

**‘THE JUDICIAL OFFICE ... BOWING TO NO POWER BUT THE
SUPREMACY OF THE LAW: JUDGES AND THE RULE OF LAW IN
COLONIAL AUSTRALIA AND CANADA, 1788-1840’**

JOHN MCLAREN*

Elsewhere there might be the sultan’s caprice, the *lit de justice*, judicial torture, the slow-grinding mills of the canon law’s bureaucracy and the *auto-da-fe* of the Inquisition. In England by contrast, king and magistrates were beneath the law, which was the even-handed guardian of every Englishman’s life, liberty and property. Blindfolded Justice weighed all equitably in her scales. The courts were open, and worked by known and due process. Eupeptic fanfares such as those on the unique blessings of being a free-born Englishman under the Anglo-Saxon derived common law were omnipresent background music. Anyone, from Lord Chancellors to rioters could be heard piping them (though for different purposes).¹

In this elegant statement the late English social historian, Roy Porter, pointed to the rule of law’s pervasiveness as a rhetorical device in 18th century England. Many of those mentioned by Porter, as well as others in both English society and British colonial settler communities, believed that it also had substantive content. Despite the narrower version associated with Alfred Venn Dicey from the late 19th century, the rule of law in the late 18th and early 19th century was a highly tensile notion. Its meaning varying depended on who was employing it and for what purpose. In one guise or another the rule of law embraced: the right to justice by the judgement of one’s peers conceded by King John in *Magna Carta*,² and trial by jury (both elements of claims of an Ancient Constitution); *habeas corpus* a protection solidified during the latter half of 17th century;³ freedom from suspension of or dispensation from laws of Parliament secured in the settlement after the Glorious Revolution of 1688;⁴ the independence of the judiciary established by the *Act of Settlement*, 1701⁵ but not operative in the colonies until the middle third of the 19th century, and its corollary, the right to a trial according to law and established legal

* Lansdowne Professor of Law, University of Victoria, British Columbia. This paper was first presented as the inaugural Macquarie Lecture, Macquarie University, The Banco Court, Supreme Court Building, Sydney, Thursday, July 25, 2002.

¹ Roy Porter, *English Society in the Eighteenth Century* (1982) 149.

² *Magna Carta*, articles 29 and 30.

³ This right was accorded legislative recognition in the *Habeas Corpus Act 1679*.

⁴ See the *Bill of Rights* (1689) ss 1-2.

⁵ *Act of Settlement* (1701) s 3.

procedures involving the application of rational principles; and, freedom from intrusion and arrest by the invocation of general warrants developed by the courts during the mid-18th century.⁶ Closely allied and overlapping with the rule of law were a series of ‘constitutional rights’, some of which seemed settled, at least in Britain, such as no taxation without representation and the right to petition the Crown, and others that represented a ‘wish list’ of protections – freedom of the press, freedom of association, freedom of assembly, and freedom of conscience. The list ranges from the inherently legal to the more clearly political. In this lecture I contend that the liberal or conservative discourses on the rule of law that embodied all or some of these elements were central to the determination by community members in both the metropolitan power and the colonies of the quality of the performance of both government in general and the administration of justice in particular. In other words, in the absence of a written constitution, the rule of law provided a standard (or perhaps more correctly a set of standards) by which to judge the performance of those possessing governmental and judicial authority. I suggest, too, that where the courts stood on these rights influenced the political culture in various jurisdictions and how narrowly or broadly the rule of law was construed within them. My particular focus is the treatment of radical and reformist dissent by both the executive and judiciary within the two colonies of Upper Canada and New South Wales.

As John Phillip Reid and Janice Potter, two North American colonial historians, have persuasively demonstrated, liberty was a shared constitutional and legal concept in the 18th century Anglo-American world.⁷ It lay at the crux of a balance between arbitrary power on the one hand and licentiousness on the other. Debates over the nature of liberty and of the rule of law had divided political and legal opinion in mid 18th Britain.⁸ On the one side there were those government or court Whigs, including their major legal apologist, William Blackstone, committed to the deployment of liberty as the guarantor of order, status and deference (an ‘ordered liberty’) as the basis for resistance to ‘faction’. For these forces a narrow conception of the rule of law that tied legitimacy to the observance of the formal requirements of decision making generally sufficed. On the other side were the country Whigs and populist Wilkites, who saw liberty as a necessary bulwark against arbitrary and corrupt government, whether that of a monarch or of Parliament. The rule of law for these people was a more expansive notion, encompassing constitutional protection of rights, the criteria for resisting corruption and arbitrariness and effective mechanisms for the redress of grievances.

⁶ See *Leach v Money* (1763) 19 State Trials 981; *Entick v Carrington* (1765) 19 State Trials 1045.

⁷ John Phillip Reid, *The Concept of Liberty in the Age of the American Revolution* (1988); Janice Potter, *The Liberty We Seek: Loyalist Ideology in Colonial New York and Massachusetts* (1983).

⁸ See H T Dickenson, *Liberty and Property: Political Ideology in Eighteenth Century Britain* (1977) 121-162 for the broader political context of these two readings of the rule of law.

These ideological tensions were in time to be replicated in the debates between Loyalists and Patriots in the American colonies both before and during the War of Independence.⁹ In an interesting loop back of the debate over the meaning of liberty and the rule of law to the British Isles from America competing interpretations were also at the centre of political conflict in Ireland between Ascendancy conservatives and reformist Whigs.¹⁰

The constitutional and legal history of the first five decades of the colonies of New South Wales and Upper Canada, founded in 1788 and 1791 respectively, reflect similar tensions between conservative and more liberal notions of the rule of law and its political significance in *those* fragile and often fractious societies. How debate and conflict played out, and who stood where on the rule of law and its meaning reflected the peculiarities of the colonial project in the particular jurisdiction and how power was distributed at both a formal and practical level in these territories. Moreover, although the nature of the interests, the discourses and the ideological positions were common or similar, the champions of the competing visions of the rule of law sometimes differed. A common element, however, is the ubiquity of rule of law discourse and rhetoric.

Upper Canada was established as result of pressure by Loyalist exiles from the United States for a distinctive colony in which they would have space to live under British rule and English law.¹¹ While the settlers were granted the full range of colonial legislative and legal institutions, in that sense 'a Perfect Image and Transcript of the British Constitution' as the first Lieutenant Governor, John Graves Simcoe described it,¹² the British government intended that the colony would be under the close and dominating rule of the chief executive.¹³ He possessed powers of veto and prorogation and enjoyed revenue, part of which was free of legislative control. Within the bosom of a reconstituted empire it was supposed that the colony's inhabitants who had felicitously escaped from the anarchy of American republicanism out of loyalty to the British Crown would rest content and prosperous in a state of colonial dependence on London. These suppositions were almost immediately to be tested. In the colony's first decade, there was disharmony among the Loyalists who formed the bulk of the European population. The sources of contention reflected differences of opinion about what it meant to be a British North

⁹ See Potter, above n 7.

¹⁰ See Alan Ward, *The Irish Constitutional Tradition: Responsible Government and Modern Ireland* (1994) 15-29.

¹¹ Robert Fraser, "'All the privileges which Englishmen possess": Order, Rights, and Constitutionalism in Upper Canada' in Fraser (ed), *Provincial Justice: Upper Canadian Legal Portraits* (1992) xxv-xxx.

¹² Governor Simcoe's 'Plans for Upper Canada' in Michael Bliss, *Canadian Documents, 1763-1966* (1966) 34-35.

¹³ John Manning Ward, *Colonial Self-Government: The British Experience 1759-1856* (1976) 2-3.

American (some colonists cherished their earlier experience with democratic institutions).¹⁴

Conflict over the meaning of the Upper Canadian constitution and the rule of law became accentuated between 1800 and the War of 1812. By this period new waves of immigrants from both the United States and Europe had settled in the colony creating a more complex and for the authorities a potentially dangerous ideological stew.¹⁵ The Upper Canadian government concerned about security in an era of high anxiety about American designs, the loyalty of immigrants from south of the border, the effects of rebellion in Ireland and war with the French reacted defensively.¹⁶ In particular it took measures to stifle dissent from both external provocateurs and an embryonic reform movement. The passage of the Sedition Act of 1804 on the initiative of the Lieutenant Governor and Legislative Council was particularly divisive.¹⁷ Although the Act was inspired directly by fears about Bonapartist designs and the activities of United Irishmen, it was available to deal resolutely and harshly with other sources of faction in the colony. The statute provided for the expulsion of anyone who had been in the colony for less than six months, or had not taken an oath of allegiance, and who had caused or was suspected of having caused disaffection against the Crown or of disturbing the tranquility of the colony with seditious intent.¹⁸ The procedure was summary in nature, the accused subject to a reverse onus, and the penalties included banishment.¹⁹

The passage of this draconian statute contributed to the formation of the first definable, although short lived, opposition. This was located among a group of Irish Whigs who saw themselves as excluded from the governing elite in favour of Scottish placemen ('Scotch pedlars' as they were derisively labeled).²⁰ The group was led by and represented in the Legislative Assembly by the irascible lawyer and legislator, William Weekes, and later by the egotistical King's Bench puisne justice, Robert Thorpe. Both men preached the notion of the constitution as a compact between the people and monarch, largely immune from imperial interference, and as the repository of the rights of freeborn Englishmen. They were also unduly forthright in their charges that the governance of the colony had been and was arbitrary and subversive of liberty. As a consequence, they became 'thorns in the

¹⁴ Jane Errington, *The Lion, Eagle and Upper Canada: A Developing Colonial Ideology* (1987) 13-54; Fraser, above n 11, xlvii-1.

¹⁵ Fraser, above n 11, 1. On the fractious state of the colony at this time, see Brendan O'Brien, *Speedy Justice: The Tragic Last Voyage of His Majesty's Vessel Speedy* (1992) 3-28.

¹⁶ Ibid li; F Murray Greenwood and Barry Wright (eds), *Canadian State Trials, Vol I: Law, Politics and Security Measures 1608-1837* (1996) 380.

¹⁷ *Sedition Act 1804*, 44 Geo III, c 1 (UC).

¹⁸ Ibid s 1.

¹⁹ Ibid s 2.

²⁰ Douglas Brymner (ed), 'Report on Canadian Archives, 1892' *Political State of Upper Canada in 1806-7* (1893). See also John McLaren, 'The King, the People, the law ... and the Constitution: Justice Robert Thorpe and the Roots of Irish Whig Ideology in Early Upper Canada' in Jonathan Swainger and Constance Blackhouse (eds), *People and Place: Historical Influences on Legal Culture* (2003) 11-24.

flesh' of the colonial administration. Both let their rhetorical flourishes get the better of them, however, and paid the price by being silenced, although in very different ways. Weekes departed this mortal coil in 1806 during a duel with opposing counsel, William Dickson. The latter was outraged with the Irishman for describing the late Lieutenant Governor Peter Hunter in open court as 'a Gothic Barbarian whom the providence of God had removed from this world for his tyranny and Iniquity'. As a consequence Weekes joined his nemesis prematurely. Thorpe who as a sitting judge ran for and won Weekes's former seat in the House of Assembly in a by-election was removed from office in 1807 by Lieutenant Governor Francis Gore on the instructions of Lord Castlereagh, the Colonial Secretary. He was fired for using his position as a judge and his role as a member of the House of Assembly to berate and potentially subvert the administration. Gore had become convinced that Thorpe was a closet United Irishman. These events and the policies applied suggested that a maverick judge with liberal constitutional values had no place in what was supposed to be a compliant and grateful community.

New South Wales was by any standards a different sort of colony – like Newfoundland 'an anomalous society', to quote John Manning Ward. In its early decades the lack of conventional legislative bodies and the single-minded commitment of Governors to establishing and maintaining a convict colony meant little open debate and conflict over the meaning of the rule of law. This despite the fact that Thomas Townshend, Lord Sydney, the intellectual planner of the colony, seems to have imagined it as a society of freemen. Under the practical disciplinary guidance of Governor Phillip and his successors various forms of radicalism including republicanism were entertained by some convicts, especially those transported for political crimes, such as Maurice Margarot, the Scottish martyr and General Joseph Holt, one of the many United Irishmen to be transported.²¹ However, as long as these people were serving time and subject to penal law, most had no accepted public forum for voicing their views.

After 1800 the discourse and rhetoric of the rule of law began to be invoked more openly by groups in the colony who stood outside the executive and judiciary. Convicts were pardoned and emancipated. Some of these, such as Margarot, continued to nurse the radical views for which they had been transported. Others deployed the rule of law out of pure-self interest. The devious and deceitful George Crossley, a former attorney transported for perjury, appealed to both English law and the rule of law to vindicate his own dubious machinations in the court room, whether as litigant or legal adviser. As Governor Philip Gidley King discovered, convicts or emancipists who were literate, gentlemanly and likely to have influential friends in Britain, could be thorns in the gubernatorial flesh when they invoked the Ancient Constitution, *Magna Carta* and the rights of freeborn English men in their correspondence with the executive. King was well aware that his

²¹ See Silver, *The Battle of Vinegar Hill: Australia's Irish Rebellion* (1989) 128-130, for pen portraits of several convicts, including Maurice Margarot and Thomas Fyshe Palmer ('Scottish Martyrs'), Joseph Holt (United Irishman) and George Mealmaker (Republican).

predecessor John Hunter had been recalled after complaints to the Colonial Office by Thomas Fyshe Palmer, Scottish Martyr turned colonial businessman. Palmer had complained about the governor's alleged fiscal mismanagement of the colony.²² It was self-protective instincts at work then that caused King to react sourly to being castigated for abusing the rule of law by John Grant, in 1805.²³ Grant had been transported in 1803 after being sentenced to death for the attempted murder of a solicitor who had warned him off an heiress with whom he was obsessed. He had arrived in the colony with 50 hogsheads of brandy purchased in Rio and expected, given his class, to be put on the government pay roll. Governor King, no doubt distracted by the aftermath of the Castle Hill Rebellion of Irish convicts in 1804, was not responsive to Grant's pleas to be allowed to land his brandy and to be granted a job. The gentleman convict reacted unfavourably when King granted him a conditional pardon in 1805, which he found to his consternation did not allow him to return to England until the termination of his sentence. In high dudgeon he wrote to the Governor. After quoting from Blackstone on the rights of English subjects in 'uninhabited' lands and with a brief reference to *Magna Carta*, he inveighed:

Now Sir! I ask you as an Independent Englishman, witnessing with astonishment the miserable state to which Thousands of Unfortunate Men are reduced in this country, by what Authority do those in power at home, by what Right do *you, make Slaves of Britons* in this distant corner of the Globe? ... [A]t your Door lies all the blood spilt in the struggle of half-starved Men for Personal Liberty in this Country.²⁴

Even though Grant and several other gentlemen and political prisoners, including Margarot, were re-transported for their temerity in accusing the Governor of despotism, they can be said to have kept the discourse and rhetoric of the rule of law alive in the colony, at least in providing a yardstick by which governmental performance should be judged. Moreover, the fact that Grant who had also directed similar sentiments to Judge Advocate Richard Atkins was called before the judge on the direction of King, convicted of sedition and sentenced to five years hard labour on Norfolk Island and Van Dieman's Land²⁵ suggests that those in the executive recognized the potential power, and, for them, the subversive quality of this rhetoric.

The earliest judicial appointments in Upper Canada assumed that the judges would provide conservative leadership, along with the Lieutenant Governor and colonial administrators, as well as being sources of constitutional and legal advice to the colonial government. Judges like Chief Justice William Osgoode, the first to hold that rank, assumed the combined functions of judge, executive officer and legislator, a pattern which, while it offended notions of the separation of powers, was common in British imperial practice, and had the approval of Blackstone and

²² Michael Roe, *New South Wales under Governor King* (MA Thesis, University of Melbourne, 1995) 135-7.

²³ On this contretemps, see Yvonne Cramer (ed), *This Beauteous and Wicked Place: Letter and Journals of John Grant, Gentleman Convict* (2000) 89-153.

²⁴ Ibid 105; letter Grant to King, 1 May, 1805.

²⁵ Ibid 116.

other conservative Whigs.²⁶ The potential implications of what Murray Greenwood in his work on official reaction to dissent in Lower Canada has described as a temptation to assume a Baconian conception of judicial office, that is one of service to government above all else, for undue cosiness between the judiciary and the executive, was only hazily realized in the period before 1812 in Upper Canada.²⁷ This was in part a result of personality clashes among both the administrators and the judges in this sparse but fractious society.²⁸

Close association between the judiciary in Upper Canada and the colonial executive and a distinct blurring of the political and judicial roles of the judges emerged after the War of 1812, coming to a head in the 1820s. The years immediately after the War were to mark the emergence of the so-called Family Compact, a group of conservative politicians, churchmen, lawyers and judges who were the offspring of early Loyalists. Most of them had been nurtured in the grammar school run by the dyed-in-the wool Anglican Reverend, later Bishop, John Strachan.²⁹ The members of this group, especially its leader, lawyer later judge, John Beverley Robinson, were unalterably wedded to the imperial connection, believed ardently in the need to replicate the values of the late 18th century British constitution and were arch conservative in political and social ideology. They were strong exponents of a limited, formal definition of the rule of law³⁰ and were opposed to constitutional change in the colony, especially that which would rob them of power and influence, and afford unnecessary legal protection to radicals and other political dissidents. This group was hostile to the United States and thus to the invocation of republican and even democratic sentiments. Operating variously as law officers of the Crown, judges and members of executive and legislative councils and assemblies they were quite ready to manipulate the administration of justice to secure their own interests and of those like them. This they did in the selection of administrators and magistrates, and in the conduct of political trials. As advisers and confidantes of the various well-intentioned, but blinkered, senior army officers sent out to rule the colony, they were able to influence significantly the exercise of executive power for more than two decades.³¹

The Compact's manipulation of the administration of justice is evident in several sedition prosecutions involving radicals or reformers. First, there was the invocation of special procedures under the Sedition Act by Robinson as Attorney General and

²⁶ Fraser, above n 11, xxvi, xli and entry for William Osgoode, 129-134.

²⁷ Murray Greenwood, *Legacies of Fear and Politics in Quebec in the Era of the French Revolution* (1993) 27-8.

²⁸ On the fractious state of Upper Canadian society in this period, see Brendan O'Brien, above n 15, 3-28.

²⁹ On Strachan and his influence in Upper Canadian Law and Politics, see Fraser, above n 11, xxxiii-xxxvi, xxxix.

³⁰ On the influence of John Beverley Robinson, see Fraser, above n 11, xxiv-xxxix, and entry for Robinson, 153-175. Also Patrick Brode, *Sir John Beverley Robinson: Bone and Sinew of the Compact* (1984).

³¹ See Paul Romney, *Mr. Attorney: The Attorney General for Ontario in Court, Cabinet and Legislature 1791-1899* (1986) 62-157.

Henry Boulton as Solicitor General against the Scottish radical, Robert Gourlay in 1817-8. Gourlay an agronomist who had been critical of arbitrary and self-interested government in the colony had had the temerity to advocate the calling of a constitutional convention to discuss the governance and future of the colony. For his pains he was banished from the colony under the 1804 Act even though he had been acquitted of sedition earlier by juries in two separate trials.³² The judges advised the Lieutenant Governor that the fact that Gourlay had taken an oath of allegiance to George III in Great Britain did not satisfy the terms of the Act. It must have been repeated in Upper Canada. The fact that this interpretation was made by the judges *in camera* with only Robinson and Boulton present in their capacity as law officers to proffer advice apparently gave no one involved any qualms.

A second instance of Compact manipulation of the justice system occurred in the late 1820s when J B Robinson as Attorney General hounded Francis Collins, a radical Irish publisher, in several libel prosecutions.³³ In his own libel trial in 1828 for comments made in his paper, the *Canadian Freeman*, against the government of Lieutenant-Governor Peregrine Maitland, the newspaperman had pointed to the malfeasance of the law officers. One of his complaints was that they had not prosecuted young Tory bully boys who had destroyed the printing press of radical newspaper editor, William Lyon MacKenzie in Toronto in 1825. The latter had committed the sin of inveighing intemperately in his columns against the Compact and its machinations. After the 'types rioters' were found guilty on an information laid by Collins with the encouragement of a new maverick judge, Justice John Walpole Willis, the prosecution of the newspaper editor for libel collapsed except for one count on which he was acquitted. Undaunted, the Attorney General then charged Collins with libeling both him and Justice Hagerman, another Compact member, in his *Freeman* columns. When the jury returned a verdict of guilty on the libel only against Robinson, Hagerman standing in for Justice Levis Sherwood who was temporarily indisposed instructed them to bring in a general verdict covering the libel against him as well. The newspaperman was found guilty on both counts, fined and imprisoned. Ultimately, Collins was granted clemency by the Crown and his fines remitted, but only after a petition to Westminster, and serving forty-five weeks in jail.

The members of the Compact led by Robinson also played a key role in the dismissal of Justice Willis by Lieutenant Governor Peregrine Maitland. The judge was considered too well disposed to reformist sentiment in the colony and all too ready to make the administration answer for its actions, as evidenced by his encouragement of Collins during the latter's original trial for libel.³⁴ The new judge had also 'ruffled feathers' in conservative circles by challenging the

³² Barry Wright, 'The Gourlay Affair: Seditious Libel and the Sedition Act in Upper Canada, 1818-19' in Greenwood and Wright, above n 16, 487-504.

³³ Paul Romney, 'Upper Canada in the 1820s: Criminal Prosecution and the Case of Francis Collins' in Greenwood and Right, above n 16, 505-521.

³⁴ Romney, above n 31, 128-133, 141-150, Fraser, above n 11, 1xix-lxxi, and entry for Willis, 195-198.

constitutionality of the Court of King's Bench sitting with less than a full complement while Chief Justice Thomas Campbell was on leave in England.

If these stratagems were not sufficient to cast doubts on the motives of Compact 'justice,' there were further calculated instances of violence by friends and supporters of the Tory elite against radical and reform interests. One of the most infamous was the tarring and feathering of George Rolph, a reformer and local clerk of the court in Ancaster, by several men, including a magistrate, two lawyers and several other local justice officials.³⁵ These incidents that proliferated in the late 1820s and 1830s confirmed that these people were not beyond descending to the values of the mob to preserve their vision of constitutional order and social hierarchy. Here was the rule of law and the concept of ordered liberty turned upside down.

As might be anticipated, the activities of Compact members in subverting the rule of law, even in the narrow sense which they gave to it, were highly contested by moderates and radicals, especially those within the ranks of the legal profession. William Baldwin, first elected to the Legislative Assembly in 1820 and four times Treasurer of the Law Society of Upper Canada and of Irish Whig heritage was the leader of this group. Baldwin and fellow lawyers, Marshall Spring Bidwell and John Rolph, who espoused rather more liberal and democratic notions of law and government, worked tirelessly in the Legislative Assembly and in court to counter the excesses of arbitrary colonial government and justice.³⁶ In their actions and discourse the emphasis was not upon a narrow conception of the rule of law but on the importance of rights and protection within the British constitutional tradition. They pointed to the freedom of Englishmen and thus colonists to dissent and to voice their displeasure with government, and the need for judges and the law officers to respect that tradition and the courts to act impartially. In his stand Baldwin was profoundly affected by his Irish Whig roots. He contended that in Upper Canada, as in late 18th century Ireland there was a constitutional compact between monarch and people which was beyond the power of either London or the Compact to change. In this he had been influenced too by his association as a young lawyer with the Irish opposition of Weekes and Thorpe and their advocacy of a prototype of responsible government.

There are many examples of this group of lawyers challenging the Compact on constitutional and rule of law grounds. Perhaps the most evocative is the letter written by William Baldwin, then Treasurer of the Law Society, to Attorney General John Beverley Robinson, in 1828.³⁷ In this communication Baldwin

³⁵ Romney, above n 31, 109-114.

³⁶ Fraser, above n 11, lxxv-lxxiv, and entry for W W Baldwin 201-21.

³⁷ Discussed in Romney, 'Very Late Loyalist Fantasies' in W Wesley Pue and Barry Wright (eds), *Canadian Perspectives on Law and Society: Issues in Legal History* (1988) 119, 131-132, written in part in response to G Blaine Baker, "'So Elegant a Web": Providential Order and the Rule of Secular Law in Early Nineteenth Century Upper Canada' (1988) 38 *Univ. of Toronto Law Journal* 184.

reproved his colleague for not taking disciplinary action against the young lawyers and students at law, several who were in Robinson's offices, for their involvement in the so-called 'types riot' in which MacKenzie's printing press was destroyed in 1825. Baldwin who was, unlike some of his reformist colleagues, a social conservative with faith in responsible aristocratic rule and no supporter of the printed vitriol of the likes of MacKenzie reminded the Attorney General of the oath of barristers to uphold the constitution and defend the rights of fellow citizens. He went on:

Is this all idle form; I think not-and have no doubt that ... there is in the object of the statute and in the Barrister's oath not merely legal wisdom, but a religious obligation from morality and the true spirit of English liberty, well worthy the contemplation of the student who if insensitive to these impressions must be unworthy of the Calling. ... [Y]ou fell back far from your duty in abstaining from all reproof all punishment of the Rioters, for conduct not only grossly violating the Laws of the Country, but also little calculated to claim from the people that respect and confidence which the Law Society should cherish their highest honour far beyond all office all title.³⁸

Here in a nutshell is the invocation of a broader, although moderate, political notion of the rule of law that embodies liberal Whig notions of constitutionalism and its crucial role in protecting liberty. Baldwin was not arguing that there should have been no legal consequences to MacKenzie's behaviour. Indeed, he hinted that conventional legal stratagems were open to the authorities to deal with the publisher's excesses. What appalled him was that Robinson's proteges descended to the values of the gutter that they abhorred in MacKenzie's journalism, rather than leaving it to the victims of his barbs or the Attorney General to make him answer at law for his attacks.

In Upper Canada then the threat to the rule of law, even in a narrow sense, during this period was from the political and legal conservative elite who normally had the ear of the Lieutenant Governor. Opposition which was based on more liberal and democratic notions of constitutionalism and the rule of law was located both within the legal profession and the Legislative Assembly.

For a short period in the mid and late 1830s the Upper Canadian political stage was seized by the republican agenda of William Lyon MacKenzie on the one hand and the conservative reaction of the colonial government of Sir Francis Bond Head and his Compact supporters on the other.³⁹ During this period debate on constitutionalism and the rule of law within the British tradition was briefly preempted. When it reemerged, as it did after the Rebellions of 1837 and 1838, it was in the far less frenzied context of movement towards responsible self-government, inspired by Lord Durham's Report on the causes of the rebellion. In his recommendations on responsible government Durham has almost certainly been influenced by his conversations with William Warren Baldwin and his son, Robert.

³⁸ Ibid 132.

³⁹ Gerald Craig, *Upper Canada: The Formative Years, 1784-1841* (1963) 226-251.

The cause of responsible government was also assisted by a realignment in politics, in which extreme radicalism was disavowed and moderation became a pervasive value on both sides of the political spectrum.⁴⁰ The consensus on constitutional values that emerged reflected both conservative and reformist understandings and British and Upper Canadian expectations. The emphasis, as in all British colonial constitutions of the era, was on peace, order and good government. The rule of law in an era of increasing legislative initiative was to lose its potency as a principle embracing both liberty and more formal interpretations of law's limiting role on state action, and to take on more clearly the trappings of Dicey's later narrow, formal definition.⁴¹ Constitutional rights became increasingly implicated in political maneuvering between the Dominion and the provinces. To the extent that these tussles produced justiciable issues, the locus of judicial power and authority was to be not the Canadian courts, but the Judicial Committee of the Privy Council.

If the rule of law was in jeopardy in Upper Canada from colonial conservatives in elite political and legal positions influencing the Lieutenant Governor, in New South Wales it was in the main the Governors themselves who tended to ignore it. That is not to say that there was no colonial elite ready to impress its image of governance and society on the colony. The role of the exclusionists, led by John MacArthur, in seeking to secure their social and economic ends is a case in point. While they were to receive a rebuff in the wake of the Rum Rebellion of 1808, their disgrace was only short lived. The exclusionists who cultivated strong connections with conservative politicians in Britain sought to exercise their influence both with the imperial government, and at home in Australia.⁴² They were the group from whom the magistracy was selected which meant they were able to secure considerable power at a local level. Moreover, with varying degrees of success they sought to put pressure on governors to further their aims of ultimate involvement in government of the colony. Lachlan Macquarie who sought advancement for and full inclusion of emancipists in colonial society was not well disposed to or patronized by them.⁴³ They fared better with another conservative governor, Ralph Darling, who lacked the vision of Macquarie, and recoiled at the importuning of and attacks by the Emancipists and their champions.⁴⁴ The New South Wales 'Family Compact', 'a snug coterie' and 'a family party' as W C Wentworth once described them, was not as consistently influential as its Upper Canadian counterpart. This is because there were lacking the executive and legislative bodies in which they were able to locate and work their will directly on the political process. Their pressure operated at a vicarious level in that they had to secure their ends through allies in

⁴⁰ Ibid 252-275; J M S Careless, *The Union of the Canadas: The Growth of Canadian Institutions, 1841-1857* (1967).

⁴¹ AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959).

⁴² J J Eddy, *Britain and the Australian Colonies 1818-1831: The Technique of Government* (1969) 68-70.

⁴³ Manning Ward, *James Macarthur: Colonial Conservative 1798-1867* (1981) 20-33.

⁴⁴ David Neal, *The Rule of Law in a Penal Society: Law and Power in Early New South Wales* (1991) 108.

the expatriate colonial administration or their friends in London. During the period under review they had no access to professional judicial office.⁴⁵

The first legally qualified judge, Ellis Bent, who was actually effective in the role was not appointed until 1810.⁴⁶ For the next three decades all of the judicial appointments in the colony were of English or English-trained barristers. These judges differed in their attitudes to 'compact politics'. The short lived Jeffrey Bent had cordial relations with the free settler elite because of mutually conservative views and distaste for Macquarie and his policies.⁴⁷ By contrast, Chief Justice Francis Forbes, a liberal, took positions contrary to their strictly exclusionist values.⁴⁸

Tension between the Governor and the judiciary was to reach a peak in the late 1820s. This was partly attributable to the more formal introduction of English law and the establishment of a conventional superior court system on the civil side. It also reflected the differing personalities and political ideologies of the Governor, Ralph Darling, and the Chief Justice Francis Forbes. Darling was a former general with some skill in that role. Although ready to improve the efficiency of the administrative and fiscal affairs of the colony, he was endowed with a conservative's suspicion and mistrust of political and social change, quick to judge others unfavourably, especially if they disagreed with him, and was unreceptive to criticism. At the same time, as a military man he was impatient with lack of action and the niceties of process.⁴⁹ Darling also lacked sound legal advice from the law officers of the Crown that might have curbed his enthusiasm for executive initiatives of dubious legality. Francis Forbes by contrast was a liberal in political and legal terms. He was born not in England but in Bermuda.⁵⁰ Forbes had been educated and trained as barrister in London, and before going to Sydney in 1820 had been Chief Justice of Newfoundland. In that latter role he had developed a reputation as a liberal; for Governor Sir Charles Hamilton too liberal, because of the judge's belief that law should to some extent reflect and respond to local conditions and needs and in the need to reign in inferior courts.⁵¹ Forbes recognized the need to bring English law and the rule of law much more fully into the operation of justice and governance in New South Wales. At the same time, as a sophisticated observer of British imperialism, Forbes was aware of the need to balance concern with centralization and system with appreciation of the realities of the particular colony, its history and population. In his judicial role he was purposely detached, perhaps too detached from an executive that needed sound legal advice. Unlike the situation

⁴⁵ W C Wentworth, *Statistical, Historical and Political Description of the Colony of New South Wales, and its dependent Settlements in Van Diemen's Land* (1819).

⁴⁶ Richard Dore, a lawyer was appointed Judge-Advocate in 1798, but died two years later, see Kercher, *An Unruly Child: A History of Law in Australia* (1995) 47-48.

⁴⁷ Neal, above n 44, 175; C H Currey, *The Brothers Bent* (1968) 99-165.

⁴⁸ See Kercher, above n 46, 82-86.

⁴⁹ See Neal, above n 44, 108 on Darling.

⁵⁰ On Forbes, see Alex C Castles, *An Australian Legal History* (1982) 182-184.

⁵¹ See J M Bennett, *Sir Francis Forbes: First Chief Justice on New South Wales 1824-1837* (2001) 16-37.

in Upper Canada in which there was a mutuality of interest and a shared ideology between the Lieutenant Governor and his colonist judges and legal advisers, a gulf existed between the Chief Justice and Governor of New South Wales in their 'visions of legality'. If the Compact judges in the Canadian colony were Baconian in their understanding of their role, Francis Forbes has some claim to have been Cokeian in his approach to law and politics, at least when faced with a governor who tended to the arbitrary and preremptory.

A major location of conflict between Darling and Forbes was freedom of the press and the Governor's increasing testiness towards radicalism in the colony, inspired in particular by William Charles Wentworth, lawyer and newspaper man, the leading advocate of the emancipist cause.⁵² Not satisfied with the conservative reforms to the constitution and justice system of New South Wales in the late 1810s and early 1820s, he was vigorous and vocal in his campaign for both trial by jury and representative legislative organs. Only these changes, he argued, would give colonists, including emancipists, a voice in both the administration of justice and their own governance.⁵³

It was a combination of Wentworth, and his journalistic colleagues, Robert Wardell and Edward Smith Hall advocating these views while labelling Darling as a tyrant, that baited Governor Darling. The Attorney General, Saxe Bannister having unsuccessfully and ineptly sought to prosecute the newspapermen for seditious libel, an offence open to repressive use, even in England, Darling then sought to muzzle them by other means.⁵⁴ The stratagem he used was legislation, apparently approved in the abstract by the Colonial Secretary, Lord Bathurst and borrowed from Van Dieman's Land. This would have required those publishing newspapers only to do so with the governor's license granted at his discretion. This legislation was coupled with a stamp act, ostensibly designed to fund the government's printing program, but incorporating a duty likely to ruin his adversaries. Forbes had the power under the New South Wales Act of 1823 to certify that legislation emanating from the newly established Legislative Council was not repugnant to the laws of England.⁵⁵ Giving what can only be described as a broad interpretation to received constitutional doctrine and a political construction to the rule of law, the Chief Justice denied certification to the licensing law as repugnant to the freedom of the press. He went so far as to describe this freedom as a constitutional privilege. As Bruce Kercher has stated: 'that was as much a statement of political aspiration as law, given the repressive nature of English press laws'.⁵⁶ The Chief Justice was also persuaded, after initially approving it, that the stamp legislation was invalid, when he became aware of the actual motive behind it. Forbes was clearly not prepared to allow the colony to continue with a form of government which gave rein to

⁵² Ibid, 125-127; Neal, above n 44, 176-177.

⁵³ William Charles Wentworth, *A Statistical, Historical and Political Description of the Colony of New South Wales* (1819).

⁵⁴ On this sequence of events, see Kercher, above n 46, 84-85.

⁵⁵ *New South Wales Act* (1823) 4 Geo IV, c 96, s 29.

⁵⁶ Ibid, 85-86.

repressive action and in which the governor was not subject to any local authority other than his own. He did so by invoking a liberal view of constitutional rights, and of the rule of law which reflected the reformist sentiments he held, and which caused him to support trial by jury and to muse about a legislative assembly in the colony.

Darling was to get into a further notable scrape with the Chief Justice and his colleagues over his distaste for dissent before he was recalled in 1831. Here the issue was whether the undoubted executive power exercised by previous governors to assign and release convicts was now subject to the demands of the rule of law and examination by the Supreme Court. Darling in venting his spleen against one of his press critics, Edward Hall, tried another tack. By gubernatorial order he sought to deprive his detractor of one of his assigned convicts, Peter Tyler.⁵⁷ The Supreme Court had already determined that the revocation power did not give the governor unfettered discretion, because a decision had to be connected to a proper purpose, for example to grant a genuine indulgence to the convict or protect him from an abusive master. The Court, led by Forbes, concluded that Darling had abused his discretion in this instance, a decision that held even though the court's interpretation was initially rejected in the Colonial Office. Once again Forbes was to take on the mantle of an opponent of arbitrary government, elevating the rule of law in the process.

The *Hall* case is also interesting in that, although the Supreme Court fought shy of issuing a criminal information against the Sydney magistrates who had convicted Hall of harbouring a runaway convict, the judges in a decision of Justice Dowling criticized the magistrates for their decision. Dowling warned them against contempt of the superior institution.⁵⁸ Furthermore, Hall ultimately secured damages against the magistrates in a civil action before the Supreme Court. This episode illustrates another point of tension within the administration of governance and justice in the colony, one that it shared with Upper Canada, the identification of the magistracy with the conservative elite.⁵⁹ In New South Wales conservative exclusionists were able to exercise significant power by their control of local government and justice.

In the *Hall* case and other decisions of the Forbes court judicial review of executive and administrative action took firm root in Australia.

With the grant of responsible government constitutional argument and the protection of rights shifted more clearly into the legislative sphere in Australia as it had in Canada. Consequently, the rule of law became more clearly a court-based and legal doctrine, despite the idiosyncratic attempts of Justice Boothby in South Australia to give the judges primacy over colonial legislation.⁶⁰ However, it may

⁵⁷ Neal, above n 44, 128-130.

⁵⁸ Ibid 130.

⁵⁹ On the role and associations of the magistracy, see Neal, above n 44, 115-140.

⁶⁰ Alex C Castles and Michael C Harris, *Lawyers and Wayward Whigs: Government and Law in South Australia 1836-1986* (1987) 126-134.

well be that disputes between upper and lower houses within several Australian colonies which from time to time produced legislative stalemate helped preserve a more clearly political role for the courts in this country than was true in Canada at the same time.⁶¹

What are we to make of the rather different treatment of the rule of law in these two colonies during the same time period especially in reference to executive and judicial responses to political dissent? Undoubtedly, the imperial vision for the settler colony of Upper Canada contained the potential for a strong identification of the executive and judiciary, while the distinctly hazy but authoritarian design for the convict colony of New South Wales had within it the promise of future tension between the executive and judiciary, should it move towards a more conventional constitutional status. Furthermore, there was inherent within the social hierarchy of the Canadian colony an indigenous elite of impeccable Loyalist heritage whose experiences or those of their immediate ancestors inclined them to a highly conservative and often reactionary view of how the colony should be run. This group included some of the lawyers and judges who achieved power and status in the decades after the War of 1812. By contrast in New South Wales the judges were necessarily drawn from England during this period. Although, those men varied in their political and social philosophies and their attitudes towards colonial conditions, it was possible and perhaps inevitable that some judges would see the value of independence and detachment in the judicial role, especially after 1820 when there was a conscious attempt to introduce more clearly the substance and values of English law to the colony. That having been said one should not underestimate the role of personalities in these two histories. Of the administration of justice in Upper Canada in the 1820s Robert Fraser has aptly observed:

[at] no other point in this province's history has the judicial system been so embattled, so mired in controversy, so liable to the charges of partiality and maladministration, and so lacking in broad public legitimacy.⁶²

Both the law officers of the Crown, in particular John Beverley Robinson, and judges such as Christopher Hagerman, acted with scant respect, even disdain, for the rule of law, even in the narrow sense in which they understood it. In this they were directed clearly by their view that they and only they and those like them were entitled to rule and direct the destiny of the colony. Their attitudes were firmly rooted in a narrow and increasingly outdated set of constitutional values. The ultimate demise of these views, although challenged by others in the legal profession, such as William Warren Baldwin, as we have seen, required both a local realignment of political thought and political intervention by the imperial government, but only after the excesses of both the Compact philosophy and its radical nemesis had been exposed and discredited in the wake of the Rebellions.

⁶¹ Paul Finn, *Law and Government in Colonial Australia* (1987); Alastair Davidson, *The Invisible State: The Formation of the Australian State 1788-1901* (1991).

⁶² Fraser, above n 11, xxv.

By contrast with the partiality of the representatives of Compact justice in Upper Canada Chief Justice Forbes in particular stands out as one genuinely committed to impartiality in the judicial role and as a sincere advocate of the rule of law, at times in a liberal sense. My sense is that Forbes was one of those people of independent mind who, despite the calumny of detractors, such as John MacArthur, eschewed strong ties with particular interests in the colony and was by background, inclination and experience a shrewd observer of British imperialism and colonial development. He was one who could relate the tradition of which he was unmistakably a part to both the present and future needs of the colonies in which he served. In common with other mortals Forbes was not infallible. I have hinted that he may be criticized for taking an excessively disinterested position in relation to the need of Darling for sound and considered legal advice. Moreover, as Bruce Kercher had observed, he could be exasperatingly illiberal in certain contexts, for example legislation relating to bush rangers, and indecisive in others, as he seems to have been in relation to Aboriginal rights.⁶³ He *was*, however, guided by a strong belief that '[t]he judicial office ...[bowed] to no other power but the supremacy of law'.⁶⁴ He does stand out among other colonial judges of this era as being singularly adept in balancing a respect for English legal tradition with a recognition that the law needed to accommodate colonial constitutional change. The colony of New South Wales and by extension Australia was fortunate to have had among its judicial pioneers, Francis Forbes.

⁶³ Kercher, above n 46, 105-107 and Bruce Kercher, 'The Recognition of Aboriginal Status and Laws in the Supreme Court of New South Wales under Forbes CJ, 1824-1836' in A R Buck, John McLaren and Nancy Wright, *Land and Freedom: Law, Property Rights and the British Diaspora* (2001) 83-102.

⁶⁴ Quoted in Foreword by Chief Justice A M Gleeson, Chief Justice of the High Court of Australia in Bennett, above n 51.