



Essay

Authority, democracy and the rule of law

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Editor's introduction

On Australia Day, 26 January 2008 the Francis Forbes Society for Australian Legal History (ACN 099 158 620) announced that James Triggs (a Year 9 Student, in 2007, at Doncaster Secondary College in Victoria) had been awarded a prize in the Society's 2007 Australian Legal History School Essay Competition. This is James' essay.

The declared object of the competition was 'to promote interest in, and an awareness of, Australian Legal History by encouraging students to develop a facility for describing historical events and for recognizing their place in historical themes'.

The theme nominated for the competition was 'Lessons for Today in Development of the Rule of Law in a Frontier Society'.

The specific topic to be addressed in the competition was the following: '*Authority, Democracy and the Rule of Law — What does it all mean for us today? Does Australian History provide any insights? Discuss these questions, referring to one or both of: (a) The Rum Rebellion, 1808; and/or (b) The Waterloo Creek Massacre and its Aftermath, 1838.*'

For the assistance of prospective competitors, the Society published on its website two 'background research papers', respectively entitled 'The Rum Rebellion, 1808; A Lesson in Nation Building' and 'Aboriginal Colonists and the Law, 1838'. As James' essay demonstrates with his reference to the Eureka Stockade and other historical events, students were encouraged to develop their own approach to how the Australian story should be told.

James' essay was rewarded with a prize for himself and his school. The school received \$750.00 and a book voucher of equivalent value supplied by Abbey's Bookshop of Sydney. James received a personal prize of \$100.00 and a \$250.00 Abbey's Bookshop voucher.

The Forbes Society acknowledges the support of Abbey's Bookshop and the other sponsors of the competition: The New South Wales Bar Association; The Law Society of New South Wales; The Division of Law, Macquarie University; The State Library of NSW; State Records NSW; Federation Press; and *The Sydney Morning Herald*.

Details of the 2008 Australian Legal History Competition can be found on the Society's website at <www.forbessociety.org.au>.

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The essay

Authority, Democracy and the Rule of Law — What does it all mean for us today?
Does Australian history provide any insights?

Authority, democracy and the rule of law are fundamental concepts of justice, which, by its nature, defines our implementation of law and our interpretation of it. The providence of justice and fair, equitable treatment is what our legal system strives for. This would not otherwise be possible without these aforementioned fundamental legal concepts. The Rum Rebellion, the Waterloo Creek Massacre and the Eureka Stockade are turning points in Australian history which show the gradual establishment of the Australian concept of 'justice' and insight into what these concepts mean for us today and how we define and implement these concepts.

This essay contains five parts. Part One will define these aforementioned terms from the perspective of today. Part Two will elaborate on the Rum Rebellion, its place in history and its role in developing today's definition of the concepts of authority, democracy and the rule of law. Part Three will elaborate on the Waterloo Creek Massacre, its role in history and the subsequent developments. Part Four will elaborate on the Eureka Stockade. Part Five is the conclusion of this essay.

Authority is widely accepted as the permission or inherent privilege of position to enforce and command, and the power to dictate how the enforcement and commands be followed. Today, the legal courts and personnel have varying degrees of authority, which is intended as the best possible method for the implementation of justice. Authority is meaningless unless recognised so the concepts of accountability and responsibility have developed accordingly. The concepts of accountability and responsibility are defined as the obligation to obey. Different types of authority exist, for example the governors of colonial Australia had direct authority to govern, but were directly responsible to the British Colonial Office. This concept as applied to Australia was vastly developed by the Rum Rebellion as here authority was challenged.

Democracy is a political system where the people of a country rule through an established government of their choice, usually representative democracy by popular vote in modern-day democracies. Democracies have the concepts of recall and referendum. In democracies, the people grant authority to those that are selected to govern and are expected to do so with, at the very least, an adequate level of skill. Democracy is intended as a form of government that is fair and just which, under ideal circumstances, would mean a legal system that succeeds in dispensing justice. The Australian view of democracy was particularly developed by the Eureka Stockade as here democratic ideals were developed.

The rule of law is the authoritative, superior placement of established law. The rule of law entails the promotion of certain concepts and freedoms, to prevent abusive use of power. The rule of law contains numerous elements. The elements state that all laws must be written, feasible, and as clear as possible and must not be contradictory. The laws can have no effect until they have been passed and are thus official and laws must be constant through time,

but must allow for revision. The rule of law differs in the specifics, but the aforementioned is what is consistent with all the definitions. The elements need to be balanced appropriately, or unfairness will result. The rule of law in relation to Australia was developed by the Waterloo Creek Massacre in conjunction with the subsequent events; a defined sense of morality was established.

The Rum Rebellion contains elements of abusive use of authority, autocracy, martial law and uncertainty of proper procedure. The Rum Rebellion involved a military coup by the New South Wales Corps, led by Major George Johnston, which deposed William Bligh, Governor of New South Wales. In retrospect, it appears that the Governor was indeed not exactly affable, but certain members of the New South Wales Corps were involved in matters at odds with the duty they were obligated to perform. On 26 January 1808, the chain of events leading to the Rebellion occurred. Bligh was confined in Government House, refusing obstinately to leave until lawfully dismissed, which he eventually was. The Rum Rebellion served as a lesson for the British Colonial Office, which decided that it was unwise to be sending naval governors to rule the colony. The New South Wales Corps were recalled and replaced with their commanding officer being the Governor.

The Rum Rebellion stemmed from a variety of factors, but the most important one was an ambiguous legal environment. If the authority of the Governor was strictly outlined, and any attempts by him to circumvent them met with inquiry, unless these attempts were requests via official channels, there would have been greater understanding on all sides that there was an obligation to obey. Rebellion might still have occurred, but defined authority would have helped to bring more order. The delays in communication meant that actions were not always reported back and many things could happen before the first one was known. The distinct personalities involved in the Rum Rebellion muddle analysis, but defined authority and obligation would certainly have improved matters.

It cannot be said that the Rum Rebellion did not achieve results. It also resulted in reform. The law needed to be laid down, authority needed to be respected. A Court of Criminal Jurisdiction was already in place but the First Charter of Justice in 1787 created both a court of Criminal Jurisdiction and a Court of Civil Jurisdiction. This was presided over by a Judge-Advocate, but the levels of their competency varied. After the Rum Rebellion, the Second Charter of Justice 1814 outlined some quick changes, that being the formation of the Governor's Court under the Judge Advocate for small disputes and a Supreme Court consisting of a Judge and two Justices of The Peace replacing the Court of Civil Legislature. This experiment did not last long but the experience meant for a developing system of justice.

The Rum Rebellion directly led to an imprinting of values into the Australian culture. Even though Governor Bligh represented authority, some of the things he did were questionable. Australians started to develop a deeper sense of fairness and justice as a result of the various Acts later introduced. Also, the rule of law seems to have been designed to prevent occurrences like the Rum Rebellion, so it has been in all probability rather influential on a large scale, politically and legally. Following up on the Second Charter of Justice was the New South Wales Act of 1823, The Third Charter of Justice of 1823

and the Australian Courts Act of 1828. These Acts helped to clear up the legal issues and helped to define the developing concepts of authority, democracy and moral obligation, as a limited Constitutional Government was allowed to establish itself. These Acts also established processes to be taken in certain situations, such as the appointment of temporary governors when needed.

The Rum Rebellion did not truly allow for a taste of how martial law would be as a form of government in Australia. John Macarthur, for example, ran the day-to-day business of the colony. But, as part of the Rum Corps, he thought like an entrepreneur. Arguably, what was given during the time of martial law was in some fashions similar to democracy. Favouritism unfortunately occurs in democracies today. The case of *R v Sutter*¹ in 1810 was a legal response, unusual for most martial law administrations where imprisonment is emphasised.

The Waterloo Creek Massacre is without a doubt one of the more questionable Acts that the Colonial Government of Australia has ever done. Major James Nunn was dispatched with 23 mounted police and instructed to 'act according to [his] own judgment, and use [his] utmost exertion to suppress these outrages'. This was in response to four murders of white servants and subsequent requests by the settlers for better protection. This 'protection' took the form of an expedition which resulted in one of the largest massacres in Australian History.

Following the Waterloo Creek Massacre, an inquiry was ordered by Governor George Gipps, which was interrupted due to the Myall Creek Massacre and the resulting public outcry. Nobody was ever charged over the Waterloo Creek Massacre. The Waterloo Creek Massacre was caused by the flexibility allowed to colonial Australia, partly due to communication difficulties and the unresolved issue of what rights were accorded to Australians. Nothing resulted from the Waterloo Creek Massacre to improve matters and it is interesting to note that Major James Nunn was technically observing orders since there were no established rights, the orders were *carte blanche*, even to perform acts that were illegal *per se*, since it was considered extenuating circumstances.

The Waterloo Creek Massacre did not serve to benefit anyone. It was undertaken despite the fact that it was technically being directed against other members of the British Commonwealth and was an intrusion upon human rights. It was a hasty plan. The Waterloo Creek Massacre, along with other similar events, reflected the state of legal limbo that Australia was embroiled in. It helped to develop the concept of the rule of law as the mistreatment of law and authority, coupled with ignorance, and basic human rights were being gradually recognised and improved. For example, in the cases of *R v Kilmeister (No 1)*² and *R v Kilmeister (No 2)*,³ the Attorney-General repeatedly stressed the nature of murder and how in this matter *ignorantia juris non excusat*. Tempting as it can be to justify such acts, it is still against the law to commit them.

The relationship between the Waterloo and Myall Creek Massacres was ex

1 (1810).

2 NSW SC, 15 November 1838.

3 NSW SC, 26 November 1838.

post facto and together it became obvious that something such as the rule of law would be needed. While there was little change in law, the need for the permanent protection of fundamental rights became ingrained in mainstream consciousness and would later assert itself as the concepts we have today like the fair go. The governors of Australia did accept British law as overriding and superior to anything they did, but their interpretation of the law and occasional resistance to it, (a notable example here is that of Alexander Maconochie), meant that they ended up doing things that misused their power and authority. Eventually solutions were found, with the adoption of the 1948 Universal Declaration of Human Rights and a changing of the government system to the one we have now. This may not have occurred if the need for it that was raised by these events had never arisen.

The Eureka Stockade was the culmination of a series of acts of protest and resistance against the government by the miners of Ballarat. This was in reaction to the high mining licence fees and overall injustice by the government. This dissenting attitude found a voice in the Ballarat Reformation League which outlined in their charter a democratic principle that every citizen has the right to have say in the laws they are to obey. While the Eureka Stockade itself resulted in violence, the ideal lived on and became the basis for the Australian concept of democracy.

The day after the Eureka Stockade, martial law was declared and a commission established. The Gold Fields Commission advised a general amnesty for those involved and in subsequent court cases most were acquitted of their charges. In March 1855 the final report by the Gold Fields Commission was complete. The demands made by the rebels were to be met. The government followed suit and as a result the Gold Commission was replaced by a new system of mining wardens and diggers possessing the miner's right were granted the vote. The same arguments used here by the rebels would later be reused during the women's suffrage movement.

The leader of the rebellion, Peter Lalor, was later a member of the legislative council on behalf of Ballarat. In total, the Legislative Council had eight representatives of the miners, paving the way for a fair system of government. The Southern Cross flag used to symbolise the democratic ideals subsequently became a part of our modern Australian flag. The Eureka Stockade was the basis for the Australian concept of democracy.

Authority, the rule of law and democracy have over the course of Australian history together formed our concept of justice. There are lessons to be learnt from this. There were originally systematic flaws within the legal system in Australia. This chaotic situation is common in frontier societies. From Australian history, we have learnt that a firm sense of authority, obligation and a solid and just system of governance will do much in preventing those problems. Today for Australians, these concepts are integral for the decisions regarding the state of the Australian Aborigines. These concepts have led to the status of reconciliation, present and future as they are today. Additionally, these concepts were instrumental in *Mabo v Queensland (No 1)*,⁴ *Mabo v Queensland (No 2)*⁵ and *Wik Peoples v Queensland*⁶ which continue to

4 (1988) 166 CLR 186; 83 ALR 14.

5 (1992) 175 CLR 1; 107 ALR 1.

influence the status of Aboriginal land rights. We have learned much and are using it to better implement justice.

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