

THE STUDY OF LAW

"REFLECTIONS ON A LIFE IN THE LAW"

THE STUDY OF LAW

REFLECTIONS ON A LIFE IN THE LAW

By the Hon Justice Michael Kirby CMG Hon D Litt\*

POETRY AND THE BINOMIAL THEOREM

I rather suspect that I was fated to be a lawyer and a judge. As a small boy I attended the Summer Hill Opportunity School, in Sydney. I did so for two years before proceeding to the famed Fort Street High School. Summer Hill was a special school in the public education system. It offered classes for boys and girls whose only shared skill was doing well in Departmental intelligence tests. Cut off in this brilliant junior hothouse, we were easy prey to the hordes of visiting social scientists from the University. Every imaginable test and survey was performed upon us.

One summery February day in 1950 I was confronted in one of these tests by an arresting question. What will you be when you finish school? I remember writing "a judge or a bishop". With such a display of unchristian immodesty, it was inevitable that I should turn from the austere and humble path of the Sydney Diocese of the Anglican Church and pursue, instead, a life in the law. Mark you, either way I seemed determined to get into an elaborate costume. Only a Cardinal - and perhaps a Bishop out of Lent - can outdress the Queen's Judges in the Supreme Courts of Australia - successors to their ermined forebears in the Royal Courts of

England.

My path towards a life in the law seemed settled at high school where I proved infinitely more interested in Shelley's Ozymandias than in Boyle's law or the binomial theorem. Even today, during particularly tedious moments in courtroom oral argument, my mind wanders off to the poems I learned in those busy school days. Every judge has a remedy for tedium. The remedy is necessary if he or she is to control anger and impatience or to stifle the ever threatening waves of peaceful sleep. Sir Francis Burt revealed, on his retirement as Chief Justice of Western Australia, that his technique was to count the panels at the back of his Court. Other judges I know meditate. Some, it is true, give way to the luxury of anger. But few. For me, it is a Rumpolian reverie of poetry. My love of verse, I share with the former Chief Justice Bray of South Australia though he not only learnt it but wrote it too.

Most lawyers love words - realising the miraculous pictures which they can send scurrying to the mind to conjure up ideas. Like many lawyers, I delight in words. I have a feeling that I will end my days writing something other than judgments. After all, who today remembers the Viscount Maugham, Lord Chancellor of England at the outbreak of the Second World War? It is Willie, his brother - W Somerset Maugham, the writer, who is remembered. Willie it is who gives continuing pleasure to millions. The dry bones of the Viscount's prose are only occasionally resuscitated from the

Appeal Cases. There is a moral here for lawyers. I state it at the outset of this piece. Our craft, so precious to ourselves and important to society, is transient. Our contributions, who ever we may be, are but temporary. In the hierarchy of human affairs, a life in the law cannot begin to compare with the world of the artist, the poet or the composer. Of course, those fields are not for the choosing. They are obligations which nature and circumstance stamp upon the creative. Creativity tends to be hosed down in the law. But there is a minor place for it. And there is no reason why legal writing - whether judgments of the highest courts or exchanges between solicitors - should be boring. We who work with words must continually strive to do better. To be readable. Even, dare I say it, to be interesting. I hope I never begin a judgment with those tedious words: "This is an appeal...". Routine and habitual ways of doing things are the enemies of fresh insights into life and its legal problems. Such ways all too often portray dull and unventuresome minds, flattened down by years of semi-automatic repetition.

#### LAW SCHOOL DAYS

Like many lawyers, I sailed through high school and university days with appropriate garlands of academic distinction. One fateful day I was absent from a law school class. The law student with whom I was sharing my notes mischievously proposed me for election to the Students' Representative Council. That law student is now the Chief

Justice of New South Wales (Mr Justice Gleeson). Little did he realise what a juggernaut of student politics he was to unleash by his humour. This is not the occasion to tell that tale. But it led to a lifelong association with universities - first the Senate of Sydney University, then the Council of the University of Newcastle and now Macquarie University, where I am Chancellor. Strange places, universities. Not to be run like factories for immediate profit. Contemplation has its own value. And even if you are utilitarian by disposition, you should reflect upon the fact that the greatest leaps in technology in our times have stemmed from the idle musings of dons upon the mysteries of pure science. It was in the speculation of Erwin Schrödinger on quantum physics, for example, that the world of lasers, nuclear fission, computers and bioengineering was conceived.

In my days at the Sydney Law School there was not much idle musing by me. The classes seemed an extension of those of an English boarding school. Rushed into dull, ill-lit, cramped and often airless rooms, we listened attentively to the often ill-arranged thoughts of a parade of busy part-time lecturers. These barristers, plucked remorselessly from their court appearances and conferences, read the standard law school notes. For me, their lectures only came alive when, almost off-handedly, they illustrated a point with a recent case in which they had appeared. I reflected then upon the fact that it was rare that they ever portrayed themselves as losing a point.

But then something happened in my life in the law. It was like first looking into Chapman's Homer. I stared for the first time at jurisprudence - helped to survey the scene by Professor Julius Stone. He rescued the Sydney Law School in those far away days from a course which bordered perilously close to the rote learning of a technical college. For the first time somebody was asking why was this the law? Was it a good law? What did "good" mean in that context? What moved the judges to reach this or that decision? The myths of institutions of the law itself were put under the microscope. Stone taught three generations of law students in Sydney the realistic approach to the law and its dramatis personae. I shudder when I think of what a barren lawyer I might have been - hostage to all of the assumptions and prejudices of the law - had I not been helped to question them by Stone, Tammelo, Blackshield, Harding and other law teachers.

Settled comfortably into the life of a solicitor, pursuing by night a double-life in student politics, I seemed (as I can now see) unwilling to sever my link with the University of Sydney. I embarked upon what Senator Gareth Evans (also a student politician and later to be my colleague in the Law Reform Commission) described, with his customary charity, as an emphasis upon quantity rather than quality in education. I collected an economics degree at night. And then a Master's degree in law, with more substantial helpings of Stone and his school. The economics has never quite left

me. Long before Richard Posner and Milton Friedmann began to write about the economics of due process and the cost benefit analysis of legal decisions, I was interested in the price and value of justice.

#### THE DISCIPLINE OF THE BAR

This comfortable world came to a close in 1967. Despite the urgings of my partners in a most prosperous firm of Sydney solicitors, I was admitted to the Bar. Sir Garfield Barwick once said that, of the various periods of his life, the one he remembered with the greatest happiness was not as Chief Justice, nor as a Minister, nor as Senior Counsel. When he responded to the sessions of sweet silent thoughts, he remembered his time as a busy junior. Well, they were not so sweet for me. Too busy. Too furious. Rushing from court to court. Lots of cases. Lots of injured plaintiffs, calculating insurers and half understood medical reports. Lots of fees. A desperate life. And an unreflective one. I could never be fully satisfied shuffling briefs and moving about the tiny pieces of the legal mosaic. Presumptuously, even then, my mind wandered off to thoughts about the whole pattern. That was an exhausting time. Doubtless it was good training in the self-discipline that is necessary for what the world calls success in a life in the law.

It was at that time that I commenced a habit of life which has not left me. My days would begin at 5.30 a.m. reading quietly and alone in my chambers the problems for the

day. I was always - and I hope still am - conscientious. Dominating the brief was very important. Getting all the facts clearly my in mind. Seeing all the witnesses who could help. Reflecting over those lonely weekends with my companionable dictaphone upon the strategies that would bring this or that case home to victory. Leaving as little as possible to chance. It is a rigorous and a hard life if you take the practice of law seriously. I could never share the self-protective superficiality of some of my colleagues. I knew that for most of the clients whom I saw I would be, for their lives, "the barrister". I knew from my own childhood that the recollection of an important professional person remained in the collective memories of the family affected virtually forever. It was often spoken about. Sensitivity to people with problems is important. Remembering that for them the courtroom is a frightening place - with none of the familiarity, comfortable for the repeat performers. It is often hard for those whose lives are lived in the law to remember the stress, tension, pain and emotion which accompanies the litigant into the courtroom. Constantly - wherever we are in the law - we must remind ourselves of those facts.

#### AN INDUSTRIAL FLIRTATION

My early morning habits and weekend devotions soon became known at the Bar. I became in demand by those Silks, themselves busy, who needed a junior who would turn his attention to the fine detail of the case. I began to work in



large commercial matters with Dennis Mahoney and Harold Glass - later my colleagues in the Court of Appeal. And then in that chancy way of the life of a barrister, the briefs started to come for the industrial tribunals. With Jack Sweeney, Lionel Murphy and Neville Wran. Let no-one denigrate the importance or interest of industrial law and industrial relations practice. Although many lawyers of a conventional mould looked down their long noses at the work of industrial courts, it was, I could soon see, work requiring considerable lawyerly skills and, as well, great sensitivity to human relationships. I liked the work. I came to admire my mentors in it. They taught me much. I was soon doing very well in big industrial cases. As Jack Sweeney moved off to the Federal Bench, Lionel Murphy to Federal politics and Neville Wran to State Parliament, the door of the cave was opened to me. The opportunity to succeed to leadership of the Industrial Bar was irresistible to someone fitfully fascinated by the mixture of politics, law and economics which it involved.

And that is how I came at the age of thirty-five to be offered appointment as a Deputy President of the Australian Conciliation and Arbitration Commission. Leaders of the Bar warned me against it. Michael McHugh told me: "You will sink like a stone and never be heard of again". But I accepted the appointment and expected to see my life for the foreseeable future labouring away in the Federal industrial scene. Mary Gaudron, then also a Deputy President, warned me

of inspections of the abattoirs which lay ahead of me - an industry which I had until then deftly managed to avoid.

I spent but a month as an active judge of the Arbitration Commission. My industry panel was the maritime one. In January 1975 I had just returned from an inspection in the Gulf of St Vincent when I entered the lift of the Sydney building in which the Arbitration Commission operated at the same time as Lionel Murphy. He was then a Senator and Federal Attorney General. In that unconventional, spontaneous, engaging way of his, he asked me to accept appointment as the first chairman of the Australian Law Reform Commission. Between the ground and the seventh floor I offered many reasons why he should look for someone older in the law, and wiser. But he would have none of it. He invited me to his office, which was on a higher floor. Ultimately I took that journey and I accepted the post. My brief flirtation with industrial relations was effectively over. I never walked in the bloodied floors of the abattoirs.

#### LAW REFORM - CONCEPTUALIZING THE LAW

Of my nine years in the Law Reform Commission I have written elsewhere. It was an adventure. Establishing a new national body with a responsibility to reform, modernise and simplify the law was a great opportunity. For it, I will always be grateful to Lionel Murphy. The Commission threw me into daily contact with lawyers of the highest talent from all over Australia. My fellow Commissioners became my

friends. Amongst the early Commissioners were Gareth Evans, John Cain, Zelman Cowen and Gerard Brennan. Professor Alex Castles of the University of Adelaide reinforced my love of legal history. He re-taught me the importance of history for an understanding of our inherited legal system. Professor David Kelly, also of Adelaide, taught me the importance of conceptual thinking. This is something the common law does not always encourage. Locked into history and blinkered by its categories, we rush like the busy barrister to solve our daily problems without sufficiently considering the way that the solution proffered will look as part of the great tapestry of the law. David Kelly and the original secretary of the Commission, George Brouwer, had a profound impact on my legal thinking. They, and the other distinguished Commissioners and consultants of the Law Reform Commission taught the importance of comparative law. As well, virtually every project of the Law Reform Commission opened my eyes to the impact on the law in our time of science and technology. A whole world of unexplored fascination opened up to me. Its fascination still shines.

#### THE APPELLATE JUDICIARY

In 1983 I was appointed to the Federal Court. I had expected that I would move to that Bench when my period in the Law Reform Commission was over. But in the middle of 1984, I was invited to accept appointment as President of the Court of Appeal of New South Wales. It is, as Justice McHugh said at his welcome in the High Court of Australia, one of

the most distinguished appellate courts of the common law world. It is a permanent appellate court of general jurisdiction. In this respect, it is the only such court in Australia, other than the High Court. Working daily with appellate judges of high talent, we can see the whole canvas of the law. The workload is heavy and growing as the Annual Reviews of the Court of Appeal demonstrate. Inevitably, as in any court, some of the work is routine. Some is even uninteresting. But much is important. The opportunities for judicial development, restatement and simplification of the law present themselves quite frequently. From my vantage point, some things are clear. A change is coming upon the Australian legal scene. With the end of Privy Council appeals and the end of appeals as of right to the High Court of Australia, the role of the High Court is changing. It is now, truly, a final court of rare resort. Inevitably, much of its time is taken up in constitutional cases concerning Federal legislation of Australia-wide application. For more than ninety-eight percent of cases, the State appellate courts, and the Full Courts of the Federal and Family Courts, are the end of the litigious line. It therefore falls increasingly to them to expound and develop the common law and statute law of Australia. Save for the contingency of the relatively rare instances of special leave to appeal being granted by the High Court, they will be the final expositors of the general principles of law, of equity and of statutory construction. This is a reason why we must become

more knowledgeable in every part of Australia, of the fine work of the other Australian appellate courts. We must borrow from each other more in the future than we have in the past. Happily technology, and improved reporting services, will facilitate this development.

So what of final thoughts? The reader who has troubled to follow what I have written here will realise that I do not always share the legal brotherhood's conviction that a life in the law in Australia is necessarily the best life. Though there are opportunities for creativity and imagination, these virtues are not at a premium in our world. Though there are occasions for noble thoughts and uplifting acts, defensive of liberty and justice, these are not the staple of a daily life in the law. Though glimpses of the whole panoply of law can sometimes be snatched, it remains as true today as when first said that the law sharpens the mind by narrowing its focus. Though there are many fine and idealistic people in our profession, there are also not a few who are cynical, self-satisfied, unconcerned about the disadvantaged and unquestioning of the content of the law which they help every day to administer. Though there are some who are internationalist in outlook, most are by their discipline contentedly parochial. Though there are a number who exhibit concern for human rights and equal opportunity at home and abroad, there are also, many who look upon these ideas with unhidden scorn.

IDEALISM, GRATITUDE, DEDICATION - AND MENTAL RESERVATIONS

I approach a life in the law today as I did when I first entered it nearly three decades ago. With idealism - for the pursuit of justice, the assertion of fairness, the defence of human rights and obedience to laws worth respecting are ideals worthy of civilized people. With gratitude - for the opportunities of private and public service in a profession which offers rich rewards that go far beyond worldly assets and high income. With dedication - for the responsibility extracts a price of hard work and gruelling attention to detail, which always threatens to engulf a lawyer who is unwary of the tyranny that a life in the law can impose. And with reservation - remembering that there are many other things: music and literature, science, the wonders of the external world and the challenge of the world of the spirit - which a narrow life in the law will miss but which must be experienced if the lawyer is to have a full life.

-  
President of the Court of Appeal of New South Wales;  
Chancellor of Macquarie University; Commissioner,  
International Commission of Jurists.