

UNIVERSITY OF NEW SOUTH WALES REGIMENT

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OFFICERS MESS REGIMENTAL DINNER

SYDNEY 15 SEPTEMBER 1987

THE ARMY, THE LAW AND EDUCATION

TOAST TO THE ARMY

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The Hon Justice Michael Kirby, CMG*
President of the Court of Appeal
Chancellor of Macquarie University

At Home in an Alien Environment

During the long years that I was Chairman of the Australian Law Reform Commission, I received many invitations to speak at Naval functions. This is the first such invitation to speak at an Army dinner. It is as if I was required to put aside the childish things of reform, before being afforded such a privilege.

Initially it puzzled me as to why I felt so much at home when I came into this room. Why, I asked myself, should I feel comfortable in such a seemingly alien and unfamiliar environment?

The answer came back when I looked around me and reflected on what I saw. I realised that I was surrounded by the symbols of the Army. They are, in so many respects, also the symbols of the judiciary. Army and the Law. Twin pillars of Australian civilisation.

The similarities between our disciplines are obvious. Each of them derives, in constitutional theory, from the

Prerogative of the Sovereign. The supreme government and command of all forces by sea, land and air and of all forts and places of strength is vested in the Queen by her Prerogative right, common law and by statute¹. There was a time when the King sat in the Royal Courts. I think the last king of England to venture such a thing was King James I. The personal participation of the monarch in the Army lasted for several more reigns. King George III gave up the personal command of the English Army in 1793. It was in that year that the first Commander in Chief of the Army was created². That post remained in England until the office was abolished in 1904 and the functions vested in the Army Council. In India, as you remember, the Commander in Chief remained the second person of the Empire of India, next after the Viceroy.

The Duty of the Sovereign

Because of our links with the Sovereign and her prerogative, we see about us in the courts and in the Army the continuing symbols of British Royalty. Above the Bench on which I sit are the Royal Coats of Arms. The Judges receive a commission from the Queen. The Supreme Court of New South Wales is established by Royal Charter. By this means the Judges derive inherent powers which can be traced to those enjoyed by the Judges of the Royal Courts in England. These inherent powers enhance our ability to deal with changing modern circumstances, as need require. So too it is in the Army. Nowadays, and in the Australian Federation, much of the army law is written down. But much is still derived from England and comes from the fact that the Army's history runs in direct lineage to the history of military forces in the United Kingdom.

But that history is not our only link. The vivid scarlet tunics in which you are dressed are also reflected in the court dress of the Judges. We too wear scarlet, at least when sitting on ceremonial occasions, in criminal trials or in the Court of Criminal Appeal. We too, in a sense, are redcoats. Like the Army, I imagine that our scarlet uniforms reflect the colour of blood. Until recently the Judges had the awesome responsibility of exacting the ultimate penalty in capital crimes. Such was also the responsibility of the Army in the defence of the Realm. Nowadays, the Army would not dream of wearing red uniforms into battle. Yet the Judges continue to wear silk of scarlet in the performance of some of their daily duties. Perhaps this shows that in some things, the Army has swept ahead, leaving the judiciary, tradition bound, behind. There are, of course, some Australian courts in which uniforms have been entirely dispensed with, such as the Family Court of Australia. Yet there are other courts where, recently, an unsuccessful endeavour was made to introduce robes. I refer to the Local Courts in New South Wales. In China, reports have it that the post-revolutionary Army is returning to uniforms. Uniforms, whether in the military or in the law, symbolise the discipline of the service. They remind the wearer that he or she is simply a unit, wearing a mantle of the authority which comes from the whole and from the nature of the responsibility exercised on behalf of the community.

The Army and the Judiciary are places of hierarchy. The layout of this table and the assignment of places in which we sit is strictly in accordance with the order of precedence. In that sense, we all know our place. In a large and disciplined

service, whether in the law or in military affairs, it is necessary that there be a settled chain of command. Sometimes it is necessary in the Army to assert rank. Doubtless, rank is sometimes pulled out of arrogance or personal oppression. But usually it is simply necessary to ensure the clarity of binding orders, to remove confusion and to make the duty of subordinate clear. The same is true of the law. On occasion it is necessary for judges in appellate courts to remind those below of the duties of compliance with the heirarchy of precedent - the binding principles of legal command³.

The Advance of Women

There is another link. Both of our vocations are overwhelmingly male. Both in multicultural Australia remain undisturbedly Angloceltic. Although in this Regiment I am told that approximately thirty of the 375 members are women, and a moment's glance around this room show how few are the women who reach officer rank. So it is also in the law and in the judiciary. We now have the first woman Justice of the High Court of Australia, Justice Mary Gaudron. More recently the Executive Council of this State has appointed the first woman Judge of the Supreme Court of New South Wales, Justice Jane Matthews. They are early forerunners to a great change which is coming. In university law schools today, women typically outnumber men in the initial intake. It can be expected that women will take an increasingly important part in the future of the law and of the judiciary. How this will change the practice of the law and the self image of the judiciary, remains to be seen.

Whether the same change will extend into the Army is a question for the future. It seems unlikely to me that the Army will be exempt from the great revolution in equal opportunity which has been such a feature of our time. In an age of technological warfare, there would seem to be little reason why women should not rise to the highest ranks. But the Army may, in this respect, be even more conservative and resistant to change than the law and the judiciary. Stereotypes about women's incapacities may ultimately bend to the news of jumbo jets being flown by entirely female crews and the invasion of cloisters previously reserved to men (such as the judiciary). The successful integration of women in the higher ranks of friendly forces may set the pace for the Australian Army which, in this regard, seems somewhat more cautious. This much can be said. In the Army, as in the law and the judiciary, mighty changes lie ahead. We can at this stage see some only of their directions.

Then to there is our shared love of ceremony. It infects the law. As this Regimental dinner shows, it is a living tradition in the Australian Army.

In a world of pleasure seeking and indiscipline, the life of a Judge or of officers of the Army is inescapably and exceptionally a life of self-control. Discipline is the watch word for both our vocations. And not just physical but also mental discipline. I ask myself as I look about this room, what it is that attracts to Army life so many busy, able people? Why, particularly, should university people, with their traditions of free-ranging research find congenial the external and internal control of a life in the Army? Why

should people sacrifice part of their spare time, precious as it is, to such a life? The answer is not simply a sense of duty, or the search of comradely companionship. It is also a thirst which, fortunately, many able people have, to channel their energies by discipline towards significant achievement - achievement for themselves which flows over to a vital contribution to the community.

There are many other things we have in common. Nowadays especially the Army is a place of intellect. The old days of brawn, muscle, spit and polish increasingly give way to technology, strategic studies, and an understanding of psychology and of international affairs. The avoidance of war is the ultimate objective of any good modern Army. In Australia, we should not curse the absence of an immediate threat to our security. It is a great blessing. In the nuclear age, the whole notion of military science must adapt to prevention.

If our external symbols, history and tradition are so similar, we also have problems in common. I am not simply speaking of the tendency of society to under-pay people of discipline, such as ourselves. I am referring also to the great changes which are occurring in society, and in our vocations. I have already referred to the challenge of anti-discrimination and equal opportunity. Of like importance are the challenges of changing social attitudes. Our society is now more questioning of institutions. It is therefore more likely to question the hierarchy of the Army and the hierarchy of the law. The challenge of adapting to technology is with both of us. Mindless infatuation with history and tradition

can sometimes blinker the subject to an indifference to the great changes of technology which are occurring about us. Our two vocations, so essential for the community we serve, must keep pace with the engine of technological change.

The Dangers of Cloning

Growing out of our traditions and the heirarchical organisation which is such a mark of the judiciary and of the Army, may be a common shared problem. If you read the histories to Thuycidides or study the more modern writers on military science, one lesson is clear. The greatest generals have been those who thought originally and were flexible of mind. So it is in the judiciary. The greatest Judges have been those able enough to adapt and develop the common law to changed circumstances⁴. I do not pretend that we can tolerate too many innovators. Nor do I suggest that their lights will necessarily show, without the opportunities which circumstances present but rarely and to relatively few. But if you study the life of Monash or of Rommel the chief instruction is, I believe, that these were men who warranted their own judgment and were not absorbed by "the system". The same is true of the law. A danger of the heirarchical arrangements of the Army and of the judiciary is the tendency to favour the advancement only of good people like ourselves. There is a tendency, clonelike, to reproduce more and more of the same. Each profession may require occasional stimulation by people who are different - with bold and new ideas. Both in the judiciary and in the Army we need such people.

Links with Universities and Education

I am glad to offer this toast. I support those members of the Universities represented here, who devote part of their lives to the service of the country in the Army. A citizens' reserve is a feature of a democratic society such as ours. Since the Glorious Revolution we have always asserted civilian control over the Army and a preference for a small professional elite over a large standing Army⁵. It has not been so of other nations. That it is true of us is, I believe, one of the reasons for our constitutional stability and also for our history of military success.

There are some who would say - education and the military are antithetical. They have nothing in common and even conflict with each other. But there is a link, as I have tried to show. Without an Army, at least in the current circumstances of the world, it is possible that we would have no courts and no universities. Ultimately, the Army is the guardian of these precious institutions of a free society. But equally, without the rule of law and without universities cultivating the spirit and civilisation of mankind, the Army would have no vital mission. Its mission is not simply to defend land and territory. Its mission is to defend a free people rejoicing in free and democratic institutions, protected by the rule of law.

It is with these thoughts on the necessity of the Army, the law and education - triple pillars of our past traditions and vital guardians of our future as a free people - that I lift my glass and toast "The Army".

FOOTNOTES

- * Personal views only.
- 1. Com. Dig, Tit prerog, C, 3; 13 Car. 2, stat 1, c 6.
- 2. See Clode, Military Forces of the Crown, Vol 1, 240.
- 3. See eg McHugh JA The Attorney General in and for the United Kingdom v Heinmann Australia Pty Limited & Anor, unreported, CA, 24 September 1987 ("the Spycatcher case").
- 4. See Lord Scarman in Gillick v West Norfolk and Wisbech Area Health Authority [1985] 3 All ER 402. (HL)
- 5. Bill of Rights, 1688 (1 Will and Mary, Sess 2, c2 S 1.