SUPREME COURT
OF QUEENSLAND

Christian Lawyers Society Inc
Annual dinner

Tuesday 16 July 2013, 6.30pm for 7pm
The Ship Inn, South Bank

"The rule of law: disparate application in disparate societies"

The Hon Paul de Jersey AC
Chief Justice

The rule of law concept would join the concepts of the presumption of innocence, the separation of powers and judicial independence in a grouping which is the subject of repeated reference. None of those concepts is generally well understood.

For example, the presumption of innocence is often presented as a guarantee that the prosecution must always establish guilt. Yet in an increasingly large category of cases these days, the onus of proof is, by statute law, reversed.

And the powers of the legislature, the executive and the judicial branch of government are never completely separate as is sometimes thought. Other matters apart, the executive is necessarily the paymaster of the judiciary.

Then there is the *sub judice* principle, which for a time became a tool of convenience for some federal politicians.

People speak of the rule of law as if its content is set in stone – not all nations respect it, but all peoples yearn for it.

In our western democracy, we have an understanding of the rule of law which is quite different from the concept as propounded in other nations which would nevertheless claim to uphold the rule of law. The irreducible minimum content of the stipulation, as we understand it, is that all citizens are equally subject to a published, comprehensible body

of law, with the enforcement of that law administered transparently and impartially by an independent judiciary.

When I speak of an irreducible minimum content, there are adjunct features which normally also obtain. The late Lord Bingham's elucidation identifies eight limbs (conveniently expressed in Tom Bingham and the Transformation of the Law (Oxford University Press, 2009) p 41):

> "One, that the law must be accessible, intelligible, clear and predictable; two, that it is by the application of law and not through the exercise of discretion that questions of legal rights should be resolved; three, that law should apply to all equally, except where differential treatment can be justified objectively; four, that the adequate protection of fundamental human rights must be guaranteed by law; five, that effective and accessible means must be provided to enable the proper and timely determination of genuine disputes, ie, there must be effective access to justice; six, that government ministers and public officers must exercise power reasonably, in good faith and for the purpose for which the power was provided by law; seven, that adjudicative processes must be fair and be seen to be fair, ie, that justice must be carried out in the open by independent and impartial courts which decide cases on their legal and factual merits having given the parties adequate opportunity effectively to participate in the proceedings… and finally, that the State ought to comply with its international legal obligations."

In our jurisdictions, governments respect and adhere to that model of the rule of law. Yet I surmise that comparatively few nations falling under the purview of the United Nations could realistically make that claim.

Other nations have their own models. Some so-called constitutional monarchies, for example, where the parliament is virtually completely subject to the will of the monarch, would claim to respect the rule of law, but not law which is truly the emanation of the people; rather the law as ordained autocratically by the monarch.

Then there are nations which claim to apply our model, but either induce or tolerate flagrant departure from it with, for example, the executive dictating the judgments of the

court, or acquiescing, at least, in judges' derelictions through serious breaches such as accepting bribes or functioning in camera.

There may be states which pretend to respect for a traditional model of the rule of law for an ulterior purpose, such as to foster financial investment, rather than the protection and advancement of citizens' rights qua citizens.

Various international instrumentalities promote acceptance of a model of the rule of law which resembles ours. Some years ago I saw a draft code of judicial conduct being promoted internationally. Its acceptance in Australia was rejected for an arguably surprising reason, which was that one of its provisions said that judges must not accept bribes. Australian judges do not accept bribes, and the provision was considered objectionable here for the implication that they needed to be reminded not to do so.

We must always recognize that conditions in many other nations and states are vastly less beneficial than the conditions we enjoy here. For instance, the Chief Judge of the Criminal Court of the Maldives was arrested last year in violation of domestic legal procedures and was held incommunicado – all as a result of the Judicial Service Commission refusing to discipline the judge. I heard of a judge from a remote third world jurisdiction who, having listened to a traditional presentation on the rule of law at an international conference, approached the speaker, a UK Judge, and despairingly observed that she had to accept bribes simply to be in a position to feed her children.

So we cannot pretend that our concept of the rule of law is in fact applied in many parts of the world, or that local conditions in many places in world would render its application even practicable.

There is another matter. While in talking about the rule of law we tend to focus on the behaviours of national political entities – bodies politic like states and nations, the true

custodians of the rule of law, in whichever situation, are the citizenry. It is they who elect democratic governments; it is they who may bring down autocracies and dictatorships – witness the Arab Spring.

Yet not all of our citizens are prepared to work within a traditional rule of law concept.

Australian nationals with unfortunate regularity travel to foreign jurisdictions where they commit crimes and then complain trenchantly that they are punished more severely than would occur following comparable offending here. Our own national government was last year anxious to secure the release of an ICC lawyer detained in another jurisdiction which contended that the lawyer had breached the legal system of that jurisdiction.

It would be facile to pretend that our concept of the rule of law is universally accepted, let alone universally applied, whether by nations or individual citizens. We would nevertheless hope that our model might command increasing acceptance, and that our model might migrate into many other nations and states throughout the world.

In May last year, I was in Doha as a guest of the State of Qatar attending a global rule of law symposium.

Qatar's climate in May resembles that of Longreach in January.

The outside temperature hovered at 46 degrees centigrade. Inside we addressed the rule of law, a hot topic in the Gulf States following the Arab Spring revolutions.

We were told of hollow supposed reform in Syria where, post-reform, the President retains office even if he dissolves parliament – which he may do in an arbitrary way. He effectively retains sole legislative power, and it falls to him alone to appoint the senior judiciary.

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I spoke on a panel chaired by the Chief Justice of the UK.

Following my co-speakers – the Chief Justices of Rwanda, a state emerging from genocide; Bangladesh, emerging from martial law; and Azerbaijan, emerging from Soviet repression – my challenge was to identify any even incipient threat to the stipulation in this home jurisdiction.

I suggested our real challenge arises from complacency: we take the rule of law for granted. It would inconceivable that our government might suspend parliament, or that our courts might abandon due process for arbitrariness.

Experience in neighbouring jurisdictions signals a need for vigilance.

And here, we have to be careful that laws, however well motivated, do not impose a rigidity which sidelines courts from their traditional curial role, that is, of standing between citizen and state.

Although in the States of my co-speakers at that Doha forum the rule of law had been rendered extinct, more subtle erosion may occur. Trends in that direction must be monitored. A not-so-subtle erosion has occurred in Hungary in recent times; with the Council of Europe's legal advisory body declaring the reforms threaten the independence of the judiciary. The reforms created a new National Judicial Office, headed by a person married to a member of the governing party, which has the power to choose what judges will hear what cases, the power to commence disciplinary proceedings leading to dismissal, and the power to appoint members of the judiciary. Over coming months, that power will be relevant to the more than 100 vacancies in the judiciary, many of which were created by a reduction in the mandatory retirement age by 8 years to 62, with immediate effect. The reforms also substantially limit the purview of the constitutional court. This

process justifiably casts doubt upon the independence of the judiciary and, in so doing, the capacity of the judiciary to protect the citizenry from the overreach of the executive government. It is pleasing to see the European Union taking strong steps, including legal action, to resist these changes, but, at present, it seems they will continue.

Also essential to maintenance of the rule of law is an adequately resourced court system, which was another theme in Qatar. Thanks to successive Queensland governments, we fortunately in this State have one. The new metropolitan Supreme and District Courthouse, the Queen Elizabeth II Courts of Law, opened last year, is its latest manifestation.

That courthouse showcases technology which, by introducing new efficiencies will enhance accessibility to justice. For example, 17 of a total of 39 courtrooms have full video-conferencing capacity, by which evidence of witnesses can be taken from locations remote to the courthouse, an important capacity in a large decentralized state. In the former courthouse, we had only nine courtrooms so equipped.

Qatar, which is an enormously wealthy state because of abundant resources of natural gas, will over the next few years spend as much as $US200 billion on infrastructure in Doha in anticipation of the 2020 Soccer World Cup. This in a nation state of only 250,000 indigenes, the rest of the 1.7 million population comprising support workers brought in from elsewhere. Is humanity served by such expenditure on a sporting event?

Recognizing that such investment demands a credible commercial dispute resolution mechanism, Qatar has established the Qatar International Court, stocked largely by senior retired UK Judges. Its sophisticated technology allows the court even to conduct virtual hearings: litigants and witnesses may participate remotely by video or audio transmission from their offices, which may be thousands of miles away, with only the Judges actually present in the courtroom.

By contrast, many Pacific Island jurisdictions continually struggle for resources. The Supreme Court of the Solomon Islands has gone through stretches where it could not even afford notepaper for court officers. We do help these jurisdictions so far as we can. At the moment, a team of registry officers from the Supreme and National Courts of PNG, and a PNG Judge, are with us here at the Supreme Court observing how we do things.

Maintaining the rule of law is not, however, just about a properly resourced, up-to-date court system, although that must be a given. It is ultimately premised on respect for human dignity and freedom, and that fortunately characterizes our society.

My session at the Doha conference substantially concerned how the traditional model of the rule of law could more effectively be promoted world-wide. Conferences like the one in Qatar are useful in that regard. So is the Conference of Chief Justices of Asia and the Pacific which I chair biennially in my capacity of Chair of the Judicial Section of LAWASIA, a conference where these sorts of concepts regularly feature on the agenda.

But we must remember that even subtle improvement, what we would see as improvement, will not result from approaches which are seen as patronizing or as involving hectoring. My hope, of course, is that our model will be accepted and respected in a much more widespread way around the world, and that that will likely not occur in my lifetime, should not mean that I drop the ball now.