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THE MARGINALISATION OF THE LAW IN AUSTRALIA

If the average Australian were asked to identify the most important characteristic of our system of governance the answer would almost certainly be that it is a democracy. That would be an understandable response: it is certainly the case that having democratically elected Parliaments, responsible government and freedom of political association and debate are crucially important components of our society. But there is another element of our system which is even more important and that is what is called the rule of law.

Democracy as we know it simply cannot operate unless we also have the rule of law. It is the rule of law which ensures that the government is made subject to the law and that the laws enacted by Parliament are properly applied by an independent judiciary; and it is the rule of law and the associated concept of constitutionalism which prevent democracy from degenerating into the tyranny of unbridled populism of the kind, for example, which gave rise to the horrors of the French revolution.

Despite its fundamental significance the rule of law is given little prominence in our society. While the operation of the political system is given extensive coverage, the ramifications and the application of the rule of law are given much less attention in the media or in the general community.

That failure to recognize the priorities at the most fundamental level of our system epitomizes the theme I would like to explore in this Oration: a widespread lack of understanding of the full significance of our legal and constitutional system and its institutions.

To begin with consider the tendency to blur the distinction between government and Parliament. In media reports and popular usage the words ‘government’ and ‘Parliament’ are routinely interchanged. For example, one often reads statements that the government intends to repeal or pass such and such a statute; whereas of course governments can do nothing of the sort - only Parliaments can enact legislation. That is not a

pedantic or trivial point. The principle that the government is distinct from and subordinate to Parliament was at the heart of the great constitutional conflict between Crown and Parliament in the 17th century which resulted in the execution of a King and eventually gave rise to the Westminster system of government and it is fundamental to our notions of democracy and responsible government today. I recognize that the blurring of the distinction between government and Parliament is partly a reflection of the fact that a government with a majority in the lower house of Parliament usually has the capacity to determine what the Parliament does. But that is not always the case and in any event constitutionally the distinction is crucial.

A serious consequence of not recognizing the distinction between Parliament and government is the diminution of the role and authority of Parliament as a distinct and important institution of our system. That reduces its significance as a component of our political system but more seriously it can also erode its position as the supreme law making authority in our system. That is especially the case when a government decides that it will no longer enforce a particular Act of Parliament. This has been done in the case of obsolete statutes, statutes which it is expected will soon be repealed or sometimes, it appears, even in the case of statutes which a government does not wish to enforce for policy reasons.

Instances of governments deciding not to enforce an Act of Parliament are relatively rare but the fact that they occur at all is a matter of serious concern. It is also a matter of concern that when such decisions do become public they do not usually attract much comment; but they should: a decision by a government that it proposes not to enforce a particular statute should be greeted with public outrage because it is plainly unconstitutional. Section 1 of the Bill of Rights (1689), which is now entrenched as part of Australia's constitutional heritage, provides "That the pretended powers of suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegall."

An example of a breach of that principle occurred in Australia in the late 1980's when a Minister directed the Trade Practices Commission to defer indefinitely dealing with an application which had been made to it because he preferred that it should be dealt with by a new statutory body which he believed would soon be taking over from the Commission. An application was made to the Federal Court for an order directing the Commission to proceed to hear the application on the grounds that the Minister was not entitled to in effect suspend the operation of the law as it

then stood. A prominent Queen's Counsel described the denouement of those court proceedings in these rather scathing terms: "The Minister" he said "did not take long to give in. His advisers explained to that surprised functionary that great as he of course was, he no more had power to dispense with the laws that in fact existed than had the Ministers who served Charles II. The Bill of Rights governed him here in Australia just as it governed and continues to govern Ministers in the United Kingdom". I do not adopt counsel's sarcasm but the substance of his observations is absolutely correct.

Such ignorance or contempt for constitutional principle is not confined to Australia. In 1975 in New Zealand soon after the National Party was elected to government, the Prime Minister, Robert Muldoon announced that the New Zealand Superannuation Scheme was to be abolished and that pending the passage of the necessary repealing legislation neither employers nor employees would any longer be compelled to make contributions to the scheme. A brave public servant thereupon commenced proceedings in the Supreme Court of New Zealand against the Prime Minister on the ground that his action amounted to a suspension of statutory law contrary to Section 1 of the Bill of Rights. His claim was upheld by the court, which declared that the Prime Minister's announcement did indeed amount to a suspension of the Superannuation Act and was therefore unlawful.

The suspension of a statute does not have to be direct in order to amount to a breach of the Bill of Rights. If an action of the Executive Government indirectly has that effect then it is just as unconstitutional. Such a case occurred in South Australia in 1997 when an administrative restructure undertaken by the Government in the Human Services portfolio could under certain circumstances have had the effect of preventing a statutory board from carrying out its responsibilities. As the Auditor General concluded in his report for that year this amounted to a breach of the Bill of Rights and he urged the Government to reconsider its actions.

I do not necessarily question the motives of governments which make announcements of this kind; in most cases they are actuated by pragmatic rather than seriously improper considerations. But that does not alter the fact that whenever governments decide that they will not enforce a law or that they will take some action which has the effect of defeating the operation of a statute, they display a disturbing degree of contempt for or ignorance of a fundamental principle of our constitutional system.

As a footnote I recognize that governments do have a limited discretion not to prosecute an offender or otherwise enforce an Act of Parliament in certain particular cases; but it does not have a general power to do so.

I draw my next example from the debate on the issue of whether we should sever our links with the Crown: the so-called republican debate.

Media reports, discussions in many forums and hundreds of conversations I had showed that a large number of otherwise well informed people had major misconceptions about at least two important constitutional matters relevant to the debate.

The first was that it was not appreciated that the making of the amendments to the Commonwealth Constitution proposed in the referendum would have had no effect at all on the Constitutions of the States or the office of Governor.

In the mountain of articles and statements and arguments with which we were inundated during the republican debate, the States hardly rated a mention. Many people assumed that if the yes case succeeded and the links between the Commonwealth and the Crown were severed, the links between the States and the Crown would also be automatically severed at the same time or at least could be fixed up as a minor administrative detail later.

That revealed a failure to appreciate a core characteristic of the Australian federal union which came in to existence in 1901.This is enshrined in Section 106 of the Commonwealth Constitution, which provides that upon Federation the Constitution of each State will continue until altered in accordance with the Constitution of that State.

In other words, Section 106 affirmed that each State is a self-governing polity which has the sole responsibility for determining what its constitutional arrangements will be and of course that includes the right to decide what sort of head of state they want.

The second misconception which became apparent during the republican debate was that it seemed to have been assumed that if the Commonwealth or the States were to sever their links with the Crown that would necessarily entail our having to review the functions of Governor-General or Governor or even to do away with those offices altogether. But that would not have followed at all.

All that severing our links with the Crown would have meant is that Governors-General and Governors would no longer be appointed by or represent the Queen. But the fact that Governors-General or Governors ceased to represent the Queen would not of itself have required any significant change to our system.

That follows from the fact that virtually all the constitutional and legal functions performed by Governors-General and Governors are derived from Australian or State law not from the fact that they represent the Queen. That is a very important aspect of our system and a very important aspect of our sovereignty as a nation but the republican debate revealed that very many people were not aware of it.

Another example of the marginalisation of the law in our society and a lack of understanding of the legal system can be found in the way in which it has become fashionable to devalue the work of lawyers.

Lawyers of course have long been favorite objects of attack. As long ago as Elizabethan times Shakespeare had Dick the Butcher say in Henry V1: "the first thing we do, let's kill all the lawyers". As an aside I wonder how many of those critics of lawyers who like to display their erudition by citing that passage realize that in fact it is rather reassuring for lawyers that Shakespeare chose to put those words in the mouth of an odious character like Dick the Butcher.

Hostility to lawyers is to some extent understandable. They are often associated with crises or conflicts in people's lives and lawyers do not endear themselves to governments, corporations and individuals when they are instrumental in enforcing the law against them or curtailing their power to act in some way. But what is troubling is the extent to which attitudes to lawyers are a reflection of ignorance of the nature and significance of the role they play in our society.

Take for example the extraordinary outburst by one Attorney General (not, I should say of Western Australia) who, speaking of lawyers claimed that: "our values are distorted... We are, as a community, rewarding one of the most unproductive sectors of our society... Lawyers are necessary," he went on "but basically produce nothing."

As the President of the Law Council of Australia rightly observed:

> "It is a matter of serious concern when the first law officer of an Australian State has such an extraordinary, unrealistic and inaccurate

> view of the legal profession and of its role in society... I would have thought that the Attorney General's grudging acknowledgment that lawyers are necessary is an enormous understatement. Indeed it is hard to imagine how society could survive, how business, trade and commerce could proceed, how our laws could be interpreted, applied and improved, how ordinary daily life could proceed, how major disputes could be resolved ... without people committed to the study and application of the law, to the maintenance of the rule of law, and to the acquisition of the skills needed to help the community build and sustain a society governed by law.
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> That an Attorney General's approach to policy should be underpinned by such a view about lawyers … is a matter that should concern all Australians."

There is also a widespread failure to appreciate that the maintenance of an independent judiciary, which is essential for the maintenance of the rule of law, is in turn heavily dependent upon the maintenance of an independent legal profession.

Such a failure was evident in the terms of reference of the New South Wales inquiry into the legal profession which included a direction that in considering the extent to which public officers such as the Director of Public Prosecutions should be publicly accountable, the Commission was to have regard to the need to maintain the impartiality and independence of those offices but imposed no such rider upon the terms of reference insofar as they applied to the private profession. The contrast is marked and suggests that whilst the government recognized the importance of maintaining the independence of government legal officers it attached no significance to the equally important need to protect the independence of the private profession.

Other attacks on the legal profession involve the promotion of the extraordinary idea that lawyers are somehow an impediment to the attainment of justice rather than its most powerful agents and that lay advocates or counselors can just as effectively do what lawyers do. This is not a new idea. Roscoe Pound in his history of lawyers observed that:

> "Throughout the history of civilization there have been abortive attempts to set up or to maintain a polity without law. Every Utopia that has been pictured has been designed to dispense with lawyers. This has been manifest particularly in the ideal schemes imagined after Revolutions. The organized legal profession was abolished following

> the French Revolution and again after the Russian Revolution. In each case the attempt proved vain."

Pound spoke also about attempts to deprofessionalise the practice of the law, instancing what he described as the "frontier idea" which permitted anyone of good character to practice as a lawyer.

A similar trend can be seen in Australia today in the creation of statutory tribunals in which lawyers are not permitted to appear and which even eschew any rules of evidence or procedure notwithstanding that it has not been shown that such tribunals administer justice better than do proper courts and anecdotal evidence suggests the contrary. One can't help gaining the impression that some governments and reformers of the law seem more concerned about getting rid of lawyers and legal forms than they are about ensuring that parties to disputes get justice.

A similar lack of understanding of the significance of the role of lawyers was evident in the debates leading to the enactment of legislation providing for the mutual recognition of licensing and registration requirements for various occupations throughout Australia. An inevitable result of that legislation was that in some states there was a reduction in the standards required for the carrying out of some occupations - including the practice of the law. In the case of many occupations that levelling effect was not of great moment and any adverse consequences were outweighed by the economic benefits of the scheme. But the fact that lawyers are professionals fulfilling a uniquely important constitutional role raised a serious question as to whether it was appropriate to include them in the same scheme at all. But on the rare occasions when the suggestion that a distinction should be drawn between lawyers and other skilled workers was addressed it was perfunctorily dismissed by members of Parliament as "ridiculous" or merely an attempt to get "a bit of extra dough for the State governments" or was met by the quite irrelevant cliché that "we are all Australians"; hardly what you could describe as thoughtful reasoned responses by our Parliamentary representatives to an important constitutional issue.

No one would suggest that the legal profession is above criticism or cannot be improved. As well the profession cannot regard itself as exempt from the demands modern society places on all our institutions to be more accountable and to justify their place in our society. But having said that it is important that governments, politicians, the media and the public have a better appreciation of the core characteristics of the profession and the significance of its place in our constitutional and legal

system than is reflected in the ill considered attacks upon the profession or proposals for its reform that are periodically made in Australia today.

My final example of the marginalisation of the law in Australia is the extent to which the development of the law and its institutions has been neglected by the great bulk of Australian historians.

There are at least sixty recognized scholarly general histories of Australia. But amongst the stories about convicts, politics, governors, gold, squatters, bushrangers and all the rest of the iconic themes beloved of Australian historians there is hardly a mention of the development of our laws and legal institutions. Given the major role which they have played in shaping Australian society, that is a truly remarkable omission. As I have already noted we cannot have democracy or a civilized society without constitutionalism and the rule of law and we cannot have constitutionalism and the rule of law without legal institutions and a coherent body of law. It follows that no Australian history could be regarded as complete which does not include an account of the development of the law and those institutions. And yet most Australian histories fail to do so. As the author of a major study into the coming of the law in Central Queensland has observed "Until the early 1980s, there was very sparse analysis of the role the law might play in the historical study of colonial Australian society" and she cites another historian's identification of obviously socially significant events such as "the operation of the jury system, the establishment and development of legal infrastructure, and the general community acceptance of notions of law and order", as examples of areas which have been overlooked by historians.

To take a specific example consider the way in which historians have treated the establishment of the Supreme Courts of Van Diemen's Land and New South Wales in 1824. This was an event of major significance in our history. For the first time in Australia we had courts of plenary jurisdictions manned by professional judges who were independent of the government. Their establishment marked the advent of the rule of law in the colonies and takes its place alongside the advent of responsible government in 1856 and the federation of Australia in 1901 as one of the three greatest constitutional and political developments of 19th century Australia. But the great bulk of Australian histories barely mention the establishment of these courts and virtually none recognize its significance. That is the more remarkable because from the very beginning the significance of this development in our constitutional history was immediately demonstrated.

The very first criminal case to be heard in an Australian Supreme Court was the trial in the Supreme Court of Van Diemen's Land of William Tibbs, a white man who was charged with manslaughter arising out of the death of an aboriginal man, John Jackson. Tibbs was convicted and sentenced to transportation for the term of three years.

How could a history of Australia be regarded as complete which does not refer to that seminal example of the application of the rule of law when the great principle that the law applies to and protects everyone-including the indigenous population- was given real and dramatic expression? The fact that that principle may not have been uniformly applied thereafter does not alter the historical significance of that first criminal trial in an Australian Supreme Court. And yet the authors of virtually every general history of Australia have managed to overlook it.

Another illustration of the inadequate treatment of Australian legal history in general histories is seen in accounts of the development of the Commonwealth Constitution.

Most popular accounts perpetuate the misconception that the federation movement was born when Sir Henry Parkes made his famous speech at Tenterfield in 1889 during which he called for a federal convention to devise a national government for all Australia. It would not be seemly for the National President of the Order of Australia Association to stir up interstate rivalries by appearing to diminish Sir Henry's contribution to the federal movement. But the point I want to make is that the popular historical account that the road to federation started at Tenterfield is simply wrong.

In fact the process started as far back as 1849 when the House of Commons passed a Bill which empowered two or more Australian colonies to form a Federal Assembly with power to make laws respecting a wide range of important subjects. The Bill was eventually defeated in the House of Lords but it had the strong support of the British government and was of considerable historical significance as the first concrete attempt to form an Australian federation. But you will not find any reference to it in the majority of the histories of Australia.

Other precursors to federation which are often overlooked include the influential essays about federation published in 1854 by John West in the Launceston Examiner and the Sydney Morning Herald, reports on the issue by a Victorian Parliamentary select committee and a Royal Commission in 1857 and 1870, motions about federation in Colonial

legislatures and speeches and newspaper articles about federation going back as far as the 1850's.

Even the histories of the events *following* Parkes's speech have serious omissions. An example of particular significance for the purposes of this Oration is the failure to adequately acknowledge the contribution made by Andrew Inglis Clark whom Sir William Deane has rightly described as the primary architect of the Australian constitution. Our histories are full of accounts of what the politicians did: the meetings, the negotiations and the rhetoric but the contribution made by the lawyer Andrew Inglis Clark who actually did the real work of bringing into existence this magnificent instrument called the Constitution of Australia is barely acknowledged.

> The examples I have cited - and there are many others – epitomize a tendency to treat the law in Australia as if it were some exotic domain peopled by judicial officers, lawyers and other aliens which is of only marginal significance to mainstream society.

I think that that is a most undesirable situation. There is of course a great deal more to our society than its constitutional and legal system; but it is an integral part of our society and if the fundamental principles upon which it is based are to survive they need to be understood and defended by the whole community. But so long as there is that lack of understanding and marginalisation of the law and its institutions in Australia those principles are at risk and that in turn puts at risk the very qualities which make us proud to be Australians.