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Law, Justice and Society

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**Law, Justice and Society
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I decided that I wanted to be a lawyer when I was 8 years old. My reason was simple. I wanted to cross examine people in criminal trials. I had heard of barristers. I also knew that judges were responsible for putting people in gaol and, in those days, in rare cases, ordering them to be put to death. Beyond that I had no real idea of the part which judges and legal practitioners played in society. All I knew was that there were criminal trials and I wanted to be part of that process.

During high school I was fascinated by history – both ancient and modern. I learned a great deal about social, political and military happenings during various periods of history but not a great deal, if anything, about the role of law in society. Anything I learned about that topic was coincidental to an understanding of major historical events. I, of course, learned that in democratic societies a body of elected persons, in some form, would decide the laws by which the community would be governed. I had some idea that to maintain that society it was necessary to have an executive which ran the government. Quite where the judiciary fitted in, beyond trying criminals was never made plain. The concept of the rule of law and consideration of the nature and role of an independent judiciary were not topics for study. It may be a consequence of my fading years but I do not remember them being referred to at all.

I grew up in a conventional middle class Australian household where the memories of the depression and the hardships brought by the Second World War were commonly discussed. The values which I was given reflected the values in Australian society and, with some important modifications, are the same values which the community shares today. They are the values which inform the laws which are fundamental to our society.

When I left school I was too young to be admitted to the law faculty. You had to be seventeen. As a consequence I was given time to study history at the University. There for the first time I began to understand the constitutional structure and legal framework of contemporary Australian society. Fundamental to that structure is an understanding of the role of parliament, the executive and the judiciary and the part which they each play in promoting a peaceful and orderly community. The outcome is often referred to as the rule of law.

My task today is to help you understand a little about the Supreme Court and the part it plays in the maintenance of the rule of law.

The system under which we are governed is commonly referred to as the Westminster System. This is because it was derived from the system of government which evolved in England. Because Australia was colonised by the English it was inevitable that the English system of government would be seen as appropriate for the new community. One essential element of the system is that, a parliament, comprised of elected representatives of the people, is given the power to make laws. Those laws extend to any activity of any person or company which the parliament believes it necessary to regulate or control. In many cases that control is exercised by creating rules. If the rules are broken a criminal offence is committed and punishment can follow. The parliament is also responsible for authorising the raising of money in the community and ultimately sanctions its expenditure.

The processes of government are administered by the executive. The power of the executive is exercised by the government of the day headed by the Premier or Prime Minister. He or she has the responsibility to manage the daily affairs of the State and ensure the efficient and effective management of the various responsibilities including health, transport, public safety, education and

many other matters.

The courts comprise the third element by which the community is governed. It is fundamental to our system of government that, once appointed, a judge is given the power to interpret and apply the law as he or she determines it to be without influence from the executive or the parliament. That concept is described as “judicial independence” which is underwritten by a guarantee of office until retirement subject to removal by the parliament in only very limited circumstances.

The gradual emergence of the rule of law in England was not the product of some theoretical discussion. It developed out of hard fought struggles between the king, the courts, the Parliament and the people. Lives, including those of kings and queens were lost. The rule of law as we know it has been fashioned from the realities of society. It should be no surprise to us that attempts to “transplant” it to less developed communities have come up against great difficulties.

When I left school I was still determined to be a barrister. Shortly after completing my law degree I was admitted to the Bar and was given the opportunity to participate in the litigation process. It is a great privilege to be asked to advocate another person’s cause in a court or tribunal. The barrister is often entrusted with an individual’s liberty, personal reputation or financial wellbeing. The stakes can be very high. Although by the time I went to the Bar the death penalty was no longer a reality in Australia, a lengthy prison term still awaits many people convicted of serious crimes.

Apart from participating in many trials my life as a barrister allowed me to be part of many commissions and inquiries. Some of you will be aware of the nuclear tests performed by the British Government in Australia. I was fortunate to be counsel assisting the Royal Commission which inquired into the physical and social effects of those explosions. In particular we examined in detail the impacts upon Aboriginal people and the health effects on military people who carried out the testing program.

When I was a barrister I was given the opportunity to participate in many enquiries, both public and private, into allegedly corrupt activities within our community. I was asked to consider many of the major environmental issues of our time. Those tasks extended to understanding the impact of irrigation from inland rivers on the ecosystems of the river and the adjoining land. I was also asked to investigate the problems with Sydney’s water supply in 1998 when cryptosporidium and giardia were identified as present in the catchment waters.

Because of the many tasks I had been asked to perform as a barrister by the time I was appointed as a judge in the Supreme Court I had a broad understanding of the mechanisms by which the community operates and some of the problems which it faces. I will talk in a little while about the benefits which that brings to the life of a judge.

My experience is not unique. I often describe the life of a lawyer as being given a “licence to learn about other people’s lives.” Because of the way our law develops and is applied the lessons learned are of great importance when choosing suitable people for judicial office.

Law is never divorced from the community which it serves. For instance, in eighteenth century England there was at one point over 200 crimes that attracted the death penalty. The offences involved were often quite trifling if judged by today’s standards. The harshness of the law was mitigated by the involvement of the community through the jury process. “Jurors would regularly convict offenders of stealing goods valued at 39 shillings (since stealing 40 shillings or more carried the death penalty).” [1]

The first legal case between citizens in Australian history was *Kable v Sinclair*. It was a case brought by Henry Kable, a convict, against the captain of the ship which had transported him and his wife Susannah to Australia. Henry was able to prove that when the ship was loaded in England, a parcel containing 15 pounds worth of his and his wife’s goods had been placed on board. On arriving in NSW the parcel could not be found. Henry successfully made out his case and was awarded 15 pounds in damages. Whilst at first glance this case might appear unremarkable, in reality it was quite exceptional. A ship’s captain was quite an important figure in early NSW, and yet a convict had taken him to court and won. In arriving at its decision the court had overlooked an apparently vital flaw in Henry’s case. In England, a convicted felon was regarded by the law as dead. He or she lost basic rights – such as the right to sue – that were the birthright of all free British subjects. This was so even if his or her sentence was reduced from death to some lesser punishment, such as transportation to Australia. Consequently, Henry would not have been able to sue the ship’s captain if he had brought his case in an English court. This should also have been the situation in Australia, but whether through

oversight or a deliberate choice, the laws of England were not applied to their fullest rigour. This made perfect sense. If there was to be any point having a civil court at all in a convict society, it would not be sensible to deny convicts access to it. So from the earliest days Australian law, whilst retaining its English heritage, has been adapted to local conditions.

The court that heard Henry Kable's case was very different to the courts that exist in NSW today. It was created by the king and consisted of a Judge-Advocate and two "fit and proper persons." [2] A criminal court was created by the same Letters Patent but it also had a statutory foundation in an Act of 1787. The criminal court consisted of the Judge-Advocate and six military officers. Trial by jury was not provided for. The Judge-Advocate was an interesting official. Some of you might have heard of the television show JAG, which stands for Judge Advocate General. The first Judge-Advocates were legal amateurs drawn from the military. They were not trained and qualified lawyers. Not only were they responsible for hearing the case, in criminal trials they also performed many of the duties of a prosecutor. Their vote carried no more weight than the votes of the other "fit and proper persons" or the six military officers who heard the case with them. David Collins was the colony's first Judge-Advocate, and he presided over Henry Kable's case.

His successor, Judge-Advocate Richard Bowyer Atkins, was surely one of the most colourful characters in early Australian history. He was reputed to be very fond of the drink and by his own admission he was a man who had perhaps "prolonged the convivial hour too far." Governor Bligh described him as "a disgrace to human jurisprudence." He had been known to pronounce the death sentence whilst intoxicated (but, in fairness, no verdict could have been reached unless the six military officers also agreed). H V Evatt, a former Justice of the High Court, roundly condemns Atkins as a weak and dissolute reprobate in his book on the Rum Rebellion, but other historians are not always so harsh. Bruce Kercher notes that with the exception of Bligh, "Atkins had the respect of the other governors despite his drinking and his legal ignorance." [3] Atkins was one of the few people in the colony who had the nerve to stand up to John Macarthur and the NSW Corps, showing an independence that has characterised the Australian judiciary to this day. Governor Bligh, who was so critical of Atkins, was found cowering under his bed when the NSW Corps seized power from him during the Rum Rebellion.

The first legally trained Judge-Advocate was Ellis Bent, a barrister from England. On the basis of recommendations he had made, a new civil court was established by a second set of Letters Patent in 1814 known as the second Charter of Justice. This Court was to be called the Supreme Court. The Judge was to sit with two magistrates appointed by the governor and juries were still not provided for. Ellis Bent's brother, Jeffrey, was appointed to preside over the new court. Jeffrey has been described variously as enraged, vain, pretentious, insolent and unconciliatory. The Chief Justice of the High Court, Murray Gleeson, has described Jeffrey Bent as follows:

"He is generally regarded, not only as the first judge in New South Wales, but also as the worst. The one thing he had to recommend him was a spirit of independence. He gave an early display of his mettle upon his arrival in Sydney, by refusing to disembark from his ship until the Governor arranged for a proper battery of guns to salute him. He refused to pay the road toll levied on users of Sydney's main road. He said he would be damned if he would pay any illegal tax. He called the gatekeeper a scoundrel, and threatened to put him in gaol. As a result, he was charged with toll evasion, convicted by a magistrate and fined two pounds. There being no Judicial Commission in those days, the matter was left to rest there.

The Court presided over by Judge Bent only ever sat to hear one item of civil business. That was an application by three ex-convict attorneys for admission to practice. The judge, who was at risk of being outvoted by the two magistrates with whom he sat, peremptorily announced that the application was refused, and that he would never preside in a court where ex-convicts were admitted to practice. Soon afterwards he was recalled to England." [4]

As a result of Bent's refusal to preside over the Supreme Court, it did not sit for three years until the arrival of his successor, Barron Field. Commissioner Bigge, former Chief Justice of Trinidad, arrived in NSW in 1819. His commission required him "to consider whether the alterations introduced into the constitution of the courts in 1814 have rendered them adequate to the wants of the inhabitants and to the due administration of criminal and civil justice..." As a result of Bigge's recommendations, the third Charter of Justice was proclaimed which created a new Supreme Court with both civil and criminal

jurisdiction. Forbes was to be the new Chief Justice.

It is noted on the Supreme Court's website that "in nearly all respects the Supreme Court has maintained continuity with the Court founded by the Third Charter of Justice in 1824."

However, the court created in 1824 was different to today's Supreme Court in several respects. An appeal lay from the Supreme Court to the Court of Appeal, but in those days the Court of Appeal was the Governor. From there a case could be appealed to the Privy Council which is a committee of the House of Lords and sits in London. Appeals to the Privy Council were only abolished in NSW by the *Australia Act* in 1986. In criminal matters, the "jury" was to consist of 7 military officers, although unlike in the past they only decided issues of fact and not of law. [5] Proper trial by jury was not established until 1833.

Today New South Wales not only has a Supreme Court but the larger District Court and the much larger again Local Court. The Local Court deals with more than 90% of the State's legal problems. The Supreme Court now has 46 judges and 4 Associate Judges. The Chief Justice is responsible for the work of the whole court. He has the assistance of three judges in managing the court's business. They are the President of the Court of Appeal, the Chief Judge in Equity and the Chief Judge at Common Law. The President of the Court of Appeal is responsible for the efficient working of that court which is comprised of judges of the Supreme Court who are appointed as judges of appeal. It is the final court of appeal within NSW for all civil cases. An appeal is possible from that court to the High Court but special leave of the High Court is necessary.

The Chief Justice has direct responsibility for the Court of Criminal Appeal. That Court on which I regularly sit is the final court of appeal in relation to all criminal matters in NSW. Again, with leave an appeal can be taken from that court to the High Court.

Both the Court of Appeal and the Court of Criminal Appeal normally sit with 3 members but on some occasions 5 judges may sit together on an appeal.

The trial work of the court is divided into two divisions. One of those divisions is called the Equity Division for which the Chief Judge in Equity has responsibility. The other Division is the Common Law Division for which I am responsible. Both the Chief Judge in Equity and myself are additional members of the Court of Appeal.

The judges of the Common Law Division of the Court are responsible for criminal trials relating to murder, manslaughter, and sometimes major sexual assaults, terrorism and major corporate crime. The judges also conduct the trials in relation to defamation, catastrophic injuries to people, disputes over contracts, possession of property and many other matters affecting people's lives. The common law judges are also responsible for determining difficult bail applications where a person facing a criminal charge seeks to be released into the community pending their trial.

Almost every day the Court of Criminal Appeal sits and is usually chaired or as the judges refer to it, presided over by the Chief Justice, myself or a judge of appeal. The other two judges will be drawn from the common law division.

Many interesting cases come before the Court and in many different ways. One which you may have heard and which illustrates the different roles of the Court involved a lady who used to run a sandwich shop in Taree. The shop burned down. The police investigated those events and the lady was charged with arson. The charge was dismissed.

Sometime later the lady who had previously been married and had a son married a man who ran a panel beating business. He had 3 children by a previous marriage. Sometime after the lady came to live with him, his children made allegations that he had sexually abused them. He stood trial and the children gave evidence before a judge of the Supreme Court. He was acquitted by a jury.

Sometime later the husband alleged that the lady who was now his wife had tried to kill him. She was tried on those charges together with an additional charge that she had an unlicensed pistol. It was alleged that she had tried to kill him by variously putting a knife into him, hitting him with a cricket bat, poisoning his drink, hitting him on the head with a rock, asking other people to kill him in return for payment. She was originally tried on 8 counts and convicted of 7. At her trial the children gave evidence that although they were present they did not observe her to commit the acts which she was said to have committed. She appealed her conviction to the Court of Criminal Appeal but that appeal

was dismissed.

Sometime later additional information came to light and the lady asked the Attorney General to approach the Supreme Court for an inquiry into her conviction. That application was granted and a retired District Court Judge was appointed to receive further evidence.

That evidence related to allegations that the policeman who had investigated the allegations against the lady had not acted properly. He was the same policeman who had investigated the allegations in relation to the sandwich shop but had since left the police service and taken up work as a private detective. The children also gave evidence at the inquiry. Although they had previously said that their stepmother had not done the things which were alleged against her their evidence now changed, they said she had done them. They also said they had given false evidence against their father at his original trial. The Court of Criminal Appeal considered all of the evidence including the additional evidence obtained during the inquiry. The result was that some of the convictions were quashed.

I have told you this story to emphasise the various roles which the court plays. Both the trial of the man and his wife were conducted by a Supreme Court judge sitting with a jury. The jury makes the ultimate decision as to guilt or innocence. However, when that decision is challenged as being not properly founded in law the matter is reconsidered by a bench of three judges sitting as the Court of Criminal Appeal. That court has the power to overturn a conviction and order a new trial or acquittal. The inquiry which was held was also determined by the Court of Criminal Appeal.

The law which is applied during those various processes is a combination of laws made directly by the parliament and law made by judges. The judges are required to interpret and apply the laws of the Parliament. At various stages of the process the judge may have a discretion as to the appropriate decision. That discretion will generally be exercised in accordance with principles which the judges have previously laid down and refined. Sometimes it is necessary to define new principles.

Apart from laws made by the Parliament the Supreme Court is required to act in accordance with and enforce the common law. For some people the common law is a difficult concept. It sometimes proves difficult for politicians! You should think of it as the body of law which began its life in England as customary law which has been taken up and applied by the judges as the law of the land. Although in the last century in many areas the common law has been replaced by statute there remain many areas in which it operates exclusively or has significant influence. Unlike statute the common law is the creation of the judges. If the parliament does not like what the judges have decided it can legislate to replace or modify the common law.

A good way of understanding how the common law develops is by thinking about cricket. As you may know in the 19th century cricket was commonly played in England on the village green. In less populated times the village green stood proud apart from residential accommodation and a lusty blow clearing the fence would come to rest harmlessly in trees or adjacent meadows. No one complained.

Until the latter part of the 19th century the law provided that if it happened that the meadow had been given over to housing with the consequence that cricket balls became a danger to occupants the house owner could not complain. It was called the doctrine of coming to the nuisance. However, in the latter part of that century the judges in England changed the law with the consequence that any person who created a nuisance (and descending cricket balls are undoubtedly a nuisance) could be sued even if they were there first. The change in principle was expressed in a case where the defendant wanted to build a small pox hospital on land close to a much-used part of a cemetery and within yards of a residence. The plaintiffs said that to build a smallpox hospital would create a public nuisance. The plaintiff lost because the court was not satisfied that the apprehended danger would necessarily exist. At the same time the court acknowledged that the old doctrine that if you came to a nuisance you could not complain was no longer appropriate.

Back to cricket? In an English case in 1977 called *Miller v Jackson* the Millers had come to live adjacent to the local cricket ground. Lord Denning who was a very senior judge sat on the appeal. He was a great lover of cricket and found himself unable to conclude that the playing of cricket could be a nuisance. His Honour said of the case

“In the summertime village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Linz in County Durham they have their own ground, where they have played these last 70 years. They tend it well. The wicket area is well rolled and mown. The outfield is kept

short. It has a good club house for the players and seats for the onlookers. The village team play there on Saturdays and Sundays. They belong to a league, competing with the neighbouring villages. On other evenings after work they practice while the light lasts. Yet now after these 70 years a judge of the High Court has ordered that they must not play there any more. He has issued an injunction to stop them. He has done it at the instance of a newcomer who is no lover of cricket. This newcomer has built for him, a house on the edge of the cricket ground which four years ago was a field where cattle grazed. The animals did not mind the cricket. But now this adjoining field has been turned into a housing estate. The newcomer bought one of the houses on the edge of the cricket ground. No doubt the open space was a selling point. Now he complains that when a batsman hits a six the ball has been known to land in his garden or on or near his house. His wife has got so upset about it that they always go out at week-ends. They do not go into the garden when cricket is being played. They say that this is intolerable. So they asked the judge to stop the cricket being played and the judge, much against his will, has felt that he must order the cricket to be stopped: with the consequence, I suppose, that the Linz Cricket Club will disappear. The cricket ground will be turned to some other use. I expect for more houses or a factory. The young men will turn to other things instead of cricket. The whole village will be much the poorer. And all this because of a newcomer who has just bought a house there next to the cricket ground." [6]

Later Lord Denning MR went on to say that he expressly disagreed that the doctrine of coming to the nuisance should not apply to help the cricket club in this case, particularly "when the ground has been there for 70 years and the houses are newly built at the very edge of it." [7] His Lordship, at a later point, stated that this case was a new case and that "it should be approached on principles applicable to modern conditions." [8] The old law should not apply. In refusing to grant an injunction against the cricket club his Lordship weighed the public interest against the private interest, saying that:

"On the one hand, Mrs Miller [the wife of the man who brought the action] is a very sensitive lady who has worked herself up into such a state that she exclaimed to the [trial] judge: 'I just want to be allowed to live in peace...Have I got to wait until someone is killed before anything can be done?' If she feels like that about it, it is quite plain that, for peace in the future, one or other has to move. Either the cricket club has to move: but goodness knows where. I do not suppose for a moment there is any field in Linz to which they could move. Or Mrs Miller must move elsewhere. As between their conflicting interests, I am of the opinion that the public interest should prevail over the private interest. The cricket club should not be driven out...The club were entitled to use this ground for cricket in the accustomed way. It was not a nuisance, nor was it negligent of them so to run it. Nor was the batsman negligent when he hit the ball for six." [9]

Ultimately, and some might say unfortunately, Lord Denning's views did not prevail. The club was ordered to stop playing cricket, but the order was suspended for a year to give them time to find a new ground. Lord Denning's reasoning is not necessarily wasted. A change in the law is often effected by the steady accumulation of powerful dissenting judgments. A court will be much more ready to accept that community standards have changed if there has been a long string of judicial opinion that says that it has. This process may take time, but that tends to ensure that the law does not move so hastily that it goes in the wrong direction.

Australian law has not to my knowledge faced problems in court with respect to cricket balls. Golf courses have been the issue and on more than one occasion a golf course has had to be modified or fences constructed to protect newly arrived neighbours from the errant hook or slice.

Another area in which you can see the development of the common law is in relation to the liability of public authorities for damage caused by their negligent acts. You may remember some cases you have heard about. Perhaps the fellow who was paralysed when he dived into the surf between the flags. This area of the law is now affected by many statutes but the common law still has work to do. One very significant change in the 20th century occurred when the courts decided that public authorities could be sued by an individual member of the community in particular circumstances. Previously the view had been taken that because a public authority was created in order to provide services for the whole community an individual should not be able to sue for damages if the public authority was negligent. The harshness of such a rule was recognised and gradually modified in the 20th century and although there are still many complications a public authority will in some circumstances now be liable to damages.

These are but some illustrations of the role which the judges play in the development and enforcement of the law.

I also want to mention to you a little about the role of judges in sentencing. This is often misunderstood by the community and there is much misinformation about the process.

When offences are created the parliament usually provides for a maximum penalty. That penalty is reserved for the most serious of offences of that type. It is unusual for the maximum to be imposed by a judge although it does occur at times.

If the maximum is not justified the sentencing judge is required to identify the appropriate penalty. This is not done by merely pulling a number out of the air or on the basis of the personal prejudice of the particular judge. What occurs is that the judge looks at the nature and seriousness of the offence and the personal circumstances of the offender including that person's chance of rehabilitation. Having regard amongst other matters to the need to punish the offender, provide an example to deter others, deter the offender from doing it again and bearing in mind the offenders prospects of rehabilitation, the appropriate sentence is determined. The judge will determine the sentence after also considering the significant body of information which is available about the level of sentence which may have been imposed on similar offenders for similar offences.

Sentencing is not an easy task. If the offender or the Crown believes that the sentencing judge has got it wrong an appeal can be brought to the Court of Criminal Appeal. There are many such appeals. Although not every appeal succeeds all of them provide an opportunity for a small group of judges to give guidance in relation to appropriate penalties for particular types of offences. In some areas guidance is given by the publication of guideline judgments. They are handed down after the widest possible consideration of particular problems with an opportunity for input from relevant interests in the community.

It is important to understand that sentencing is not a mechanical process but is undertaken by judges who have over time accumulated very considerable experience in identifying appropriate sentences. Although it is not uncommon to find that judges are criticised for the sentences which they impose (they are normally said to be too light) most empirical research shows that when a member of the community is made aware of all of the facts known to the sentencing judge it is most common for the community member to suggest a lesser penalty than that which has been imposed by the sentencing judge.

If your interest takes you towards a career in the law the opportunities for an interesting and rewarding career are significant. Contrary to the prevailing myth many of those career paths do not offer significant financial rewards but the opportunity to contribute to your society is real and significant. If you choose that path some of you may be asked to become judges. If you are I hope you take up the opportunity.

I wish you all the best in your studies this year.

END NOTES

[1] P Parkinson, *Tradition and Change in Australian Law*, 2nd Ed, LBC, Sydney, 2001, p. 105.

[2] *Ibid*, p. 110.

[3] B Kercher, *An Unruly Child*, Allen & Unwin, St Leonards, 1995, p. 48.

[4] M. Gleeson, Speech given on 17 May 1999 at the 175th Anniversary Dinner of the Supreme Court of New South Wales.

[5] B Kercher, *An Unruly Child*, Allen & Unwin, St Leonards, 1995, p. 72.

[6] *Miller v Jackson* [1977] QB 966 at 976.

[7] *Miller v Jackson* [1977] QB 966 at 977-978.

[8] *Miller v Jackson* [1977] QB 966 at 981.

[9] *Miller v Jackson* [1977] QB 966 at 982.