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CHALLENGES FOR THE RULE OF LAW

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There are two things that I want to convey to you:-

- 1) The great virtue of the rule of law is to provide certainty and predictability, so that people and businesses know how to order their lives and activities. It is more important infrastructure, in my view, than roads and railways, dams and generators. But I also think that that infrastructure has real problems of sustainability. And I want to make out some of the reasons why.
  
- 2) Then I want to think about the sorts of things that we need to attend to make the rule of law sustainable. Some of those things are things you can help with. Some are beyond your control.

So what are the challenges to the sustainability of the rule of law? I recall as a student reading an essay by the famous C19th English jurist Sir Frederick Pollock. I remember he described how the common lawyer perceived statute law as a sort of catastrophic intervention, a type of earthquake or eruption, that interfered with equable flow of evolutionary development. Maybe that was mere nostalgia even in Pollock's day. But it reminds us of something important to our system of law. The fundamentals of Australian law, the most primal principles, come from the Common Law – a system of judge made law.

Indeed in Sir Edward Coke's day, in the C17th and C18th, courts felt themselves entitled to declare that laws enacted by Parliament were not valid because they offended something like the generally accepted morals and values of the land. It was not really until Dicey's enunciation of the primacy and omnipotence of Parliament that we arrive at the sort of jurisprudential world view that prevails today. The laws of Parliament prevail over the Common Law.

Dicey's view of parliamentary supremacy, whatever its basis as a pillar of democracy, has significant implications for the nature of law and the rule of law. First, it makes law something that is hostage to politics. It means that the political processes of parliament determine what the law is, not the processes of the Common Law. Politicians elected by the people, not judges, decide what the law is.

One consequence of that development is that there is nothing that guarantees that the body of law produced by Parliament will represent a coherent system of rules underpinned by general and fundamental principles and doctrines of law. There is nothing that guarantees that what we arrive at represents a system of law as opposed to a collection of rules arrived at by a process of individual and disconnected decisions. The only things that work in the direction of principle and system are :

- (1) professional policy advice that places a premium on coherence and consistency;
- (2) professional drafting that similarly attempts to reconcile apparent contradictions or tensions;
- (3) community and business expectations that the Parliament will not deliver incoherent and mixed messages and;
- (4) the fictions built into legal process that attempt to impose consistency on the law (for example, the doctrine that a later inconsistent law repeals the earlier law or the specific provision prevails over the general etc).

A second consequence of this development is that over time the Common Law will atrophy and disappear. Of course, we can try to preserve Pollock's world view, and continue to see the general principles of tort, contract, equity, administrative law etc as the framework or background to a series of interventions. We can see the courts as

a machine for integrating parliamentary intervention into the fabric of the Common Law. But as the extent and detail of statute law increases, so this ploy becomes more and more an unsustainable fiction. At a certain point the doctrines of the Common Law will need to be declared “dead” – albeit the “death” of a thousand qualifications.

A third consequence is that techniques or the craft associated with the Common Law actually become dysfunctional. Here I have in mind pre-eminently the doctrines of precedent – stare decisis, the distinction between ratio decidendi and obiter dicta. Admittedly these doctrines are not that ancient. They were really formalized and systematized in C19th. But for all that, they represent the internal logic of the Common Law and the craft of the common lawyer. I used to think that the sort of looseness that had entered into judicial practice over recent decades was a failure of legal education and technical skill among lawyers. I no longer think that is the correct diagnosis. I think it is just plain silly to apply these techniques to a world increasingly dominated by statute law. Why? Two reasons : one is that the rules of precedent really have to do with how you develop law in an orderly way. When it comes to interpreting law there is already a fundamental constraint on where you can go – the words of the statute. However inventive a court, you still have to come back to the statute. You can't go that far. Second, with the explosion of blackletter law and the number of courts and tribunals, you have to wonder who is going to keep track of all these rulings and how much it is going to cost to go to work on them all with the sophisticated tools of Common Law precedent. Do we really think it makes sense for a Consumer Tribunal, for example, to go through the complexity of analysis involved in the application of the rules of precedent? No, what we would expect is something more rough and ready – the Tribunal would ask itself “if this goes on appeal what would superior courts say about it? Have they exhibited some attitude to what these words might mean in this situation?”

Which brings me to the fourth consequence, the rise of the canons of statutory interpretation. These are not rules and canons designed to figure out what the lawmaker intended to do. The idea that fundamentally we are trying to discern the intention of the legislator, is the exact opposite of what these rules and canons of statutory interpretation are designed to do. In fact they are designed to say to

lawmakers this is how you must indicate and show your intentions. If you want to oust the jurisdiction of the courts or the rules of natural justice or the requirement of mens rea or a plea of reasonable excuse etc, then you are going to have to spell that out in words of great precision and clarity. The courts are really saying to the legislature “we presume that no reasonable person would be wanting to do any of these things – so if that is what you want to do, you have to come clean and spell it all out for all the world to see – we dare you!” What goes into this list of presumptions represents what in the eyes of the courts are key or fundamental values of our society.

Then there is the idea that a statute needs to be interpreted in its entirety. That it only makes sense to construe a provision or a word in the context of what the purpose of the law is as a whole. Or more, how it fits into the overall fabric of the law, other statutes and the Common Law. The quest here is for consistency and coherence. And that is essential for the rule of law. As Pollock pointed out, it is as if the law needs to present to the citizen the same sort of consistency and certainty as the laws of nature. I know that if I let something drop it will fall to the ground and smash. I can predict that with absolute certainty. I can plan my actions around that sort of certainty. Well, the law should give me the same sort of certainty about how other citizens and police officers and officials will react. So I can plan my life with the same sort of certainty. The canons of statutory interpretation have at the centre the idea of discerning the intention of the legislature. Now, that is more or less a fiction. The idea that the legislature has an intention or is something that is capable of having a unitary intention is problematic. But what the courts are really saying to the legislature and the legal community and the community generally is this : “these are the rules we will use in applying the laws you turn out, so you should draft them accordingly. If there is uncertainty we will have a look at the second reading speech so you had better pay attention to that. We will not paw over a whole range of other extraneous material. So, if anything else is crucial to how we are going to construe this law, you had better spell it out.”

The value of these rules of interpretation lies in the message they send to the community about what they need to look at to understand what their rights and obligations are. There has been a tendency to loosen these rules. Even a tendency to

celebrate activist judges who look at all sorts of extraneous reports, and books and treaties and opinions in coming to a view about the law. I think this practice is a dangerous one. It is dangerous precisely because it undermines the certainty and predictability of the law. It makes it difficult or impossible for people to predict where the court will come out on difficult issues. What considerations are legitimate. To be sure, in the short term, in the individual case there may be a better result (there may not be, too). But in the long term such an approach undermines certainty and predictability.

As many commentators have noted, the tendency has been not only for the centre of gravity of lawmaking to shift from the courts to the legislature, but more crucially the centre of gravity has shifted from the legislature to the executive. This is a result of many factors. But first and foremost it is due to the sheer complexity of modern societies and economies.

Marx was wrong about many things, but I think he was right about the impact of technology and the increasing division of labour in societies and economies. That drives greater complexity and closer interdependence. We are now seeing clearly that that trend breaks down the traditional boundaries or constraints of the system of nation states. It gives rise to what has been called “globalisation”. I will come back to that in a moment – because I think this is important for lawmaking.

But the first point I want to make is this: the sheer complexity of the business of rule making has meant that the legislature is mostly out of its depth and can do little more than set the general framework for law. Think about how much now gets done through subordinate instruments – regulations, statutory rules, by-laws, guidelines, plans, standards etc. It is at this level where a lot of the real “bite” and effect of law happens. In a sense this is not surprising. A hundred years ago it may have been enough to have general rules about the sale of goods in general. Now what people (manufacturers, unions, consumer groups, retailers, wholesalers, local governments, environmental activists etc) want are regulations that copiously deal with white goods or even washing machines – efficiency standards for water and energy use, warranties, waste disposal, credit and terms of agreements, import and export etc.

Law has had to keep up with the complexity of the economy and society – what sociologists refer to as “social and economic differentiation”.

Not only is this sort of detailed prescription beyond the capacity of legislatures, it is also beyond the capacity of Cabinets and Ministers and probably senior public servants. Things are becoming ever more specialised and detailed.

The response to this tendency is complex but, I think, in the last analysis unsustainable:-

- (A) There has been a requirement, increasingly, to undertake cost-benefit analysis of regulations and standards. Regulatory impact statements. To consult with stakeholders. To submit to independent scrutiny by some sort of regulatory review agency or parliamentary committee.
- (B) There have been at regular intervals avowed campaigns against “red tape”. Audits, stocktakes, wholesale reviews. For example, the Competition Agreements signed up to in 1995.
- (C) There have been attempts to make low level lawmaking more accountable through guidelines. Ombudsmen, Auditor-Generals, Tribunals of various sorts. Even professional organisations such as engineers, doctors, lawyers, architects etc.

None of this seems to me sustainable. Why? Because it is based on a false premise. It is a premise we do not want to acknowledge as false, because it is very uncomfortable to do so. The false premise is simply this : that the body of law in a state is a single coherent set of rules that derives its authority ultimately from the parliament, the people’s elected representatives. It is Dicey’s idea. Earlier, the idea of Bodin and the theoreticians of the modern state. The idea that the king, the sovereign, the Parliament has a monopoly on authority; that all authority emanates from that source.

It seems to me that that proposition is no longer true or capable of being true. To put it in perspective it is a relatively recent idea. It is something that comes out of the C16th and C17th at the earliest. It would not have occurred to theorists or ordinary people in the Middle Ages. It was obvious to them that there were lots of contending centres of authority, not just one. There were different systems of rules and laws, different courts, different centres of authority that impinged on their lives – the king, the lord the church, the city, the guild or professional organisation, all sorts of groupings and organisations. There was no single consistent set of rules and laws.

It should also be obvious to us that the phenomena of globalisation and complexity and pluralism throw up a very similar state of affairs, international and regional organisations that make rules, private groups that make rules that govern the practice of their members, large corporations that issue guidelines and pro forma contracts and agreements, all sorts of tribunals and arrangements for arbitration and dispute settlement and mediation. Some we would characterise as “public”, some “private”.

The phenomena of pluralism and complexity are also critical. There is a much more educated and articulate constituency these days. People are less prepared to accept mass-produced solutions to problems. Neat political divisions between left and right, Labor and Liberal are problematic. There has emerged a plethora of groupings demanding customised solutions to particular problems. To illustrate : in education we are moving toward individual customised learning programs for students, not generic curricula or syllabii. This phenomenon is not simply a challenge to the traditional institutions of representative democracy, it is also a challenge to the traditional bureaucratic way of organising government; to the application of generic rules and policies set by Cabinet or the Parliament, or even the Minister or CEO. You can see that this tendency, paradoxically, demands greater accountability, but, at the same time, greater flexibility and customisation.

Some commentators have coined the phrase “glocalisation” to describe this pulling apart of the traditional institutions of the state in both the direction of the local and the particular on the one hand and the direction of the global and general on the other.

So, the emerging picture challenges that premise about the coherence of a single body of rules and the monopoly of authority claimed by the states. What has been occurring in many OECD countries over the last two decades or so also shows a de facto and implicit recognition of the unsustainability of this premise. What has been occurring, and will continue to occur is directly relevant to you as professional draftsmen.

What do I mean by that? What has been the trend? The rhetoric has to do with the cost of regulation. And that is real enough. There has been recognition that regulation, just as much as taxation and the costs of transport, water and electricity has real costs for business. Regulation is a significant input cost for the economy and in an increasingly global and mobile economy affects the competitiveness of local economies and countries as places where people choose to locate and do business.

The trend or response to that recognition has been to look at more light handed regulation, the use of economic instruments and the withdrawal of the state from the business of regulating. What I would describe as the “privatisation” of regulation. Let me give you one example to illustrate what I mean. Climate change. In discussions over a decade around the shape that the Kyoto Protocol should take there were two contending schools of thought.

One was the “Policies and Measures” School. Mainly continental European countries who wanted to deal with climate change by agreeing on a series of policies and measures that countries would then implement. Things such as prescribing building standards, automobile performance, substitution of fuels, design of transport and energy systems etc. Things that would have required a whole range of regulatory intervention by States and a range of traditional “command and control” techniques by government officials.

The other school we might call “the Market or Economic Instrument” School of thought. Here the idea was to avoid prescribing specific policies and measures. Instead what was suggested is that the cost of emitting greenhouse gases should be factored into the price of doing business either through a carbon tax or through

limiting the amount of carbon emission that would be allowed and issuing tradeable permits or licences to emit carbon. Solutions to the problem of global warming would then be left to businesses and consumers to work out. The State would simply create the incentives and the circumstance to allow that to happen.

Now it is the latter school of thought that seems to me to exemplify the way things will tend to go. The State minimising its involvement in sorting out environmental, social and economic issues. Creating institutions and incentives that allow private individuals and corporations to figure out what to do. You will no doubt be able to think of many counter-examples to this trend, not least in the wake of September 11. But it seems to me an important and logical tendency.

Importantly, for you, it changes the character of law. It does not remove the need for law. But it changes the nature of state intervention. The sorts of regimes that need to be set up are different in character. Essentially legislation will be concerned with setting up the infrastructure for a market to operate. And that can be done more or less well. A good way to create a market was the very simple legislation we passed here in NSW which simply created the ability to treat the carbon sequestered in trees as a property right. A bad example of how to proceed is the prolix and complicated tome of rules and protocols that creates the national electricity market. What I am saying to you is that both draftsmen and policy makers are going to have to get “more savvy” about the economics of law, or better, how to create and maintain markets. Interventions are going to have to be more targeted and strategic.

The other trend, to focus for a moment on the pull towards the local and the particular, will be the re-emergence of a sort of contract or quasi-contract jurisprudence. Where individuals customise their own solutions and agreements around health, social security, education and training and other government services. The role of general rules and generic law in that situation is problematic. It can at most provide the general framework for that to occur, the bare outline of what is to be done and institutions for accountability and review. For example, social security increasingly has to do with “mutual obligation” where the beneficiary enters into an agreement with a private organisation and maybe also an employer.

This is the way I see things going, having to go. That is why when I look at the business of law making I find it in its current mode unsustainable. The attempt to draft laws, rules and regulations, guidelines, protocols, orders etc, the ever more detailed and attempt to deal with every contingency imaginable, is simply unsustainable. And even if it could be done it is a sort of reductio ad absurdum of the idea of the rule of law. Because it would then be so complicated that no one would be able to understand it. All law would be like tax law. [that quest reminds me of the Grants Commission Process].

The other thing is that you don't simply need to make and create such laws, you need to maintain them and adjust them. The expense and complexity of that task is mind-boggling. But, you will say, ""privatising the law" in your sense does not make all these tasks go away, it simply moves them to private individuals and corporations". And that is true. But, ironically, what it also means is that our attention will need to turn back to the courts, or rather to those institutions that sort out disputes and disagreements. The centre of gravity in terms of law making may well shift back toward the variety of institutions that do the job of adjudication, arbitration, mediation.

Milsom in his lectures on the development of the Common Law explains how the Common Law Courts were virtually legislators. To begin with they made procedural laws and rules. And such procedures or forms of action, in Maitland's celebrated thesis, gave rise eventually to substantive law. Perhaps we will be go back to a world in which process and procedure will be, in an important sense, at the centre of things. And that should not surprise us in a world where there is greater pluralism and complexity and ever less consensus around substantive values. For, process does not dictate what in the end the result should be. It simply places constraints around the means by which we advance our own interest or our own views about what is valuable.