THE RULE OF LAW—LOOKING BEHIND THE ICON

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Nowadays the word "icon" is much misused. But the word retains the traditional meaning of an object of particular admiration, even veneration. In that sense, the concept of the rule of law, which we celebrate this week, would, I believe, be widely accepted (not only by lawyers) to be an icon of Australian society.

At the heart of the concept of the rule of law is the idea that a government is entitled to control individuals, or to punish them for their behaviour, only to the extent it has been authorised to do so by a law previously validly made. The rule of law contrasts with the type of idiosyncratic, despotic control of people that has occurred, at some stage during its history, in virtually every country.

Of course, everybody, except (presumably) the despot himself and his henchmen, will prefer the rule of law to despotic rule. There is no doubt that Australians do. The idea that governments may infringe individuals' liberties or legal rights only when so authorised by a previously
enacted law is deeply embedded in our culture. The widespread concern over the treatment of David Hicks furnishes evidence of this.

David Hicks aside, it must be said that Australian governments do generally observe the rule of law, in the sense that they are careful to ensure they are covered by appropriate legislation before deliberately taking an action that is disadvantageous to any particular individual. It may then fairly be said that Australia is a country governed in accordance with the rule of law.

However, it does not necessarily follow that individual rights are well protected in Australia.

Whether or not adherence to the rule of law adequately protects vulnerable people depends on the content of that law. The apartheid system in South Africa was based upon an enormous body of law, all passed by South African Parliaments duly elected from time to time in accordance with the then racially discriminatory Constitution. The South African judges of the apartheid era regarded themselves as bound by that body of law—rightly, according to conventional legal theory—and made orders, sometimes against their consciences, that we would all denounce today. We would do this because we would see those orders as denying what we regard as fundamental human rights.

South Africa is not the only country that can provide examples of governmental and/or judicial decisions which, though based on validly made laws, we would all regard as being totally unacceptable. Think Nazi Germany. Think slavery in the United States, noting that, for 70 years, slavery co-existed with a constitutionally enshrined Bill of Rights. This was able to occur because the Bill of Rights did not contain an equality clause, such as that contained in s15 of the Canadian Charter of Rights and Freedoms, and most (if not all) other modern charters.

Closer to home, think of some of the past laws affecting indigenous Australians and those implementing the White Australia Policy.

As these examples indicate, the rule of law, though an essential element of the adequate protection of individuals, does not itself ensure that result. The content of the law is all-important. How then can we best ensure our laws will always have a content that is appropriate to that purpose?
No doubt, as in every other sphere of human activity, perfection is unattainable. However, it seems to me we can usefully look at two possible steps for improving the protective effect of our laws. The first step is to upgrade the law-making process, so as to increase the prospect that the laws our parliaments enact will take into account the needs of all members of our diverse community. The second step is to set some protective benchmarks with which valid legislation must comply, at least in the absence of a considered decision to the contrary.

Theoretically, a dictator may make decrees that are protective of individuals' rights. However, none of us would believe this to be likely. How could such a dictator maintain his hold on power? Unhappily, experience demonstrates the truth of Lord Acton's famous dictum: "All power corrupts and absolute power corrupts absolutely."

In recent years, we have watched events in Zimbabwe. A once-democratic and prosperous country, in which the rule of law was enforced by independent judges, has been laid waste by a President increasingly inclined to treat the country as his personal fiefdom, able to be raided for his own advantage. Significantly, the deterioration began, some ten years ago, with President Mugabe's termination of the commissions of the independent, expatriate judges, who had served the country since it threw off white rule, and replacement of them by local judges who were beholden to him. There was never a lack of law in Zimbabwe; it was just that Mugabe ensured this law would be construed and applied in a manner favourable to his wishes.

A similar position applied in the Soviet Union and other Eastern Bloc countries. There was plenty of law, but it was enacted by puppet parliaments, whose members were unresponsive to public opinion, and it was applied by judges who accepted direction from the General Secretary of the Communist Party.

In the light of these experiences, it seems to be clear that, for laws satisfactorily to protect individuals' rights, they must be freely enacted by members of a democratically-elected parliament and be construed and applied by independent judges. If these are necessary elements of a desirable system of governance, how, in Australia, do we rate?
Federally, and in every State and Territory, we have regular free and fair elections, supervised by an Electoral Commission that is widely admired for its impartiality and competence. If the vote goes against an incumbent Australian government, it does not call out the army or police; it resigns in favour of its successful opponents. There are no riots in the streets. The new government is sworn in and gets on with the job. Is this not enough?

Many would argue it is enough. Australian practice satisfies the essential minimum requirement for a country to be described as democratic. However, I emphasise the word "minimum". The term "democracy" covers a range of situations. Some countries are more democratic than others. How does Australia fare? In my view, not very well. I believe there are serious deficiencies in the quality of our democracy and, moreover, that the situation has deteriorated in recent years. I will explain the basis of this belief.

The 1990 Blackburn Lecture was given by Sir Gerard Brennan, then a Justice (and later Chief Justice) of the High Court of Australia. It was entitled "Courts, Democracy and the Law"(1). In that lecture, his Honour traced the history of the doctrine of separation of powers and, in particular, the theory of responsible government taught by people such as Professor A V Dicey. Sir Gerard said this theory was "the ideal to which the Australian Constitution gave expression".

However, Sir Gerard went on: "The political and economic events of the 90 years since Federation have exposed the fallacies of Dicey's theory or made much of it obsolete. ... In the last 90 years, the balance of power has reverted decisively to the Executive Government."(2) He set out reasons. I need not refer to them all, but it is pertinent to note this observation:
"Concurrently with the growth of executive power, the tightening discipline of political parties and the predilection of the media for individuals on whom to concentrate attention tied the political fortunes of the members of the Parliament to the political status and reputation of party leaders. Members in the governing party became increasingly dependent on the Ministry for their chances of re-election; backbench members of the opposition became increasingly dependent on shadow cabinets for their chances of governing. The theory of responsible government, which made the fate of an Executive Government dependent upon the confidence of the Parliament was, so to speak, turned on its head by the
political dependence of the majority members of the Parliament on the Executive Government. Policy formulation became primarily an Executive function. As the pressure on legislative time intensified, a virtual monopoly over initiatives for legislation passed to the Executive Government."(3)

Sir Gerard commented that "(t)he risk to democratic freedom is obvious." He went on to quote a well-known remark of Lord Hailsham, the long-time Lord Chancellor of England: "We live under an elective dictatorship, absolute in theory if hitherto thought tolerable in practice". (4)

Lord Hailsham's remark was made as long ago as 1976. Sir Gerard thought it remained apposite in 1990 and I contend it is even more apposite today.

Consider how our parliaments operate. Ordinarily, legislation is first discussed by the Cabinet. We know little about the workings of Cabinets, because confidentiality surrounds their deliberations, at least until the release of Cabinet minutes 30 years later. However, for the reasons given by Sir Gerard, it seems likely that the view of the Prime Minister or Premier will have great influence. Whether or not that is the case, there is a firm expectation, on both sides of politics, that, after Cabinet's decision is made, all members of the Cabinet will close ranks around that decision, supporting it publicly, in the Party room and in the Parliament. And, of course, on both sides of politics, backbenchers are expected to support the Party room decision, whether they agree with it or not. This has always been the rule in the Labor Party. At one time, the non-Labor parties prided themselves on being more tolerant of dissent; however, not any longer. Consider the outcry last year against the handful of government backbenchers in the federal Parliament who expressed opposition to the legislation(5) that would have mandated that all asylum-seekers be sent to Nauru. Even though this might reasonably have been considered a matter of conscience that was not critical to the government's ability to govern, the dissentients' reasons for concern were not debated on their merits; rather, the dissentients were chided for disunity and told this would imperil colleagues in more marginal seats.

The effect of the practices and attitudes I have listed is that it is possible for legislation to be enacted by a parliament notwithstanding that it is contrary to the real view of a majority of members. Is this democracy?
The problem I have mentioned would not be so serious if pressure to toe the line was confined to legislation that was critical to a government's ability to survive (such as providing supply) or was a direct implementation of an election promise, when it might be argued that all government members had a moral obligation to support delivery of the promise. However, it is not so confined; rather, if the government has the numbers, it is applied to all legislation; even legislation not mentioned at the preceding election.

I said "if the government has the numbers" because there have been occasions, especially in State parliaments, when the government of the day depended on independents to stay in office, but was not guaranteed their support for all the legislation it might put before the parliament. When that has been the position, government legislation has sometimes been voted down. However, so far as I recall, nobody ever argued this meant the government needed to resign. The point, of course, is that the merit of a particular Bill is logically distinct from the question whether a particular government should be allowed to continue in office. And yet, when a government has a majority in the lower house of the parliament, it is regularly suggested that defeat of a particular Bill will be fatal to the government. This is a convenient line for a Prime Minister or Premier to push; it is another means of maintaining the leader's control.

Occasionally, pressure is placed upon a government to allow a "conscience vote" on a particular Bill. When that happens, the parliament comes alive. Members, on both sides of the house, say what they really think and are able to influence the form of the legislation by moving amendments. They do what they were elected to do. The debate is usually engrossing, often quite moving. People ask why this cannot happen more often. I ask why this cannot be the norm, leaving aside Bills that are critical to the government's ability to govern or are a direct implementation of an election promise. Are electors so stupid that they cannot see there is room for different viewpoints within a party, notwithstanding a shared opinion that their party should continue to govern? How ironic that the parliament, theoretically the master of the government of the day, gets to do its job properly only with the permission of that government!

In recent times, the "elected dictatorship' syndrome, identified by Lord Hailsham, has begun seriously to blur
the dichotomy between Federal and State functions and powers which lies at the heart of the Australian Constitution. Consider three recent examples.

First, in late January 2007, the Prime Minister announced that the Commonwealth would make available the sum of $10 billion towards alleviation of the problems of the Murray-Darling river system. This expenditure was to be dependent on the relevant four States transferring to the Commonwealth the powers over management of the river system that had been left to them in 1901 under the Constitution. Although the precise powers to be transferred have yet to be specified, it is obvious that any effective transfer of management will result in an enormous expansion of Commonwealth power in the relevant parts (which are substantial) of the affected States.

I do not wish to express an opinion as to whether this expenditure, and expansion of power, would be a good thing or a bad thing. I mention the proposal only because it was subsequently revealed that it was neither considered by the federal Cabinet nor scrutinised by Treasury prior to the Prime Minister's announcement. It was always apparent that the proposal had not then been considered by any Parliament, but it might reasonably have been assumed it had been carefully considered at an Executive level. However, not so. A proposal involving both the expenditure of a considerable sum of money (even by Commonwealth standards) and a major increase in Commonwealth powers and responsibilities was put before the public on the authority of one man. Because that one man was the Prime Minister, upon whose performance and authority so many government members depend for their chances of re-election, government members (even if Ministers) were effectively precluded from voicing any concerns they or their constituents (or, if Ministers, their departments) might hold.

My second example concerns education. A few weeks ago, the Commonwealth Education Minister pushed her State and Territory counterparts to agree to a system of performance based remuneration for teachers. They refused. That might reasonably have been thought to be the end of the matter. However, it was announced in the Commonwealth Budget last week that, from 2009, Commonwealth contributions to public school funding will be dependent upon the introduction of performance based remuneration. Although the States and Territories contribute much more than the Commonwealth to the cost of running public schools, and have constitutional
responsibility for this area, their judgment on this issue is to be overridden. My question on the issue is not whose judgment is correct, but who should get to decide.

The difficulty faced by the States and Territories is that the fiscal imbalance between the Commonwealth, on the one hand, and the States and Territories, on the other, makes it essential for the latter to receive assistance from the former. And this assistance comes in the form of special purpose grants, commonly called "tied grants", to which the Commonwealth can, and does, attach any conditions its Minister pleases.

The third example is the Prime Minister's proposal, last month, for the States to transfer their product liability powers to the Commonwealth in return for Commonwealth funds.

There is nothing new about the Commonwealth using its financial muscle to influence policy in areas outside those assigned to it by the Constitution. However, the practice seems to have accelerated in recent years and to have increasingly descended to minutiae such as the former Commonwealth Education Minister's insistence on all schools having flagpoles and conducting flag-observance ceremonies. It seems inherently wrong that, without any constitutional or parliamentary mandate, the Commonwealth should overrule State and Territory Ministers and officials in respect of management issues within the latter's constitutional domain. It must be destructive of morale for departmental officers to have to carry out their work under the shadow of outside interference like this.

Another result of the fiscal imbalance, and federal use of tied grants, is the inability of the public to determine who is to blame for unsatisfactory services. There is widespread current criticism of the public hospital system. Which government is to blame for this? A significant portion of public hospital funding is provided by the Commonwealth, yet public hospitals are managed by the States and Territories. The Commonwealth blames the deficiencies of the public hospital system on State and Territorial mismanagement. The States and Territories say they are starved of funds. Who is correct? It is impossible for any ordinary member of the public to know. So accountability, which lies at the heart of democratic government, is lost.
The Commonwealth is able, by use of the corporations power, substantially to impose its will in relation to virtually any area of State responsibility. As was demonstrated last year in the Industrial Relations case(6), that statement is true even in respect of a governmental area that is expressly assigned to the Commonwealth on only a limited basis, the balance of responsibility being left with the States.

In his dissenting judgment in the Industrial Relations case, Justice Ian Callinan commented (?) upon the prospect of the powers of each of the State parliaments being progressively reduced until "it becomes no more than an impotent debating society". Perhaps we have not yet reached that stage. However, I believe we are already seeing the debilitating effect of Canberra's dominance. State and Territory elections tend to be tepid affairs devoid of passion and, more importantly, with little debate about fundamental policy; merely a haggle about details of the implementation of generally accepted policy. No doubt this situation substantially stems from the fiscal and constitutional constraints binding the States and Territories. But I believe another factor--the consequence of the first--is the uninspiring nature of many members, on both sides, of our State and Territory parliaments. On the day of the recent New South Wales election, an opinion poll was published. It revealed that 51% of respondents thought the Government did not deserve to be re-elected, but 57% thought the Opposition did not deserve election in its place.

Considering all these factors, I am driven to wonder whether our country might be better served--at least governed more transparently and accountably--if we openly acknowledged that the Commonwealth had won its power struggle with the States and the obsolescence of the distribution of powers thrashed out at the Constitutional Conventions of the 1890s, and thereafter written into our Constitution? Might it be better expressly to amend the Constitution so as to vest all legislative power in the Commonwealth, I suggest subject to provisions designed to protect members of disadvantaged and minority groups, but with administration of all services conducted at a regional level?

It can cogently be argued this would provide Australians with the best of all worlds: legislation that operated uniformly throughout the nation, constitutional protection for the more vulnerable members of the population (at least in relation to generally accepted
human rights) and administrative officers who were more easily accessible even than those of the (mostly large) existing States.

Although this idea has been around, and argued by many discerning people, for some time, I recognise that many people sincerely believe that, in a country the size of Australia, it is best to retain a federal system of government. I respect that view, but I suggest those who hold it need to do more to improve the working of that federal system. If the federal system is to be retained, there is need for a fundamental re-appraisal of the distribution of powers effected by the Constitution. Each level of government should be given clear responsibility for whatever functions are best dealt with at that level, without interference by any other level of government. And there would need to be a review of the revenues available to each level of government, so that none is put under the power of the other's purse.

Whether we are talking about moving to a unitary system of government or merely overhauling our federal system, we are talking major constitutional change. Of course, any such change would require approval at a referendum and we all know how few referendum proposals have been approved. The pursuit of either change would stir up such a hornet's nest of opposition, from those who would consider themselves to be personally disadvantaged by the change, that there would be no chance of the referendum being carried; that is, if we took the usual course of proposing that the change have immediate effect.

But what if we took a different course? What if the legislation provided for a delayed effect, so that the new regime only came into operation some years later?

This strange notion, as you might think it, came into my head as long ago as 1983. In that year, you will recall, the Hawke government was elected with an announced program that included many items of a constitutional or legal nature. One of the promised items was a pledge to initiate a referendum to amend the Constitution so as to provide for Commonwealth four-year fixed parliamentary terms. A few months after the election, Hawke was asked when he would move on this promise. He replied to the following effect: "Well, I've been thinking about that. I do not see why I should be the first Prime Minister since Federation to be unable to decide when to hold an election." Hawke's personal disadvantage had trumped his
assessment of what was desirable in the public interest. Had the issue been a change that would take effect in, say, 2001, he may have seen it differently. As we know from the famous Kirribilli agreement, not even Bob Hawke expected to last as long as that.

You may reply: "Well if a particular change is a good idea, how can you justify postponing its operation for a decade or so?" My answer would be a pragmatic one. Better a delayed reform than none at all. If Hawke had pursued the promise of four-year fixed terms, but delayed until 2001, this would now be the rule.

In the context of a possible switch to a unitary form of government, I mentioned constitutional protection for the more vulnerable members of society. I had in mind a series of entrenched rights and freedoms such as those included in the Canadian and South African constitutions, to mention but two of the modern charters of rights. These charters, unlike the United States Bill of Rights, both contain an explicit guarantee of equality before the law, perhaps the most important guarantee of all. However, adoption of such a charter is not dependent on switching to a unitary system of government; it would be equally useful in a federal system. It is an issue that has previously been considered, without a positive outcome. It is an issue which ought now be revisited, in my opinion.

I do not wish to take time today arguing the case in favour of the adoption of a charter of rights, especially because the topic has recently been well-ventilated in this Territory, in the context of debate about the Human Rights Act 2004. Victoria has followed the lead of the ACT by enacting the Charter of Human Rights and Responsibilities 2006, which is not yet in full operation. Experience in these two jurisdictions will help to inform the debate as to the desirability of a similar initiative elsewhere, including federally.

However, I would like to comment on one argument that is often put against the notion of a charter of rights. It has often been said, most recently by the new Attorney-General of New South Wales, that a charter of rights is undemocratic because it gives to unelected judges the last word about legislation, rather than allowing this to be a decision of elected parliamentarians.

Whether or not that is true depends upon the terms of the charter. One of the problems about this debate is that people tend to look at the United States Bill of
Rights, the oldest and most famous charter, and to assume any charter that may be adopted elsewhere will follow its essential structure. Yet it need not do so. The Canadian Charter of Rights and Freedoms, for example, has a clause allowing the relevant legislature specifically to override a court's finding that a particular enactment, or part of it, is invalid because it infringes a protected right. The legislature does this by re-enacting the impugned legislation, with a clause declaring it is to have effect notwithstanding the court's decision.

A similar situation applies in jurisdictions where the rights are contained in a statute, rather than a constitution, for example New Zealand and the United Kingdom. The fact that the parliament is able to have the last word does not make the protection futile. Experience shows that, in practice, legislatures take considerable notice of the court's findings. Overriding is rare.

Constitutional amendments are not the only way in which we may improve our system of governance, and therefore the responsiveness of our laws to the wishes of the people. Much that may usefully be done does not depend upon constitutional change. An important initiative would be to improve our parliamentary procedures. Question time was designed to provide an opportunity for members of the parliament to obtain information from Ministers. In theory, it is the most direct and important way in which Ministers are made accountable to the parliament. However, it no longer works like that. Question time today is highly structured. The questions are divided in advance between the government and opposition, the government members' questions being mostly "Dorothy Dixers" that will allow the Minister to make a statement about some topic. The opposition front bench tends to hog the questions available to their side, targeting the topic of the day. Ministers make it a point of honour never to deal with the substance of the question but to deliver themselves of a prepared statement that most often has only a tangential association with the question that was asked. Any protest about the Minister's failure to address the question is invariably brushed aside by the Speaker and often ends with one or more opposition members being thrown out of the House.

I have often thought how different the situation would be in a court of law, where the presiding judge would insist that the witness address the question, not make a statement about something else. I do not put the difference down to the fact that, ordinarily, Speakers lack legal training, but rather that they are usually
members of the same political party as the Minister and the highly partisan atmosphere that infects modern parliaments. It is perhaps too much to expect a Speaker to rein in a senior member of the party upon whose electoral standing he or she depends for re-election.

As you may know, the tradition in the House of Commons is that a newly-elected Speaker immediately resigns from his or her party and no longer attends party meetings. In return, the tradition is that the Speaker will not be opposed by any other party at the following election. The development of such a tradition in Australian parliaments would go a long way towards restoring fairness in parliamentary debate and utility to question time. Perhaps this is beginning to be realised. Although they did not need to do so, from a numbers point of view, last week the Labor majority in the New South Wales Legislative Assembly voted for an independent Speaker, the Premier referring to the Westminster tradition. It will be interesting to see what difference this makes.

I earlier suggested the quality of our democracy had deteriorated in recent years. The position at federal level was examined in a recently published book entitled "Silencing Dissent"(8). The book describes the way in which the Howard Government has methodically reduced the possibility of criticism from many of the institutions that historically have been important in advising governments and/or alerting citizens to deficiencies in government policies or actions: universities, the scientific research community, non-government organisations, the media, the public service, statutory authorities and the military and intelligence services.

Time does not permit me to set out the wealth of instances cited by the various contributors to this work. Particularly worrying aspects of their account include the way in which the Government has prevented communication of information to the public by publicly-funded experts such as scientists employed by CSIRO and has taken over the role of the Australian Research Council in determining which academic research grant applications will be funded. Manipulation of academic research programs, and suppression of discomforing scientific conclusions, must adversely affect the quality of our democracy.

Much more is spelled out in "Silencing Dissent". It includes the emasculation of Freedom of Information laws, dramatically illustrated by the High Court’s decision last year(9) to treat as conclusive a certificate of the
Commonwealth Treasurer that it would be contrary to the public interest to disclose documents concerning the effect of bracket creep on the First Home Owners’ Scheme, and the diminished ability of parliamentary committees to obtain information about governmental activities. Information is critical to accountability. When information is suppressed, democracy is diminished.

At some time during the next six months there will be a federal election. I do not imagine its outcome will be decided by reference to issues like those I have mentioned today. Yet, on both sides of politics, there are people who understand the importance of these issues. Is it too much to hope that, when the sound and fury of the election has abated, whoever is then in power will look beyond immediate political goals and consider some of the issues I have raised? Is it too much to expect that societies of lawyers, who do understand these issues, will encourage them to do so?

(2) Op cit at 7
(3) Op cit at 8-9
(4) Op cit at 10
(5) Migration Amendment (Designated Unauthorised Arrivals) Bill 2006.
(7) At 819
(9) *McKinnon v Secretary, Department of Treasury* (2006) HCA 45.