decline, the fundamental answer is plain. Whilst our competitors have invested capital and human resources in education, we have ambled negligently along - an under-educated and somewhat sybaritic community. We have half the proportion of young people in tertiary education that Japan and the United States can boast. And then we ask why our industries decline, our technology goes offshore, our employment opportunities evaporate, our markets are lost, our dollar shrinks. These new

graduates are timely recruits for our complacent, under-educated community.

THE GOLDEN THREAD OF CONSTITUTIONALITY

Having extended these words of felicitation I could sit down. I would surely make the Guinness Book of Records if I did, as the briefest graduation speaker of all time. I will resist the temptation - though I will not keep you long. The rules require that I should now say something terribly important - but be brief about doing so.

Once before, I was scheduled to speak at La Trobe. An air strike intervened. I considered this means of protecting La Trobe graduates from my oratory to be somewhat extreme, at the time. I am glad, at last, to have made it. The Chancellor in those days was Sir Reginald Smithers. The present Chancellor, Sir Reginald and myself, is a Judge. Twelve of the 19 Australian University Chancellors are Judges or retired Judges. You will therefore not be surprised that, in the few minutes available to me, and in the current circumstances of our country, I propose to say a few words about the judiciary. I hope that this, the last of the graduates' lectures, will be of interest to the legal and social scientists who have graduated. But if it is not, at least they will not be tested for their concentration.

When I was a boy, tomorrow, 24 May, was celebrated as Empire Day. Medals were distributed. The flag was run up at school - the Union Jack of course in those days. Speeches were made about the Empire on which the sun never set. The Governor distributed half day holidays to unworthy school students. Crackers and fire works were lit at night. And the fire brigade was kept busy to protect neighbours from shoolboy incendiarists.

But behind these foolish, festive acts were serious symbols. We were marking the links of our Antipodean country with an old civilisation with a constitutional history which could boast of many proud moments. The day, 24 May, was, of course, Queen Victoria's birthday. In some parts of the old Empire, they still think Queen Victoria is on the throne. It is even rumoured in Sydney that this misapprehension is rife in some of the better Melbourne suburbs and older university colleges.

Earlier this week, I saw an image of the other side of the coin. It was a face of Empire not spoken of in those glowing orations of 30 years ago. I had lunch with the visiting Law Minister of Zimbabwe. He spent ten years in a Rhodesian jail, imprisoned by order of the then Minister for Law and Order. There he acquired his first University degree - Bachelor of Laws in the University of London. Far from exhibiting bitterness to the British, his point was that the departure from the Rule of Law, principles of democracy and the independent judiciary countenanced in Rhodesia after UDI were aberrations. They were departures from the golden thread of English constitutional history of which Zimbabwe (as much as Australia) is an inheritor.

That golden thread leads back to the Conqueror and the famous battles by which, ultimately, the People asserted their ascendancy under the Crown. Nowadays, the Crown itself, like the Judges, serves. But it was not always so.

SERVILE CREATURES AND JUDICIAL INDEPENDENCE

Throughout the reigns of the Stuart kings, judges were dismissed if they withstood the King. All too often in those

busy days the judges became the "servile creatures" of the King and his Ministers.[1] They held office during the King's "good pleasure". It was only after the Glorious Revolution which overthrew King James II that the Netherlands King William commissioned the judges quam diu se bene gesserint - during good behaviour. This promise, secured by the Act of Settlement[2] was confirmed by the House of Hanover, of which the present Queen is the direct descendant.

To ensure that judges are not put under the threat of retaliation by the government for courageous or unpopular decisions there are constitutional protections. Their judicial commissions nowadays typically promise the judges that they may not be removed except on an address from both Houses of the Parliament praying for such removal on the ground of proved misbehaviour or incapacity.[3]

Colonial judges were not always afforded the same protections. Australian colonial history records a number of judges who were preremptorily removed by Whitehall.[4] Taking lessons from the dangers of such arbitrary action, (and picking up the arresting language of the American Declaration of Independence), the Founding Fathers of the Australian Commonwealth took pains to enshrine judicial independence in our Constitution. Indeed their intention was made absolutely clear by amendments to the first draft of the Constitution. In committee, at Adelaide, on Mr. Kingston's suggestion, judicial tenure was further secured by limiting even the Parliamentary power of intervention to cases of "misbehaviour or incapacity". It was pointed out that, in a Federal Constitution, where the courts are the "bulwarks of the constitution" against

Parliamentary encroachment, the independence of the judges from the legislature should be specially safeguarded.[5] It was not for Parliament to remove judges except for "misbehaviour or incapacity". This was still further secured at the Melbourne session by the addition of the requirement that the misbehaviour or incapacity be "proved".

PROTECTING A PRECIOUS ASSET

Now, in 1986, for the first time in our country, attention is being given to the language of this section of the Constitution. The circumstances are extraordinary. One cannot but have sympathy and understanding for the Government and Parliament. They have their own responsibilities under the Constitution in this regard. Special legislation has been enacted.[6] Commissioners have been appointed. I must not comment on the specific responsibilities that have devolved upon them. Indeed my concern is not the instant case at all - but that we should consider its implications for the future.

This much is clear. The present inquiry is the latest step in a long constitutional story. It must be seen in the context of the famous struggle by which the independence of the judiciary was secured in English speaking countries. One of the most remarkable phenomena of our time - especially since the Second World War - has been the growth of the power and influence of the public sector. Today the Crown itself has symbolic functions only. The modern "Crown", from which judicial independence must be secured, is the Executive Government, in all its manifestations and the Parliament. In defence of the liberties of citizens, it is often necessary, both in criminal and civil cases, for the judges to do things

which upset, dismay and even anger politicians and bureaucrats. Sometimes the law also requires them to make decisions which puzzle the ephemeral tides of public opinion. This is the way we strike a delicate balance between the powers of elected politicians, of appointed officials and of independent judges.

It will be essential, as it seems to me, that nothing should be done in the coming months that erodes the independence of the judges or sets in place procedures of inquisition which have the effect of diminishing judicial independence of the legislature and of the Executive Government. If that were to happen then, in the name of dealing with one special case, we may run the risk of elevating to a new danger Parliamentary and Executive control over or influence upon the judiciary. Before we take such a step we should remember the "servile creatures" of the Stuart judiciary and of the colonial judiciary. Nowhere is this more important, than in our constitutional situation as a Federation. In a world of oppression, we enjoy such liberties as we have, partly because of the battles fought long ago. We should not squander the precious asset of judicial independence. Once lost, it would be hard to regain.

The judicial function involves the neutral application of principles. The community looks to the judges for such neutrality because everywhere else there is evidence of partialityand self interest. Judges know that the way one difficult case is dealt with requires care because of the natural inclination of mankind to act consistently in later, analogous cases. That is why our Parliamentary institutions and those who advise them face a test in the current intiative

under s 72 of the Constitution. That is why the way we deal with one case tends to set our standards for the way we may deal with future cases. If we were to deny one judge the preliminary indication of charges at the outset of the inquiry, we may deny another. If we were to refuse one judge the privilege against testimony and against self incrimination, we may equally refuse the next. If we were to institute a roving inquisition into unspecified conduct in one case, might it not be revived for another? Procedures are central to the protection of freedom. Once adopted, they affect the relationships of those subject to them.

I am sure that the test we are facing will be addressed with the recollection of the famous history that was in the minds of those who drafted our Constitution and which they were determined to enshrine. A wise consideration of the procedures and decisions in one case may affect the precious value of judicial independence. For precedents tend to be followed. And what happens once tends to set the standard for what may come next. In this way, the approach we take to the instant case under section 72, may define for future decades the relationship that is assumed between the Parliament and Executive, on the one hand, and the judiciary, on the other.

JUDGES-AND THE FUTURE

In the turmoil of press coverage of particular cases, it is vital that our community should not lose its perspective. In Australia, there are 600 judicial officers. Half of them are magistrates; half are judges. It is a hard and disciplined life. No one can sit in judgment in our courts without daily reminders of the historical tradition and high standards of

intellect and integrity that are expected. Most citizens know little of the judicial life. Of its nature, it is somewhat removed from the ordinary human experience. But unlike most officials, judges perform the great part of their duties in public court rooms under the constant scrutiny, and critical eye, of their own profession, the media and the public. Their judgments and orders are invariably published. The courts are open.[7]

Nor is there complacency in today's judiciary. In Canada they are in the midst of an important national investigation about improvements in judicial education[8] which we may follow in Australia. Here, led by Justice McGarvie, the judiciary and experts in court administration, are examining ways to improve the efficiency of the courts. New technology will improve the throughput.[9] But I hope it will not replace human justice by computer control or diminish our collective recollection of the wisdom handed down from one generation to the next by those dutiful, earnest, hard working independent officials who are the Judges.

Doubtless there are faults. I would be the last to urge complacency. But in the acres of newsprint that have been devoted to recent events, it would be easy for the community to lose its perspective - and perhaps its faith in the judicial institution. Such a result would be a great national misfortune. No institution is immune from scrutiny in a free society. But those who would, with Australian gusto, damage the judicial institution, destroy its independence and weaken public confidence in it, should reflect on the lessons of our

constitutional history. For those who forget history are bound to repeat its mistakes.

The precious gift of education, which the graduates have received from this fine University, requires them, even on this happy day, to reflect on these high matters.

FOOTNOTES

* Personal views only.

1. F.W. Maitland, The Constitutional History of England, Cambridge, 12950, 312. See Coke 4 Inst. 117.

2. 12 and 13 William II c 2.

3. Australian Constitution s 72(ii)

4. Cf M.D. Kirby, The Judges, Boyer Lectures 1983, 45 ff.

5. Constitutional Debates, Adelaide, 944-962.

6. Parliamentary Commission of Inquiry Act 1986 (Cth).

7. See Raybos Pty Limited v Jones (1985) 2 NSWLR 47, 50.

8. Canadian Judicial Centre Project, Survey of Judicial Education in Canada, 25 February, 1986.

9. Justice D.L. Mahoney, Delay in the Courts: the Responsibility of Lawyers, unpublished paper for the Australian Legal Convention, 1985