

## At the Coalface

### A speech by Justice David Angel to the Law Society Opening of the Legal Year Dinner Alice Springs

5 February 2009, Crowne Plaza Alice Springs

The Opening of the Legal Year is an occasion of significance. It was Lord Macmillan, I think, who said that the Opening of the Legal Year service serves to remind us of what is too often forgotten, namely, that the practice of the law is more than a mere trade or business, and that you who are engaged in legal practice are the guardians of ideals and traditions to which you should dedicate yourselves anew each year. It is incumbent on you to remind yourself, and others, of the true justification of your profession. One of the state's prime concerns is to maintain courts of law to resolve disputes and dispense justice according to law. In order for this primary function of government to be properly discharged, the existence of a legal profession is indispensable, a legal profession skilled in advocacy and advising and helping people in the vindication of their rights. In applying statute law and the abstract principles of common law and equity to concrete cases, the lawyer makes a real contribution to the development of the law, and, as Justice Kitto said in his foreword to the First Edition of Meagher, Gummow and Lehane on Equity, successfully to carry forward the common law and equity into a world which is changing swiftly, but in some respects is ever the same, is a task for reverent hands.

Working as lawyers in Alice Springs, you are at the coalface, actively involved in the encounter between our Western culture and legal system and Aboriginal cultures – I emphasise the plural. Bearing in mind the relativism



*Justice David Angel speaks at the Opening of the Legal Year Ecumenical Service*

and equivocation which exist in some sections of our society with respect to ethics and morality, I wish tonight to address some things that I believe are relevant to your legal practice, the essential purpose of the law being the creation and maintenance of order which is your true objective as lawyers.<sup>1</sup> Without law, in the words of W B Yeats:

“Things fall apart; the centre cannot hold;  
Mere anarchy is loosed upon the world,  
The blood-dimmed tide is loosed, and everywhere  
The ceremony of innocence is drowned;  
The best lack all conviction, while the worst  
Are full of passionate intensity.”<sup>2</sup>  
When I refer to ethics and morality,

I mean the rules which are generally regarded in a particular community at a particular time as the rules which ought to be followed, ie. the rules which indicate the right thing to do and what is ideally the right thing to do. I shall also say something about ‘culture’.<sup>3</sup> Somewhat surprisingly, there is no Greek word that can remotely translate as ‘culture’, but that is not to say that Pericles & Co had no culture in the sense I use it. Culture can be a fighting word.<sup>4</sup> For example, the National Gallery of Australia had an Aboriginal art exhibition in 2007 called “Cultural Warriors”. Matthew Arnold defined culture as the best that has been thought and said in a given environment, but that does not reflect current usage. Today we speak of “high” and “low” culture. The Mexican Nobel Laureate Octavio Paz

defined culture as “the totality of objects, institutions, concepts, ideas, customs, beliefs, and images that distinguish each society”,<sup>5</sup> all of which interact and change. I use the word culture in this sense, emphasising customs, beliefs and creative achievements at all levels. Cultures are not set in aspic; cultures are living things, not fossils. After European contact no Aboriginal culture is self sufficient. Just as no man is “an island entire unto himself”, nor is any desert Aboriginal language group entire unto itself. Toyotas, telephones and television, alcohol and Aussie Rules Football, money and the English language are all part of Desert Aboriginal cultures today.

At the Ecumenical Service to mark the Opening of the Legal Year at St Paul’s Anglican Cathedral in Melbourne in January 2008, the Most Reverend Peter Elliott, the Auxiliary Bishop of Melbourne, spoke of the dangers of divorcing morality from law. He pointed out that the natural law posits that the realities of good and evil are knowable through reason. He rejected legal positivism, which separates morality from law as failing to offer any guarantee of protecting human rights from tyranny, having pointed out that the Nuremburg trials and the current international cases against genocide and war crimes could only be justified by natural law principles. He expressed the view, a view which I share, that our legal system rises or falls on its fidelity to moral truth. He emphasised that the principles of the natural law and their interpretation and application as natural justice rest on reason, not only faith.<sup>6</sup>

To reject positivism is not to advocate that laws should make or attempt to make men moral or seek to superimpose theology, religion or morality upon people or the law.

It is, however, to recognise that, ideally, one should never subordinate principle, and that laws, to be acceptable, and therefore effective, need to be underpinned to some extent at least by arguments derived from morality, if not economics or matters of social administration.

Some of you will remember from your jurisprudence lectures that Professor Ronald Dworkin set principles above rules of law as an intermediate between legal positivism on the one hand and natural law on the other, defining a principle as, “a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality”.<sup>7</sup>

Rejection of the realities of good and evil lead inevitably to a moral vacuum and an absence of rock-bottom conviction. Self evidently, humanity cannot flourish in a moral vacuum. It was the philosopher Bertrand Russell who said, “Remember your humanity, forget the rest”. As G K Chesterton put it in his 1905 book, *Heretics*:

“Man can be defined as an animal that makes dogmas. As he piles doctrine on doctrine and conclusion on conclusion in the formation of some tremendous scheme of philosophy and religion, he is, in the only legitimate sense of which that expression is capable, becoming more and more human. When he drops one doctrine after another in a refined scepticism; when he declines to tie himself to a system; when he says that he has outgrown definition; when he says that he disbelieves in finality; when in his own imagination he sits as God, holding no form of creed but contemplating all, then he is by that very process, sinking slowly backwards into the vague-

ness of the vagrant animals and the unconsciousness of the grass. Trees have no dogmas. Turnips are singularly broadminded.”<sup>8</sup>

It is important that we recognise the enduring from the ephemeral, that there are values that do not change with the seasons, and that good and evil are realities, the existence of which does not depend on individual opinion. As Marcus Aurelius put it in his *Meditations* in 170 AD, “Does beauty need anything more? Nay, no more than law or truth, or kindness, or modesty. Which of them owes its virtue to being praised or loses it by being blamed?” Nothing is good or bad because it’s old or new. Goodness and badness are intrinsic values divorced from time. Good and evil, like beauty, are not in the eye of the beholder.

Western culture incorporates the liberal value of tolerance of difference in contrast to the repressive conformism evident elsewhere in the world. Representative democracy provides a legal institutional framework to protect, preserve and foster pluralism and individual autonomy. Civil association in a democracy does not impose any one ideology or enterprise upon its members. It allows each member to pursue his or her own life in peace and to cooperate with others as he or she chooses. Members are protected from collision or conflict by the laws.

A critical factor in the rise of both Communism and Fascism was the debasement of the idea of individual liberty and autonomy. The idea of individual autonomy recognises, amongst other things, that self reliance is a virtue and not a synonym for personal greed. The idea of individual autonomy recognises:

- that one is entitled to act in one’s own interest;

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- that one is entitled to mind one's own business and tell others to mind theirs;
- that one is entitled to treat people differently (e.g. to prefer family and friends to strangers);
- that one is not obliged to act for the welfare of others unless constrained by law to do so; and
- that one's legal obligation to assist the weak, the disadvantaged, the needy, is via payment of taxation.

We live in a "multicultural" society. Multiculturalism has its critics, though there is much to commend it. "Diversity is the protectress of freedom" said Bray CJ who also said "I like the singularity of things". "Variety's the very spice of life, that gives it all its flavour," as the English poet Cowper has said.

Pluralism had much force when Fascism and Communism were our common enemy, but today, unlimited, it poses risks to our Western culture.

Cultural diversity can mean lack of moral solidarity. In a liberal democracy there is an underlying agreement that the government's task is that of preserving liberty (of diversity) in civil association under the rule of law, that is, it is accepted that political solidarity does not hinge upon shared moral values. A Western society with a culture of tolerance of difference can not extend, however, to hosting any culture bent on undermining it – the members of any minority culture (subculture if you like) within our democracy should be able to pursue their own culture and traditions under the overarching Western liberal idea of individual freedom and tolerance of difference – provided (and it is a fundamentally important

proviso) – that in the event of a conflict between those cultures, the host culture must prevail. There can be no equivocation about this matter, else putting our common culture at risk by dividing our society into small, mutually hostile groups.

There are challenges to the very nature of our Western liberal society today, quite apart from any question of nationalism. Traditional Islam rejects secularism in denying any distinction between the spiritual and temporal. As Viscount Bryce has written – "In Islam Law is Religion and Religion is Law, because both have the same source and an equal authority, being both contained in the same divine revelation".<sup>9</sup> It is difficult to assimilate traditional Islam to Western values of tolerance of difference. Islam has never had a reformation forcing it to accommodate modernity. It appears to have largely bypassed the sexual revolution of the 1960s. Traditional Muslims have different values in their treatment of women, in relation to freedom of speech, in relation to freedom of religion, in the separation of private and public values and in respect of tolerance of homosexuality. These, as Melanie Philips in a *Spectator* article in May 2002 pointed out, are liberal fundamentals which are not negotiable. The great triumph of Kemal Ataturk was not only to see off the ANZACs at Gallipoli but to modernise Turkey by separating Islam from the state.

This reference to modernism brings us closer to home. By that, I mean closer to the coalface that I referred to earlier, ie. your work here in Alice Springs, involving as it does, the impact of a Western legal system upon Aboriginal cultures and peoples. There is a

matter, sometimes overlooked, which needs to be taken into account before the current problems and dysfunction in many Aboriginal communities can properly be addressed. Octavio Paz referred to it in 1979 when he said:

"I believe we are condemned to be modern. We cannot, and must not try to, get along without technology and science. As a solution to the impasse of industrial society, any 'return to the past' is impossible and unthinkable. The problem lies in adapting technology to human needs rather than the reverse ... traditional societies must be defended, if we wish to preserve diversity. We all realise that this is extremely difficult, but the other possibility is grim; a general collapse of civilisation... From this point of view, the preservation of plurality and differences between groups and individuals is a preventative defence. The extinction of each marginal society and each ethnic and cultural difference means the extinction of yet another possibility of survival for the entire species. With each society that disappears, destroyed or devoured by industrial civilisation, a human possibility also disappears – not only a past and a present but a future. History has thus far been plural: different visions of humanity, each with a different vision of its past and future. To preserve this diversity is to preserve a plurality of futures, that is to say life itself.

The other great danger, closely linked to what I have just described, lies in conceiving of the new society as a geometric construction: utopia. There is nothing more oppressive ... The temptation of geometry is the intellectual temptation par excellence. It is

the temptation of philosophical Caesars. We must cultivate and defend particularity, individuality, and irregularity – life. Human beings do not have a future in the collectivism of bureaucratic states or in the mass society created by capitalism. Every system, by virtue as much of its abstract nature as of its pretension to totality, is the enemy of life. As a forgotten Spanish poet, José Moreno Villa, put it with melancholy wit: ‘I have discovered in symmetry the root of much iniquity’<sup>10</sup>.

There is, as Paz points out, a tension between on the one hand the need to preserve diversity, life, and on the other, the contemporary tendency to unify. And yet we are all, Westerner, Muslim, Asian, Australian Aboriginal alike, condemned to be modern and this must be acknowledged, both for the well-being of Aboriginal

peoples to improve, and, in addition, better to address the pressing International question of the West and Islam.

Our modern society is complex. Within it are many cultures, including those of desert Aboriginal peoples. Desert Aboriginal cultures have inevitably changed. As I have said, they now include the English language, television, telephones and Toyotas, alcohol and Aussie Rules Football, money and much else besides. The preservation of ever evolving Desert Aboriginal cultures within our western liberal democracy is in the common interest. It calls for mutual understanding and considered cooperation. In so saying, particularly in relation to desert peoples, we must not presume to treat them as if they were non-Aboriginal, or assume we are able to speak for them, like those anthro-

pologists who, in many instances, are but well-meaning trespassers. As history relates, well-meaning people have done some of the greatest harm of all.

**Footnotes**

1. Lord Macmillan Law and Other Things, Cambridge University Press 1937 at 22.
2. W B Yeats, The Second Coming.
3. Alan Bloom, Giants & Dwarfs, Touchstone Simon & Schuster 1990 at 280.
4. R M Crunden, A Brief History of American Culture, Paragon House 1994 at ix.
5. Octavio Paz, Convergences – Essays on Art and Literature, Harcourt Brace Jovanovich, Inc 1987 at 147.
6. Victorian Bar News, Autumn 2008 at 24–28
7. Ronald Dworkin, Taking Rights Seriously, Duckworth 1977 at 22.
8. G K Chesterton, Heretics (reprint) Nelson’s Royal Classics Thomas Nelson Inc 2000 at 151–152.
9. Quoted in Law and Other Things at 59.
10. Convergences – Essays on Art and Literature, Harcourt Brace Jovanovich Inc 1987 at 117–8.

**Opening of the Legal Year Supreme Court update**

Justice Sally Thomas opened her address to the Law Society’s Darwin Opening of the Legal Year lunch with an update on the Supreme Court’s past year, and plans for the future.

Speaking on behalf of the Chief Justice, Justice Thomas said there has been an increase in the number of mentally ill offenders coming before the Supreme Court in the past year.

“This is a very serious issue. There is clearly an urgent need for an appropriate facility in the Northern Territory staffed by properly trained personnel outside the existing gaol system. This is a matter that will be pursued further,” said Justice Thomas.

The Judge also spoke of successful mediations conducted by Territory Judges in civil trials for the first time in 2008.



*Justice Thomas addresses the OLY luncheon in Darwin*

“Our experience in 2008 has encouraged us to continue this in appropriate cases, and during 2009, some Judges will undertake further training in mediation,” Her Honour told the luncheon.

The Judges have also instituted a review of civil pre trial proce-

dures, in consultation with the profession.

Justice Thomas said the 2008 appointment of the Territory’s first Senior Counsel, Ms Judith Kelly, was “a very exciting event”.

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