

# THE PROVINCE OF AN INDEPENDENT LEGAL PROFESSION<sup>#</sup>

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Our language, our law and our constitutional system originated in England. England and Australia are, therefore, bound together by ties that will endure notwithstanding the changes that the future will bring. The influence of England's legal tradition upon us is, I think, as important as the influence of the English language. For it is the law that has given rise to assumptions that infuse not only the whole of civil life as we know. For this reason the legal and constitutional history of England remains relevant to any understanding of our political and legal institutions and the ideas which underpin them. It is, indeed, dangerous to contemplate changes to fundamental institutions without first considering the reasons, revealed by history, for their present form. For this reason, Sir Edmund Burke said:

“It is with infinite caution, that any man ought to adventure upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society, or on building it up again, without having models and patterns of approved utility before his eyes.”<sup>1</sup>

Sir Matthew Hale said something similar:

“It is a reason for me to prefer a law by which a kingdom hath been happily governed four or five hundred years than to adventure the happiness and peace of a kingdom upon some new theory of my own though I am better acquainted with the reasonableness of my own theory than with that law. Again I have reason to assure myself that long experience makes more discoveries touching conveniences or inconveniences of laws than is possible for the wisest counsel of men at first to foresee. And that those amendments and supplements that through the various experiences of wise and knowing men have been applied to any law must needs be better suited to the convenience of laws, than the best invention of the most pregnant wits not aided by such a series and tract of experience.”<sup>2</sup>

It is felicitous that this week marks the 800<sup>th</sup> anniversary of the signing of Magna Carta. It was presented to King John on 15 June 1215; it was sealed on 19 June 1215.

Chapter 39 provided as follows:

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<sup>1</sup> *Reflections on the French Revolution* at 90.

<sup>2</sup> Holdsworth, *History of English Law* Vol V at 504.

“No free man shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers and by the law of the land.”

It has been observed<sup>3</sup> that the expression “in accordance with the law of the land” might originally have been intended to have a narrow and technical meaning. However, by the 14<sup>th</sup> Century it was read as equivalent to “by due process of law”.

For these propositions to have been included in Magna Carta implies that they had long been considered, if not accepted, before that document came into existence. As Lord Bingham has pointed out, Magna Carta was not a peace accord botched up to meet a sudden crisis and which was liable to unravel. It had a quality of inherent strength because it expressed the existing will of the people, or at any rate the articulate representatives of the people.<sup>4</sup>

So, by 1215 it was already assumed that no prejudice ought be suffered by any person except by the enforcement of a law of general application. This was a rejection of arbitrary power. Of course, it was to take many more centuries until such a result was truly realised. It is the purpose of this paper to consider the contribution of barristers towards that end. I do not include solicitors only because the history of the development of that branch of the profession is quite separate from that of the Bar. And, for reasons that are well understood, although is no longer relevant or correct to speak of senior and inferior branches of the profession, the principles which underlie the practice of each are different.

The birth of an identifiable Bar in England can also be traced to Magna Carta.<sup>5</sup>

Because all departments of government were centred in the King’s household, the legal tribunals which dispensed the King’s justice followed wherever the King went<sup>6</sup> so, as the King moved around his kingdom, perhaps from one favourite hunting ground to another, crowds of supplicants and litigants followed him slavishly. Law suits in which the Crown had a particular interest were known as royal pleas or “pleas of the Crown”.<sup>7</sup> Those in which the Crown had no interest were ordinary or “common pleas”.<sup>8</sup> Common pleas did not require to

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<sup>3</sup> *Magna Carta, A Commentary on the Great Charter of King John*, McKechnie, 2<sup>nd</sup> Edition 1914, at 379.

<sup>4</sup> *The Rule of Law*, Bingham at 12; McKechnie, *op. cit.* 111.

<sup>5</sup> It might be thought that Chapter 45, which obliged King John to “appoint as justices, constables, sheriffs or bailiffs only such as know the law of the realm and mean to observe it well” was the foundation for a judiciary of technically learned professionals. But that would be a mistake. The clause was directed at particular French cronies of the King and, after he died, the clause did not survive to make it into the reformulated Charter of 11216. It is missing from the third edition of Charter sealed in 1225 which is its final form.

<sup>6</sup> McKechnie at 262.

<sup>7</sup> *ibid.* at 263.

<sup>8</sup> *Ibid.*

be determined in the royal presence, unlike royal pleas. So it was possible to appoint a bench of judges to sit in a single place to hear such matters irrespective where the King might be. This would obviate the great expense of litigants travelling the country and engaging lawyers, if necessary, at such places as the King choose to stop.

For this reason Chapter 17 of Magna Carta provided:

“Common pleas shall not follow our Court, but shall be held in some fixed place.”

This provision had two large unforeseen consequences. First, it physically divided the Court of Common Pleas, which would evolve into the Courts of Westminster, from the Royal Court of St James and from the King’s direct influence. Second, and most importantly for the purposes of the present discussion, Chapter 17 concentrated the common lawyers in one location and thereby formed them into an organised body. They acquired properties in which to house themselves. These were the Inns of Court.<sup>9</sup>

By the reign of Queen Elizabeth (1558-1603) it was possible for Lord Coke to describe the Inner temple, Greys Inn, Lincolns Inn and the Middle Temple as follows:

“four famous and renowned Colleges or houses of Court ... all these ... [are] not farre distant one from another, and all together doe make the most famous Universitie for profession of law onely, or of any one humane science, that is in the world, an advance of itself above all others. In which houses of Court and Chancery the readings and other exercises of the lawes therein continually used are most excellent, and behooveful for attaining to the knowledge of these lawes.”<sup>10</sup>

The giving of instruction assumes a formally recorded body of knowledge. The written legal record began at least as early as 1284 in the form of reports of cases.<sup>11</sup> These Year Books chiefly contained cases heard in the Court of Common Pleas.<sup>12</sup>

It was, of course, the barristers who made the notes of cases which they themselves would then use in subsequent matters. And the reports of decided cases would, by a natural process of reasoning, give rise to an identification of common principles of law appearing in them. By the time of Queen Elizabeth, Francis Bacon was able to give advice to reporters concerning the form which a report should assume:

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<sup>9</sup> *Yale Lectures on English and American Laws in Jurisprudence* (1894), Yale University Law Journal 34 at 43; The Inns appear to have been established soon after Magna Carta but the available records of the oldest of these Inns, Lincolns Inn, go back only to 1423; *Ibid* at 44

<sup>10</sup> Dillon, *op. cit.* at 50.

<sup>11</sup> *A History of English Law*, Holdsworth, Vol II at 526.

<sup>12</sup> *Ibid* at 537.

“Let this be the method of taking down judgments and committing them to writing. Record the cases precisely, the judgments themselves word for word; add the reasons which the judges allege for their judgments: do not mix up the authority of cases brought forward as examples with the principal case; and omit the perorations of counsel, unless they contain something very remarkable.”<sup>13</sup>

However, from a very early stage it was accepted that a considered decision, recorded in the Year Book, could be regarded as laying down a general rule for the future. In 1304, counsel in argument was able to submit:

“The judgment to be given by you will be hereafter an authority in every *quare non admisit* in England.”

Similarly, in 1310, BerefordCJ said:

“By decision on this avowry we shall make a law throughout all the land.”<sup>14</sup>

Of course, just as at the present day, not every case is reported. An editor somewhere makes a decision whether a case will be included in the law reports and, as a consequence, whether a case will ever be available as an authority. No judge can hope to have any significant effect upon the development of the law if his or her judgments are ignored by present and future members of the bench. When Lord Campbell was a reporter of *nisi prius* decisions during the time of Lord Ellenborough’s tenure as Chief Justice, it is said:

“Campbell ... exercised an absolute discretion as to what decisions he reported and what he suppressed, and sternly rejected any which appeared to him inconsistent with former rulings or recognised principles. He jocularly took credit for helping to establish the Chief Justice’s reputation as a lawyer, and he used to boast that he had, in one of his drawers, material for an additional volume in the shape of ‘bad Ellenborough law’.”<sup>15</sup>

Another feature of the centralisation of the English profession around the Inns of Court was an intimacy between bench and Bar. The members of the bench were appointed from the ranks of serjeants at law, at that time the highest rank in the legal profession. They considered themselves as belonging to an order and addressed each other as “brother”. Appointment to the bench did not mean any cessation of membership of the order; on the contrary, because it was regarded as essential that a member of the bench be appointed from this order, it became common in later days to appoint a barrister as a serjeant at law merely as a precursor to an

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<sup>13</sup> Quoted in *Some lessons from our legal history*, Holdsworth, at 13.

<sup>14</sup> Cited in *History of English Law*, Holdsworth, Vol II at 541.

<sup>15</sup> *Some lessons from our legal history*, *op. cit.*, at 24-25, footnote 49.

immediate appointment to the bench. It is why until recent times judges commonly addressed each other as “brother”.

The senior barristers, the serjeants at law and the judges constituted the governors of each of the Inns of Court, the so called “benchers”. As a consequence of membership of an Inn, a barrister learnt the craft of advocacy in company with senior practitioners, on terms of some intimacy with judges and inevitably was imbued with the culture of the profession of barrister.

The opportunity for barristers to influence the development of the law was not restricted to writing notes of cases and breaking bread with judges. They gradually gained control over the court process itself. It happened in this way.

Until the early 1700s it was unusual for counsel to appear in criminal trials other than political trials for treason and other State Trials. While on the prosecution side it was a matter of choice whether the Crown did or did not brief counsel in an ordinary criminal case, defendants were barred from using lawyers. As a consequence, there were few rules of evidence and judges routinely examined witnesses and defendants.<sup>16</sup>

Trials were quick. Almost no trial took more than 20 minutes.<sup>17</sup> In the early 18<sup>th</sup> century, a session conducted at the Old Bailey lasted several days and a single jury of 12 was impanelled for the whole session. This jury would process between 50 and 100 cases of felony and serious misdemeanours.<sup>18</sup> Most of the jurors who sat at any session were veterans of other sessions.<sup>19</sup> The absence of challenges to jurors, of opening or closing statements, of examination and cross examination and of any applicable evidentiary or procedural rules made for swift justice. But it must not be thought that those who participated officially in these trials believed that the defendant was being treated unfairly. It was believed that the accused was more expert about the facts than any lawyer and needed no intermediary to be able to tell a truthful story:

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<sup>16</sup> *The rise of the contentious spirit: adversary of procedure in 18<sup>th</sup> century England*, Stephan Landsman (1990) 75 Cornell Law Review 498 at 498-499.

<sup>17</sup> *A history of the English Assizes 1558-1714*, JS Cockburn, at 109.

<sup>18</sup> *The criminal trial before the lawyers*, John H Langbein (1978) 45 University of Chicago Law Review 263 at 274.

<sup>19</sup> *Ibid* at 276.

“... criminals of that sort, should not have any assistance in matters of fact, but defend upon plain truth, which they know best, without any dilatories, arts or evasions”.<sup>20</sup>

William Hawkins, in his famous *Pleas of the Crown*, published in 1721, said that any layman:

“... may as properly speak to a matter of fact, as if he were the best lawyer; and that it requires no manner of skill to make a plain and honest offence, which in cases of this kind, is always the best ...

[since] it is the duty of the court to be indifferent between the King and the prisoner, and to see that the indictment be good in law, and the proceedings regular, and the evidence legal, and such as fully proves the point in issue ... [the innocent are better off] having the court their only counsel.”<sup>21</sup>

This process was in contrast with that which applied in State trials. Although for a long time counsel was denied even in such cases, it became common for such an accused to consult counsel before the trial in order to obtain advice about points that might be taken. Even in these cases hostility was shown to defendants who obtained such assistance. In the trial of Steven College<sup>22</sup> the accused’s notes, which he had prepared for his use at the trial, were taken from him and examined by prosecution counsel who was thus enabled to ensure that witnesses whom College might have contradicted or cross examined were not called. However, in the decades culminating in the glorious revolution of 1688 it became widely believed that innocent men had been condemned to death as traitors.<sup>23</sup> As one contemporary writer put it the judges “generally have betrayed their poor client, to please, as they apprehended, their better client, the King ...”.<sup>24</sup>

The *Treason Act* 1696 provided for a right to counsel to an accused in treason cases but there was still no right to counsel in ordinary criminal cases. However, counsel could be permitted to appear in the exercise of the court’s discretions and this became more common in the early 1700s. They would examine or cross examine for the defence; there was still no right to address a jury at the end of the case. Of course, the ability of a judge to conduct a trial without the aid of counsel implies that a judge undertook an interventionist role and that the occasion for consideration of points of law were very few. Counsel’s limited role was summarised in a case in 1777 as follows:

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<sup>20</sup> Langbein, *op. cit.* at 308.

<sup>21</sup> Hawkins, *Pleas of the Crown*, Vol II at 400.

<sup>22</sup> (1681) 8 StTr 549 at 585.

<sup>23</sup> Langbein, *op. cit.* at 309.

<sup>24</sup> *Ibid* at 309.

“Your counsel are not at liberty to state any matter of fact; they are permitted to examine your witnesses; and they are here to speak to any matters of law that may arise; but if your defence arises out of matter of fact, you must yourself state it to me and the jury.”<sup>25</sup>

However, one of the inevitable consequences of permitting counsel to “speak to any matters of law that may arise” is that such matters of law would then arise. In a number of cases in the 1730s evidentiary points were taken which led to acquittals.<sup>26</sup>

Thus, in the prosecution of a woman for forgery of a bill of exchange, the prosecutor sought to lead evidence of a second forgery almost identical to the one charged. The following exchange occurred:

“Prisoner’s counsel: I submit to your Lordships, whether that question can be asked.

Court: Why do you ask the question, Mr Howarth?

Prosecuting counsel: She was paid by a £50 bank bill, which I shall produce to you.

Court: We have considered of it, and it is not evidence, the case must rest here, upon this being a forged bill; she may have issued other forged bills, and may not have issued this.”<sup>27</sup>

This was, of course, an objection to similar fact evidence being led.

Over the course of the 18<sup>th</sup> Century, rules of evidence conceived by barristers became part of an advocate’s weaponry. A leading barrister of the day asserted it as an inviolable principle that:

“The King cannot break down, or infringe, or invade any one of the rules of evidence; he has no prerogative to say that innocence shall not be protected.”

It can therefore be said that barristers came to harness the rules of evidence to control the trial itself. In that way they created the law of evidence.

It common to think that, upon taking an objection to evidence, it is counsel who submits to a judge’s ruling. It may be more accurate to take the view that it is counsel, by taking an objection, who requires the court to submit to the operation of the law and thereby controls the trial. Certainly it is the natural perspective of many criminal barristers.

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<sup>25</sup> Landsman, *op. cit.* at 534, footnote 183.

<sup>26</sup> Landsman, *op. cit.* at 537-538.

<sup>27</sup> Landsman, *op. cit.* at 559.

This intrusion of barristers into criminal cases, albeit at the discretion of the judge, gained strength over the course of the 18<sup>th</sup> Century so that by the middle of that century a barrister who was given leave to appear could insist upon putting his instructions over judicial objection. In a prosecution of a man for stealing lead from buried coffins, defence counsel suggested during cross examination that high ranking church officials might have authorised the defendant's scheme. The judge rebuked him for putting matters that impugned the character and reputation of a person not present in court, to which the answer was:

“I must follow my instructions and will not go from them.”<sup>28</sup>

This is an assertion of a right to cross examine which the judge himself could not limit. By the late 1700s it had become common to have counsel appear in criminal matters and finally, in 1836, a statute was passed which provided for a right to counsel in all criminal cases.<sup>29</sup>

Barristers did not only influence the development of the common law and court procedure; they also influenced the content of important statutes. From the earliest times lawyers were powerful and influential members of the House of Commons. Sir William Holdsworth has demonstrated in detail the effect which the common lawyers had upon the form which the Statute of Uses finally took.<sup>30</sup> He has also pointed out that the Statute of Frauds was the creation of Lord Nottingham and Chief Justice North.<sup>31</sup> The involvement of practising lawyers as law reform commissioners began in England in the 19<sup>th</sup> Century and continues to this day in Australia.

It is fair to observe that, although anybody might conceive a good public policy, because lawyers spend their working lives considering and applying statutes, they are likely to have a better idea than anyone else concerning the form which legislation ought to take so as to make it effective in addressing its aims. Indeed, they may for that reason be the first to apprehend a need for a new statute.

A consideration of the history of the involvement of barristers thus far demonstrates, at least to me, that the character of our courts, the ways in which they operate and the laws which they apply have all been the product of incremental influence of barristers working as advisers, as advocates, as judges and as law reformers.

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<sup>28</sup> Landsman, *op. cit.* at 540.

<sup>29</sup> *Defence of Felony Act* 1836.

<sup>30</sup> *History of English Law*, Vol IV at 453-461.

<sup>31</sup> Holdsworth, Some lessons from our legal history, *op. cit.* at 48.

However, while their influence in these respects has been very wide, it runs much more deeply.

As I observed at the beginning, the *Australian Constitution* and the form of government we employ in the Commonwealth, the States and the Territories all arise directly from the form of British government in 1900. That form was the product of many influences but not least of these was the influence of a number of barristers.

So, it is a fundamental principle of our Constitution that the executive has no right to levy money from citizens in the absence of a statute of the Parliament authorising it to do so. This guarantee against the exercise of arbitrary executive power was hard won during the course of the 17<sup>th</sup> Century. Charles I had adopted the practice of compelling persons to lend him money without the benefit of parliamentary approval. Upon non-payment those who refused to pay were imprisoned. A constitutional crisis ensued when Parliament sought to resist the King's actions. Parliament passed the Petition of Right on 7 June 1628. That document contained restrictions upon the King including a prohibition against non-Parliamentary taxation. The King agreed to the Petition of Right but immediately breached its terms. He prorogued Parliament and levied a tax called "ship money". Like scabrous politicians to this day he sought to justify the tax on the pretext of the danger to commerce from terrorists, that is to say pirates, as well as upon the grounds of vague military threats from religious opponents in Europe.

John Hampden was a graduate of Magdalen College, Oxford and was a barrister, a member of the Inner Temple. On principle he refused to pay the tax and was prosecuted. He lost the case, nine judges to three. But he never paid the money and by taking on the King he became the most celebrated man in England. His public stand meant that others refused to pay the tax so that only 20% of the money demanded was ever raised and the Act was a failure. It was repealed three years later. He thereby helped to establish the principle that there can be no tax without parliamentary approval.

Another barrister and a contemporary of Hampden's was John Pym. He too was educated at Oxford and went on to join the Middle Temple. He was one of the chief drafters of the Grand Remonstrance, a list of grievances drawn by parliament and presented to Charles I in 1641. He was the effective leader of the opposition to the King in parliament and was the proponent of that document. He led parliament in its abolition of the Court of Star Chamber by the enactment of the *Habeas Corpus Act* 1640. Lord Bingham, in his book *The Rule of Law*,

regards *Habeas Corpus* as one of the milestones leading to the rule of law as we understand it today.

It is difficult to imagine that the battles undertaken by Hampton and Pym, involving matters of political principle which are to be considered in the context of an exercise of political power by legislation, could have been championed by other than lawyers. Nor do I think that it is a coincidence that four of the strongest Australian Prime Ministers of modern times were lawyers, Menzies, Whitlam, Hawke and Howard. Moreover, as periodicals of today show, the place of lawyers in the vanguard of battles for freedom continues to the present day.<sup>32</sup>

It is an accepted axiom that there can be no liberal democracy in the absence of the rule of law and that the rule of law, as it is understood in such a polity, requires the existence of independent judges.

The *Bill of Rights* 1689 established some fundamental constitutional principles. In particular, it firmly established the authority and independence of parliament. However, it lacked an important provision. Although the committee which drafted the Bill had included a provision safeguarding the tenure of judges and the protection of their salaries, that provision was dropped at the time. Twelve years later, when the *Act of Settlement* was passed in 1701, to provide for the Protestants succession, the provision was included and passed through both Houses without a division.<sup>33</sup> When put together with the established principle that judges are immune from civil suit or criminal prosecution by acts done in a judicial capacity, the judges thereupon became truly independent.

Sir William Holdsworth has observed that there was a change for the better in the quality of the bench after the Revolution when the influence of the executive upon judges' tenure came to an end.<sup>34</sup>

However, security of tenure, while fundamentally important, is in a sense mere machinery. Its essence is to secure against interference by the executive or other appointing authority.<sup>35</sup>

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<sup>32</sup> 800 members of the Hong Kong Law Society met in August 2014 and passed a resolution of no confidence in their own President on account of his statements that Hong Kong judges should be "patriotic" and his open support for the Communist Party of China (Reuters, 15 August, 2014). In Iran, the government which took power in 1979 moved swiftly to close down the Bar Association and to arrest and imprison the majority of the members of the Association's Board of Directors (*Iranian Bar Association, Struggle for Independence*, Iran Human Rights Association Centre, 2012);

<sup>33</sup> *The Rule of Law*, Bingham at 25.

<sup>34</sup> *Some lessons from our legal history, op. cit.* at 25.

<sup>35</sup> *Valente v The Queen* (1985) 2 SCR 673 at 698.

Such machinery safeguards do not provide a guarantee against lack of integrity. For example, it has often been argued that the prospect of judicial promotion within a court or to a higher court gives rise to the possibility of a loss of integrity.<sup>36</sup> Such a prospect cannot be guarded against by any rationally based machinery. Indeed, what ultimately stands between any judge and the temptation of executive preferment is not an institutional safeguard but personal character.<sup>37</sup>

Integrity is innate; however, the behaviour required of professionals of integrity within the technical constraints of a profession must be learned by experience and that experience must be gained before appointment to the bench.

I wish to make a connection between certain features of the Bar as a profession, which distinguish it from other professions, and the inculcation of the necessary attitude required in a truly independent judge.

The necessary form of independence under discussion is an individual attribute of a barrister and not one that belongs to the Bar as a body. That independence requires a barrister to be independent from the improper influence of clients, of third parties and even, on occasion, of judges themselves. The assertion of such independence may risk to reputation and to income.

The *Australian Barristers' Rules* contain provisions, familiar to all of us, which articulate aspects of a barrister's duty to the court. That duty may, on occasions, conflict with the interests of the client but will nevertheless prevail. None of these rules generally raise any practical difficulties in application nor, indeed, any real temptation to disobey.

More subtle difficulties can arise when the barrister's opinion about how to conduct the case conflicts with that of the client. As long ago as 1876 an English judge said:

“The nature of the advocate's office makes it clear that in the performance of his duty he must be entirely independent, and act according to his own discretion and judgment in the conduct of the cause for his client. His legal right is to conduct the case without any regard to the wishes of his client, so long as his mandate is unrecalled ...”<sup>38</sup>

The *Australian Barristers' Rules* provide to a similar effect:

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<sup>36</sup> See *Forge v ASIC* (2006) 228 CLR 45 at [44] per Gleeson CJ.

<sup>37</sup> *Ibid* per Gleeson CJ at [44].

<sup>38</sup> *Batchelor v Pattison & Mackersy* (1876) 3 R 914 at 918.

- “41 A barrister must not act as the mere mouthpiece of the client or of the instructing solicitor and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client’s and the instructing solicitor’s wishes were practicable.
42. A barrister will not have breached the barrister’s duty to the client, and will not have failed to give appropriate consideration to the client’s or the instructing solicitor’s wishes, simply by choosing, contrary to those wishes, to exercise the forensic judgments called for during the case so as to:
- (a) confine any hearing to those issues which the barrister believes to be the real issue;
  - (b) present the client’s case as quickly and simply as may be consistent with its robust advancement; or
  - (c) inform the court of any persuasive authority against the client’s case.”

What these rules and the principle which underlies them attest is that the loyalty purchased by a client is a limited loyalty. The lawyer’s technical skills are made available for reward; the lawyer’s personal and political convictions are not available.<sup>39</sup> This raises the question why the lawyer’s total commitment is not engaged. I think that the answer is to be found in the nature of a profession strictly so called.

It must not be forgotten that the primary meaning of the word profession, or at least its original meaning, was, according to the Oxford English Dictionary “the declaration, promise or vow made by one entering a religious order; the action of declaring, acknowledging, or avowing a belief”. In describing a calling it was, at first, applied only to divinity, law and medicine. Each of these is a vocation. They imply the acceptance of a code of conduct aimed at serving the public good.

The great American jurist, Dean Pound, has said:

“The member of a profession does not regard himself as in competition with his professional brethren. He is not bartering his services as is the artisan nor exchanging the products of his skill and learning as the farmer sells wheat or corn ... the best service of the professional man is often rendered for no equivalent or for a trifling equivalent and it is his pride to do what he does in a way worthy of his profession even if done with no expectation of reward. This spirit of public service in which the profession of law is and ought to be exercised is a prerequisite of sound administration of justice according to law.”<sup>40</sup>

Why is there said to be a “spirit of public service” in what is, in every other respect, a private business carried on for profit?

<sup>39</sup> *The independence of lawyers*, Robert W Gordon, (1988) 68 Boston University Law Review 1 at 13.

<sup>40</sup> *Redefining the “public” profession*, Debra Lyn Bassett (2005) 36 Rutgers Law Journal 721 at 750.

The answer lies, I think, in the peculiar role in our system of government of the Courts. It is axiomatic that the Courts exist to vindicate the rule of law. As every practitioner knows, the court process would be strained beyond endurance but for the assistance given to judges by lawyers. When a court's jurisdiction is engaged by a litigant in person, the most efficient dispatch of the case at hand immediately becomes impossible. Moreover, even the just determination of the case at hand becomes much more difficult. Consequently, the upholding of the rule of law would be defeated if there were no lawyers representing clients. Moreover, that aim would also be defeated if lawyers were free to conduct cases in whatever manner might suit the client's peculiar interests or even dishonestly.

Indeed, so great is the need for there to be advocates if the courts are to function that, except in defined and limited circumstances, a barrister cannot refuse a brief.

The origin of the "cab rank rule", as it has come to be known, is lost in history. But its finest exposition was by the great barrister, perhaps the greatest barrister ever, Thomas Erskine in his speech in defence of Tom Paine, on a charge of seditious libel. Paine's book, "*The Rights of Man*", was regarded as a work which endangered public order at a time when it was feared, for seemingly good reason, that the violence of the French Revolution might spread to England. Erskine was heavily criticised in the newspapers for even taking the case. He defended himself in lapidary terms:

"I will forever, at all hazards, assert the dignity, independence, and integrity of the English Bar; without which impartial justice, the most valuable part of the English Constitution, can have no existence. From the moment that any advocate can be permitted to say, that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end. If the advocate refuses to defend, from what he may think of the charge or of the defence, he assumes the character of the judge; nay, he assumes it before the hour of judgment; and in proportion to his rank and reputation, puts the heavy influence of, perhaps, a mistaken opinion into the scale against the accused, in whose favour the benevolent principle of English law makes all presumptions, and which commands the very judge to be his counsel."

The subject matter of a barrister's practice is constituted by laws enforceable by a sovereign authority. A lawyer is concerned with legal rights and obligations. These rights and obligations are those which the State, by its coercive powers, will enforce. Whether in the field of civil law, public law or criminal law, the end point, if a litigant is foolish enough to go there, may involve invoking the assistance of the State to apply a physical sanction. That much is obvious in the field of criminal law. However, even in the fields of civil or public

law, an obstinate disregard of court process can ultimately lead to imprisonment for contempt. Therefore, a refusal by a barrister to act for a person may involve exposing that person to the risk of an unjustly applied sanction. It is unacceptable, in a constitutional democracy, for any person to be exposed to such a peril without protection against the possibility of an unjust outcome. Indeed, the judges themselves, who wield the ultimate power, deserve and require assistance to protect litigants against the possibility of injustice.

A corollary of a public duty to act for all comers is the requirement, adverted to earlier, that a barrister must never be the mere mouthpiece of the client. This requires a barrister to be fair, honest and candid to the court and to the opponent. While the duty is often expressed as one owed to the court, at the most fundamental level it is a rule of conduct that exists to support the rule of law. For such reasons, it is no mere matter of etiquette that a barrister in court never states “I think that” but says “I submit that”. The submission advances the client’s case; the personal opinion of the barrister is irrelevant. It is also harmful to the extent that it implies identification of the barrister with the client. Rule 43 of the *Barristers’ Rules* enshrines this proposition. This rule against personal identification with the client’s cause is also a protection for the independence of the barrister and a guarantee that the public perception of the barrister’s conduct will recognise that what a barrister does so powerfully, and sometimes so hurtfully, is done out of duty and not personal interest. As Sir Robert Megarry put it:

“When appearance in court for a client is a professional duty and not as of choice, any identification of counsel with his client or his client’s interest lacks reality. The Bar is virtually free from any political or social reproaches arising from performing its forensic duty ... the dissociation between the man and the advocate is nearly complete even in the public eye.”<sup>41</sup>

We speak of the barrister’s duty to the court; however, I think we really mean the barrister’s duty to the rule of law. This can be seen from the occasions when it will be the barrister’s duty to challenge the court itself

Late in the 18<sup>th</sup> century, a cleric, the Dean of St Asaph, had caused to be published a pamphlet advocating general adult franchise. He was charged with seditious libel. Erskine was briefed to defend him. At the time, the accepted legal doctrine was that the question for a jury in such a case was solely with the issue whether the defendant had published the material and whether the meanings attributed to the words by the prosecutor had been established. Whether the innuendos were libellous and whether the defendant acted in good

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<sup>41</sup> *Lawyers and Litigants in England*, Sir Robert Megarry, Hamlin Lecture 1962 at 33.

faith were matters of law for the judge. This legal proposition was the subject of great controversy. As one pamphleteer put it:

“Why force 12 honest men in palpable violation of their oaths to pronounce their fellow subject a guilty man when almost at the same moment you forbid their inquiry into the only circumstance which in the eye of the law constitutes guilt – malignity or innocence of his intentions ...”<sup>42</sup>

In short, under the existing law the jury was bound to find the Dean of St Asaph guilty. Erskine’s only chance of acquittal was to induce them to make a finding inconsistent with the law.

His closing submission to the jury raised the rarely discussed principle of jury nullification. Jury nullification occurs when a jury acquits a defendant even though the members of the jury unanimously believe that the accused is guilty of the charges. This can occur when the members of the jury, as representatives of the people, disapprove of the law which the accused has been charged with contravening or believes that the accused should not have been charged in that particular case. Needless to say, judges rarely inform juries that they have this power. But it is a safeguard against tyrannical laws. A legislature may pass whatever laws it thinks fit; if juries refuse to convict then the law is set at naught.

Erskine said:

“Crimes consist wholly in intention. Of that which passes in the breast of an Englishman as the motives of his actions, none but an English jury shall judge ... the administration of criminal justice in the hands of the people is the basis of freedom. While that remains there can be no tyranny, because the people will not execute tyrannical laws on themselves. Whenever it is lost, liberty must fall along with it.”<sup>43</sup>

Justice Buller’s charge to the jury was firmly to the opposite effect. He said:

“But upon his evidence it stands thus; he afterwards published [the pamphlet] in English ... there is no contradiction as to the publication: and if you are satisfied of this in point of fact, it is my duty to tell you in point of law you are bound to find the defendant guilty.”

The jury went away to consider its verdict and returned in only half an hour. What followed is recorded in the transcript:

“Associate: Gentlemen, do you find the defendant guilty or not guilty?”

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<sup>42</sup> *For the Defence*, L P Stryker, 1947, Staples Press at 121-122.

<sup>43</sup> *Speeches of Erskine*, Volume 1, 1810, at 198, 199, 200.

Foreman: Guilty of publishing only.

Mr Erskine: You find him guilty of publishing only?

A juror: Guilty only of publishing.

Mr Justice Buller: I believe that is a verdict not quite correct ... if you find him guilty of publishing, you must not say the word *only*.

Mr Erskine: By that they mean to find that there was no sedition.

A juror: We find him guilty of publishing. We do not find anything else.

Mr Erskine: I beg your Lordship's pardon with great submission. I am sure I mean nothing that is irregular. I understand they say, we only find him guilty of publishing.

A juror: Certainly, that is all we do find.

...

Mr Erskine: Gentlemen, I desire to know whether you mean the word *only* to stand in your verdict?

One of the jury: Certainly.

Another juror: Certainly.

Mr Justice Buller: Gentlemen, if you add the word *only*, it will be negating the innuendos ...

...

Mr Erskine: My Lord, I desire the verdict may be recorded. I desire your Lordship sitting here as Judge to record the verdict as given by the jury. If the jury depart from the word *only* they alter their verdict.

Mr Justice Buller: I will take the verdict as they mean to give it; it shall not be altered. Gentlemen, if I understand you right, your verdict is this, you mean to say guilty of publishing this libel?

A juror: No; the pamphlet, we do not decide upon it being a libel.

Mr Erskine: Is the word *only* to stand part of your verdict?

A juror: Certainly.

Mr Erskine: Then I insist it shall be recorded.

Mr Justice Buller: Then the verdict must be misunderstood; let me understand the jury.

Mr Erskine: The jury do understand their verdict.

Mr Justice Buller: Sir, I will not be interrupted.

Mr Erskine: I stand here as an advocate for a brother citizen, and I desire that the word *only* may be recorded.

Mr Justice Buller: Sit down, Sir; remember your duty or I shall be obliged to proceed in another manner.

Mr Erskine: Your Lordship may proceed in what manner you think fit; I know my duty as well as your Lordship knows yours. I shall not alter my conduct.”

There are very few Erskines in the world. Courage was intrinsic in him. In November 1778 Captain Baillie was the Governor of a Seaman’s Mission, the charitable funds of which were being corruptly misappropriated. He wrote a letter to the directors exposing these crimes. The Chairman, Lord Sandwich, himself corrupt, provoked several of the directors to institute a prosecution for seditious libel. He himself controlled the litigation behind the scenes. Erskine was briefed as the third junior in the case to defend Baillie and so he spoke last. Of the barristers, he alone invoked Lord Sandwich’s name. The presiding Judge, Lord Mansfield, stopped him. He said Lord Sandwich was neither a party nor a witness and should not be referred to. Erskine’s response was this:

“I know, that he is not formally before the Court, but, for that very reason, I will bring him before the Court: ... I will drag him to light, who is the dark mover behind this scene of iniquity. I assert, that the Earl of Sandwich has but one road to escape out of this business without pollution and disgrace: and that is, by publicly disavowing the acts of the Prosecutors, and restoring Captain Baillie to his command. ... If he keeps this injured man suspended, or dares to turn that suspension into a removal, I shall then not scruple to declare him an accomplice in their guilt, a shameless oppressor, a disgrace to his rank, and a traitor to his trust.”<sup>44</sup>

As I have said, the trial of Captain Baillie took place in November 1778. Erskine had been called to the Bar only in July of that year.<sup>45</sup>

However, all of us have seen barristers who, when the occasion demanded it, have been prepared to stand up to judicial pressure. Indeed, it would be difficult to imagine a Bill Pincus, a Tom Hughes or a Cedric Hampson acting otherwise. Those of us who do not have the strength of character of such heroes at least have profited by their example. Their example is available to us because of one of the characteristics of our odd profession.

From the time of the serjeants, when the serjeants and judges addressed each other as “brother”, barristers have shared a close professional intimacy with each other even after they have been appointed to the bench. As Sir Robert Alexander has said:

“The Bench is raised up from the Bar and carries its concept of legal practice. The Bar’s traditions and its independence are jealously guarded by the judges, whose own

<sup>44</sup> *Speeches of Erskine, ibid* at 30.

<sup>45</sup> Not surprisingly he took silk five years later in 1783.

independence and separation from the political or executive field is constitutionally assured. .... Association fosters an awareness of any deviation from propriety, as well as a unique opportunity for succeeding generations to be imbued with the standards of the profession. The Bar is a small profession of independent lawyers; by an osmotic process difficult to define reputations are built up and those who are dishonourable or who cut corners are gradually identified. This and the duty to the court are positive forces and the practice of the law.”<sup>46</sup>

This form of cultural breeding has resulted in judges who are capable of resisting the political pressures of the moment. An example from 19<sup>th</sup> Century South Africa will illustrate this. A Cape Colony judge was pressed with a submission that, the Colony being in a state of rebellion, he ought not to apply the law in a way that was likely to increase disorder. However, he said:

“But then it is said that the country is in such an unsettled state and the applicants are reputed to be of such a dangerous character that the Court ought not to exercise a power which, under ordinary circumstances might be usefully and properly exercised. The disturbed state of the country ought not in my opinion to influence the Court, for its first and most sacred duty is to administer justice to those who seek it and not to preserve the peace of the country ... the civil courts of the country have but one duty to perform and that is to administer the laws of the country without fear, favour or prejudice, independently of the consequences which ensue.”<sup>47</sup>

That dictum was quoted and applied by Kannemeyer J in *Nkwinti v Commissioner of Police*.<sup>48</sup> In concluding that the continued detention of the applicant during a state of emergency was illegal, Kannemeyer J declined to take into account the possible consequences of his order. Even if, as a result of his order, every detainee held under emergency regulations was to be considered as being held illegally and had to be set free, he said he could not shirk making the order.

Such attitudes are not characteristic of judges who have a proclivity to please the executive government or who crave popularity.

This institutionally close association of barristers which has resulted from Chapter 17 of Magna Carta has given rise to a peculiar caste. The great German sociologist and philosopher, Max Weber identified two important concepts in this area:

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<sup>46</sup> *The History of the Law as an Independent Profession and the Present English System*, Robert S Alexander, (1983-1984) 19 Forum 185 at 201.

<sup>47</sup> *Willem Kok and Nathaniel Balie* (1879) Buchanan Supreme Court Reports 45 at 66 quoted in *Hard Cases in Wicked Legal Systems*, Second Edition, Dyzenhaus at 152.

<sup>48</sup> (1986) (2) SA 421(e) at 439.

“One is the calling of the aristocracy of the intellect; the other is a notion of duty over and beyond the everyday sense of doing a job.”<sup>49</sup>

It is dangerous to speak in such terms and not only because it will draw the fire of populists if misunderstood. The gravest danger lies in the possibility that we will fool ourselves:

“[A] profession is likely to employ altruistic pretence; that is, it will try to conceal the extent to which its members are motivated by financial incentives, in order to make more plausible the implication that they have been drawn to the profession by the opportunity to pursue a calling that yields rich intellectual rewards.”<sup>50</sup>

Nevertheless, we cannot afford to shut our eyes to one characteristic of a profession. It is that professionals possess and draw upon and employ a store of knowledge that is more than ordinarily complex. It follows that being a “self-made man” or “knock-about bloke” or even being a “bloke” at all is neither a necessary nor a sufficient qualification for membership of the profession. It also follows that there can never be a large or across the board membership of such a profession.<sup>51</sup>

Ultimately, there is a more fundamental reason why our profession must be protected against being degraded by a reduction in standards. It is because our profession has a constitutional significance.

In *Kable v Director of Public Prosecutions (NSW)*<sup>52</sup> the High Court held that because the Constitution established a nationally integrated court system, State legislation which purported to confer upon such a court of function which substantially impaired its institutional integrity would be invalid. The existence of State Supreme Courts requires that they continue to answer the description of “courts”. For a body to answer that description it must satisfy minimum requirements of independence and impartiality. If State legislation attempted to alter the character of a Supreme Court in such a manner that it no longer satisfied those minimum requirements, the legislation would be contrary to Chapter III of the Constitution and would, for that reason, be invalid.

As I have sought to demonstrate, Australian courts would quickly cease to function if there were no lawyers or if lawyers ceased to be bound by the ethical constraints under consideration or, indeed, if lawyers were beholden to the Executive. In my view it is a logical

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<sup>49</sup> *Redefining the “Public” Profession*, (2005) 36 Rutgers Law Journal 721 at 729.

<sup>50</sup> *Professionalisms*, (1998) 40 Arizona Law Review 1 at 4.

<sup>51</sup> *Redefining the “Public” Profession*, *op. cit.*, at 739, 740.

<sup>52</sup> (1996) 189 CLR 51.

step from the principle established by “*Kable*” to conclude that the continued existence of an independent legal profession is mandated by the Constitution. If this is accepted, attempts by the executive or by the legislature to impinge upon that independence will be invalid.

But attacks upon the integrity of the institutions of justice can and does come from quarters other than legislative action. It can take the form of denigration and defamation of particular legal practitioners and the profession as a whole.

In February 2014 the then Premier of Queensland said this about lawyers:

“These people are hired guns. They take money from people who sell drugs to our teenagers and young people. Yes, everybody’s got a right to be defended under the law but you’ve got to see it for what it is: they are part of the machine, part of the criminal gang machine, and they will see, say and do anything to defend their clients, and try and get them off and indeed progress their dishonest case.”<sup>53</sup>

Such an attack can be met with the ordinary law of defamation if a particular lawyer is affected.

These attacks can also take the form of scandalising the court, which, in legal terms, means the publication of words calculated to bring a court or a judge into contempt and to lower the judge’s or the court’s authority in the eyes of the public.<sup>54</sup> Such contempts are punishable as criminal acts. This category of contempt exists because, without public faith in the administration of justice, the task of upholding and enforcing the law would be imperilled.

The last year and a half has seen a pattern of repetitive insults to the court which have been unprecedented in our country.

In March 2014, the then Attorney-General of Queensland falsely implied that the President of the Court of Appeal was a hypocrite for failing to recommend a woman for an appointment to the Court of Appeal and that she lacked integrity for suggesting her husband for the role.<sup>55</sup> These trumped-up attacks upon the character of the President of the Court of Appeal have since been continued by others.

In 1880, the then Chief Justice of New South Wales said:

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<sup>53</sup> Courier Mail, 6 February 2014.

<sup>54</sup> *R v Gray* (1900) 2 QB 36 at 40; “Any act done or writing published calculated to bring a court or a judge of the court into contempt ought to lower his authority, is a contempt of court.” Per Lord Russell CJ.

<sup>55</sup> Sunday Mail, 23 March 2014.

“What are such courts but the embodied force of a community whose rights they are appointed to protect? They are not associations of a few individuals claiming on their personal account special privileges and peculiar dignity by reason of their position. A Supreme Court like this, whatever may be thought of the separate members composing it, is the accepted and recognised tribunal for the maintenance of the collective authority of the entire community ... it derives its force from the knowledge that it has the whole power of the community at its back.”<sup>56</sup>

Prosecutions for such contempts are rare. There is a natural reluctance to prosecute because there is a natural sense that the public interest in prosecuting a contempt may conflict with the public interest in the freedom to discuss the administration of justice.

We can therefore put aside prosecutions for contempt in other than the most extreme cases. However, if it is true that attacks upon the judiciary and upon judges made in bad faith have a propensity to degrade the administration of justice, then the members of the Bar must accept that it is part of their duty, as participants in the administration of justice with the judges, to defend them and the judiciary as a whole against such attacks. By the possession of our peculiar knowledge and experience as barristers we are best placed to undertake this duty. This is particularly so because of the well-established principles which require restraint in judges making public statements. Justice Keane is right to say that their defining characteristic is politically neutral professionalism.<sup>57</sup> For that reason, the calling of a press conference by a judge, for example, to put forward a political argument as a public defence of the judge’s personal position demeans that judge’s office and is, in my view, conduct unbecoming a justice of the Supreme Court. In some cases, it would be capable of amounting to misconduct justifying removal from office. Consequently, it is imperative that lawyers, who are not constrained by these principles, to meet such attacks with great force on behalf of those judges who, from a their sense of duty, cannot defend themselves.<sup>58</sup>

The judiciary constitutes one of three arms of government and, as Justice Keane has rightly said, when a 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.<sup>59</sup> Attacks upon the judiciary are therefore revolutionary attacks upon the judicial arm of government of which the Bar is an indispensable and intrinsic part. I believe that a failure or a refusal by the Bar to

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<sup>56</sup> *Re The Evening News*, Newspaper (1880) 1 NSWLR 211 at 237 per Sir James Martin CJ.

<sup>57</sup> Keane, *op. cit.* at 3.

<sup>58</sup> Namibian lawyers have expressed the view that, due to “the judiciary being the weakest branch of government, it is incumbent on the legal fraternity to vigorously defend the independence of that branch.” (*The independence of the Legal Profession in Namibia*, Kavendjii and Horn, at 304.

<sup>59</sup> *The Idea of a Professional Judge*, PA Keane, Paper delivered to Judicial Conference of Australia Colloquium, Noosa, 11 October 2014, p.5

defend against threats to the courts constitute a betrayal of the profession and the public which it serves.

Sir Owen Dixon said that the rule of law is the assumption upon which our Constitution is founded.<sup>60</sup>

The rule of law has many facets. The right to a fair trial is cardinal among them. Without that right, there can be no equal application of the law to all. There can probably be no application of the law at all. As I have sought to show, the development of procedures which result in a fair trial has been very much the consequence of the work of barristers. The development of our constitution has also been the result partly of the work of barristers at crucial moments of history. I believe that the maintenance of the hard won right to a fair trial is also part of the work of barristers. The right to a fair trial can be corroded in a number of ways. The executive might choose not to appoint judges so that the court becomes overloaded; the executive might choose to appoint a political flunky from whom it expects some form of cooperation; it might cut the budget for legal aid so that criminal defendants are denied access to lawyers and a judge's task in ensuring a fair trial according to law thereby becomes more difficult. And politicians and others might make attacks upon the court as a whole, as well as upon lawyers and upon judges as individuals in order to degrade them in the eye of the public.

It is my view, therefore, that the proper province of the Bar is not limited to chambers and the court room. The constitutional liberties we enjoy now have been partly paid for in blood. Lawyers in other countries have been prepared and continue to be prepared to pay in loss of liberty and in death.<sup>61</sup> None of us will be called to pay such a price. We owe it to ourselves as members of a profession that, I believe, truly is noble to safeguard them by our advocacy wherever we are called.

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<sup>60</sup> *Australian Communist Party v Commonwealth* (1950-1951) 83 CLR 1 at 193 per Dixon J; see also Dixon, "The Law and the Constitution" in *Jesting Pilate and other papers and addresses* (1965) at 53.

<sup>61</sup> The dictatorship of Pervez Musharraf in Pakistan removed Chief Justice Chaudhry from office. Lawyers mobilised themselves into a movement which ultimately prevailed but not before many of them were beaten and imprisoned: *Pakistani Lawyers' Movement*, (2009-2010) 123 Harv.L.Rev.1705; *State of Emergency: General Pervez Musharraf's Executive Assault on Judicial Independence in Pakistan*, Qureshi, (2009-2010) 35 N.C.J.Int'l & Com. Reg. 485; Dina Kaminskaya was a leading Soviet defence attorney for 37 years before being forcibly expelled from the Soviet Union in 1977 *Final Judgement: My Life as a Soviet Defence Attorney*, Kaminskaya, Simon and Schuster, 1982; Max Hirschberg was a prominent lawyer in Weimar Germany, overturning many wrong convictions. The apogee of his career was the cross examination of Hitler himself during Hitler's libel action against a newspaper. Five weeks after Hitler became Chancellor, Hirschberg was arrested: *Crossing Hitler*, Benjamin Carter Hett, OUP, 2008.