SUPREME COURT
OF QUEENSLAND

University of Queensland address to 1st Year Law Students 2015

University of Queensland, St Lucia
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The Hon Tim Carmody
Chief Justice

Good afternoon **Mr Russell Hinchy, Dr Clare Cappa, Professor Simon Bronitt, (Professor Fiona Rohde)** and to those of you aspiring to graduate in law in a future indeterminate year.

Gallipoli anniversary

Before embarking on my address, I would like to take a moment to acknowledge the significance of this time of year for all Australians as we draw closer to commemorating the 100th anniversary of the ANZACs at Gallipoli.

It is a milestone in our nation's social and military history and a time to truly admire and try to appreciate – like never before – their monumental effort and sacrifices for their country and those of us who followed them. The legal profession lost many brave members in that bloody conflict.

The law

The law is both a central and indispensable social institution. It is a complex system of rules and regulation for governing human conduct for the peace, order and security of society. It is also a discipline of thought and knowledge expressed in practice.

Laws are made (by Parliament), implemented (by the Executive) and enforced (by police), and construed and applied (by courts).

I can only mention some of these aspects and even then only in passing in the limited time available.

Democratic Government

To borrow from Abraham Lincoln, democracy is a government "of the governed" (i.e. popular consent and people power). Australia is a representative version. It reflects an egalitarian society that ignores hereditary class distinctions and tolerates minority opinion and action up to the point of intolerability.

A republic, by contrast, is based on equal opportunity for the governed and minimal State intervention and favours decentralisation of power. It is a government "for" rather than "of" the people but like a democracy is "by" the people rather than by divine right.

A parliamentary democracy

This is a representative from within democracy. Power resides in and is distributed by the State. Parliament is the sole institution of the State with authority for making laws. It gives practical expression to democratic precepts through the principles of responsible and representative government.

The dominant ideology of social order and control principle in western democracies is liberalism. Social welfare on this view is the sum total of individual welfare. It emphasises human rights over conflicting public policy goals.

The degree of State intervention varies depending on purpose and alternative options.

The liberal democratic State protects civil liberties and freedoms.

Liberal legal relations are distinguished and characterised by the rule of law.

Parliament's law making power is unconstrained except by the constitution and voter accountability.

As Leslie Stephen explained in 1882:

> If a legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal; but legislators must go mad before they could pass such a law, and subjects idiotic before they could submit to it.[1]

Likewise, if a modern Australian parliament wants to pass bad laws i.e. inconsistent with the overall public interest or repugnant to fundamental social values it can, but must do so openly in plain and unambiguous language so that it – not the court – can be judged at the polls.

A judge's role qua judge remains to interpret and faithfully apply laws as written, not to modify it to suit his or her perception of what is just.

The rule of law:

The rule of law is a protean legal concept eluding precise definition.[2] The rule of law is the greatest achievement of human civilization – without it force would be the sole determinant of right and wrong, and consistent with Darwinian theory only the strongest will prevail – like Mad Max. As we verge upon the 800th Anniversary of Magna Carta, this is an apt time to reflect on its contribution to the development of the rule of law. Magna Carta was an expedient and short-lived response by King John to grievances of over taxed barons. However, there are two chapters which give important expression to aspects of the rule of law.

Firstly, Chapter 29 of Magna Carta 1297 conferred a broad right against arbitrary or unjustified interference with private property rights or personal liberties by the Crown.[3] It

[1] Leslie Stephen, *Science of Ethics* (1882), 143.
[2] Joseph Raz, "The Rule of law and its Virtue" in *The Authority of Law: Essays on Law and Morality* (Oxford: OUP, 1979), 210; John Finnis, *Natural Law and Natural Rights* (Oxford: OUP, 1980), 270.
[3] Chapter 29 was originally Chapter 39 of Magna Carta 1215. It is worth remembering that Chapter 29 of Magna Carta 1297 remains in force in Queensland by reason of the *Imperial Acts Application Act 1984* (Qld), s 5, sch 1. However, Chapter 29 of Magna Carta 1297 does not possess constitutional status and may be expressly or impliedly repealed by parliament: *Chia Gee & Ors v Martin* (1905) 3 CLR 649, 653; *Re*

also applied to all ***freemen***, the most egalitarian term conceivable at the time,[4] but still exclusive of the majority.

Secondly, Chapter 61 of Magna Carta 1215 provided for the establishment of a tribunal of barons to decide any alleged breaches of the compact, enforceable by seizure and sale of the sovereign's assets. Although Chapter 61 was omitted from later iterations of Magna Carta, it gave practical expression to the subordination of the monarch to regular law for the first time.

In 1885, Albert Venn Dicey – influenced by Magna Carta – made one of the earliest sophisticated attempts to define the essential character of the rule of law as being:

1. supreme over arbitrary or discretionary powers;

2. equal in its application

3. not the source but the consequence of individual rights[5]

Although Dicey's third contention is partly contrary to Australian law,[6] it remains a valuable starting point in analysing the concept.

Skyring (1994) 68 ALJR 618' *Skyring v ANZ Banking Group* [1994] QCA 143; *Re Cusack* (1985) 66 ALR 93, 95; *Markan v Bar Association of Queensland (No 3)* [2014] QSC 225.

[4] Naturally, this did not include all denizens of 13th Century England. Lord Chief Justice Woolfe, *Magna Carta: A Precent for Recent Constitutional Change* (Speech delivered at the Magna Carta Lecture, University of London, 15 June 2005) 7; cited in *Antunovic v Dawson and Anor* (2010) 30 VR 355, [44].

[5] Arthur Venn Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, OUP: Oxford, 1960), 202.

[6] In Australia, the Constitution is a recognised source of many socio-political rights, such as the right to freedom of political discourse, the right to trial by jury for Commonwealth offences prosecuted under indictment, and a limited right to participate in general elections, subject to certain qualifications. However, consistently with Dicey, many socio-political rights are not entrenched by the Constitution, such as the right against self-incrimination. Other rights, however, are deemed to originate at common law, but receive limited indirect and contextually-dependent protection under the Constitution, including the right to private property and the right to procedural fairness.

The rule of law is not an institution of standard form and content; rather it describes a collection of fundamental common law doctrines and principles. In Australia, these include:

1. *legal* equality;[7]

2. supremacy of regular law;[8] and

3. legality.[9]

The Relationship between Judicial Independence and the Rule of Law:

The efficacy of the rule of law requires protection against unlawful or arbitrary legislative or executive action. It was once thought that under the Westminster system of government – as Coke CJ held in *Bonham's Case* – that courts could invalidate laws where they were "against common right or reason".[10]

Since the demonstration of the supremacy of Parliament in the Glorious Revolution of 1688, that supposed principle has become obsolete.[11] There is no doubt that parliament

[7] Legal equality must be distinguished from substantive equality. The doctrine of legal equality does not require equal or non-discriminatory operation of laws: *Kruger v Commonwealth* (1997) 190 CLR 1, 66; contrast *Leeth v Commonwealth* (1992) 174 CLR 455, 485-486 per Deane and Toohey JJ. The legislature, however, has enacted statutes to secure substantive equality in specific contexts: Age Discrimination Act 2004 (Cth); Disability Discrimination Act 1992 (Cth); Racial Discrimination Act 1975 (Cth); Sex Discrimination Act 1984 (Cth); Anti-Discrimination Act 1991 (Qld).
[8] See, for example: *Wulaign Association Incorporated v Minister for Racing and Gaming* (1991) 78 NTR 1, 8. However, the supremacy of regular law is impliedly reflected in principles governing the control of government action, procedural fairness, parliamentary sovereignty, and the doctrine of *stare decisis.*
[9] See, for example: *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [58]; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, [17], [20], [43]; *Attorney-General (SA) v Corporation of the City of Adelaide* (2014) 87 ALJR 289, [41]-[46], [148]-[16].
[10] *Dr Bonham's Case* (1610) 8 Co Rep 107a, 118a.
[11] *British Railways Board v Pickin* [1974] AC 765, 782, per Lord Reid; cited with approval in *Building Construction Employees & Builders' Labourers Federation v Minister for Industrial Relations* (1986) 7 NSWLR 372, per Kirby P.

may modify the common law, and that courts are bound by the natural and ordinary meaning of the statute.[12]

Courts are Constrained by Community Values

As well as being limited – sometimes by the nether regions of regular laws – judges are also expected to make decisions and reach outcomes reflecting shared community values. Community values are not mere personal opinions or preferences but a collection of *trans-situational guides* to durable attitudes, actions and judgments,[13] characterised by *substantial public consensus.* In this respect, Sully J in *R v WKR* held that:

> [C]ourts cannot and should not pretend [they operate] in a total moral vacuum. The courts exist in order to do justice according to law. The law, as enacted by parliament, is taken without question…to reflect contemporary "minimal standards of morality and behaviour".[14]

Had the law failed to adapt to community values and evolving conceptions of justice, it would have fallen into disuse and become a long forgotten artefact of a bygone era.[15] In the past, popular revolution has been a common method of vindicating community values and, ironically, the rule of law.

In 1215 the Barons, as already mentioned, rebelled against the arbitrary taxation and penalties levied by King John, forming the fundamental compact of Magna Carta. In 1649 King Charles I was tried for treason before the jurisdiction of the High Court of Justice. In 1689, following the Glorious Revolution, joint regents King William and Queen Mary executed the Bill of Rights. Each of these revolutions were instrumental in developing and protecting the rule of law.

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[12] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' Case)* (1920) 28 CLR 129. This is, of course, subject to the ordinary principles of statutory interpretation.
[13] John Braithwaite, 'Community Values and Australian Jurisprudence' (1995) 17 Sydney Law Review 351, 352-353.
[14] *R v WKR* (1993) 32 NSWLR 447, 465.
[15] *Dietrich v R* (1992) 177 CLR 293, 318-319.

Within the relative safety of Australia – with a democratic Legislature, restrained Executive, and independent Judiciary – these revolutions are of historical interest only. However, people power remains a very real (although often ineffective) method of vindicating the rule of law and deeply rooted community sentiment. Within the past five years the popular demands for regular law and legal equality contributed to several uprisings and regime changes, including the:

- Jasmine Revolution in Tunisia in 2010, displacing President Ben Ali;
- Arab Spring in Egypt in 2011, displacing President Hosni Mubarak;
- Libyan Civil War in 2011, displacing Colonel Muammar Gaddafi;
- Ukrainian Revolution in 2014, displacing President Viktor Yanukovych; and
- ongoing Syrian Civil War against President Bashar Al-Assad.

Conclusion:

The rule of law is not an abstract concept – it is a foundational institution and predicate of ***all*** functioning liberal democracies. It embodies the principles of supremacy of regular law and legal equality, and is reflected in the principle of legality. It constrains judicial decision-making by parliamentary sovereignty and requiring judges to rule by law. Community values also play an important role in constraining the authority of the Judiciary and Legislature.

Perhaps, however, the rule of law is best demonstrated by example. During the arraignment of King Charles I in 1649 for treason, the King was requested to enter a plea. Charles declined, claiming that no court had jurisdiction over a monarch. John Cook – the valiant lawyer briefed to prosecute Charles – began reading the indictment. Furiously,

Charles struck Cook so forcefully with his cane that the ornate silver tip broke and fell to the ground. Charles instructed Cook to retrieve the tip, but Cook refused. After a long delay – Charles stooped to recover the tip himself. This historic moment was an unintended metaphor for what was happening – the divine sovereign bowing before the majesty of the law of man.[16]

Following the Restoration, in 1660 Parliament enacted the *Indemnity and Oblivion Act*, impliedly revoking any immunity possessed by participants in the regicide. Cook, and several judges comprising the High Court of Justice, were thereupon tried, convicted, hanged, drawn, and quartered. As well as showing the potential inefficacy or impermanence of popular revolt – it also demonstrates how judicial decision-making is bound by the rule of law and, under parliamentary sovereignty, the Legislature may override fundamental common law rights.

And with that wry tale I will take my leave and wish you all the best in your legal studies and however you choose to put the knowledge you gain here to good use. Good luck.

[16] Geoffrey Robertson, *Crimes against Humanity* (New York: Penguin, 2007); Geoffrey Robertson, *The Tyrannicide Brief* (New York: Anchor House, 2007).