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When I was invited to deliver the 14th Sir Leo Cussen Memorial Lecture, I was initially quite flattered and readily agreed. However, shortly afterwards, I received a letter to which was attached a list of previous speakers and their subjects. There were two Governors, four Chief Justices, six Justices of the High Court and a Judge from my own Court who was also a former Executive Director of the Institute. Their subjects encompassed a broad range of issues and challenges for our legal system and our society. I then experienced a powerful urge to write to the President indicating that, regrettably, I had forgotten a prior engagement. I trust that at the end of my presentation you will not regret that you had not had a similar engagement.

The topic that I have chosen "Human Rights and the Criminal Law" merits, I consider, very careful attention at this particular stage of our history and development, when so much that has been regarded as fundamental to the very definition of our society and the operation of its systems and structures is under challenge.

I have connected the notions of human rights, the criminal law, the definition of a society and the operation of societal structures and systems in this fashion as it is apparent that it is not by reference simply to the existence of formal structures or constitutions that the true character of it can be defined, but rather by reference to the actual availability of rights within it. The constitution of the U.S.S.R. was a document remarkable for the rights and protections that it appeared to confer upon Soviet citizens. The reality, particularly with respect to the operation of the criminal law was starkly different. Only a moment's thought is required to appreciate that the criminal law is, at the same time, both a crucially important and potentially dangerous social instrument.

There are very important balances between the respective rights and responsibilities of individuals and the community of which they are members represented by and reflected in the principles and structures of our legal system. Obviously, as society itself changes, those balances need to be reassessed. This process is a continuing one with the actual balances being affected by an incredibly wide range of factors. Often the shifts are subtle and may in a given case be affected by a simple variation in government funding for legal aid. It is not the fact that the balances are changing with which I am concerned, but the possibility that, through a failure to recognize the nature and combined impact of the multiplicity of changes already made or in contemplation, the fundamental character of our society will be adversely affected and that the human rights which underlie and justify our social compact will, as a practical proposition, be denied to the vulnerable among us.

An appropriate point at which to commence my remarks about these values and challenges and their relationship with the criminal law is the current debate concerning the collection of legal principles encompassed by the concept of double jeopardy. It has been accepted for several hundred years that an individual should not be tried twice for the same crime. The rationales for the adoption of the principles were hardly challenged. It was accepted that, for a number of reasons, there should be finality in criminal proceedings and that individuals should not be exposed to the repeated exercise of State power. The concept rests upon a particular view of the relationship between the individual and the community and, importantly, the rights accorded to the individual that underpinned that relationship. They are reflected, for instance, in the expression that an individual is presumed innocent until guilt has been established according to law. This is no mere statement of the onus of proof in a criminal proceeding but involves a reference to the underlying rights of the individual and carries a number of implications and consequences. With respect to the concept of double jeopardy, it involves acceptance of the proposition that those who had been acquitted of serious criminal charges should not carry any stigma and so the results of their trials are not to be impugned either directly or through some collateral attack. The centrality of the recognition of individual autonomy and the human rights values associated with it are, of course, fundamental to the rhetoric and generally, if not always, the practice of most western societies. Accordingly, the concept of double jeopardy has been recognized at common law, in the International Covenant on Civil and Political Rights, in the European Convention on Human Rights and in the 5th Amendment of the United States Constitution.

It has been long appreciated that these protections and limitations of State power came at a price, but this was one that society has been prepared to pay. Undoubtedly, there have been perpetrators who have not been held accountable for their wrongdoing. However, for what have been regarded as overwhelmingly important social, moral and structural reasons, that result has been countenanced.

Until very recently, an argument to the contrary would have short shrift indeed. Yet there is now a distinct possibility of change in this area. Towards the end of last year, the *Criminal Justice Bill* (2002) was introduced to the English Parliament. That Bill has reached the Committee stage in the House of Lords. The New Zealand Law Reform Commission has recommended changes that would limit the operation of the principle in relation to what have been referred to as acquittals in "the most serious classes and kinds of case". As I understand the position, however, no legislation has yet been introduced. In New South Wales, a draft Bill called the *Criminal Appeal Amendment (Double Jeopardy) Bill* 2003 has been published for consultation but has not yet been brought before the Parliament.

In an interesting article in the *Modern Law Review*, Paul Roberts from the University of Nottingham Law School set out the following extract from the speech of Martin Linton MP in the House of Commons when the *Justice Bill* 2002 was before it:

> "There is an old saying that convicting one innocent person is more serious than allowing 10 guilty people to go free. That is an unbalanced approach to justice, which assumes that there is no injured party when there is a wrongful acquittal. A rape victim who knows the person who committed the rape, but is unable to convince a jury, will live the rest of their life in fear because the person remains at liberty and may repeat the crime. When new evidence becomes available – if we are not to take an extraordinarily cavalier attitude to the rights of victims – it is just as much a question of justice that such a person … should be dealt with as it is that a person who was wrongfully convicted … should be allowed to go free when the case against them is demolished. … If we pursue the logical precept that the legal system must be seen as clearly from the victim's point of view as from that of the accused, we must surely conclude that a wrongful acquittal is as bad as a wrongful conviction. The double jeopardy rule gets in the way of exposing wrongful acquittals, and it should be relaxed."

That extract can be contrasted with the passage contained in the joint judgment of Gleeson, C.J. and Hayne, J. in *R. v. Carroll*:

> "A criminal trial is an accusatorial process in which the power of the State is deployed against an individual accused of crime. Many of the rules that have been developed for the conduct of criminal trials therefore reflect two obvious propositions: that the power and resources of the State as prosecutor are much greater than those of the individual accused and that the consequences of conviction are very serious. Blackstone's precept "that it is better that ten guilty persons escape, than that one innocent suffer" may find its roots in these considerations."

Roberts in the article to which I referred is, in my view, understandably critical of the approach adopted by the Member in the House of Commons which fails to address the nature of a criminal trial and appears to present the process as simply a contest between perpetrator and victim. However, not dissimilar views have been expressed very recently by political leaders in this country and I would suspect that it is an approach with quite wide appeal.

Many of the basic propositions upon which our criminal justice system has traditionally operated are now being queried or, through substantive or procedural changes, attributed less significance. The balance between the individual and the State with respect to the criminal law is being altered by these changes. Trial management procedures, for example, are arguably impacting upon the accusatory character of a criminal trial, gradually rendering the process more and more akin to a civil proceeding. That trend is, I believe, highly likely to continue, to the extent that I anticipate that in the relatively near future they will be distinguishable only by the

burden of proof applicable. The prosecution and the accused would, in that scenario, be regarded as theoretically equally positioned.

Consistent with these developments, there is, I believe, an emerging view of the criminal process that places less emphasis upon its accusatory character and the balances of State power and human rights inherent in that accusatory system. Against that background, there can be little surprise that the justifications for the existence of a right to remain silent at the investigative and trial stages are now by no means as apparent to our communities or the legislatures which represent them as they have been in the past. Trial by jury, often referred to as the bulwark of the law, has become the mode of trial in progressively fewer cases.

The development of the system of trial by jury has been regarded as one of the proudest achievements of the common law. In every trial conducted in this way, the trial judge makes a statement to this effect in his charge:

> "You represent one of the most important institutions of our community, the institution of trial by jury. What in the final analysis our legal system endeavours to guarantee to our society and to any individual charged with a criminal offence, is the right to have the case which is presented against that person determined by 12 independent and impartial members of the community on the basis of admissible evidence and in accordance with relevant principles of law. It is for you and for you alone to decide whether the accused is guilty or not guilty of the charge."

There is no good reason to suppose that trial by jury may not disappear completely within a matter of years. In some jurisdictions even murder trials can currently be conducted without a jury and, in most, majority verdicts can be accepted for a wider range of offences. There is certainly a distinct possibility that, within a relatively short period of time and throughout the country, the criminal trial before a jury will change from one in which the general issue of guilt or non guilt is addressed to one in which, after the adoption of more elaborate pre-trial procedures, the merits or otherwise of specific allegations or defences will be considered by the tribunal of fact. It is conceivable in such a scenario that some issues would not be dealt with by a jury at all. Complex accounting matters and other questions arising with respect to expert testimony may well be dealt with separately. I am not to be taken as against the adoption of new techniques that are directed to simplify the process, as clearly some action is necessary, but to draw attention to the possibility that their effect may well be to alter fundamentally the character and the concept of fairness upon which the criminal trial has traditionally proceeded and the place and function of such a trial in our society.

What has provided the impetus for change in these areas? I would suggest that the answer can be found, in part, in a changing relationship between the citizen and the State in modern democratic societies. Little by little, as society has become more

complex, the role of government has increased and the area of autonomy for most people has become correspondingly restricted. Generally, and less and less grudgingly, this development has been accepted as inevitable. I believe that people are feeling less secure in terms of their employment, their prospects educationally and otherwise for their children and, of course, as a consequence of the terrible things that are happening in our world. Against that background we, as a community, are barely disturbed by actions that would, only very recently, have been regarded as serious breaches of fundamental rights and liberties.

The history of the last century demonstrates, I believe, that when such circumstances arise, the community becomes significantly less tolerant. Law and order issues attract much more attention and the resolution of complex issues through the mechanisms of the criminal law becomes attractive. Politicians are well aware of this phenomenon and both respond to and regularly endeavour to exploit understandable community concerns. The manner in which the issues relating to the sentencing of juvenile offenders were approached in some Australian jurisdictions in clear disregard of our international obligations and the application of basic principles of fairness will be remembered by most of those present here.

Although this process of change has been continuing for many years, there would seem to be little doubt that it is accelerating, particularly in the post-September 11 period. We now have Commonwealth legislation in place under which persons, not suspected of the commission of any offence, can be detained and questioned if a federal magistrate or judge has reasonable grounds for believing that the grant of a warrant for this purpose will substantially assist in relation to the collection of intelligence that is important in relation to a terrorism offence. Failure to provide the requested information is an offence under the Criminal Code. A strong argument has been advanced by Michaelson in the *Sydney Law Review* that the detention of non-suspects authorized by a non-judicial body for the mere purpose of questioning is incompatible with Australia's international human rights commitments.

Whether or not the various Acts which have been passed in the last 18 months or so constitute elements of a sensible response to the threat of terrorist activity in this country, or involve unjustified departures from basic principle, is debatable. What is apparent is that, in this new environment new balances and priorities are developing and there is a need for great care to be exercised.

Speaking almost exactly one month after September 11, Kirby, J., addressing the opening plenary session of the Australian Legal Convention held by the Law Council of Australia, drew attention to the danger of over reaction:

> "Keeping proportion. Adhering to the ways of democracy. Upholding constitutionalism and the rule of law. Defending, even under assault, and even for the feared and hated, the legal rights of suspects. These are the ways to maintain the support and confidence of the people over the long haul. We should not forget these lessons. In the United States, even in dark times, the lessons of *Dennis* and of

> *Korematsu* … need to be remembered. … Every erosion of liberty must be thoroughly justified. Sometimes it is wise to pause before acting precipitately. If emergency powers are clearly required, it may be appropriate to subject them to a sunset clause – so that they expire when the clear and present danger passes. … Always it is wise to keep our sense of reality and to remember our civic traditions …"

I wonder whether we are heeding that advice?

Returning to the debate concerning the principle of double jeopardy, the recent impetus for change in this country was provided by the decision of the High Court in *R. v. Carroll.* It is perhaps worthwhile delaying for a few moments on that matter as it is an interesting example of some of the processes in action. Carroll was tried in 1985 for the murder of a 17 month-old child whose body had been found some 12 years earlier on the roof of a toilet block in Ipswich in Queensland. It was a truly terrible crime that attracted and merited public outrage. Carroll pleaded not guilty and gave evidence that he was at an R.A.A.F. base in South Australia at the time of the murder. There was evidence by a forensic odontologist that bite marks on the child's thigh were caused by Carroll. This evidence was disputed. The prosecution also relied upon some similar fact evidence. The details are not significant for present purposes.

Carroll was convicted, but the verdict was subsequently set aside by the Queensland Court of Criminal Appeal on the basis that it was not open to the jury to find that the possibility that he was in South Australia had been excluded beyond reasonable doubt.

Later, further evidence obtained claimed to support the prosecution's allegation that he was not present at the base at the time, and different experts expressed the view that the bite mark on the victim's thigh matched that of Carroll. The critical evidence however, in the view of Williams J.A. who delivered the principal judgment when the matter came before the Queensland Court of Appeal, was provided by a man named Swifte, a fellow inmate where Carroll was being held on remand in February 1984.

Carroll, in consequence, of this additional material, in February 1999, was charged with having committed perjury at his trial. Again, he was convicted and again he appealed. The appeal was allowed. It is perhaps worthwhile to recite a few significant parts of the judgment of Williams J.A. First, the evidence with respect to the bite marks:

> "I have come to the conclusion that a verdict that the appellant was responsible for the death of the child based on the odontological evidence given at the perjury trial was unsafe and unsatisfactory. But, as I have already said, the matter should never have got to the jury. The prosecution case on the perjury trial was essentially a re-trial for murder based on odontological evidence from a fresh set of witnesses, asking the jury to

disregard contrary opinion from the odontological experts called at the first trial where the basic data on which each opinion was based was the same."

Second, the evidence of Swifte:

> "What the jury were not told, and in my view there should have been a specific direction on it, was that Swifte's evidence was highly unlikely to be true (perhaps more likely to be untrue) because the appellant had been in Boggo Road for no more than approximately 24 hours. It was conceded that he was received into Boggo Road prison at some time on 27 February 1984. It is also a matter of public record that at some time on that day (in theory it could have been before he was taken to Boggo Road) he signed his affidavit in support of the bail application. At some time before 4pm the following day he was in the Ipswich Magistrates Court, and released from there on bail. There was clearly no time for Swifte to have had the series of conversations he swore to over a 'couple of days'. The underlying premise in Swifte's evidence is that it was not on the first occasion they met in Boggo Road that the alleged confession to murder was made. That came at a later time. Leaving aside all the doubts any rational person must have about Swifte's evidence because of his account of the vision of a child and the timing of his statement to the police and its use on his being sentenced in 1997, the confession could not have been made in the circumstances deposed to by Swifte. That clearly takes the matter far beyond the situation considered by the High Court in *Pollitt*. At least the jury should have been very specifically directed that in the light of all that he said on oath it was so highly improbable that the confession was made as alleged that Swifte's evidence should be rejected in its entirety."
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> "As the learned trial judge noted … the critical evidence was that of Swifte. As he said, without Swifte's evidence the prosecution would, in all probability, not proceed. But, for the reasons given above, it became clear by the end of the trial that no weight at all could be attached to his evidence. Indeed, many may well think it ironic that such evidence was led on a perjury trial although his alcoholism may suggest he was unreliable rather then dishonest. Without Swifte the prosecution had no case; their only hope was to re-run the murder trial under the guise of a perjury trial. That in substance is what happened."

With respect to the evidence of a witness Hill who claimed to have seen Carroll in Ipswich at around the relevant time:

> "At most for the prosecution it was some other slight evidence which, if accepted by the jury, might have put the appellant in a position where he had an opportunity of committing the crime."

…

> "When one considers the conduct of the perjury trial, and the evidence as it there emerged, it is clear that the principle of double jeopardy was substantially breached. In essence, the prosecution set out to prove that the appellant murdered the child by calling different witnesses but without there being any new substantive acceptable evidence to that led at the original trial."

The prosecution took the matter to the High Court which up-held this view.

There was, not surprisingly, in view of the way in which the matter was reported in the media, considerable public reaction to the result. Shortly after the High Court decision, the Premiers of New South Wales and Queensland spoke out about the injustice of the situation. Two juries had considered the matter. One had found him guilty of murder and the other of lying at his trial about his guilt. Surely justice required that he should not be permitted to walk away in that situation? No question of his guilt appeared to be present in what I observed of the public debate about the decision. However, I have pointed out and as was observed in the High Court judgments, the Queensland Court of Appeal, which did address this issue, held that, a properly instructed jury, properly considering the matter, could not have been satisfied beyond reasonable doubt on the prosecution evidence that he was in fact guilty. This, however, did not discourage one media organization offering to fund a civil proceeding and, it would appear, that as a direct consequence a bill to limit the area of operation of the double jeopardy rule was prepared in New South Wales.

There are a multitude of issues to consider that may lack wide appeal or be totally lost in a *Carroll* type scenario which rather than serving as an example of the need for change could arguably be used to support the existing law. As you will appreciate, it is not my purpose tonight to discuss the double jeopardy rules, although my very tentatively held view is that there are some respects in which they may need to be reconsidered, but to emphasize the complex nature of the relationships between our basic rights and the criminal law and, of course, the need for careful consideration of the effect upon those relationships of making superficially attractive changes in the law designed to deal with perceived problems in particular cases. It must not be overlooked that alterations of the system to achieve what is presumed to be justice in a specific type of situation may occasion serious injustice to others.

It is at this point that it becomes necessary for some other basic propositions relating to the nature of our criminal law and the structures which enforce it.

For a variety of reasons, sometimes good, sometimes not, our society, through its legislature or the evolution of the common law, prohibits engagement in specified kinds of behaviour. Sanctions, generally determined by the perceived seriousness with which the behaviour is viewed, may be imposed. Historically, the interference by the State with the personal autonomy of individuals through the use of the

criminal law has raised issues of considerable sensitivity. There have been occasions on which this power has been abused, whilst the law is replete with examples of injustice being brought about by ignorance, misunderstanding and the very crudity of the system itself, both conceptually and operationally. I need only refer to the over-representation in our prisons of the indigenous people of this country as well as the intellectually disabled and other disadvantaged groups in this context.

I am reminded of the times when, as a young lawyer, I appeared for gay men charged with the offence of being a male person engaging in an act of gross indecency with another male person. This offence, which carried a maximum sentence of imprisonment, was included in a set of provisions in the Crimes Act that addressed what were described as "unnatural and indecent offences". There was, I should add, no equivalent offence for women. I suspect that the existence of such activities was so extreme a notion that the possibility could not be legislatively recognised. It was common for gay men who pleaded guilty to the commission of the offence to be subjected to aversion therapy before they came to court in order to avoid imprisonment. The "treatment" consisted of the presentation of stimulating images accompanied by painful electric shocks or injections. Evidence would be given by a psychiatrist that the individual was undergoing a course of treatment designed to reduce the risk of re-offending. As I understand the process, the therapy was of course incapable of affecting the individual's sexual orientation and not intended to do so. Rather, it was designed to create a continuing association in the person's mind between the expression of that sexuality and pain so that upon experiencing a sense of sexual stimulation, the individual would suffer intense feelings of anxiety, often accompanied by dry retching. The process was very similar to that depicted in the film "A Clockwork Orange", and equally inhuman.

It is difficult now to accept that within the period of my own personal experience our society addressed issues of adult sexuality through the application of crude criminal law provisions and with such ignorance.

The criminal justice system is, at its heart, a coercive mechanism, capable through its operation of denying even the most basically recognised rights and freedoms of individuals who are subject to it. That alone requires that its principles and procedures must be clearly justifiable and that its impact upon those rights and freedoms should be confined, as far as is practicable, within the boundaries of strict necessity. Seldom, however, is the debate conducted at that level and those who do attempt to do so are dismissively marginalised as soft on crime as I have remarked from the perspective of Government and Opposition representatives, according to which political grouping is in power at the time, it is both simple and attractive to attempt to address social issues through the criminal law, rather then identifying and dealing with the underlying problem in an honest manner. The human rights implications are apparent.

If the operation of the criminal law can present serious problems with respect to human rights, of greater concern are the devices currently being employed by

governments that have the effect of by-passing the protections that it does offer and the human rights values on which it has been traditionally based.

There would seem to be no doubt that it was in order to avoid the necessity to comply with their own Constitution and, in particular, the obligation to accord to the persons detained, any rights under that Constitution, a large number of individuals are being held by the United States Government outside of the country in Guantamano Bay, Cuba. For practical purposes, they have no enforceable rights at all. The period of their incarceration is indefinite and at the will of the Government. I observed in a report in the Australian newspaper the day before yesterday, a statement attributed to the Secretary of State that they could be detained until the global war against terrorism is won. They may or may not ever be brought to trial. If they are, it will apparently be conducted in secrecy before a military tribunal with their capacity to challenge the evidence against them severely restricted. Included in their number are two Australian citizens. There seems to be no suggestion that they may have committed any offence under Australian law and, although held by American authorities, they are being denied the protections generally available under American law. They are not regarded as prisoners of war and are consequently not accorded the protections provided by international law. A new category of enemy combatant has been created to describe their status which is unrecognised in international law and to which none of these protections attach. I find it very disturbing that we appear to accept the situation with equanimity and that our attachment to the human rights of two of our own citizens seems to be so tenuous.

Questions of the detention of individuals outside the criminal justice system have arisen without satisfactory resolution in this country in relation to asylum seekers. In order that they are denied full access to our legal system and the rights recognized by it, we have, for migration law purposes only, employed a device that effectively alters our national boundaries. The so-called “Pacific Solution” was adopted so that those who were intercepted before they reached our migration zone were transported to detention centres outside the country. Those so held are therefore without access to our courts and effectively kept out of sight in island states. A large number who were able to reach these shores, were taken into custody, men, women and children alike. They have not been designated as criminals but, nevertheless, have been subjected to indeterminate detention behind razor ribbon. Whatever language is employed to justify the situation, in reality a substantial number of people, including children, have been kept in circumstances less satisfactory than that of most individuals in prison and with fewer rights. Whilst, as it has been proudly claimed, the system may well have been successful in discouraging such people from attempting to come here, we, as a nation, have paid a high price in terms of our self-respect and our integrity of our position with regard to the recognition and enforcement of human rights.

Just as the criminal law can constitute a powerful threat to human rights, its central purpose can and should be to protect them. Detention outside the criminal justice

system on the basis of executive order, albeit with legislative authority, is a very worrying notion.

As I understand the generally accepted basis upon which our society operates, personal autonomy and the opportunity to attain personal fulfilment are regarded as fundamentally important values. Governments have a limited role with respect to the establishment and maintenance of conditions that would enable those values to be advanced. Some of our societal values are said to be fundamental. In all probability, in the past they would have been referred to as inalienable. The function of government is to protect and advance those rights and certainly not to restrict them, or through its activities, render them illusory.

In other and generally authoritarian communities it is argued that the notion of rights is meaningless in the absence of a stable and ordered society that is not under threat internally or externally. It is the stability of the society which assumes paramountcy according to this approach, with the limits of personal autonomy being determined by the extent and character of asserted threats. In each of these types of society the criminal law has significant parts to play both in the maintenance of stability and the vindication of its values, but the emphases and consequent outcomes of its operation can differ dramatically.

From the perspective of those in power in authoritarian regimes, the criminal law is a very powerful instrument for social control. It can and has been used to deny human rights. The processes of law can be converted very easily into the techniques of oppression.

On the other hand, notwithstanding the criticisms that can be made, our legal system generally and our criminal law in particular are based securely upon human rights principles. If we remain astute to the need to maintain those principles in daily operations, we will not go far wrong. The law, so viewed, is an instrument of empowerment with its values forming part of the very definition of the society in which we live. As I see it, perhaps the most important role of the law is to play its part in the protection of the individual citizen against the exercise of arbitrary power, whether by those who do not honour their civil obligations, the citizen criminal, the international terrorist or the State itself.

Many of the rules and principles that direct the operations of our criminal justice system are, as I have said, currently under challenge. Some will need to be adapted or abrogated in order to deal with new issues in a rapidly changing world. What should not be abandoned or devalued are the human rights values upon which our existing rules have been developed. It is simply a truism that part of the cost of living in an open and just society is that there will be occasions where perpetrators will avoid the processes of law. That is the price which we pay for having a system of justice rather than one based on arbitrary power.

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