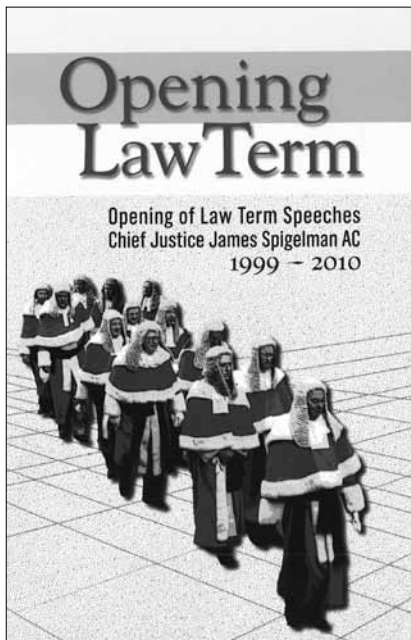


Opening Law Term: Opening of Law Term Speeches Chief Justice James Spigelman AC 1999–2010

Law Society of New South Wales | 2010



It was no use hanging on to the English notion that you are safe so long as you keep the law. Practically the law was what the police chose to make it.¹

Two indicators of a democracy are a broad suffrage and an engagement of that suffrage by close intervals. No politician can survive without an appreciation of both. One deft exploitation brings a mandate, more than one confers statesmanship.

What of the judiciary? How does this third branch of our democratic governments – frequently criticised by those other branches as lacking any mandate at all – earn for itself the respect that it requires? And, as Orwell’s Spanish experience shows, our law requires respect. It has no police.

The common law has been fortunate in that during the period of democracy’s birth and development, it has had a goodly share of persons able to articulate a strength out

of what others have decried as a weakness.

Among democracy’s (occasionally unintended) midwives, Mansfield in England and Marshall in the United States – and, I think we can now say without too much inferiority, Forbes in New South Wales – articulated and foresaw a rule of law whose power was and remains directly proportional to the rarity with which it has had to be displayed.

For lawyers who become judges, the understanding of this proposition can lead to a personality change upon elevation; there is an intimate acceptance that their opportunities to participate in our political life – a quality of citizenship – is necessarily circumscribed.

Judicial speeches will never please everyone. Many view the merest smile from a judge as a sign of impermissible activism. Many others view speeches as a necessary feature of judgeship; for them, precedent as something which all judges are ethically obliged to ignore. Luckily for the rest, there are more of us and we are in between.

One area in which a judge – particularly a chief justice – has room to move is the set-piece speech. It serves two purposes. The first is to reiterate what politicians have no need to do, the importance of and the vitality of the rule of law. The second is to articulate a position on a particular issue which may need articulation by the judiciary.

The current chief justice brings to the task of speechmaking an

enthusiasm (and hence a focus on vitality) and political experience (which allows him to articulate apolitically).

The current chief justice has already been collected. Tim Castle edited a volume which was published in 2008.² (I am afraid my ignorance precedes me; if any reader of this review knows the noun for a collection of judges’ speeches, please write to me care of this organ’s editor.)

Castle’s volume is by subject, doubtless giving the editor and the speechmaker some latitude in choice, there being 147 speeches given by the chief justice during the decade to 2008. For example, one gets the benefit of the launching speech for Philip Ayres’ biography of Sir Owen Dixon, in which the launcher gives a pert and pertinent but not impertinent assessment of ‘our most formidable legal mind’, opining, surely correctly, that ‘To some degree Dixon’s depth came at the expense of breadth’.

The current chief justice’s depth is a matter for law reporters and not reviewers. But there is no question as to the breadth.

The publishers of the current assemblage (closer?) ran the risk of being forced to ignore the breadth. After all, speeches opening law terms might be regarded as the younger sibling of (vice) regal speeches opening parliament.

However, this is not so, for two reasons. The first, as may be inferred from what appears above, is that apt

chief justice – unlike a merely titular head, who has a constitutional obligation not to outshine the government whose praises he or she must sing – will be articulating their own agendas, not somebody else's.

His first speech enlists Mozart and Confucius; his (so-far) midterm speech opens with an explanation of why the space shuttle program is confined by the width of two horses' backsides.

The second is that the current chief justice is constitutionally incapable of refusing to draw upon his wider interests to give colour to the formality at hand. His first speech enlists Mozart and Confucius; his (so-far) midterm speech opens with an explanation of why the space shuttle program is confined by the width of two horses' backsides.

Sir Thomas More, along with Thomas Becket something of a hero, rightly dominates the 2008 address whose subject is not merely the rule of law but its most important constituent, a commitment to it. The collection closes with an overview of the long march to a national judiciary and profession, drawing on Darwin's

take on maturity and Monty Python's take on legitimacy.

Chief justices can't always pick the thing for which they will be remembered. While Sir Frederick Jordan would be remembered for a brilliance shrouded by public

appearances of 'a few well-frozen words', few will recall him for his intensely private discrimination and humanity, in particular his broad – but, it must be confessed, hardly modern – learning and his involvement in the attempt to save the shattered and disgraced Christopher Brennan.

Sir John Kerr's own effort at saving something different, the King Street Courthouse, was overshadowed by later events. His successor's reputation as a deft administrator and his excellence as a lawyer must necessarily take its place in the popular mind alongside his evidencing of heredity.

Sometimes chief justices are remembered for things they are

not. Sir William Cullen, by most accounts a gentile equity type, appears to have been taken up by the botanists of the common law bar as *eucalyptus cullenii*, a species of ironbark.³

Sir Anthony Mason says in a foreword that a reading of the opening term speeches shows 'not so much a perspective from within the legal system, as a helicopter perspective, a view from above, which enables the viewer to see all the elements and how they intersect with each other'.

The current chief justice is fortunate to have had Castle and now the Law Society take the initiative with the collections. His speeches achieve something which most lawyers' speeches do not; they achieve perspective. In times as fast as these, perspective is as rootless as ever, and someone able to place it may have the good fortune to be recalled by a future already turning its back on the rest of us.

Reviewed by David Ash

Endnotes

1. George Orwell, *Homage to Catalonia*, 2000 (1938), Penguin, p 173.
2. Castle (ed), *Speeches of a Chief Justice: James Spigelman 1998-2008*, 2008, CS2N Publishing.
3. Cullen's ironbark, *eucalyptus cullenii*.