THE RULE OF LAW – NECESSARY BUT NOT SUFFICIENT?[1]

Professor Therese Joiner, Executive Dean, Faculty of Law and Business of Australian Catholic University; Professor Marea Nicholson, Associate Vice-Chancellor; Professor Rocque Reynolds, Dean of Law, Thomas More Law School of Australian Catholic University; Mrs Jan O'Keefe and Mr Philip O'Keefe; other distinguished academic and religious guests; judicial colleagues and other members of the legal profession; ladies and gentlemen; and, if I may so, most importantly, the 130 first year law students whom it is my special privilege to be able to address today.

I commence by acknowledging the traditional owners of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their elders past and present and to other Aboriginal and Torres Strait Islander people here today.

I: INTRODUCTION

I am deeply honoured by the University's invitation to deliver this second annual lecture in memory of my friend and colleague, the late the Honourable Barry Stanley John O'Keefe AM QC. You have left me not one, but two very large pairs of shoes to fill: first, those of the remarkable man whose memory this lecture honours and, second, the Honourable A M Gleeson AC QC, former Chief Justice of the High Court of Australia, who delivered the inaugural lecture last year. I shall do my best to measure up to the task.

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[1] The 2016 Barry O'Keefe Memorial Lecture delivered on Thursday, 18 February 2016 at Australian Catholic University, North Sydney by the Honourable Justice François Kunc KCSG, KC*HS, a Judge of the Supreme Court of New South Wales. I acknowledge the research assistance of my tipstaff, Ms Sarah Evans B Com, LLB (Hons).

I would like to begin with a few words about Barry O'Keefe. I will then come to the substance of this lecture, which is concerned with what we call the rule of law. Perhaps a little counterintuitively, I propose to talk about what is essential to the rule of law through the stories of two real judges in Nazi Germany and a fictional judge in communist Czechoslovakia. Having told you a little about the rule of law, I will advance the proposition that the rule of law is necessary, but not sufficient, for the law to contribute to the greater good and human flourishing. What is also required is for each and everyone involved in the study or practice of law to develop and maintain a well-formed and rationally justifiable sense of justice.

II: THE HONOURABLE B S J O'KEEFE AM QC

We are meeting this evening less than two years since Barry's death at the age of nearly 81.[2] Born on 20 May 1933, Barry was educated by the Christian Brothers at Waverley College and studied law at the University of Sydney. He was called to the bar in 1957 and took silk in 1974. He had a legendarily vast practice, appearing in various state Supreme Courts, the High Court and the Privy Council. The bigger the case, the more complex the facts, the happier was Barry. After terms as the President of the New South Wales Bar Association and on the executive of the Law Council of Australia, he was appointed Chief Judge of the Commercial Division of the New South Wales Supreme Court in 1993.

In 1994 he accepted a five year appointment as the Commissioner of this state's Independent Commission against Corruption. He later became Chairman of Interpol's International Group of Experts on Corruption and Chairman of the International Anti-Corruption Conference. After ICAC, he returned to the Supreme Court before "retiring" to a new full time career as a consultant to the law firm Clayton Utz.

[2] See the obituary which appeared in the Sydney Morning Herald on 24 May 2014: http://www.smh.com.au/comment/obituaries/barry-okeefe-a-life-of-public-service-for-the-mild-one-20140523-zrlrh.html (viewed 10 February 2016).

All of that would have been more than enough for one legal lifetime. But we remember Barry O'Keefe not just for his extraordinary legal contribution but also for his example of prodigious community service. While maintaining a huge legal practice, he served a record ten years as Mayor of Mosman. He was the President of the Local Government Association of New South Wales and the President of the National Trust of Australia. He served as a member of the Sydney Harbour Federation Trust. He was deeply involved in many other social and cultural causes both with his time and with generous financial support.

Above all else, he was a man of unwavering Roman Catholic faith. While deeply respectful of all people of any faith or none, he made no secret of his own beliefs. He was generous with his gift of service to many church organisations. I shall return to that aspect of his life at the end of this lecture.

I hope you will forgive me one personal reminiscence. I first met Barry when I was a newly admitted solicitor. As it happened, we found our paths crossing in legal, church and cultural settings. He became for me someone whom I am proud to call a friend, a role model and a colleague.

The particular memory I want to share with you is this. It happened during Barry's term as ICAC Commissioner when I was a very junior barrister. I had the good fortune to be briefed in a matter which required me to go the United States. Quite by chance, I met Barry at the departure lounge at Sydney Airport. We were on the same flight. As we boarded, Barry, naturally enough for him, turned left to go to first class. I turned right, destined for somewhere less spacious.

At the end of the flight we met again in the customs hall at San Francisco Airport. With typical generosity, Barry searched me out to offer me a lift. I assumed he meant we would share a taxi together. That assumption was hopelessly naïve.

It turned out that Barry was in San Francisco to attend a very secret, high level international meeting of anti-corruption agency heads. When we emerged from the terminal building, two large men in dark suits with ear pieces met "Mr Commissioner" and proceeded to escort him to the biggest limousine I have ever seen in my life. Barry told them that he wanted to give his young Australian colleague a lift into town. They told him that this was contrary to their instructions and security protocols. Barry insisted that if they did not extend this simple courtesy there would be an international incident. As was almost always the case, Barry won the argument and I enjoyed what is probably the most luxurious car ride I have ever had before or since. Not only was Barry's generosity typical, so too was the fact that during our ride into town, with a characteristic Irish twinkle in his eye, he simultaneously displayed great delight at our exalted mode of transport while mercilessly taking the mickey out of his overly serious American hosts.

III: THE ARGUMENT

Conformably with Barry O'Keefe's extraordinary life of service to the law and the wider community, the theme of this lecture is "the contribution of law to the greater good and human flourishing". However, I am certain that is not intended to be an invitation to uncritical professional self-congratulation. This evening I will explore briefly what I suggest are the two prerequisites for the law to be able to contribute to the greater good and human flourishing. I will do that by calling to mind a period of history when a legal system did neither of those things. What I propose this evening is a lesson by exception to highlight what is really required for the law to be a force for good.

The first prerequisite is the rule of law. You will hear that phrase many times in your legal careers but I hope that, at the outset of your legal studies, it will be useful to think about what that phrase really means. My point this evening is that the rule of law is necessary but not sufficient for a legal system that contributes to the greater good and human flourishing. For that, the law must

also be just. By virtue of their training, lawyers have a special responsibility to promote just outcomes and call out the unjust. In the absence of an underlying commitment to justice the rule of law is something quite different – what we might call rule by law. I will demonstrate rule by law in the examples to which I will come. Those examples will also serve as a reminder that lawyers must be astute to guard against the unthinking metamorphosis of the rule of law into rule by law.

There are two reasons why I have chosen this topic and approach.

First, we are all tremendously fortunate to live in Australia. Ours is a country where, at least in my lifetime and of those of you beginning your law studies, the rule of law has never been under existential threat. The rule of law is like the air we breathe. We cannot see it but our society needs it to survive. Like the air, the rule of law can be progressively degraded. However, that process of degradation can be subtle, just like our capacity to tolerate an increasingly stuffy room. The problem is that by the time the air becomes unbreathable, it is too late. Some of the history to which I refer will remind us of the need to be vigilant. As the experience of a country like Germany in the 1930s indicates, the degradation of the rule of law usually happens incrementally rather than by large and obvious steps.

Second, history is important. While it is beyond the scope of this lecture, I firmly believe that you cannot be a good lawyer without a good understanding of legal history. The diminished attention to legal history in our law schools is, in my respectful opinion, a retrograde step. However, when I refer to legal history I mean more than just the history of the Anglo-Australian legal system. While English and Australian legal history is not without its inspiring and shameful episodes, we can also learn much from looking at other legal systems: what they have done well and how they sometimes lost their way to become engines of great suffering rather than advancing the common good.

IV: TWO NAZI JUDGES

The 13th chapter of the Book of Daniel contains a salutary lesson for judges. It tells the story of the young, beautiful and God-fearing Susanna. Two elderly men, who had been selected to be judges for the Jewish people, lusted after Susanna. They tried to rape her while she was bathing alone in her private garden. She rejected their advances and cried out. The two judges cried out as well, putting out the false story that they had come upon the unmarried Susanna having an intimate and illicit encounter with a young man.

What follows is one of the great trial scenes in all literature. The case turns on the word of the two judges against the distraught Susanna. She is convicted because the people give weight to the status and seniority of the two corrupt judges. As she is being led away to death the young prophet Daniel raises his voice against the injustice. He uses the basic forensic technique of examining the two co-accused separately to expose the fatal inconsistency in their stories. Susanna is vindicated and the two corrupt judges are put to death. The moral for judges is obvious.

For present purposes the importance of this story is that it shows how judges are, and are respected as, the embodiment of the legal system. They are meant to represent the best of all lawyers. A failure by them represents a failure of the legal system.

For that reason I want to tell you the story of two judges in Nazi Germany and their complicity in a deeply unjust legal system, a system where there was rule by law rather than rule of law. Because they were civil rather than common law judges their work included, but was not limited to, presiding over trials, but nothing turns on that for the point I want to make. I could tell you similar stories from Vichy France[3] or South Africa during the apartheid era, or Spain or

[3] R H Weisberg, *Vichy Law and the Holocaust in France*, New York University Press, Washington Square, New York, 1996

Argentina under the generals. But reference to Nazi Germany means, I hope, that I have to explain little by way of general historical background. In this context I would like to acknowledge, at least in passing, the equally important question of what judges should do when they find themselves part of an unjust regime.[4] That is a topic for another day.

I am sure that most of you have heard of the Nuremberg trials which took place in the US occupied zone in Nuremberg after the end of World War II. You may have heard of the "Nuremberg defence" – "I was only following orders". I say trials, because what is sometimes forgotten is that there was more than one trial. The trial nearly everyone knows about is the Trial of Major War Criminals, being the surviving leaders of the Third Reich and carried out under the auspices of an international military tribunal. Twelve further trials took place before US military courts in Nuremberg.

One of those trials is known as the "Justice Case", which lasted from March to December 1947.[5] Sixteen German judges and lawyers were tried for their part in the Third Reich's crimes against humanity. At the trial the well-known "Nuremberg defence" became "I was only applying the law". One of the defendants was the first judge I want to tell you about, Oswald Rothaug. The case against him was translated by the great American film director Stanley Kramer into the Oscar winning 1961 film "Judgment at Nuremberg". I will give you a break from listening to me and show you the prosecutor's opening address from the film so you can get a sense of what the Justice Case was all about.[6]

[4] H P Graver, *Judges Against Justice – On judges when the rule of law is under attack*, Springer-Verlag Berlin 2015

[5] *The United State of America v Josef Altstötter et al.* ("The Justice Case") 3 TWC 1 (1948); 6 LRTWC 1 (1948); 14 Ann Dig 278 (1948)

[6] At this point an excerpt from the film is played showing Richard Widmark in the role of the prosecutor, giving his opening address https://www.youtube.com/watch?v=qD_nbk3ET44

In 1942 Oswald Rothaug was the chief judge of the special court of Nuremberg.[7] He presided over the trial of a Jewish man named Leo Katzenberger. So determined was Rothaug to demonstrate his Nazi credentials to his colleagues and superiors that he sent out tickets for the trial to those whom he wanted to attend.

Katzenberger was a highly respected member of the Nuremberg Jewish community. Over a long period of time he was friendly with a young German woman. The evidence of both of them was that their relationship was nothing more than like that of a father and daughter.

Nevertheless, Katzenberger was charged under the *Rassenschutzgesetz* ("Racial Protection Law") with *Rassenschande* ("racial defilement"), being the criminal offence of sexual relations between a person of pure German heritage (called an "Aryan") and a Jew. Rothaug was so determined that Katzenberger should be executed that he bulldozed his way through two fundamental flaws in the case against the accused. First, there was no credible evidence. Second, the offence with which Katzenberger had been charged did not carry the death penalty.

Rothaug overcame the first difficulty by charging and convicting the young German woman, whose evidence otherwise exonerated both herself and Katzenberger, with perjury. He reasoned that because her exculpatory evidence was perjured, then the allegations had to be true.

Rothaug's method of overcoming the second difficulty was even more outrageous. The maximum penalty for "racial defilement" was a prison term of hard labour. However, two thirds of the way through his judgment, Rothaug decided that Katzenberger was guilty of another crime (one with which he was not originally charged), namely that of being a "public enemy" for taking advantage of the

[7] This account of Rothaug and his trial is based on A.E. Steinweis & R.D. Rachlin, *The Law in Nazi Germany: Ideology, opportunism and the perversion of justice*, Berghan Books, 2013, p 137 & ff, Chapter 6, "Evading responsibility for crimes against humanity – murderous lawyers at Nuremberg" by H Reicher.

wartime blackout and curfew to visit the young woman in secret. Katzenberger was ultimately sentenced for that crime, which carried the death penalty, as well as the crime for which he had in fact been tried. He was duly executed.

Rothaug's behaviour was too much even for some Nazis. He was moved to a desk job in Berlin because even the Justice Minister considered him unfit to be a judge. At his trial at Nuremberg, Rothaug was convicted and sentenced to life imprisonment but was in fact released in 1956 at the age of 59. He died in Cologne in 1967.

Of the defendants generally, the military tribunal said that "the dagger of the assassin was concealed beneath the robe of the jurist".[8] Of Rothaug in particular, the tribunal concluded that "by his manner and methods he made his court an instrumentality of terror and won the fear and hatred of the population. … He was and is a sadistic and evil man. Under any civilised judicial system he could have been impeached and removed from office or convicted of malfeasance in office on account of the scheming malevolence with which he administered injustice".[9]

The tribunal's conclusions in relation to Rothaug make it very clear that in a world of white hats and black hats, Rothaug wore a very black hat indeed. He was an evil man who enthusiastically and willingly put himself in the service of an evil system. As I will demonstrate shortly, his view of the German legal system was that it existed solely to do the Führer's will. As a matter of Nazi jurisprudence he was perfectly correct.

My second Nazi judge is more interesting than Rothaug because if it is possible to live in a world of white and black hats, Konrad Morgen's hat is as murky grey as Rothaug's is very black.[10]

[8] The Justice Case 3 TWC 1 (1948) at 985
[9] The Justice Case 3 TWC 1 (1948) at 1156
[10] This account of Morgen is based on H. Pouer-Studer and J.D. Velleman, *Konrad Morgan – the conscience of a Nazi Judge*, Palgrave Macmillan, 2015.

Qualified in civil law before the war, Morgen became a judge in the SS judiciary, a system of courts devoted to the delinquencies of the Nazi Waffen-SS. In contemporary terms it was a military court which tried cases against members of the military. Morgen became an expert in investigating financial corruption.

He became involved in a case where a small but heavy package had been opened by postal inspectors to disclose three lumps of gold. Morgen recognised it as dental gold. He also knew that the dental wards of the concentration camps collected gold from the teeth of the victims of the ovens. In a remarkable example of his moral blindness, his knowledge of the existence of such a task did not concern him. He was worried, however, that a person of authority in the camp was stealing gold that belonged to the Third Reich. But then he took one further step. He made a calculation as to how many people would have to have been killed to produce the amount of gold in the package. He was shocked when he realised that the few kilos of gold could have represented up to 100,000 bodies.

Morgen decided that he would, in his capacity as an investigating judge, visit Auschwitz-Birkenau. He did so and was given complete access. He became an important witness in a number of trials after the war precisely because he was one of the few people left alive who could give what was accepted as a complete, accurate and objective account of what that terrible place looked like at the height of its operation.

Morgen was shocked by what he saw. Time does not permit me to set out his evidence of the process of reasoning which led him to his ultimate course of action. To us today it is breathtaking in its moral and legal half-truths and self-deception, filled with the right thoughts for the wrong reasons.[11] Suffice it to say, an essential part of his reasoning was that he could not charge anyone with the extermination of the hundreds of thousands in the gas chambers of Auschwitz-Birkenau because that atrocity was undertaken under the authority of Hitler, whose will was literally law in the Führer state. He could not bring a

[11] Pouer-Studer and Velleman, n 8, pp 87 & ff.

charge against Hitler for an act which Hitler himself had authorised. Horrible as this may sound, it resonates with early English history and the principle that the Crown could do no wrong.

Instead, Morgen decided to bring some of the lesser perpetrators to trial on other charges. He reasoned that while he could not stop the exterminations, prosecuting some of the perpetrators for "ordinary" murders and other offences at least took their attention away from their appalling task. So it was that Morgen brought charges against Karl-Otto Koch, a former commandant of the concentration camp at Buchenwald, and against Maximillian Grabner, chief of the Gestapo at Auschwitz, who routinely killed prisoners in the camp jail when it became too crowded. These were "illegal" killings for Morgen as opposed to what was being done under Hitler's authority in the nearby gas chambers.

Buchenwald commandant Koch was ultimately convicted on a charge of corruption but was in fact executed in 1945, shortly before the end of the war. Grabner's trial was adjourned, never to resume. Grabner was executed in 1948 by a war crimes tribunal in Poland. Morgen was never charged with war crimes. In fact, he gave evidence at several of the Nuremberg trials and some of Germany's own de-Nazification trials in the 1960s. He gave his last deposition in 1980, two years before his death.

V: THE RULE OF LAW

There is no single, authoritative list of the necessary constituents of the rule of law, but the various attempts to identify them come out with the same basic points. There is a general thematic unity even if the precise expression differs. Some aspects of the rule of law are really corollaries or consequences of more fundamental points. With those qualifications I will set out my summary of ten matters, which while not exhaustive is intended to touch on the main points.[12]

[12] What follows is based on a consideration of two sources: The Hon A M Gleeson AC QC, "Courts and the Rule of Law" in C Saunders and K Le Roy eds, *The Rule of Law*, The Federation Press, Leichhardt, 2003, pp 178 & ff and The Rule of Law Institute of Australia's Statement of

First and foremost, all authority is subject to, and constrained by, law. This is sometimes expressed as "no one is above the law" or "everyone is equal before the law". In *Gouriet v Union of Post Office Workers* Lord Denning MR famously quoted "be you ever so high, the law is above you".[13] An important consequence of this is that the government itself is subject to law. So it is that the State or Commonwealth is a regular litigant in our courts and, when it loses, it abides by that decision. Of course, where there is constitutional power to do so, the government, by virtue of its control of the legislature, can change the law, including to overcome a decision of the courts which it does not like.

Second, there must be separation between the executive and judicial functions. Our system of government depends upon the separation of the powers of the legislative, executive and judicial branches of government. The party political system often obscures the separation of the legislature and the executive, but the judicial branch must be independent of both. The fact that the courts are an independent branch of government and not an agent of the government (the executive) of the day is too often overlooked, particularly in an era like ours which is obsessed with the language of consumerism. Justice Keane of the High Court of Australia put it very well, if I may respectfully say so, when he said:

> "But to see the courts as providers of services is a constitutional nonsense.
>
> An accused person who is tried, convicted and sentenced is not being provided with a service. And when a civil court resolves a dispute between citizens or between a citizen and the State, the parties are not being rendered a service; they are being governed."[14]

Principles http://www.ruleoflaw.org.au/principles/ (viewed 10 February 2016). Apart from these, an excellent foundational discussion may found in T Bingham, *The Rule of Law,* Allen Lane, London, 2010.

[13] [1977] QB 729 at 762

[14] The Hon Justice P A Keane AC, *"The idea of the professional judge: the challenges of communication"*, (2015) 12 (3) TJR 301 at 306.

An important aspect of that independence has been recognised in what is called the "*Kable* principle" which means that the role of courts as courts is constitutionally protected so that the legislature cannot interfere with their essential function as courts. A simple example is that parliament cannot pass a law telling the court what the outcome in a particular case must be.

Gregory Kable was convicted and imprisoned for the manslaughter of his wife. During his imprisonment he sent threatening letters to her relatives. In response, the NSW Parliament, before his release, passed the *Community Protection Act 1994* (NSW). The Act was fashioned to apply only to Kable. After the Director of Public Prosecutions successfully applied under the Act for Kable to be detained for a further time in prison, Kable appealed to the Court of Appeal and then to the High Court. The High Court found the Act to be invalid. What has followed from that judgment is an understanding that, to adopt the analysis of the Hon Kevin Lindgren AM QC:

> "the Constitution assumes, indeed provides for, an integrated Australian system of courts of which the state Supreme Courts form an essential part, with the result that it is inconsistent with Chapter III of the Constitution, and therefore impermissible, for their institutional integrity as "courts" to be impaired by State legislation…*Kable* can be seen also to have entrenched within the State sphere an aspect of the rule of law, namely, a constraint on the exercise of political power"[15]

Third, judicial decisions are to be made according to publicly available legal standards rather than undirected considerations of fairness or general discretion.

Fourth, no one can be prosecuted, civilly or criminally, for any offence not known to the law when committed.

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[15] The Hon K E Lindgren AM QC, "*Kable's* Case and the Rule of Law" in I McDougall, *Cases that Changed Our Live*: Volume 2, LexisNexis, 2014 pp 74 and 80.

Fifth, there must be some minimum capacity for judicial review of administrative action. Those who hold and exercise governmental power must be compelled to exercise that power lawfully. A tribunal for example that falls into jurisdictional error and thereby exceeds its lawfully created power in an administrative context can be held accountable by the judiciary.

Sixth, courts may not grant the executive (i.e. the government) dispensation from the criminal law. This is perhaps a corollary of the principle of equality before the law in that the law should not be applied differently when dealing with a person of office.

Seventh, citizens have a right to a fair trial. This includes having the benefit of the presumption of innocence and a right against self-incrimination, to be informed of any charges laid, to be tried without delay and to be free on bail unless it can be shown they might escape the country or are a risk to the community.

Eighth, the criminal law should operate uniformly in circumstances which are not materially different.

Ninth, subject to exceptions such as fraud, the confidentiality of lawyer client communications must be preserved.

Tenth, courts must act when their jurisdiction is properly invoked and access to the courts should be available to citizens who seek to prevent the law from being ignored or violated, subject to reasonable requirements as to standing. A right that cannot be invoked or enforced is not worth much at all.

Having set out my list, it is instructive to compare it to the legal world of Rothaug and Morgen. I have time to offer two examples.[16]

The fourth matter I referred to gives expression to the Latin legal tag *nullum crimen, nulla poena sine lege* – no crime or punishment without a law. That principle was represented in the pre-war German criminal law which stated "An action can be punished only if that punishment is legally set before the action

[16] Again drawn from the works referred to in nn 7 and 10 above.

was performed". Nazi jurists objected to that principle because they said it enabled a wrongdoer to avoid punishment by exploiting loopholes in poorly drafted statutes. That is a seductive sentiment which still reappears in the editorials of certain newspapers during overheated "law and order auction" election campaigns.

Nazi jurisprudence turned the principle around to become *nullum crimen sine poena* – no crime without punishment. The Nazi penal code provided:

> "Whoever commits an act which is declared punishable by law, or which deserves to be punished according to the fundamental idea of a penal law and the sound perception of the *Volk* [loosely, the true German people], will be punished. If no particular penal law is directly applicable to an act, then the act is punished according to that statute, the fundamental idea of which fits it best."

Not only did that law offend the idea of there being no punishment for something that was not then a crime, it also breaches the prohibition against leaving it up to the judge to decide arbitrarily what is and is not criminal conduct. This is because, taken at its height, that law left judges with huge discretion to attribute criminal consequences to conduct not obviously prohibited but which they regarded as being contrary to the values and interests of the Nazi state. Rothaug's approach in the Katzenberger case is a classic example.

Second, there was no concept of separation of powers or judicial independence. This was because the Führer was the embodiment of the state and constitutionally there was nothing from which the judiciary could be independent because it was an agent of the state. This was the legal reason, logical according to its own terms, for Morgen's conclusion that the extermination of the Jewish people was not unlawful because it was authorised by the source of law himself. The idea was summarised as the *Führerprinzip* and articulated in an infamous document called the "Rothenberger Memorandum" of 31 March 1942. It said in relation to the judiciary:

(1) Law must serve the political leadership.

(2) The Führer is the supreme judge; theoretically the authority to pass judgment is only his.

(3) A judge who is in a direct relationship of fealty to the Führer must judge like the Führer.

That same year, Hitler's Minister of Public Enlightenment and Propaganda, Joseph Goebbels said:

> "While making his decisions the judge had to proceed less from the law than the basic idea that the offender was to be eliminated from the community. … The idea that the judge must be convinced of the defendant's guilt must be discarded completely. The purpose of the administration of the law was not in the first place retaliation or even improvement but maintenance of the State. One must not proceed from law but from the resolution that the man must be wiped out."

VI: THE NEED FOR JUSTICE

I hope that this brief survey gives you some idea of the elements of the rule of law and, through those historical examples, how it can be undermined, sometimes with a beguiling appearance of logic or convenience. But is the rule of law enough to ensure that a legal system contributes to the greater good and human flourishing?

I have told you about two real judges. Let me introduce this final part of my lecture by telling you about a fictional judge.

One of the finest works of 20th century Central European literature is the Czech writer Ivan Klíma's novel *Judge on Trial*. It is set in Prague during the communist era. Klíma's fictional judge, Adam Kindl, has serious misgivings

about the system in which he serves, saying "I still failed to grasp the logic of a legal system which, knowing that it couldn't prosecute everyone who broke the new laws, selected certain individuals and punished them severely as an example to the rest".[17] He follows his superiors' instructions and imposes an unjust sentence on a shopkeeper who failed to hand over some of his stock when it was confiscated by the state. It is an important turning point in the novel when Judge Kindl describes his actions:

> "I sentenced that man to three and a half year's imprisonment, even though I knew full well that the sentence was unjust, and although I was fully aware the that the majority of those who had worked themselves up to some post or other in The Hole [Kindl's description of where he worked] and had some hand in the exercise of power accepted bribes and committed fraud, that at least half of all the illegally distilled liquor found its way into the cellars of those who ought to be setting an example, who represented the law or at least the authorities, and that where liquor was not enough, money changed hands. I convicted a victim. The only thing I can advance in my defence is that I lived in a vacuum and lacked courage.
>
> I had not been a faithful servant of justice. All I had managed to do was to assist the existing state of lawlessness, sometimes aggravating and sometimes attenuating its mistakes, while acquiring experience and trying to discover what the law was. The more I learnt about the true state of affairs, the less acceptable I became for the existing regime.
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> In the same way that people who start ruling stop being people and become masters, a servant of arbitrary power who starts to think stops being its auxiliary and starts to become its enemy."[18]

[17] I Klíma, *Judge on Trial*, (translated by A G Brain), Chatto & Windus, London, 1991, p 335
[18] Klíma, n 24, pp 337-338

The lessons to be drawn from Klíma's fictional judge are that lawyers cannot live in a vacuum, must not lack courage and must have sufficient insight to speak against the exercise of arbitrary power. The rule of law, while it has substantive elements, is essentially a framework. Into that framework, I suggest, must be injected a strong sense of justice.

I would like to make three points about maintaining a sense of justice in everything you do as lawyers.

First, nothing I say should detract from the proposition that technical mastery of the law is essential for a successful lawyer. But like the framework of the rule of law is insufficient for a good legal system, technical legal mastery is necessary but insufficient for a good lawyer. Recently both Justice Gageler of the High Court of Australia and Chief Justice Bathurst of the Supreme Court of New South Wales have recalled Professor William Twining's famous lecture "Pericles and the Plumber"[19].

Professor Twining's analogy to lawyers being like plumbers is an important reminder that technical competence is essential. However, if as I suspect within an hour or two of leaving here you will remember almost nothing of what I have said, the one thing I hope you will remember is that to be a good lawyer technical legal competence is not enough. You must never lose sight of the need to do justice.

Second, Klíma's fictional judge, in the profound observation that "a servant of arbitrary power who starts to think stops being its auxiliary and starts to become its enemy" invites lawyers to serious thought about justice. What is it and how is it achieved? That is a challenging and perhaps lifelong question which calls for intellectual rigour and, for lawyers, honest introspection.

[19] (1967) 83 LQR 397. Justice Gageler's reference is in the "Pearls of Wisdom" section of the NSW Law Society Journal, July 2015, p21. Chief Justice Bathurst refers to it in his 2016 Opening of Law Term Address, http://www.supremecourt.justice.nsw.gov.au/Documents/Speeches/2016%20Speeches/Bathurst_20160204_speech.pdf (viewed 10 February 2016)

Konrad Morgen offers us a real example of how even a well-educated and apparently civilised man can go horribly wrong in trying to answer that question. Morgen's biographers say this of him:

> "Morgen once described himself as a *Gerichtigkeitsfanatiker* – a fanatic for justice. This self-description is true in a sense, but that sense is neither as clear nor as favourable as he thought. Morgen was indeed fanatical about justice as he conceived it, but his conception of justice was inadequate to the systematic inhumanity that surrounded him. And his fanaticism was too single-minded to allow for self-critical reflection. It led him aright in some instances and grossly astray in others."[20]

So, what is justice? The correct, classical answer of justice being to give each person his or her due is only a starting point in our complex world. In this regard I respectfully hope that you will be well served by your choice of a Catholic university. While I would never suggest that the Catholic Church has anywhere near a monopoly, or anything like it, on understanding justice, it does have one of the longest continuous traditions of systematic reflection on the topic. From the earliest church writings to St Thomas Aquinas in the fourteenth century to the large body of contemporary Catholic social teaching, there is a rich resource of philosophical inquiry about justice.

Basing itself upon the natural law, the Church's exposition of justice is advanced as being something which is accessible to all people of good will on firmly rational grounds without the need for any supernatural belief and over which the Church does not have exclusive rights.[21] Most importantly, its starting point is the inalienable and inherent dignity of every human being. It is no accident that in response to the horrors of the Third Reich, some of which I have touched on this evening, Article 1 of the Basic Law of the now Federal Republic of Germany

[20] Pouer-Studer and Velleman, n 8, p xi.
[21] International Theological Commission, *In search of a universal ethic: a new look at the natural law,* (2009) at [34] http://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_con_cfaith_doc_20090520_legge-naturale_en.html (viewed 10 February 2016)

provides "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority".[22] I hope that as part of your studies you will be helped to think about fundamental questions of justice in a rigorous and informed way.

Third, some of you might be thinking by this point (other than how close is he to the end?) that, of course, on an occasion like this a judge is going to talk about justice, but that it is all a bit "airy fairy". Let me give an example to demonstrate that it is not. One of the fundamental and most frequently cited statutory provisions concerning the administration of justice in this state is s 56 of the *Civil Procedure Act 2005* (NSW) which provides, in part:

> 56 Overriding purpose
>
> (1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.
>
> (2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.
>
> (3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court…

[22] I am grateful to Johanan Ottensooser, solicitor and former tipstaff to my colleague Justice Darke for drawing this to my attention.

The introduction of s 56 has had an important influence on the way litigation is conducted and has encouraged change in the way lawyers go about their work in the context of litigation, although much remains to be done.[23] It requires every legal practitioner to give active consideration to the just resolution of the dispute, or any part of it, in which they are involved. There is nothing "airy fairy" about a statutory obligation to consider what is just in the particular circumstances. Similarly, judges have to make many interlocutory and final decisions where they have a lot of room to move in what they decide – what lawyers call substantially unfettered discretions - and the primary concern is what is the just outcome having regard to the facts proven before them.

VII: CONCLUSION

In conclusion, I would like to return to the story of Barry O'Keefe. By 2013 Barry was terminally ill. However, at the request of the Australian Catholic Bishops' Conference, he agreed to be the inaugural chair of the Truth, Justice and Healing Council, established to co-ordinate the Church's response to the Royal Commission on Institutional Responses to Child Sexual Abuse. He died while holding that position.

Barry's offering of that final act of service exemplifies the point I have tried to make about the importance for lawyers of never losing sight of the fundamental need to do justice, irrespective of the pain or personal cost. Barry well understood the implications of the phrase *fiat iustitia ruat caelum* – let justice be done though the heavens may fall. In the early days of the establishment of the Truth, Justice and Healing Council Barry consulted widely about its structure and operation. He rang me on several occasions and we conferred a couple of times. Neither of us knew that within two or three months of our discussions, I would be appointed to the Supreme Court.

[23] I considered some of those ramifications in *Ken Tugrul v Tarrants Financial Consultants Pty Limited ACN 086 674 179* [No 5] [2014] NSWSC 437 at [64] – [77]

Barry O'Keefe was a man who valued institutions. He knew what a positive role they could play in our society. Of all the institutions with which he was involved, I have no doubt that the one which he loved most with every fibre of his being was the Roman Catholic Church. He told me how pained and appalled he was at the revelations of the horrible misdeeds of Catholics in positions of trust and the failings of some of the Church's leaders. But he also knew that his personal pain and disappointment was as nothing when compared to the suffering of the survivors. He was determined that justice had to be done by the Church acknowledging the wrongs of the past, making amends to the survivors and ensuring the future safety of young people.

The life and career of Barry O'Keefe offers you a wonderful example as you begin your legal studies. It demonstrates that is a privilege to put your talents and skills at the service of the community through the mastery of the law, but that it is an even greater privilege to serve the cause of justice until your last breath.

You are entering a profession filled with quiet achievers and public achievers. It doesn't matter which you are, provided that you remain committed to service through the rule of law as a means to doing justice. I wish you well in your future careers, wherever they may take you, and look forward to seeing you one day become custodians of the best traditions of our profession, traditions which Barry O'Keefe upheld through a long, distinguished and faith-filled career.