

EUREKA CELEBRATION COMMITTEE

126TH ANNIVERSARY OF EUREKA

ADDRESS TO CITIZENS OF BALLARAT, VICTORIA

3 DECEMBER 1980, 11 A.M.

EUREKA AND REFORM OF THE LAW

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

November 1980

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THE FACTS OF EUREKA

We are here today to commemorate an event which took place not far from here 126 years ago. To some it may seem a strange cause for celebration. A group of gold diggers defied the legitimate authority of government. They broke the law. They refused to pay taxes. They hoisted a rebel flag over a stockade and resisted, with arms, a body of the Queen's troops sent by the Governor. They were defeated in the assault. In fact, it was all over in a matter of minutes. Three soldiers and more than 30 diggers were killed. The leaders of the rising were tried for treason.

Foreign observers no doubt consider Australians very strange people. When we are not praising a bushranger, Ned Kelly, we are celebrating the Eureka Stockade. Every year we commemorate Anzac Day. In terms of battle accomplishment, each of these events — Eureka and Anzac — would seem to be a failure. Someone who knows little about Australian history might draw the conclusion that here is a strange people of the Southern Pacific who annually, in a spirit of contrariness, commemorate two distinct military failures.

Ten years ago, I stood at Anzac Cove not far from Golibolu in Turkey. I looked down to where the Australian and New Zealand soldiers stormed the impossible cliffs and fought bravely, but unsuccessfully, against the valiant Turkish defenders. One can look down from that battle field to where Xerxes crossed the Hellespont, leading his troops across the Dardenelles from Persia to the conquest of Greece. We celebrate Anzac because it was the first great battle, after our country was united in federation, in which the spirit of its soldiers was tested. But 60 years before, not far from here, an earlier test had demonstrated, within Australia, an important and enduring feature of the Australian people.

There may be some of you who will think it strange, even 126 years after the event, for a judge to take part in a celebration of the Eureka Stockade. Certainly the Governor of Victoria at the time, Sir Charles Hotham, would have found it quite unaccountable. When he wrote to London, to report the unhappy events of the Stockade, he put forward most eloquently the view that legitimate government must always uphold and enforce even unpopular laws. This is what Hotham wrote:

So long as a law, however obnoxious and unpopular it may be, remains in force, obedience must be rendered, or government is at an end. Concessions made to demonstrations of physical force bring their speedy retribution; the laws which regulate the gold fields are as I found them and until they are legitimately repealed or modified, it is my duty to maintain them.¹

The dispute which broke out in the gold fields has been blamed by some upon the dishonesty of the colonial judiciary and by others on the indifference of the unelected colonial administration.

So far as the judiciary is concerned, it is said that a magistrate named Dewes wrongly, and to the outrage of the gold diggers, acquitted the owner of the Eureka Hotel of the charge of murdering a popular miner named Scobie. The community denounced the magistrate Dewes. It accused him of having a financial interest in the Eureka Hotel which led him dishonestly to protect his friend the publican. The discontent of the community at the injustice of the magistrate's action led, on 19 October 1854, to a large assembly burning the Eureka Hotel to the ground. Later, Mr. Dewes was removed from office and his conduct criticised as

'tending to subvert public confidence in the integrity and impartiality of the Bench'²

The hotel proprietor was also charged and convicted of the manslaughter of Scobie, the digger. In a sense, the law responded to the community's demand that its procedures should be impartial and just and that guilty men should be brought to trial and punished.

The unrest which arose out of the Scobie murder on 6 October lasted to the Stockade itself. The flames of the Eureka Hotel were easily rekindled at the Stockade. The gold diggers were inflamed by an attempt of the Governor to enforce a licence fee resented as unjust, unequal and unfairly imposed.

The injustice of the fee was that it fell equally on miners, whether or not they discovered gold. The inequality of the fee was that it fell heavily on miners whilst the landed squatters paid little or no tax. It was unfairly imposed because English liberties had been founded on the constitutional principle that there should be no taxation without Parliamentary representation. Within living memory, the American Revolution had been fought for this principle. Yet at the time of Eureka the principle was not observed in Victoria. Sir Robert Menzies, paying tribute to the motivation of the gold diggers resisting the Governor's force of arms said:

The Eureka Revolution was an earnest attempt at democratic government³ ... so far as the Eureka revolt indicated any general movement at all, it was a fierce desire to achieve true Parliamentary government and true popular control of public finance.⁴

From the Labor side of politics, it has been said that the Eureka Stockade marked the beginnings of trade unionism in Australia.⁵ Dr. H.V. Evatt, former Labor leader, pointed to the fact that though English and Irish diggers took the lead, participants in the Stockade came from many countries 'united in defence of the Southern Cross'.⁶ He declared that the Stockade:

was of crucial importance in the making of Australian democracy.⁷

When Labor and Liberal politicians agree that this was an event important for Australia's national identity, democratic aspirations and resistance to unfair authority, we can safely assume that Eureka is a national and in no way a class, sectional or partisan event.

EUREKA AND LAW REFORM

Why have I been chosen to make this address in 1980? As you have heard, I am the Chairman of the Australian Law Reform Commission. That Commission is, a permanent body established by the Australian Parliament for the orderly review, modernisation and simplification of the federal laws of our country. Nowadays, the pent-up frustration with unjust laws and unfair administration of those laws need not lead to a stockade, gunfire and death. Soon after the Eureka Stockade, and doubtless hastened by concern that it should ever have come to this, Victoria adopted a system of elected Parliaments which was the first step here on the road to the modern representative democracy. One of the advantages of having lawmakers who are periodically accountable to ordinary people through the ballot box is that laws are more likely to be made which are sensitive to the community's modern sense of fairness. Thus it was not long after an elected Parliament assembled that a different system of taxation was introduced, reforming the unjust licence fee on the gold diggers which had led to the Stockade.

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Similarly, it should never be forgotten how the jury has traditionally stood as a bulwark against oppressive enforcement of the laws. Thirteen of the Ballarat miners were tried for treason arising out of the Stockade. They were on trial for their lives. Had they been found guilty, they would have been hanged. But every one of them was acquitted by a jury of ordinary Melbourne citizens. Legally, there was a strong case against each and every one of them. They had fought under a rebel flag. They had fired on the Governor's troops. But when the jury acquitted them, the cheers ran down the streets and the prisoners became popular heroes. The Age newspaper explained this reaction at the time:

For the first time, the conviction is realised that public opinion is an accepted and authorised power. ... It is the first instance of the Government of this colony bowing down before a direct expression of the popular will.⁸

Lately, it has become fashionable to criticise jury trial, even in criminal cases and to suggest that efficient and speedy justice requires that we should do away with this 'palladium' of the inherited common law of England. The Eureka treason trials showed that sometimes the jury can be a faithful barometer of the community's sense of fairness and justice. It can even sometimes soften the application of outmoded laws, inherited from earlier times and out of keeping with contemporary perceptions of justice.

Rules which courts enforce in our country are made, for the most part, by Parliament or by the judges themselves. Sometimes, they get out of step with society's sense of right and wrong. Some of our criminal laws may fall into this class. Certainly, some of the earlier attitudes to women, to migrant groups, to the poor and to others may be seen today as discrimination. Attitudes to personal morality and to the role of the family appear to be changing. Law reform exists to help lawmakers cope with these difficult problems, so that they will not be swept under the carpet and met with delay and indifference as happened when the gold diggers objected to the licence fee.

The growth of the importance of government, changes in modern commercial operations and the impact of science and technology on our society all argue for constant improvement and modernisation of our laws. The invention of computers, the birth of the first 'test tube baby' and the potential of genetic engineering are just three of the developments which demand constant review and modernisation of the law today. A legal system which is out of sympathy with the needs and attitudes of the community it serves is likely either to promote contempt and cynicism or, more dangerously, to lead desperate people fired by a sense of justified grievance to seek more radical and even revolutionary solutions.

Henry Lawson, commenting on those who died at Eureka, referred specifically to the fact that one of the causes for which they died was reform of bad, outdated laws:

But not in vain those diggers died. Their comrades may rejoice;
For o'er the tyranny is heard the people's voice;
It says: 'Reform your rotten law, the diggers' wrongs make right;
Or else with them, our brothers now, we'll gather in the fight.⁹

TOWARDS A FAIRER SYSTEM OF LAW

Here then, you have an age-old controversy. It is illustrated by the events of Eureka. The Governor said : But the law is the law. Whilst it remains the law it must be obeyed. The diggers said : the law is unjust. It is unfairly administered. It is developed without reference to what the people think is just. At Eureka, the only solution to this controversy, each side having merit, was a bloody encounter, 33 people dead, a magistrate dismissed, abortive treason trials.

Nowadays, in modern Australia, we must try to do things better. The Law Reform Commission has been established to help Parliament deal with the 'too hard basket'. This is done after consultation with the community that will be governed by the law. The end result should be a legal system which is sensitive to modern attitudes and aspirations. What we need is a legal system freed from the unmoving dead hand of the past. To achieve this will require Parliaments wise enough to devote some of their time to reforming 'rotten laws'. We also need a community sensitive to its responsibility for the state of the law and determined to remove injustices wherever they occur, and even though only a few of its citizens may be affected.

If we cannot achieve reform of the law in this orderly way, Eureka stands as a warning to indifferent politicians, judges and other officials. In the ultimate, the law is not obeyed because it is made in this or that way or even because it is declared in courts of the highest authority. In the end it depends upon the community's acceptance of it. It is for that reason that citizen and lawyer alike should constantly labour to make the law more just and modern and in harmony with the attitudes of today.

When you look at our Australian flag, you will see that though it bears in one corner the Union Jack (to mark our historical and legal origins) and in the other the Star of the Federal Commonwealth (as a signal of our national unity) the dominant feature is the inclusion of the stars of the Southern Cross.¹⁰ These stars were adapted from the flag of the Eureka Stockade. Whenever you look at our flag, it should remind you of Eureka and of the determination of a small band of early Australians to take a stand against injustice and to seek out a less oppressive system of government and a fairer

FOOTNOTES

1. Sir Charles Hotham, Letter to Sir George Grey, No. 162, 20 December 1954 in G. Blainey, Eureka Documents, Melbourne, The Public Record Office, 6, 8.
2. *ibid*, No. 148, 5.
3. R.G. Menzies, Melbourne Sun, 17 July 1946, cited in Historical Studies of Australia and New Zealand, Special Eureka Supplement, University of Melbourne, December 1954, 79.
4. R.G. Menzies, Melbourne Sun, 9 July 1946, cited *loc cit*.
5. W. Foregan Smith, Report of Speech to Annual Convention of Australian Workers' Union, Sydney Morning Herald, 2 February 1938, cited *ibid*, 78.
6. H.V. Evatt, Golden Jubilee Souvenir of the A.L.P., 1890-1940, Sydney, 1940, cited *ibid*, 78.
7. Evatt, *loc cit*.
8. The Age, cited in L. Fox, Eureka and Its Flag, Mullaya, 1973, 8-9.
9. Henry Lawson, cited *ibid*, 14.
10. See the poem by Victor Daley, cited in Historical Studies, Australia and New Zealand, 61:
But, patient as the Gods are,
Justice counts the years and waits —
That Banner now waves proudly
Over six Australian States.