

**SPEECH FOR THE DINNER
FOLLOWING THE OPENING OF THE LAW TERM
SERVICE AT THE GREAT SYNAGOGUE SYDNEY***

12 February 2014

“Civility, reason, fairness and justice, and the law”

It was with great pleasure that I took up Stephen Rothman’s suggestion that I speak at this occasion.

This evening was the last occasion that Rabbi Lawrence will conduct a service of this kind in Sydney. I have been coming to them since I began my duties as President of the Court of Appeal. Rabbi Lawrence’s intellect and humanity have shone out in the way he conducts these services and what he has said. I know that he has served the Jewish community and the legal community with the greatest of distinction. I wish him well in his future appointment. Through Chief Justice Bathurst, I have been asked to express the same sentiments from former Chief Justice Spigelman, who apologises for his absence, but who is overseas. He would no doubt more eloquently express his sentiments than I can, but he wished that his admiration for Rabbi Lawrence as a man and for his work be expressed tonight, and I do so.

I wish to make some remarks on the place of the law and of judges in our society and the deep importance of the inter-connected qualities of civility, reason, fairness and justice.

What I wish to say may perhaps be viewed as controversial, not, I hope, because of what I say, but perhaps because of what others might say. It is necessary to be said, however, because of the important questions raised about law in our society.

The proposition that I wish to put forward is not original. Yet, like many ideas that are neither new nor original, it is important.

In a community and polity, such as Australia, that is made up of so many nationalities and religions (including in that latter word, secular humanism) the law and the administration of justice face great challenges. These challenges are ones of acceptance, adherence by loyalty, and the development of a sense that the law and our system of justice is owned by all in the community.

The challenges are not limited to procedural and behavioural matters, such as making the courts more accessible to the community, and participating in the education of the community about the work of the courts (important as those matters are). These procedural and behavioural challenges have led, in my view, to a better judiciary. Judges are generally less rudely behaved and less difficult than they were in early generations. That said, judges are not required to be gentle or kind, but rather civil and courteous. All judges consciously or intuitively appreciate the concept of the two bodies that they bring to their task. The political concept of two bodies so eloquently discussed by the German historian, Ernst Kantorowicz in his seminal work on medieval kingship, “The King’s Two Bodies”, is always implicit in the framework of behaviour of a judge. Judges are people, but they are, first and foremost in their work, the disembodied personification of state power – just, lawful and impersonal. Emotion does not enter their deliberations, rather the great public sentiments of fidelity to the

* A corrected and slighted amended version of the speech delivered

public, to the lawful power placed in their hands and to justice and right, are what guide them. Those who think it easy to deploy judicial power have never experienced the emotional, and sometimes physical, burdens of changing, often for the worse, other people's lives. Sending someone to prison, ordering taking the home of a debtor, making someone bankrupt are no easy tasks, especially the first.

The challenges extend to the development of legal doctrine. Law as rule, as command, without the underlying social bond of notions of fairness and justice will be inadequate to bind diverse groups **by loyalty** to a legal system and administration of justice that is so fundamental to our polity.

We live, after all, in a state governed by law (*un état du droit*). Rules developed without roots in the ethical streams of justice and fairness will often strike their application in different circumstances in a manner that seems unfair.

When told "it may seem unjust or unfair, but that is the law" the new or alienated citizen may say, "Whose law? Not my law. Must be another person's law and another person's system".

On the other hand, as the great Justice Victor Windeyer said in *Cobiac v Liddy*,¹ a rule tempered to avoid the rigidity of inexorable law is of the very essence of justice.

If a rule is drawn from common notions of civility, reason, fairness and justice, it is more likely to be accepted as just, and so deserving of loyalty.

The rule of law (*l'état du droit*) requires clarity, precision and order; but it also requires civility, reason, fairness and justice.

By "civility", I mean manner of human expression and social intercourse that provides the environment for the exchange and debate of conflicting ideas. It is an environment of manners and peaceful willingness to see views and ideas of others.

Civility and manners in social intercourse are not bourgeois affectations; they are the necessary human customs for peaceful and respectful exchange of ideas. They should not be abandoned, whether through carelessness, or for personal gain, or for any other reason. To do so impairs civil society's capacity to deal with difficult issues, and so impairs good government.

There have been a number of recent examples of the loss of civility in social debate in New South Wales, in particular, in dealing with the judiciary and criminal punishment.

Let me begin by a comment, being a personal opinion, based on my own experience sitting on the New South Wales Court of Criminal Appeal over 4 ½ years from June 2008 to the end of 2012. New South Wales is not a light sentencing state. To say that there is some widespread or endemic failure of judges to reflect proper punishment according to community values is, in my view, and with the utmost respect to those presently saying to the contrary, to talk nonsense.

¹ (1969) 119 CLR 257 at 267.

In a recent violent and tragic case of a young man killed after an unprovoked and cowardly blow, a dutiful careful judge (dealing carefully with the submissions made, including those of the Crown) imposed a sentence which some in the press thought was too light. It may or may not have been. I do not comment upon that. All I am certain of is that the judge in question undertook his task in good faith, recognising the heavy responsibility of state power placed in his hands. A Crown appeal against the inadequacy of the sentence has been lodged. It has not been heard.

Yet an apparently responsible journalist thought it an appropriate use of the freedom of the press to launch what was, in my respectful opinion, a personal attack on the judge in print and on radio. I found the personal nature of the attack shocking. On the radio, the journalist apparently called the judge “a moral pornographer” or words to that effect. What the article lacked was any real discussion of the reasons of the judge. There was an assumption of error and a movement from that assumption to personal criticism of the judge.

This is not the only example of personal attacks on judges, and not only in New South Wales. Judges are now sometimes described personally (often by their names alone, whether surnames or first names, with thus either deliberate or accidental rudeness), the result of their decision criticised and their personal characteristics linked to the criticised result. It is an *ad hominem* technique that ignores the judge’s constitutional responsibility and judicial oath (or implies the latter’s breach) to deal with cases according to law, without fear or favour, affection or ill will. That responsibility and that oath require the judge to act as the disembodied repository of state power. To assert that judge X has this background or this personality and so brought down this (wrong) judgment (especially in the absence of any attempt to discuss the reasons of the judge) implies a personal nature of the process that is profoundly wrong, and implies a failure by the judge to adhere to her or his oath to do right to all in the objective manner to which I have referred. It is a technique that is deeply wrong. The technique reflects a failure to understand the basic premise of the exercise of judicial power, and it is redolent of the discourse of the mob.

This kind of lack of civility was to play its part in the political response to the evil of alcohol-fuelled violence. That there is a problem of alcohol-related violence in our society, there is little doubt. Yet one might have thought the solutions to it may lie in steps other than the directing of personal attacks on judges attempting to fulfil the heavy responsibilities of sentencing for serious crime.

That political response has been to introduce mandatory sentences for crimes glibly called “one-punch killings”. The range of circumstances for such offences is infinite. The social and personal tension, hormones, habits and weaknesses that lead young men to fight or express aggression are unlikely to be summed up by a three-word political slogan.

The introduction of the rigidities of mandatory punishment into laws on sentencing necessarily introduces arbitrariness into the law. Arbitrariness in the response of law and rules to social behaviour carries with it the seed of an antithesis of equal justice and of fairness. As Sir Gerard Brennan said in an article in 2001 on mandatory sentencing,² the potentiality of injustice in mandatory punishment is impossible to gainsay.

² “Mandatory Sentencing: Rights and Wrongs”: (2001) 7(2) Australian Journal of Human Rights 3.

Equal justice has been a powerful and lasting theme of the development of legal and constitutional doctrine in Australia. The norms and conceptions of fairness and equality before the law have informed the development of powerful procedural and substantive principles. The conceptions of fairness, justice and equality before the law inhere in the fabric of the law and in its daily exercise by judges applying judicial power. Equality before the law lies at the heart of what all expect from the law.

An essential attribute of the exercise of judicial power is that it is to be wielded in accordance with the judicial process that includes equality before the law, impartiality, fairness and the facts being determined in accordance with rules and procedures which permit them to be ascertained.³ The requirement of judges to act according to these basic principles may conflict with the requirement to impose arbitrary punishment. There is a question whether the judicial power (a Constitutional conception that is the creature of the common law) can be deployed in a manner that is arbitrary and cruel.

How the necessary arbitrariness of mandatory sentencing fits within these conceptions of judicial power is yet to be dealt with by the High Court. Recently, however, the issue presented itself to the High Court, but the Court displayed no particular enthusiasm for addressing the question by reference to the above considerations.⁴

Lack of civility can thus contribute to laws lacking a degree of reasoned (as opposed to impassioned) response, leading to the introduction of arbitrariness into the law.

Lack of civility has other consequences. Uncivil discourse detracts from the appropriate environment in which ideas can be discussed, debated, and, sometimes, resolved. Yet incivility is, to a degree, built into our political freedoms. Take the implied constitutional limitation upon Parliament and the Executive based on the freedom of expression necessary to support the operation of democratic representative government provided for by the Constitution.

In *Coleman v Power*,⁵ the High Court dealt with a provision of a Queensland statute that prohibited the use of any threatening, abusive or insulting words. Chief Justice Gleeson upheld the validity of the law, and, in doing so, gave a customarily succinct and evocatively pithy example of conflicting rights in society and of the importance of civility. He gave an example of a mother, who was a recent immigrant, taking her children to play in a public park where she is exposed to threats, abuse and insults including references to the immigration policies of the government. The language used is uncivil and ugly. The Chief Justice was of the view that there was no undermining of the political process or the protection of democracy by the legal prohibition of such conduct. How, I respectfully ask, could this be wrong?

Justice Heydon saw the constitutional protection as limited to civilised interchange about governmental and political matters.

Chief Justice Gleeson and Justice Heydon, were, however, in the minority on this issue.

³ *Nicholas v The Queen* (1998) 193 CLR 173; *R v Carroll* (2010) 77 NSWLR 45.

⁴ *Magaming v The Queen* [2013] HCA 40

⁵ (2004) 220 CLR 1.

Others on the Court refused to attach a limitation to the protection afforded by the constitutional implication based on civility of expression. Justice McHugh spoke of the “use of insulting words...as **weapons of intimidation**”.

Justices Gummow and Hayne said that insults and invective were well-known forms of political communications.

Justice Kirby referred to the views of Justice Heydon as a description of an intellectual salon where civility might usually prevail. He saw Australian history and politics as including insult, emotion, calumny and invective in the armoury of political persuasion.

We have a society and a nation to bind and build on democratic principles. That democracy should be protected by freedom of expression and that democracy should itself protect freedom of expression can be accepted as powerful truths and credos. Why, however, is civil democratic society advanced or fostered by the expression of insulting calumny or personal invective?

These issues come within the orbit of cases now before the Federal Court, and I will refrain from exploration of the debate about s 18C of the *Racial Discrimination Act*, for that reason. I would only repeat something that I have said in a published judgment:⁶

“Certain subject matters are of a character that care needs to be taken in discussion of them so that the forces of anger, violence, alienation and discord are not fostered. Race, religion and sexuality may be seen as examples of such. ...A diverse society that seeks to maintain respectful and harmonious relations between racial and religious groups and that seeks to minimise violence and contemptuous behaviour directed towards minorities...is entitled to require civility or reason and good faith in the discussion of certain subjects.”

How our society develops in, and adapts to, the coming century will, to a degree, be determined – or at least influenced – by ideas and values. The law plays a part in a necessarily secular manner in the maintenance and development of the basal concepts that we should all share: tolerance, civility, fairness and justice.

In the diverse community in which we live, it is possible that the sharing of those values diverges in application from group to group. Also there are important issues that contain the potential for significant underlying disagreement. The elastic and context-specific meaning of such concepts as fairness and justice make agreement on their application to a given circumstance problematic on occasions. But these are not reasons for abandoning their recognition and expression in the law. Their inexactitude is a reflection of the complexity and often contradictory nature of the human condition. The lack of an *a priori* definition of fairness and justice is a reflection of the profoundly human content of the words. To seek to define fairness and justice is to seek to define life.

These concepts take their place in a polity’s rules, regulations and judge-made law. Their existence in the fabric of the law is essential for the humanity of a society, and the humanity of its law. Their enemies are violence, arbitrariness and cruelty. Laws built on, or having

⁶ *Sunol v Collier (No 2)* [2012] NSWCA 44.at [73].

within them, arbitrariness and cruelty eat like a cancer at the essential humanity of law and of the society it serves and reflects.

That is not to say that society and state power should not confront violence and cruelty by those within it. It should. Too often in the past, it has not. One only needs to contemplate the societal toleration, whether through wilful blindness or ignorance, of violence and sexual predation against children, and of violence against women to understand that.

Legitimate state power should have, at its outer limits, the power to deal strongly with serious offending and with unremitting, implacable enemies of civil society by severe punishment. Intoxicated, aggressive and cowardly adolescents and young men, are, however, offenders, not enemies of society worthy of crushing. We should learn to defend ourselves through means that do not crush people, but nevertheless maintain the protection of the community from the forces of violence and evil that arise and exist within society.

These are important social and legal challenges that are deeply undermined by emotional or ill-considered attacks on the branch of government whose constitutional responsibility is the administration of justice within the community and the protection of society.

The most far-reaching form of power is the command of ideas. The abstract speculations of the great philosophers and prophets, of thinkers such as Descartes and Kant still live with us. They are translated into action and every-day ideas of enduring value. Ideas have a long life. As Chou En-lai said when asked what he considered to be the effects of the French Revolution, “it is too early to tell”.⁷ The world today (as Oliver Wendell Holmes said in 1897 in “The Path of the Law”) is “governed more by Kant than Napoleon”.

It is fair to say that civility, justice and fairness are the more general and less defined ideas in the law, and, in that sense, the remoter parts of the law. The law must incorporate them if it is to fulfil its function as the binding agent of a just democratic society with the strength, as this nation has, of a hundred nations. Only through the incorporation of such conceptions will lawyers be able to hear the recounting of the words of Holmes about the law and proudly say “That is my profession. That is what I do.”

Holmes said:

“The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.”

Civility is a daily task. We sometimes all fail in it. Recently, on holiday in Europe, I reacted to the incivility of a French shopkeeper by being blunt, and perhaps, in her eyes, rude. When the shopkeeper seemed to object to my purchase of one orange, and perhaps my rudeness in picking up the fruit, she snatched the orange from my hand, and, in a barking voice, spat out “*avancez, avancez, avancez*”. [move out of the way; move out of the way; move out of the way - I was standing between her and the scales.] I felt that I should not submit to this incivility. But I perhaps was rude myself. I said to her, “*Madame, vous êtes une femme très impolie. Gardez votre orange*”. [Madame, you are a very impolite woman. Keep your

⁷ It is now generally thought that he was referring to the 1968 “revolution”, but the reference to 1789 makes better copy

orange.] I could have been gentler, but she got the message. Nevertheless, our respective incivilities led to the failure of an infinitesimal commercial transaction. It might have been important in another context.

Nothing I have said is intended to place judges in some privileged position, other than the privilege of being burdened by state power and the demands inhering in its exercise. Everyone is entitled to their views, and judges should be open to criticism. It should not, however, be too much to ask for that criticism to be reasoned and civil, and not take the form of personal attack.

Chief Justice James Allsop
12 February 2014