FOUNDATIONS OF THE RULE OF LAW IN AUSTRALIA

OPENING ADDRESS

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This Conference of judicial officers from throughout Australia assembles on the eve of a significant anniversary for the establishment of the rule of law in this nation. Australia Day this year marks the bicentenary of the only military coup in our history popularly, but inaccurately, known as the "Rum Rebellion". Tomorrow evening I will deliver the annual Australia Day Address in which I will develop the theme at greater length than I can do on this occasion. Nevertheless, it is appropriate to highlight some aspects of this anniversary to this audience.

The civic discourse of early Sydney was, understandably, expressed in terms of the intellectual toolkit of 18th century Britain. The core concept of that era, before both political discourse and jurisprudence came to be dominated by Bentham's utilitarian philosophy,

was the bundle of procedural and substantive principles known as the rule of law, then generally expressed in terms of rights, particularly rights of property and of personal liberty. Later, under the influence of the utilitarians with their impoverished view of human nature, talk of rights ceased for a century and a half, especially talk of inalienable human rights, which Bentham had denounced as "nonsense on stilts".

Blackstone's great work, which functioned as a core authority in the nascent Australian legal system, used the language of rights, until watered down in subsequent editions. The edition current in 1808 remained faithful to the original in this respect. That edition, by way of an interesting aside, was edited by the brother of Fletcher Christian, who led the mutiny on *The Bounty.*

Three decades ago, the English Marxist historian, E P Thompson, after close study of 18th century British society, was driven by his intellectual honesty to the unexpected, at least to him, conclusion that the upper class was subject to the law and that the rule of law was a "cultural achievement of universal significance and an unqualified human good".[1] He was treated as an apostate and attacked by his fellow left wing historians.[2]

The centrality of the discourse about the law in late 18th century Britain cannot be doubted.[3] It was this discourse that accompanied soldiers, convicts and free settlers to Australia and created from the outset a strong legal tradition in the penal colony.[4]

Only a few decades ago emphasis on the rule of law would have been dismissed in many circles as Eurocentric and neo-colonialist. That is no longer the case. The concept has now been adopted as a model and an aspiration for so many different nations of divergent cultural traditions that any approach to this concept based on cultural relativism must be rejected.

Our own achievement in this respect over a period of some two centuries, whilst taken for granted in Australia, is increasingly recognised internationally, not least in the international judicial exchanges in which Australian judges have participated with increasing frequency over recent years.

One of the oldest and most debated questions in political philosophy is the identification of the circumstances in which resistance to legitimate authority is justifiable. The language of the rebels in the Coup of 1808 deployed the then current ideas of John Locke to the

effect that there were such circumstances. Inevitably, whether or not such circumstances exist is a matter on which there will be differences of opinion. There was, in 1808, a general consensus that the Glorious Revolution of 1688 which overthrew James II, the last of the Stuart Kings, was such an occasion. Whether or not the so-called "Rum Rebellion" could be so justified is a matter which was fiercely debated at the time and remains contested.

There are two clearly distinct bodies of writing on this issue. The first, and perhaps best known, is exemplified by H V Evatt whose book entitled *The Rum Rebellion* was originally delivered as a series of lectures to mark the sesquicentenary of the event. This approach emphasises the venality of the officers of the New South Wales Corps, and generally explains the event as a defence by them of their monopolistic practices, particularly with respect to trading rum. On this approach John Macarthur, a former officer of the Corps who had become one of the wealthiest men in the colony, is cast as a conniving puppet master. Bligh's numerous personal defects are sometimes acknowledged, but played down, and the fact that he already had one mutiny on his record is not regarded as particularly relevant.

A second approach has become increasingly prominent in historical writing over recent decades. It emphasises the role the officers of the New South Wales Corps as providing the entrepreneurial skills essential for a successful economy. This approach emphasises the confrontational nature of Bligh's policies and his significant personal defects. What is rejected as greed, on the first approach, is treated as normal commercial profit motive in the second.

This is one of those historical controversies that is not capable of final resolution. The historical record largely consists of assertions by those with a vested interest in the outcome, as is inevitable when dealing with an event that polarises a small community. Sydney with a population of some 7,000, of whom almost 10 percent were officers and soldiers of the regiment, manifested all the petty rivalries, gossip, bickering, slights and the vendettas of village life. In such a context any historian can always find a reason for doubting one person's version of events. It is understandable that historians remain as polarised as the community that lived through the event.

The rule of law issues involved in the Coup of 1808 commenced with Bligh's own conduct when he challenged what the local elite regarded as property rights. This was particularly acute with respect to

certain urban leases that his predecessor Governor King had issued for periods of up to 14 years. Governor Phillip had reserved much of the land closest to the harbour for public purposes. It was the first attempt at town planning in Sydney. Bligh wanted to return to important aspects of Phillip's original plan, but King's leases stood in the way.

Bligh refused to issue any more leases, announced he would not approve building on any existing leases, ordered residents to surrender possession of their homes, ordered the demolition of structures built without approval and threatened to demolish others. He clearly intended to revoke some of the leases and sought instructions from London, but was removed before he could do so.

Amongst the important causes of the Coup of 1808 was the conflict between real estate developers and the public interest over the exploitation of prime urban land near the water. Nothing could be more "Sydney" than this.

There is now a broad consensus amongst historians that the so-called "Rum Rebellion" had nothing to do with rum. A number of other interests were affected by Bligh's conduct and the traffic in rum was of

little significance to the officers, although it was to some of the non-commissioned officers.

Their exercise of what purported to be absolute discretionary powers caused widespread resentment of Bligh's conduct particularly amongst, but not limited to, those whose wealth or expectations were directly affected. However justifiable these wide powers may have been for the chief warden of an open air prison or for the captain of a ship, they were not regarded as tolerable by free settlers or, emancipists, who regarded themselves as entitled to the rights of free Englishmen. Indeed there were serious doubts as to whether the Governor could exercise such powers over free settlers at all. These doubts were expressed by Bentham in a privately circulated attack on the constitution of the penal colony and were known to some of the Sydney elite.

On the other hand, Bligh relied on his authority and was determined to reassert the public interest as he saw it and to overturn the policies of his predecessors that he believed had permitted private men to grow wealthy at the expense of the Crown. He was determined to pursue his policies, which were in accordance with the instructions he had received.

There could be no coup without the involvement of the officers of the New South Wales Corps. The commercial interests of some of them, and of former officers like John Macarthur, which were challenged by Bligh's policies, would not have been enough. Bligh had alienated the Corps in a number of ways but, in my view, the most significant was his complete failure to respect them as gentlemen acting in accordance with the code of honour. Bligh's foul-mouthed, short-tempered, tactless behaviour frequently degenerated into mockery, abuse and derision. This cut to the core of the personal identity of the officers of the Corps.

The social position of those officers was the same as that described in one of the books published in 2005 to mark the bicentenary of the Battle of Trafalgar, where the perceptive author states:

> "Social and financial security, which are deeply connected to the question of honour, had a shaping effect on the officer corps of the British Fleet at Trafalgar. They were men on edge, not certain of the place they held in the hierarchy for which they were fighting, with enormous rewards in terms of money and status dangling before their eyes, but the equal and opposite possibility of failure, ignominy and poverty if chance did not favour them or their connections did not steer them into the path of great rewards. The quartet of honour,

> money, aggression and success formed a tight little knot at the centre of their lives, the source at times of an almost overwhelming anxiety … A body of officers coming from an uncertain and ill-defined social position needs to rely on the idea of their honour to establish their place in the social hierarchy … [W]hen, if you define yourself as a gentlemen you had nothing else, as so many did not, honour was what you had. It was membership of the moral community, which is why the language used is so critical. Your membership was defined by the respect with which other people treated you."[5]

Bligh was completely incapable of treating gentlemen with the respect or in the language that they believed they deserved. Bligh ordered that six, out of the total of nine officers of the Corps, be charged with criminal conduct, by reason of their involvement in a trial. He suggested that the conduct amounted to treason. This was clearly an attack on the institutional integrity of the New South Wales Corps. The brotherhood and loyalty of the officer's mess was called into play.

All of this is an explanation of the Coup but of course not a justification. The officer's reaction was, at best, self-indulgent. Their

action was fundamentally inconsistent with the maintenance of the social order that it was their very purpose to preserve.

Plainly rebellion against legitimate authority, for whatever reason, was a direct challenge to the rule of law. More significantly the subsequent experience of two years under military government was such that the significance of the rule of law was established on the basis of direct experience in Australia, not simply on the basis of the intellectual heritage of 18th century England.

After the Coup substantial sections of the community lost any sense of security in their person and property, particularly in the first six months. The distortions in the legal system during this period were such that it could be said that the rule of law was suspended. Magistrates loyal to Bligh were dismissed. Other loyalists were subject to a parody of justice that was no more than malevolent revenge. They were convicted on bogus charges and sent to work in the coalmines at Newcastle. The civil court processes were abused.

For the entire period of two years of illegal government, every appointment, including to judicial office, was clearly invalid. So was every governmental decision, including every exercise of judicial power.

Uncertainty was ubiquitous. Personal and property rights were institutionally insecure.

Governor Lachlan Macquarie took over on 1 January 1810 with his own 73rd Regiment to enforce the removal of the New South Wales Corps. He invalidated the appointments and the decisions of the rebel administration, including the appointments to, and the decisions of, the courts. On the basis of necessity, perfected orders were not reopened, as applied most poignantly to a number of invalid death sentences that had been carried into effect. Some redress was, however, available for the past illegal exercise of governmental power. For example, one of those banished to the coalmines sued successfully for false imprisonment.

The rule of law was emphatically restored. It has only been significantly challenged in Australia on one occasion since.

That occurred, perhaps understandably, over an issue that incited the passions of the populace more than any other, the issue of race. The intensity of the hostility to Chinese migration in the mid to late 19th century, particularly virulent on the gold fields, led to a direct

confrontation between the Government of New South Wales and the Supreme Court in 1888.

The government ordered its police force to prevent the disembarkation of Chinese passengers on a number of ships that arrived in Sydney Harbour in mid 1888. Two Chinese, one an alien and the other a returning resident with a statutory certificate of exemption from the poll tax, sought habeas corpus from the Supreme Court to prevent police restraining their disembarkation.[6] A submission on behalf of the government, to the effect that the police were simply acting upon orders, was summarily rejected. That after all was the purpose of a writ of habeas corpus. "No man's liberty", said Chief Justice Darley, who referred to an identical claim made by Charles I, "would be safe for one moment were it held that this was sufficient …".[7]

The then Premier, Sir Henry Parkes, no stranger to stirring up popular prejudice for political advantage, dismissed the Supreme Court decision as "technical" and asserted that "the law of preserving the peace and welfare of civil society" must prevail.[8] He directed the police to continue implementing the government policy and to ignore the court orders.

Notwithstanding considerable debate in the Parliament and the media, the government maintained its defiance of the law for a considerable period. The Court reiterated the basic principles of the rule of law, and the necessity for the government to comply, in a subsequent unanimous judgment upon the application of another Chinese immigrant.[9]

As Chief Justice Darley said with respect to the events that had occurred:

> "We are not aware that such a course of conduct as has been pursued in the matter of these Chinese has ever before been adopted at any period of our history. No sovereign, no matter how tyrannically inclined, no government, however unconstitutional in its acts, has ever ventured to act in open opposition to, and in disregard of the law, when that law was once pronounced by the duly constituted authority. Unfortunately there have been times when by the appointment of venal judges those in authority have sought to twist the law of the land to suit their own purposes, but never has the law, once pronounced, been set at defiance. The danger of the course here pursued is obvious. We say nothing of the evil example set to the weak

and thoughtless in the community, pernicious as this is in itself."[10]

The government backed off and the detainees were released although Parkes, as was his want, did so with politically motivated words of defiance.

I should note that some months later, without the same kind of confrontation with its executive government, the Supreme Court of Victoria reached the same conclusion on the interpretation of the relevant legislation, which was virtually uniform amongst the States on the eastern seaboard. It did so, however, without reference to the prior New South Wales decisions.[11] Conferences such as this have played an important role in establishing a sense of national collegiality amongst Australian judges so that this kind of snotty indifference is unlikely to occur today. In any event the High Court has indicated that it should not.

The fact that matters of racial and ethnic identity were regarded with such passion that they could lead to the only serious challenge to the rule of law in Australian history since the Coup of 1808, is a matter that should give us all pause. There is no reason to believe that the

people of this, or of any other, nation are now so enlightened that these kinds of passions cannot be stirred again. There are too many examples in history of such xenophobia leading to catastrophe for us not to remain vigilant in this regard.

As is so often the case, perhaps the best short description of the evils of racial and ethnic intolerance was written by William Shakespeare. He wrote it in a form that was not definitively attributed to him for centuries. Furthermore it is not found in one of his plays or poems and, accordingly, is not contained in anthologies nor taught in literature courses. It is a passage that is very little known.

There is in existence a single manuscript of a play entitled *Sir Thomas More* which was written in at least six different hands in the period 1591-1593. A passage of a few pages, referred to by Shakespearean scholars as Hand D, is attributed to Shakespeare. The play was rejected by the censor of the day, not because any positive depiction of More was impermissible under a Tudor monarch, but because of its reference to the London mob rioting in hatred of foreigners. In the years 1592-1593 there had been a number of riots against foreigners, which the authors of the play were obviously intending to exploit, but the censor feared the play would aggravate the

existing tensions. It was banned, never finished and its first recorded performance was in 1994.[12]

The occasion depicted in the play, to which the censor objected, was what became known as the "Evil May Day" of 1 May 1517, when the London mob violently attacked foreigners throughout the city in an outburst of what we would today call ethnic cleansing. Thomas More was then the Under Sheriff for the city and played a role in suppressing the riot. It was in this role that he was depicted in that part of the draft play attributed to Shakespeare.

More asks what it is the rioters want and is told that they want the strangers to be removed. More replies in words which ring down the ages:

> "Grant them removed, and grant that this your noise
> Hath chid down all the majesty of England;
> Imagine that you see the wretched strangers
> Their babies at their backs, with their poor luggage,
> Plodding to th' ports and coasts for transportation,
> And that you sit as kings in your desires,
> Authority quite silenced by your brawl,
> And you in ruff of your opinions clothed;

> What had you got? I'll tell you. You had taught
> How insolence and strong hand should prevail,
> How order should be quelled – and by this pattern
> Not one of you should live an aged man;
> For other ruffians, as their fancies wrought,
> With selfsame hand, self reasons, and self right
> Would shark on you; and men like ravenous fishes
> Would feed on one another."

I know of no passage that more effectively depicts the dangers of ethnic cleansing and the role of the rule of law in controlling the kinds of passions that give rise to ethnic, religious or racial hatred. The "ravenous fishes" metaphor would resurface in the mouth of Cardinal Wolsey in Shakespeare's *Henry the Eighth* (I.ii.79). It was to Wolsey that More had appealed for assistance to stop the 1517 riots.[13]

The rage associated with ethnic cleansing is well captured in the image of self-devouring humanity. It is an image repeated in *Lear*, *Othello*, *Troilus and Cressida* and the very phrase "Would feed on one another" appears in *Coriolanus* (I.i.184-8). That is the result when mob rule replaces the rule of law.

The passage deserves to be better known.

Sir Thomas More is, of course, one of history's exemplars of commitment to the rule of law. You have all heard many times the passage from Robert Bolt's *A Man For All Seasons* in which Sir Thomas More rejects the religious fervour of his son in law to argue that the devil himself is entitled to the protection of the law. As Chief Justice Gleeson has observed, the use of the image of the law as a windbreak in this passage is important. "The law restrains and civilises power", he said.[14]

One of the principal reasons why the judicial task is often thankless and prone to controversy is precisely because we are obliged to protect the legal rights of unpopular people. The judicial oath requires no less.

When, as I have shown, it was popular passion, indeed outrage, that gave rise to the only serious challenge to the rule of law in Australia for two centuries, the words of Shakespeare that I have quoted are of particular resonance on the bicentennial of the Coup of 1808. Often it is the law alone that can prevent a situation in which, to repeat:

"… men like ravenous fishes would feed on one another."

This a task in which we are all engaged, perhaps less dramatically than on the occasions to which I have referred. Nevertheless, like any safety system it must be well maintained in order to operate when it is needed.

I have no doubt that the Australian judiciary satisfies this requirement.

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[1] E P Thompson *Whigs and Hunters: The Origin of the Black Act,* Pantheon, New York (1975) esp at pp 265-266.

[2] For example M J Horwitz "The Rule of Law: An Unqualified Human Good?" 1977 86 *Yale Law Journal* 561; Adrian Merritt "The Nature of Law: The Criticism of E P Thompson's *Whigs and Hunters*" 1987 *British Journal of Law and Society* 194; see generally D H Cole "'An Unqualified Human Good': E P Thompson and the Rule of Law" (2001) 28 *Law and Society Review* 117 accessible at www.ingentaconnect.com.

[3] See e.g. Douglas Hay "Property, Authority and the Criminal Law" in Hay et al *Albion's Fatal Tree: Crime and Society in Eighteenth Century England,* Pantheon, New York (1975); "Introduction" in John Brewer and John Styles (eds) *An Ungovernable People: The English and their Law in the Seventeenth and Eighteenth Centuries,* Hutchinson, London (1980).

[4] See esp David Neal *The Rule of Law in a Penal Colony* Cambridge Uni P, Cambridge (1991); John Braithwaite "Crime in a Convict Republic" (2001) 64 *Modern Law Review* 11; John Gascoigne *The Enlightenment and the Origins of European Australia,* Cambridge Uni P Cambridge (2002) pp 39-44.

[5] Adam Nicholson *Men of Honour: Trafalgar and the Making of the English Hero* Harper Perennial, London (2005) pp 102-103, 114.

[6] See *Ex parte Lo Pak* (1888) 9 NSWLR (L) 221; *Ex parte Leong Kum* (1888) 9 NSWLR (L) 250; J M Bennett *Colonial Law Lords: The Judiciary in the Beginning of Responsible Government in New South Wales,* Federation Press (2006) pp 28-41.

[7] Lo Pak supra at p 235.

[8] Eric Rolls *Sojourned: The Epic Story of China's Centuries Old Relationship with Australia* University of Queensland Brisbane (1992) at p 481 and see 487.

[9] See *Ex parte Woo Tin* (1888) 9 NSWLR (L) 493.

[10] Ibid at 495- 496

[11] See *Toy v Musgrove* (1888) 14 VLR 349.

[12] See Stephen Greenblat *Will in the World: How Shakespeare Became Shakespeare,* W W Norton & Co, New York (2004) at 262-264. See also the Wikipedia entry "Sir Thomas More

(play)" www.wikipedia.org/wiki-Sir_Thomas_More_(play); Ron Rosenbaum "A Hand for Applause Books: A Hand for 'Hand D'" 10 May (1999) *The New York Observer* accessible at www.observer.com\node\41447.

13 Jasper Ridley *The Statesman and the Fanatic: Thomas Wolsey and Thomas More,* Constable, London (1982) pp 78-79.

14 Murray Gleeson *The Rule of Law and The Constitution: The Boyer Lectures* 2000 ABC Books, Sydney (2001) p1.