The Rule of Law in a Social Media Age

Sir Francis Burt Oration 2022

The Honourable Justice Peter Quinlan

Chief Justice of Western Australia

3 November 2022

The Rule of Law in a Social Media Age

Sir Francis Burt Oration 2022[1]

Thank you to Alain Musikanth SC and to the Board of Francis Burt Chambers for your kind invitation to present the 2022 Sir Francis Burt Oration. I am particularly honoured to have been invited to deliver the oration in the year that marks 60 years since F T P Burt QC established the chambers that now bear his name and which is committed to upholding Sir Francis' commitment to excellence, integrity and independence. We are also honoured by the presence of members of Sir Francis' family, Mrs Sally O'Connor and her husband, Peter. Thank you for being with us this evening.

May I commence my remarks by acknowledging the Traditional Custodians of the land on which we gather this evening, the Whadjuk people of the Noongar nation. I pay my respects to all Noongar elders past and present and to their continued observance of the laws and customs that maintain their traditional connection to the land and waters of this region.

Acknowledging the Traditional Custodians of this land helps to introduce an important theme in my remarks this evening. That is because the notion of a 'tradition' is an important part of the topic of my remarks: the Rule of Law in a Social Media Age.

The 'rule of law', to which I will return in a moment, forms an essential part of our own legal *tradition*. It is, as the High Court has said, a shorthand description of a complex concept central to an appreciation of the form of government that inheres in the text and structure of the Commonwealth

Constitution.[2] Regardless of the extent to which that concept limits or contracts legislative and executive power under our *Constitution*, the rule of law is nevertheless an enduring concept that underpins the entirety of our legal tradition. As Sir Owen Dixon said in the ***Communist Party Case***, the rule of law is one of the 'traditional conceptions' assumed by the *Constitution* and upon which it is based.[3]

For this reason, striving to better understand what we mean by 'traditional' in the context of an acknowledgment of Country, which itself depends upon the acknowledgment of the laws and customs of Traditional Custodians, may help to situate the importance of a sense of tradition in our understanding of the rule of law.

A deeper appreciation of what 'tradition' means to the First Peoples of this continent can help us to better understand and appreciate what is at stake in 'traditional' concepts, such as the rule of law, and how those concepts interact with the social environment in which they operate.

In this regard, the inherited legal structures under which we, as lawyers and judges, discharge our professional duties has much to learn from the respect for, and adherence to, the structures of other traditional legal systems. I was reminded of this earlier this year when I had cause to meet, and discuss a matter of mutual concern, with a Pitjantjatjara elder of the Central Desert region. In explaining the significance of a particular matter of traditional law to me, the elder said words to the effect that, as a senior law man, he had a particular responsibility to protect the integrity of this particular law and he emphasised the immutable quality of that responsibility (with the words 'that can never change'). Then he added that I, of all people, should understand the nature of

that responsibility because, as he put it, 'you are a senior law man, for your law'. It was a striking reminder of the fact that respect for tradition, for the rule of law, is something that can, and should, operate across diverse cultures – and that each of our traditions, and our respect for them, is enhanced, rather than diminished, by coming into contact with one another.

While I am on this point, allow me to dwell a little longer on the meaning of 'traditional law and custom' in this context, this time drawing upon the High Court's native title jurisprudence. In ***Members of the Yorta Yorta Aboriginal Community v Victoria***, Gleeson CJ, Gummow and Hayne JJ observed that the word 'traditional' was apt to refer to a *means of transmission* of law or custom. Their Honours continued:[4]

> A traditional law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice.

Their Honours went on to emphasise the inextricable link between a society and its laws and customs, and that the *vitality* of that society is what gives the laws and customs *their* vitality. The social nature of traditional laws and customs was thus emphasised. For example, their Honours said:[5]

> Laws and customs do not exist in a vacuum. They are, in Professor Julius Stone's words, 'socially derivative and non-autonomous'. As Professor Honoré has pointed out, it is axiomatic that 'all laws are laws of a society or group'. Or as was said earlier, in Paton's Jurisprudence, 'law is but a result of all the forces that go to make society'. Law and custom arise out of and, in important respects, go to define a particular society. In this context, 'society' is to be understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs.

As the sources cited in this passage make clear, their Honours were not here making an observation unique to Aboriginal societies and their laws and customs. The point is rather a general one about laws and societies; and about the socially derivative nature of all laws and legal traditions.

The social nature of laws, and the dependence on the social world for their continued vitality, points to the other half of my topic this evening: the age of social media.

To be clear, I do not propose in these remarks to focus on social media itself, and how it interacts with the courts, the legal system or particular laws. I don't propose any analysis of the interaction, for example, between social media and the law of defamation, or freedom of speech generally or with the law of contempt. These are, of course, matters of great importance and great consequence. Much can, and is, being said about them by others. They are not, however, the focus of my remarks.

My focus rather is on the *age* of social media: what might be described as the social and philosophical underpinnings of our current age. I refer to it as the age of social media because, I suggest, social media has become the most conspicuous manifestation of, and in many ways a synonym for, those social and philosophical underpinnings.

Before identifying what I think are some of the salient features of our age – the age of social media – I should start by identifying what exactly I mean by 'the rule of law' in the context of these remarks. This is always necessary when we embark on any discussion of the rule of law because it is a protean concept, the content of which is highly contested and is expressed in many forms. As Lord

Bingham of Cornhill said, in the preface to his magisterial book *The Rule of Law* written after he delivered the Sir David Williams lecture in 2006, the rule of law was chosen as his subject because:[6]

> the expression was constantly on people's lips, I was not quite sure what it meant, and I was not sure that all those who use the expression knew what they meant either, or meant the same thing.

Lord Bingham's *The Rule of Law*, traces the history of the concept of the rule of law in Western thought. That history includes modern expositors of the concept, such as A V Dicey and Joseph Raz, as well as their classical predecessors, including Aristotle.

Indeed, while he did not use the particular phrase 'the rule of law', to my mind Aristotle captured well the essential meaning of the core concept when he said: 'It is better for the law to rule than any one of the citizens'.[7]

I like this rendering because it calls to mind, with some embarrassment, my own misunderstanding of the meaning of 'the rule of law' when I first heard the expression many years ago. While I can no longer remember when it was, or for how long I laboured under the misconception, when I first heard the phrase 'the rule of law', what immediately came to my mind was a 'rule', in the sense of a 'principle, maxim or regulation governing individual conduct': as in 'a rule of thumb', the 'rules of the game' or 'you must obey the rules'. The 'rule of law', therefore, conjured in my mind the notion that there was a rule somewhere – a rule known as the 'rule of law' – which was apparently important but of which I had no conception. Indeed, the 'rule of law', as I understood the phrase, seemed to be something of a tautology. It sounded, to me at least, something like the 'rule of rules' or the 'law of laws'.

It was only much later, I have to confess, that I realised that the phrase did not use the word 'rule' in this sense at all. Rather, the 'rule of law' used 'rule' in the sense of 'govern or control': as in 'the ruling class', 'the rule of Queen Elizabeth II', or 'long may she rule'. With this clarification, I finally understood the 'rule of law' to be a statement about 'that which rules us'; namely that people do not rule us, the law does. It is the same idea captured by John Adams' phrase, enshrined in Article XXX of the Massachusetts Constitution, that the government of that Commonwealth would to the end be 'a government of laws and not of men'.

It is perhaps worth reminding ourselves that that famous phrase was used by Justice Blackburn in the ***Gove Peninsula Land Rights Case***, two decades before the decision in ***Mabo v Queensland (No 2)***,[8] to describe the laws and customs of the Yolngu people:[9]

> The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me.

We may therefore safely conclude that the rule of law, in this sense, has been part of the legal traditions on this continent for tens of thousands of years.

Lord Bingham, in *The Rule of Law*, offered his own (non-exhaustive) definition of the rule of law:[10]

> The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.

This definition is, of course, not comprehensive, and Lord Bingham spent the balance of *The Rule of Law* exploring different aspects of the rule of law in more detail. In doing so, he distinguished between what have been referred to as 'thick' and 'thin' conceptions of the rule of law. 'Thin' conceptions of the rule of law, such as those often attributed (fairly or not) to A V Dicey, tend not to include reference to the substantive content of laws, but rather their accessibility, clarity, consistency and prospectivity.[11]

'Thick' conceptions of the rule of law, by contrast, include as a central component of the rule of law, the protection of fundamental human rights and freedoms. As Lord Bingham, who stood firmly on the side of a thick conception said:[12]

> A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed.

Again, such a conception of the rule of law has much to recommend it, even if, as Bingham acknowledged, this is a difficult area 'since there is no universal consensus on the rights and freedoms which are fundamental, even among civilised nations'.[13]

For present purposes, however, I want to focus on an aspect of 'thin' notions of the rule of law; for without observance of even the 'thin' conceptions of the rule of law a society has little hope of the protection of fundamental rights and freedoms commonly included within its 'thick' variants.

Indeed, I want to focus on an aspect of the rule of law so obvious that it is sometimes overlooked: namely, that laws are *objective* standards. In a society that observes the rule of law, the law exists logically prior to, and conceptually outside, the mind of a single individual. As we have seen, laws are, of course, 'socially derivative and non-autonomous', but once made, they are objective in character. This is, of course, the whole point: under the rule of law we are ruled by objective laws and not by the whims or preferences of persons.

Of course, those objective laws must nevertheless be executed and applied by human beings. The law is, after all, a human institution. Nevertheless, the rule of law presupposes that laws will be interpreted and applied objectively. It presupposes that the objective interpretation and application of the law is something of which humans are capable. The particular human beings that the rule of law presupposes are capable of doing this, of course, are the independent judiciary and, more broadly, the legal profession. To adapt Blackburn J's description of the legal system of the Yolngu people, the rule of law presupposes that there *can* exist people who are able to apply the law free 'from the vagaries of personal whim or influence'.

That is why the independence and the impartiality of the judiciary is so essential to any conception of the rule of law; for without a human institution that can objectively administer the law, there is no means by which the law can 'rule'.

This, of course, may all sound obvious. In some respects I hope that it does. If judges and lawyers lose sight of the *objective* nature of their professional duties the rule of law will soon collapse. I will return to this idea later.

But for now, I want to turn to the age of social media, and what much of what we see on social media reveals about our public culture. Because as much as the reality of the objective application of law is essential to the maintenance of the rule of law, so too is the social perception and acceptance of that reality.

And that is where social media comes in, because any passing reference to social media reveals that it is marked, above all, by a radical *subjectivity*.

To identify what I mean by this I want to draw on the work of two north American philosophers, both now in their 90s, but whose work, particularly in the 1980s was in many ways prophetic in describing the age in which we now live and work.

In his 1981 book on moral philosophy, *After Virtue*, Scottish-American moral philosopher Alasdair MacIntyre sought to explore the particular problem of moral or ethical disagreement in our age.

Early on in the book, MacIntyre says this:[14]

> The most striking feature of contemporary moral utterance is that so much of it is used to express disagreements; and the most striking feature of the debates in which these disagreements are expressed is their interminable character. I do not mean by this just that such debates go on and on and on – although they do – but also that they apparently can find no terminus.

MacIntyre wrote that in 1981. If it was true 41 years ago, how much more so has public discourse in relation to political and ethical issues become a polarised battle for ascendancy in which there can be no common ground or satisfactory resolution: merely success or defeat.

MacIntyre identifies much of the cause of our predicament as coming from the philosophical theory known as emotivism. As he describes it:[15]

> Emotivism is the doctrine that all evaluative judgments and more specifically all moral judgments are nothing but expressions of preference, expressions of attitude or feeling, insofar as they are moral or evaluative in character. ... [M]oral judgments, being expressions of attitude or feeling, are neither true nor false; and agreement in moral judgment is not to be secured by any rational method, for there are none. It is to be secured, if at all, by producing certain non-rational effects on the emotions or attitudes of those who disagree with one. We use moral judgments not only to express our own feelings and attitudes, but also precisely to produce such effects in others.

Just pausing there for a moment. If you replace the word 'moral' in this passage for the word 'legal', the kind of evaluative judgments with which the rule of law is concerned, you will get an idea of where I am heading.

MacIntyre, to be clear, disagrees with emotivism as a moral theory, and much of *After Virtue* is an exercise in trying to find a way (back) to rational moral discourse. I happen to agree with MacIntyre in this regard, but that is not important for present purposes.

What is important, for present purposes, I want to suggest, is the fact that emotivism is, in many respects, the default position of our public discourse. Regardless of our avowed theoretical standpoint, as MacIntyre puts it, 'to a large degree people now think, talk and act *as if* emotivism were true … Emotivism has become embodied in our culture.'[16]

I think this is true. It is certainly true of what one sees on social media and in public discourse more generally. Evaluative judgments are almost always

expressed in highly personalised terms and as proceeding from one's own inner experience. Witness the rise in phrases such as 'my truth' and 'your truth'. Indeed, we often see, in our public discourse, that the application of an external standard (any external standard) is regarded as an affront to, and an attack on, one's personal integrity or well-being.

A related phenomenon, described by Canadian social and political philosopher Charles Taylor, is 'expressive individualism', the culture by which 'people are encouraged to find their own way, discover their own fulfillment, 'do their own thing'.[17] Expressive individualism is often associated, perhaps unfairly, with youth and youth culture, and the notion that young people ('millennials') are particularly, and perhaps uniquely, self-absorbed. Witness the phenomenon of the 'selfie'. I think this criticism, however, is unfair. Expressive individualism is not a characteristic of the young; it is a characteristic of us all. It has been a tacit philosophy of the Western world since at least the rise of post-World War II consumerism.[18] It has simply accelerated with the pace of technology. Nevertheless, to a greater or a lesser degree it is the culture in which we all operate and to which we all conform. And again, please note, that in describing our age as, at least in part, characterised by expressive individualism, I am not making a criticism. I am simply identifying a social reality in which we all live and work.

The combination of emotivism and expressive individualism produces, in us all, a potent attachment to our own evaluative judgments, be they political, ethical, or aesthetic. This in turn affects all of our social institutions: religious, governmental, educational and so on. Those institutions are no longer traditions into which we are initiated and formed. They now exist in service of our self-actualisation. As Israeli-American conservative political scientist

Yuval Levin put it:[19]

> We have moved, roughly speaking, from thinking of institutions as moulds that shape people's character and habits, towards seeing them as platforms that allow people to be themselves and to display themselves before a wider world.

I think this is, in many cases, true. Let me give perhaps a small example from one such institution: the University. My daughter, who is studying Politics, Philosophy and Economics at a local university (my *alma mater* as it turns out) was earlier this year enrolled in the core unit in Logic. The name of the unit was not something such as *Foundations of Logic 101* or *Principles of Logic 101*. The official name of the unit, as it appears in the course guide, is *Logic: How to Defeat Your Foes with Reasoning*. Gone, it seems, is any pretence that, through the exercise of reason and logic, a student might arrive at some new, or previously undiscovered, truth. It is taken as axiomatic that a student will have a pre-formed attitude or mental preference and that what a university course can offer is the means by which, in defeating one's foes, the pre-formed attitude or mental preference can prevail.

Anyone with a passing knowledge of social media will be familiar with this phenomenon: interlocutors on social media do not persuade, debate or even argue with one another; they 'destroy', 'demolish' or 'defeat' one another. The absence of true rational exchange, I want to suggest, however, is not the problem here. It is, rather, the symptom. It is a symptom of tacit emotivism and expressive individualism, the notion that all evaluative judgments are *merely* expressions of preference, feeling or attitude and that the purpose of politics, education and media is merely to provide a platform for their expression. And that all evaluative judgments are radically and essentially *subjective*.

And it is this radical *subjectivity*, I want to suggest, that gives rise to a real threat to the rule of law. Because a culture which tacitly assumes that all evaluative judgments are expressions of *subjective* personal preference or attitude, will have a great deal of difficulty accepting, or even appreciating, that some evaluative judgments are in fact the application of objective laws and not the whims or preference of individual persons. And given that those judgments are decisions with outcomes that affect people's lives, such a culture will naturally understand those outcomes to be the product of those personal preferences.

This disconnect between the objectivity inherent in the notion of the rule of law, on the one hand, and the emotivism embedded within our culture, on the other, I suggest, manifests itself in a number of ways.

It is, for example, commonplace in social media and indeed in traditional media, to see the outcome of legal proceedings described in terms that suggest that the outcome is, in fact, the expression of the individual judge's preferences or attitudes. Not long ago, for example, the outcome of an application before the Supreme Court of Western Australia which saw the respondent released on a supervision order under the *High Risk Serious Offenders Act 2020* (WA) was reported under a headline that read: 'Sympathy for the Devils?'. The headline could only be understood as reporting that the judge concerned made the relevant decision out of 'sympathy' (that is, personal preference) rather than by conscientious application of an objective law. Worse still, it suggested that the judge was motivated by sympathy for 'devils', implying that the judge was actively promoting a personal preference for evil.

One might simply bemoan this as sensationalist and inaccurate reporting; and that is what generally happens when judges or lawyers gather to discuss such matters. We pat ourselves on the back for being able to withstand such calumny. But this, I think, misses the deeper point. To identify the outcome in a particular case with the personal preferences of the judge concerned, may not simply be (if at all) a matter of imputing bad faith to the particular judge. Rather, it may reflect a more fundamental problem: namely, that everyone assumes it could be no other way: *'Of course the judge decided the case in accordance with her own preferences, attitudes and feelings! After all, that is true of all evaluative decisions. Why should a judge be any different*.'

This near exclusive focus on outcomes, and their tacit association with the personal or political preferences of judges, is often a widespread view of judicial decisions. It was on full display earlier this year following the decision of the Supreme Court of the United States in ***Dobbs v Jackson Women's Health Organisation***[20] which overruled the 1973 decision in ***Roe v Wade***.[21]

I raise that decision tentatively, because any Australian judge should be cautious in remarking on the legal system of another country. I have concluded, however, that it is appropriate to do so because it is illustrative of the kind of social and legal issues I am trying to address. It is also important because, those issues are not confined to our own country. Indeed, I think it fair to say that the United States is a good deal further down the road than we are in this regard. To look to the United States may therefore help us to see more clearly the dangers that may lie ahead and in relation to which we must be on guard.

And of course, I could hardly ignore the decision. When it was delivered on 24 June 2022, the internet, and social media in particular, exploded. Depending

upon which corner of the internet one looked in, the decision was applauded, or as was more commonly the case, derided, in the strongest possible terms.

Indeed, a week after the Supreme Court delivered the decision in ***Dobbs*** a large number of men and women protesting the decision marched down St Georges Terrace onto Barrack Street and past the windows of the David Malcolm Justice Centre. The protest was aimed squarely at the *outcome* of the decision and the judges who made it. In that regard, I think we can be fairly confident that our fellow West Australians were not marching in protest over a decision of the United States Supreme Court because they disagreed with the Court's analysis of the due process clause of the Fourteenth Amendment to the United States Constitution, or took issue with the direction of the Court's jurisprudence in relation to 'substantive due process'.

They were, rather, protesting the *outcome* of the decision on access to abortion in the United States and its potential impact elsewhere and, at least implicitly, protesting that the decision was a result of the subjective personal or political preferences of the individual judges concerned. Whether the perception in that case reflected the reality is a more troubling issue for the rule of law, to which I will return.

What is notable about the reaction to the decision in ***Dobbs*** was that, at both ends of an extremely polarised political and social debate, both sides explicitly appealed to the 'rule of law' as supporting their position. Those who praised the decision hailed it as a victory for the rule of law. Those who denounced the decision lamented that it had abandoned the rule of law. And this was not confined to advocates, critics or political commentators either. All of the justices of the U.S. Supreme Court appealed to the 'rule of law' as supporting

their conclusions in ***Dobbs***. The justices in the majority, for example, said that their decision was 'what the Constitution and the rule of law demand'.[22] In almost identical language, the dissenting justices, said precisely the opposite, stating that their conclusion was 'what the rule of law requires'.[23] The dissenting justices earlier said that the Opinion of the Court had substituted 'a rule by judges for the rule of law'.[24]

In this way the rule of law itself becomes a rhetorical device in an interminable debate. As Professor Judith Shklar acerbically suggested:[25]

> [The rule of law] might well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling class chatter.

Even more tellingly, Lord Bingham recounted commentary by Professor Jeremy Waldron in relation to another U.S. Supreme Court decision (***Bush v Gore***), that 'recognised a widespread impression that utterance of those magic words meant little more than 'Hooray for our side''.[26] This particular quote is telling because it echoes precisely how Alasdair MacIntyre described emotivist theories in *After Virtue*, namely that 'to say this is good' was to utter a sentence meaning 'Hurrah for this'.'[27]

The 'widespread impression' that Professor Waldron recognised surrounding ***Bush v Gore***, and that almost everyone had of ***Dobbs*** (on both sides of the political and social divide), was a perception of emotivism; a perception that the evaluative judgments of all of those involved were nothing but expressions of personal or political preference.

Even more troubling, in the case of ***Dobbs***, and indeed, the 50 years of polarised political battles played out in relation to judicial appointments in the United States over that time, is the prospect that the perception actually reflected the reality. As Justice Stephen Gageler recently remarked in an address to the Australian Judicial Officers Association, in relation to the reactions to ***Dobbs***:[28]

> Were those reactions attacks on judicial independence? Or were they manifestations of an erosion of judicial legitimacy resulting from a realistic perception that a partisan process of judicial appointment had led to a partisan judiciary? Though it pains me to say it, I have difficulty escaping the conclusion that it was the latter.

And, of course, the reality of a partisan judiciary is an even more existential threat to the rule of law, than the perception of one.

Nevertheless, I hope it is apparent from what I have already said that emotivism in our culture generally – the widespread assumption or *perception* of subjectivity – in relation to what is (or should be) an objective determination according to law itself threatens to undermine the rule of law at its very roots.

One of the ways in which it does this is that it necessarily 'flattens out' any hierarchy of authority in relation to evaluative judgments. It is taken as given in any discourse characterised by emotivism and expressive individualism that all evaluative judgments are of equal value and that there is no criteria by which one might prevail over another (*'You have your view and I have mine', 'Who are you to say you are right and I am wrong?'*). Debate becomes a contest of wills, rather than a contest of reason.

We see this in the phenomenon of the sovereign citizen movement, in which our fellow citizens deny the entire legitimacy of our legal system, based on a

mixture of social and political philosophy and pseudo-law, which commonly draws on historical legal authorities such as the *Magna Carta*. All of it is, of course, wholly misguided. Nevertheless it is striking how sincerely and ardently held such beliefs seem to be and how impervious to reason they are; and, how the sovereign citizen takes it as axiomatic that his or her judgment sits on an equal footing with that of the court and, as a result of their sovereign status, should prevail.

Significantly, and in something of a paradox, the sovereign citizen almost always has a fervent belief in the importance of the 'rule of law' as they see it. Indeed, the sovereign citizen is deeply committed to the rule of law. It is simply that the 'law' for them happens to be the idiosyncratic subjective opinions that they hold (or have absorbed from social media).

But again, it is a mistake to think of sovereign citizens as simply bizarre outliers wholly unconnected to our legal system as a whole. They are, I want to suggest, simply the extreme end of a continuum that tacitly regards any decision of a court applying the law as merely one opinion among many. This same tendency can be seen in litigation involving large commercial actors, where the courts are regarded as simply one of a number of tools in the parties' strategic and commercial armoury – and by no means the most important one. It can be seen where court orders are routinely treated as 'aspirational guidelines' rather than binding obligations.[29]

It is most concerning, however, when it is seen in the actions or attitude of the executive government. The courts, after all, are unable to enforce their own orders; they are, in large part, dependent upon officers of the executive government to execute and enforce them. And when those orders are orders

directed to the executive government, they are dependent upon officers of the executive government to implement and obey them. It does not take much imagination to see that if executive governments take the view that decisions of courts are simply one point of view among many, or that the executive may take the view that a decision is wrong in law and need not be followed, the rule of law will not long survive.

Again, this might not be the result of wilful defiance, but because of a belief, sincerely held, that the true legal position is otherwise than as declared by the court.

In ***AFX17 v Minister for Home Affairs (No 4)***, for example, the Federal Court (Flick J) had made orders requiring the Minister to make a decision regarding the applicant's application for a protection visa within a reasonable time. While those orders were outstanding, a representative of the Minister wrote to the applicant's representative in the following terms:[30]

> As the Minister has now appealed the judgment of Justice Flick, no decision will be made on your client's visa application pending the outcome of the appeal. The Minister's position is that s 501A is an available power in relation to your client's visa application and that Justice Flick was in error in finding that the delay in making such a decision was unreasonable and that s 501A was not an available power in the circumstances of this matter. Any decision made prior to the resolution of the appeal as to whether BAL19 was wrongly decided would render the appeal moot.

As a consequence of this, and other actions by the executive in that case, Flick J made a succession of orders requiring action by specific times. His Honour added that it was prudent to observe that in the event of non-compliance with the final order made, contempt proceedings would be instituted.[31] That such an

admonition of the executive government was seen to be necessary is, to say the least, striking.

Indeed, there are many striking things about ***AFX17***. However, one thing that is particularly noteworthy, for present purposes, is the unabashed and apparently guileless nature of the email from the Minister's representative. The author gives no hint that there is anything incorrect, unorthodox or unusual about the view that had been expressed: namely that the Minister regards the Court's decision as being in error and therefore it would not be complied with. The author was quite open in regarding the decision of the Court as simply one opinion among many and as such, one that need not be obeyed.

While no doubt sincere (and indeed because it was sincere), such an approach by the executive is simply a manifestation of the phenomenon I have been describing: the tacit view that a decision of a court applying the law is merely one opinion among many. And it is no less wrong – and no less inconsistent with the rule of law – than the amphigories of the sovereign citizen. We should, therefore, not think of these as isolated instances.[32] They are all, I suggest, the common outworking of a social environment in which all evaluative judgments are *prima facie* regarded as subjective and in which there is no hierarchy of value in relation to such judgments.

All of which is to emphasise that *all* of the branches of government: the legislature, the executive and the judiciary, have a particular responsibility to maintain and uphold the objectivity upon which the rule of law depends. All branches of government are responsible for arresting the growth of emotivism in our public institutions. And we each have a particular responsibility, in the face of a social media culture that wants to suggest otherwise, to create a civic

culture that holds fast to the notion that the objective laws that rule us can be, and are, interpreted and applied objectively.

The judiciary, in which I include, as an essential component, the legal profession, has a particular responsibility, of course, to ensure that the perception of objectivity remains a reality, as the cautionary tale of the United States over the past 50 years demonstrates. As Justice Gageler has said, essential to the maintenance of the rule of law is not merely judicial independence but *judicial legitimacy*. And judicial legitimacy – the public's confidence in the *capacity* of the legal system to produce outcomes according to law without fear or favour – requires us to redouble our commitment to judicial *competence* and judicial *impartiality*.[33] We, ourselves, must resist the temptation, in our own work, to fall into the twin traps of emotivism and expressive individualism.

To do that, I return to where I started, the respect for, and adherence to, our own legal traditions. And in particular the traditions of independence, impartiality and objectivity that so characterised the life and work of Sir Francis Burt.

And to recognise that decisions we make in our professional lives must always be measured against and assessed in light of the legal tradition of which we form a part. A tradition to which we all contribute in our own way, no doubt, and which on occasion we must, collectively, correct. It is, after all, a living tradition; what MacIntyre described as 'a historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition'.[34] The legal tradition of which we form a part must, of course, maintain its vitality and its capacity to self-correct if it is to continue to serve the community for which it owes its existence.

But, for all of that, it is a tradition that is greater than us and, as that senior Pitjantjatjara law man made clear to me, it is a tradition the integrity of which we have a particular, and immutable, responsibility to protect. And I can think of no better exemplar of the discharge of that responsibility than Sir Francis Burt, whose memory we honour this evening.

Thank you for your attention.

---

[1] I gratefully acknowledge the Sisterhood (Lauren Hodson, Sophie Coffin, Julie Jupp and Anne Hatten) for their assistance in the preparation of these remarks.
[2] ***Palmer v Western Australia*** [2021] HCA 31; (2021) 394 ALJR 1 [8] (Kiefel CJ, Gageler, Keane, Gordon, Steward & Gleeson JJ).
[3] ***The Australian Communist Party v The Commonwealth*** (1951) 83 CLR 1, 193 (Dixon J) (***Communist Party Case***).
[4] ***Members of the Yorta Yorta Aboriginal Community v Victoria*** [2002] HCA 58; (2002) 214 CLR 422 (***Yorta Yorta***) [46].
[5] ***Yorta Yorta***, [49].
[6] Tom Bingham, *The Rule of Law* (Penguin Press, 1st ed, 2011) (***The Rule of Law***), vii.
[7] Aristotle, *Politics and the Athenian Constitution*, Book III s 1287.
[8] ***Mabo v Queensland (No 2)*** [1992] HCA 23; (1992) 175 CLR 1.
[9] ***Milirrpum v Nabalco Pty Ltd*** (1971) 17 FLR 141, 267 (Blackburn J).
[10] *The Rule of Law*, 8.
[11] ***Palmer v Western Australia*** [2021] HCA 31 [22] (Edelman J).
[12] *The Rule of Law*, 67.
[13] *The Rule of Law*, 68.
[14] Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (University of Notre Dame Press, 1981) (***After Virtue***), 6.
[15] *After Virtue*, 11 - 12.
[16] *After Virtue*, 22.
[17] Charles Taylor, *A Secular Age* (Belknap Press of Harvard University Press, 2007), 299.
[18] Charles Taylor, *A Secular Age* (Belknap Press of Harvard University Press, 2007), 473 - 475.
[19]Yuval Levin, *A Time to Build; From Family and Community to Congress and the Campus; How Recommitting to Our Institutions can Revive the American Dream* (New York: Basic Books, 2020), 33 - 34.
[20] ***Dobbs v Jackson Women's Health Organisation*** 597 US __ (2022) (***Dobbs***).
[21] ***Roe v Wade*** 410 US 113 (1973).
[22] ***Dobbs***, 6 (Opinion of the Court); see also at 66.
[23] ***Dobbs***, 56 (Breyer, Sotomayer & Kagan JJ).
[24] ***Dobbs***, 33 (Breyer, Sotomayer & Kagan JJ).
[25] Judith Shklar, 'Political Theory and the Rule of Law', in *The Rule Of Law: Ideal or Ideology* (Cazwell, Toronto, 1987) cited in *The Rule of Law*, 5.
[26] *The Rule of Law*, 5.
[27] *After Virtue*, 12.
[28] Stephen Gageler, *Judicial Legitimacy*, Paper delivered at the 2022 Australian Judicial Officers Association Colloquium in Hobart, Tasmania ,7 October 2022.
[29] ***Jensen v Nationwide News Pty Ltd [No 7]*** [2019] WASC 166 [75].

[30] ***AFX17 v Minister for Home Affairs (No 4)*** [2020] FCA 926 (***AFX17***) [4] (Flick J).
[31] ***AFX17*** [8] (Flick J).
[32] See also ***Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL*** [2020] FCA 394 [57], [81] - [83] (Wigney J).
[33] Stephen Gageler, *Judicial Legitimacy*, Paper delivered at the 2022 Australian Judicial Officers Association Colloquium in Hobart, Tasmania ,7 October 2022.
[34] *After Virtue*, 222.