

**ADDRESS GIVEN AT THE COMBINED SOUTHLAND OTAGO LAW  
SOCIETY BRANCH CONFERENCE 2015**

**Held at the Ascot Park Hotel, Invercargill,  
Saturday 10 October 2015**

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I am delighted to have the opportunity to observe first-hand the model for continuing professional development followed by the Southland and Otago branches of the Law Society. I have been concerned for some time that the opportunities for contact between members of the profession has diminished greatly in the years since I was a young practitioner. Then the meetings of the local societies and the triennial Law Society conference provided valuable opportunities for all members of the profession to get to know each other, against a background of stimulation provided by speakers addressing subjects of interest. That tradition died out in most districts about 20 years ago. I think the profession lost something precious. It may be that the statutory requirements of continuing legal education are now ensuring greater contact. A conference such as this which brings people together for more than a seminar of a few hours on a particular subject has great advantages. A few years ago I was invited to speak to the Law Summer School, held over a couple of days on an annual basis by the Law Society of Western Australia. It brought back memories of the old NZLS conferences in which young star-struck lawyers could meet and talk to the heroes of the profession and learn something outside their areas of particular interest. The seminar was stimulating and enjoyable, as this conference will I am sure, be.

I have had a week of speaking around the South Island. I had intended to talk to you this morning about continuing legal education, and why it is indispensable, but both at Christchurch, where I spoke on Tuesday and Dunedin where I spoke on Wednesday, people who indicated they would be coming here today as well – gluttons for punishment! – told me that they thought continuing legal education was a boring subject. So I have been deflected from that purpose. I do want, in opening to stress that I applaud the initiative you take in the south and I do consider that continued learning is the indispensable obligation of a thinking profession.

Instead of beating up on that theme any further, I thought I might offer you some thoughts about the profession and the legal order and the challenges both face.

**The profession**

There is a whole world of law that never sees a courtroom. Sir John Baker emphasised this in writing of “Why the History of English Law has not been Finished”:<sup>1</sup>

Law can exist, in the sense that people are aware of it and conform to it, even when it is neither written down in legislation nor the subject of accessible declarations by the judiciary.

Enacted or decided law is then only part of the picture. Law is also the collected wisdom to which people adhere, not simply to keep out of trouble, but because they believe it is right to do so. The rule of law then depends on law-mindedness. Justice Robert Jackson of the US Supreme Court did not refer to the rule of law, but expressed much the same idea when he said that “the administration of justice is based on *law practice*”.<sup>2</sup>

The learning and independence of the profession underwrites “law practice” and “law-mindedness” through the advice it gives and in its preparedness to stand up for what is right when necessary. That is why Sir Owen Dixon<sup>3</sup> and others have rightly seen the contribution of the lawyer to the rule of law as more important than the contribution of the judge. Nor is it a contribution made even principally through litigation. In addition to the advice they give clients, lawyers contribute to law-mindedness in the community by participating in public debates and by protecting the values of the legal system. In an age of talk back and populism there are risks to the rule of law if law is seen as remote, inaccessible and incomprehensible. Lawyers are a bridge to understanding. To be effective in promoting law-mindedness in the community, however, lawyers need to be trusted and respected for their independence and learning.

It should therefore be a matter of concern that the standing of the legal profession in most societies is not high. Caricatures of lawyers as blood-sucking parasites or amoral mercenaries are staple fare. (They are almost as common as cartoons of judges in full-bottomed wigs asking inane questions to demonstrate how out of touch they are). That perception erodes the moral authority of the profession to speak for the legal system and to explain its operation. The problem is also compounded by the circumstances of modern practice in which public service and the disinterested representation of those engaged in public controversies may no longer be seen as the clear responsibility of legal practitioners. The managing partners of legal firms do not generally like controversy if the client base of the firm is conservative. Increasing specialisation can lead to increasing fragmentation of the profession. In a number of jurisdictions, the larger firms which represent corporate clients

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<sup>1</sup> JH Baker “Why the History of English Law has not been Finished” [2000] CLJ 62 at 78.

<sup>2</sup> Robert Jackson “The County-Seat Lawyer” (1950) 36 ABAJ 497 at 497 (emphasis added).

<sup>3</sup> Owen Dixon *Jesting Pilate* (The Law Book Company Ltd, Melbourne, 1965) at 245–246.

are increasingly disengaging from the organised profession. Other factors which may contribute to a lack of popular sympathy or respect for lawyers may be found in doubts about the representativeness of the profession and its commitment to excellence in the provision of legal services. There may be complex cause and effect in some of these factors.

I am conscious that every generation bemoans the ethical standards of the day compared to those of times past. I do not propose to suggest that the lawyers of my youth were more altruistic, more connected with the community, more willing to take on unpopular causes or give advice their clients do not wish to hear than today. In fact, although the incomes of lawyers may have been lower in 1970 when I entered the profession, there is no doubt that the profession today is much more representative and much better educated. While legal practice has altered in a number of ways that may have affected the effectiveness of the profession in assisting law-mindedness, the real causes of erosion of such a climate are to be found elsewhere, perhaps in the decline of faith in expertise, in a rising querulousness, in increasing claims for pluralism, in widening differences within our communities.

Complacency about the role of the lawyer is not an option for the profession. Its shared values need nurturing. The opportunities to reinforce these values are much more limited than in the past when members of the profession were thrown together all the time. The size and organisation of the modern profession means that it is harder to meet together and to make common cause. That is why what is learned in law school and in professional admission programmes needs to be reinforced by professional associations and through continuing legal education.

There are those who may see this view of the profession in standing up for the rule of law as romantic. One American commentator said of such exhortations:<sup>4</sup>

I know perfectly well that when lawyers start talking this way about their public duties, being officers of the court and so on, most of us understand that we have left ordinary life far behind for the hazy aspirational world of the Law Day sermon and Bar Association after-dinner speech – inspirational, boozily solemn, anything but real.

I believe these suggestions are dangerous and wrong, but there is sufficient truth in the gibes of self-interest to require lawyers to reflect upon their roles. If the profession loses focus, further erosion of its standing is inevitable. Unless the profession has a clear vision of its role and demonstrates dedication to the

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<sup>4</sup> Robert W Gordon "The Independence of Lawyers" (1988) 68 BUL Rev 1 at 13.

values that underpin it, it forfeits its claim to independence and the moral authority to defend the rule of law.

### **The rule of law**

It is hard to escape rule of law talk these days. I have thought that it is a little embarrassing when judges speak out for the rule of law and have tried to avoid it myself. It is too easily mischaracterised as a power grab, a claim of “rule by judges”. Of course that could not be further from the truth. The rule of law, as I had occasion to remark earlier in the week in Otago, is a rule of reason. Judges too are bound by the rule of law. It is the antithesis of arbitrary power. The rule of law is, as s 3 of the Supreme Court Act recognises, one of the twin elements of our constitution, the other being the supremacy in law-making of Parliament. These two principles are in tension. It is true that, like other elements of our constitution, the content of these principles is contestable. Perhaps for this reason, the government has decided to drop reference to these principles in the Judicature Modernisation Bill. I think that step is a pity, because the slight textual references we have to the constitution are helpful in making it more accessible. If we are to have a culture of law-mindedness, it seems to me that the role of the profession in explaining why the rule of law matters to the wider community is essential. If the wider community does not value constitutional government, the outlook is bleak. So I thought that I might speak a little to you about the rule of law and our constitution.

The timing is right. This year marks two anniversaries of importance to New Zealand law. It is 175 years since the signing of the Treaty of Waitangi. It is 800 years since the sealing of Magna Carta by King John. Since both the Treaty and Magna Carta are foundations of constitutional government in New Zealand, I offer you some reflections on both. It allows me to talk a little about our constitution, something that Sir Geoffrey Palmer assures me is an inescapable duty for a Chief Justice.

A constitution is concerned with distribution of government power among the organs of the state, and with the limits and checks on that power. Talking about limits or checks on power makes some people nervous. But that is I think only because, lacking a constitutional text, our constitution is so very opaque. It needs to be talked about, otherwise we lose it. In our system, we have to work hard to identify the values in our order that are rightly described as constitutional. So the perspective offered by the two anniversaries is to be welcomed.

### **Magna Carta**

I have to acknowledge that my perspective on Magna Carta is what some commentators have dubbed “the lawyer’s view”. Oddly enough, you might think, the lawyers are said to be a romantic about Magna Carta. Perhaps less oddly they are said to be bad historians. It is not necessary to go quite as far as Lord Bingham in describing the Charter as the most influential secular document in the history of the world (although that argument can convincingly be made),<sup>5</sup> but the lawyer’s view of the Charter is that it establishes the ideal of the rule of law.

The “lawyer’s view” is contrasted by Lord Sumption (a pretty good lawyer but also an impressive historian himself) with what is said to be “the historian’s view”.<sup>6</sup> What he calls the “historian’s view” sees the Charter as the product of its time and shortlived at that. This view is sceptical of the Charter’s constitutional significance and its resonance today. It emphasises that the Charter was extracted for reasons of self-interest by a gang of disaffected barons from the north of England. Those who subscribe to it point out (quite rightly) that the ideas we see in Magna Carta in the context of the 21st century would have mystified those who had a hand in its creation. Those who take this view of Magna Carta say that it dropped from view until revived by Lord Coke in the clashes between Parliament and the King and that Coke himself invented the lawyer’s romantic view of the Charter.

There is much that is valid in the view that the Charter must be seen in its own light and that it cannot carry too much baggage. The history of the Charter (in all its versions) is exciting enough to repay study in its own terms and in its own times, but it is interesting that modern historical scholarship, aided by modern methods of research, has turned up much more information about the circumstances of the obtaining of the Charter and its contemporary effect.

### **Magna Carta in New Zealand**

To some it may seem odd to speak of a tradition of law formed over many centuries, when our nation was founded only 175 years ago. John Beaglehole gave one answer to such thinking when in “The New Zealand Scholar” in 1954 he rejected what he called the “parrot cry” that we are only a young nation.<sup>7</sup> We are, he said, as old as civilisation – but there is a more direct answer in the case of New Zealand law. I do not speak today of the indigenous traditions of New Zealand law, but through the Treaty of Waitangi and the system of government it enabled, we imported into New Zealand the statutes and common law of

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<sup>5</sup> Tom Bingham *Lives of the Law* (Oxford University Press, Oxford, 2011) at 3.

<sup>6</sup> See Lord Sumption “Magna Carta then and now” (Address to the Friends of the British Library, 9 March 2015, London).

<sup>7</sup> JC Beaglehole “The New Zealand Scholar” in P Munz (ed) *The Feel of Truth: Essays in New Zealand and Pacific History* (AH and AW Reed, Wellington, 1969) at 244.

England in effect in 1840, including the provisions of Magna Carta still in effect. So in law in New Zealand we are as old as the inherited common law and its rich history and the early Charters which drew on the older common law and which galvanised the common law in its turn.

I must admit that as a young lawyer I was never very sure of what parts of English law remained in effect. I once had the unnerving experience in the 1970s or early 1980s of being left as junior to make a reply in a case where senior counsel, the very learned David Baragwanath QC, had to leave for another case but had raised Magna Carta in his argument. On comparing notes with another junior barrister in our rooms, Robert Chambers, I found out he had had the same experience. Neither of us had a clue whether Magna Carta was an artefact of any relevance at all. My recollection is the Judge was similarly mystified and there was no mention of Magna Carta in the judgment. I think Magna Carta was thought in those days to be “fighting talk” to be avoided in polite submissions, but of course Baragwanath QC was quite correct to treat articles 39 and 40 of the 1215 version of Magna Carta as part of the law of New Zealand.

In 1988 that was made clear by the Imperial Laws Application Act, which lists the legislation of England still in force in New Zealand.<sup>8</sup> Although they are listed in order of seniority, Magna Carta appears after the Statute of Westminster the First of Edward I, but that is because the version of Magna Carta which is enacted for New Zealand is that entered on the parliamentary roll in its reissue by Edward I in 1297.

The only clause of Magna Carta preserved is the celebrated provision prohibiting imprisonment without “lawful judgment of his peers or by the law of the land” and providing the pledge for “administration of justice”: “We will sell to no man, we will not deny or defer to any man, either justice or right”. This is clause 29 as entered on the parliamentary roll in its reissue by Edward I in 1297 but as originally contained in articles 39 and 40 of the original in 1215. The Edward I version is almost identical to the reissue by Henry III, when he gained his majority. It remains law in New Zealand by virtue of the Imperial Laws Application Act, in which it is positioned in the schedule with other enactments which are described as “constitutional”.

The Statute of Westminster the First of 1275 which appears first in the list of imperial legislation still in force in New Zealand in fact builds on the liberties under the Great Charter of 1215 the promise of equality before the law “as well poor as rich, without respect of persons”. Magna Carta may appear second in the schedule to the New Zealand Act, but there is no doubt of its pre-eminence.

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<sup>8</sup> Imperial Laws Application Act 1988, sch 1.

So Magna Carta came to New Zealand and remains a provision recognised by legislation as constitutional.

### **The significance of the Charter**

The Charter has had its detractors. Cromwell jeered coarsely at it - (but then he was levying taxes without Parliamentary authority). Legal philosophers in the nineteenth century thought its exaltation by its partisans, such as Lord Coke, was romantic antiquarianism or special pleading, which ignored the self-interest at work in its creation and invested it with modern values undreamed of by the magnates who obtained it. It is said to have been misunderstood in its own terms.

It is true that the terms of Magna Carta are often misunderstood. Inevitably, myths have grown up around it. Detractors have pointed out that there is little in Magna Carta that was truly new. It is true that similar promises of good government had long been made by Anglo-Saxon and Norman Kings. Contrary to folk-lore Magna Carta did not establish habeas corpus or trial by jury. Nor did it establish parliamentary control of taxation. Although it treats taxation by the King without the council of the land as contrary to law and custom, the council had not yet developed into anything like even the rudimentary Parliament of the time of Edward I. In article 14 (which provides for the summoning of the barons and the bishops to advise the King) there are indications of a felt need for wider and more systematic representation in the council advising the King, as Sir William Holdsworth suggests.<sup>9</sup> Magna Carta does not point to the repositioning of the sovereign power to make law in the king-in-parliament. Still less does it say anything about democratic government. Nor does it protect the independence of the judges, which was not secured until the Act of Settlement in 1701. All these things lay in the future in 1215 and their achievement was by no means made inevitable by the Charter.

None of this diminishes Magna Carta. More importantly, the folk memories of the importance of "The Great Charter of the Liberties of England" (as it was called in the Petition of Right of 1628) and their persistence in popular estimation tap into enduring values despite the politics and self-interest of the moment in 1215.

The clauses of the Charter repay reading, especially in the more accessible translations produced for this anniversary. They indicate a seed bed for the development of law and protections of liberty, realised in succeeding centuries.

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<sup>9</sup> William Holdsworth *A History of English Law* (7th ed, Sweet and Maxwell, London, 1956) vol 1 at 55.

The clauses of the Charter protest against arbitrary deprivation of liberty and property and look to proper legal process. If the term “due process of law” is not used in Magna Carta, due process of law is the effect of the promises. The provisions of Magna Carta are concerned that justice is not corrupt and not delayed. It is to be provided by royal justices who know the law and are committed to fulfilling it.

The provisions of Magna Carta are concerned to ensure that justice is not corrupt and is not delayed. They look to the provision of justice increasingly by the King’s judges. A complaint of the barons was that the King’s judges were not accessible enough. The Charter fixes the place of justice in Westminster and provides for regular assizes by judges sent on circuit to the counties. It promises that those appointed will know the law and be committed to fulfilling the obligations of the Charter.

The Charter looks to common laws and common measures and weights. It is concerned to protect trade and the free movement of merchants. In this it indicates a society in change. The magnates cannot do without the towns and the merchants, both specifically mentioned. The “quarrel” which gave rise to the events of Runnymede arose from John’s abuse of his feudal privileges and there is much in the Charter about redress and correction for them, but it is clear from the text of the Charter that, as Ferdinand Mount puts it, “the middle classes were on their way” and fifty years later knights and burgesses as well as barons were summoned to the Parliament of Simon de Montfort.<sup>10</sup>

If the direct obligations are for the benefit of free-men and the tenants in chief of the King, they also look to a trickle-down effect because lords are required to observe like obligations in their dealings with their own tenants. Some clauses in the Charter refer to all men, pointing to an extension that was made in succeeding legislation in part because of the difficulties in determination of who was free and who was villein.

Wales, Scotland and the law of the Marches are all recognised in the Charter, indicating a plurality in the realm that simmers on today in the United Kingdom. Widows are protected in their dowers and their husband’s houses (for forty days) and in the freedom not to marry if they do not wish to and there is anxiety to ensure that fines are proportionate to the gravity of the offence and do not destroy the livelihood of the merchant or freeman. Clause 20 of the Charter of 1215 provides:

20. A free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be amerced

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<sup>10</sup> Ferdinand Mount “Back to Runnymede” (2005) 37 London Review of Books 15.

according to its gravity, saving his livelihood; and a merchant likewise, saving his merchandise; in the same way a villein shall be amerced saving his wainage; if they fall into our mercy. And none of the aforesaid ameracements shall be imposed except by the testimony of reputable men of the neighbourhood.

### **The effect of the Charter**

If the Charter represented in its day in large part claims for restitution of freedoms and liberties long-known or was preoccupied with aspects of feudal tenure, it also represents a departure. Demands for the laws of Edward the Confessor were no longer made after Magna Carta. Instead, the focus changed to confirmation of the Charter and the better securing of its promises. Subsequent reforms invoked the Charter. The Charter was widely known. Encroachments on freedom were resisted in its name, both in the remainder of the 13th century and later in the times of growing absolutism under the Tudors and Stuarts and the dictatorship of Cromwell. It was cited in opposition to arbitrary power to imprison or take property, taxation without parliamentary consent, and development of Crown prerogative powers. The Charter was critical in the battle of ideas which led eventually to parliamentary government.

It is not fanciful to see in the terms of the Charter ideas central to the rule of law and which have influenced modern statements of rights. Magna Carta has been cited in court cases from the 13th century down and in all jurisdictions which have inherited it. It continues to be cited and was for example an important plank in the reasoning of the United States Supreme Court in *Rasul v Bush* 542 US 466 (2004) which held against executive imprisonment.

The best evidence of the importance of Magna Carta in our legal history is, as Sir William Holdsworth suggested “[t]he history of our public law from the time of the granting of the charter”:<sup>11</sup>

The charter was constantly appealed to all through the mediaeval period, and during the constitutional conflicts of the seventeenth century; and, after those conflicts had been settled, its observance came to be regarded both by lawyers and politicians as a synonym for constitutional government.

While some of the claims made for the Charter were not wholly correct as a matter of history, Sir John Baker says “that made no difference”: “Magna Carta, though not in any sense a written constitution, was morally entrenched”.

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<sup>11</sup> William Holdsworth *A History of English Law* (4th ed, Sweet and Maxwell, London, 1936) vol 2 at 215–216.

Chapter 29, in particular, “was the chief legal weapon deployed against growing absolutism”.<sup>12</sup>

### **Future directions**

“Moral” claims are not, of course, the same as legal right. In our legal system moral or political claims are a twilight world. Magna Carta and the legislation and law to which it has given rise is at least acknowledged to support claims of right, recognisable as law in the courts. But entrenched rights they cannot be in a system of parliamentary supremacy, which is why Baker accurately identifies them as “morally entrenched” only.

How secure is moral entrenchment? It would be nice to think that it is as secure as formal entrenchment, but that can only be if there is widespread understanding and willingness to work harder at maintaining what is essential in our mostly unwritten constitution in which the rule of law shadows but is unequally matched to the legislative supremacy of Parliament.

Magna Carta lays the foundations for the rule of law and parliamentary sovereignty, the twin elements of the New Zealand constitution today. The 800th anniversary of Magna Carta may be a good time to take stock of how well they are serving our society. It is puzzling that the constitutional conversation we have had to date seems largely hung up on the identity of the head of state, an element of the constitution that seems to work well. It seems reluctant to engage with bigger ideas, such as the fulfilment of the ideas set loose at Runnymede in the circumstances of today.

Magna Carta confronted the arbitrary power of the Crown. Over the following centuries the ideas it launched brought the Crown under the law, as Bracton and Coke insisted it was. The King they said is made by the law. Is Parliament itself made by the law? If so, is it subject to law, as James I had wit enough to see was the implication of being made by the law? Is arbitrary power acceptable today if exercised by a Parliament democratically elected? These are big questions. Lord Hailsham, then the once and future Lord Chancellor of England, was raising such questions in connection with the constitution of the United Kingdom in his Dimpleby lecture, provocatively entitled “Elective Dictatorship”, forty years ago.<sup>13</sup> His paper is worth revisiting. It accurately identifies some of the strains now evident in the constitution of the United Kingdom today.

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<sup>12</sup> John Baker *Collected Papers on English Legal History* (Cambridge University Press, Cambridge, 2013) vol 2 at 936.

<sup>13</sup> Lord Hailsham “Elective Dictatorship” (The Richard Dimpleby Lecture, 14 October 1976).

In recent years there has been much change in New Zealand that is properly characterised as “constitutional” – New Zealand Bill of Rights Act, the change to the system of electoral representation and the Official Information Act in particular have been transformative. They may be sufficient change for now. Our adaptable and pragmatic constitution may suit New Zealand society and indeed has some considerable virtues. It would however be foolish to think constitutional evolution is at an end in New Zealand. Even if change in our institutional arrangements is not in prospect, a largely unwritten constitution needs to work and constitutional values may provide political limits, at least if they are talked about and understood. One thing we can be sure of is that in the necessary discussions we will continue to have on constitutional directions, the ideas of Magna Carta will continue to be drawn on, as they have been for the past 800 years.

### **Risks to the rule of law**

The rule of law can be imperceptibly eroded unthinkingly if it is not valued by our society. That is not only by changes to the substantive law but also by changes to the administration of justice, including in such matters as listing of cases, court fees and legal aid – matters in our system largely under the control of the executive, not the judges. They can also be eroded by changes to the adjectival law of procedure and evidence which control effective access to justice. They also are increasingly under the control of the political branches of government, not the judges. I think there is no room for complacency here and that the law schools and the profession need to be vigilant to ensure that access to justice is not unreasonably impeded by the understandable imperatives of government.

The courts have to stand apart. That is not an easy message to get across. Indeed, courts are I think increasingly treated as though a department of government, as in form for some purposes they are. I think this erosion has come about unthinkingly, rather than by design. In part it may have been because the District Court as the volume court has come to be seen as the basic model for court administration, but the registries of the High Court and appellate courts are increasingly managed by the Ministry. Although subject to direction from the judges in terms of judicial work, what is judicial work is a concept that is becoming blurred. Scheduling of cases, including setting priorities for hearings, and budgetary decisions not shared with the judges (which also alter priorities) have the capacity to undermine access to justice and to obscure the institutional constitutional function of courts.

The New Zealand Constitution Act 1986 makes separate provision for the legislative, executive and judicial branches of government. Although our legal system requires the independence of the judiciary from other sources of State

power, in reality, that independence is fragile. Judges have security of tenure and salary but the work of the courts is dependent upon the administration provided by the Ministry of Justice.

The Ministry wears many hats in the administration of justice. Some of its interests conflict with others and potentially with the values served by the courts. In the new government joined-up justice sector, there are pressures to share information (including court information increasingly captured electronically) and to manage resources across the sector, moves which are potentially destructive of the institutional independence of the courts and access to justice, without which the rule of law is worth little. It is difficult to get across the message that the independence of the courts is not secured simply if it is understood that judges may not be told how to decide individual cases. If cases cannot get before a judge because of policies followed in the registry, the rule of law is at risk. The move to specialist panels under the new legislation is potentially risky if not under judicial control because the Executive is implicated in most of the cases that come before the courts and there is need to ensure that there is no possible suspicion that choice of judge can be manipulated by setting up panels for particular work.

International statements of basic principles for judicial independence adopted both by the United Nations General Assembly and by the Commonwealth recognise that judicial independence has an institutional dimension.<sup>14</sup> The Supreme Court of Canada has held that administrative independence in the organisation of judicial work and the support necessary to achieve it are aspects of judicial independence.<sup>15</sup> Chief Justice Barak of Israel has expressed the view that it is inconsistent with judicial independence for the administration of the judiciary to be through a department of government.<sup>16</sup> In the United States, Canada, and Australian jurisdictions considerable operational autonomy is given to judges. In the United Kingdom, the Supreme Court was set up with full institutional autonomy and the court service of England and Wales is under joint management of the Executive and the Judges. We are out of step – and the implications for the rule of law are not being sufficiently thought through.

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<sup>14</sup> *United Nations Basic Principles on the Independence of the Judiciary*, endorsed in GA Res 40/32, A/RES/40/32 (1985); and GA Res 40/146, A/Res/40/146 (1985); and *Commonwealth (Latimer House) Principles on the Three Branches of Government*, as agreed by Law Ministers and endorsed by the Commonwealth Heads of Government Meeting (Abuja, Nigeria, 2003) at IV.

<sup>15</sup> *Re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3 at [118].

<sup>16</sup> Aharon Barak "A Judge on Judging: The Role of a Supreme Court in a Democracy" *The Supreme Court 2001 Term – Foreword* (2002) 116 Harvard Law Review 19 at 54–55.

Matters such as these are ones the profession needs to engage with. The profession needs to speak out when there is risk to the rule of law. Whether the profession is listened to depends on the standing it has within society.

### **The profession**

It is now more than 20 years since Anthony Kronman, then Dean of Yale Law School, wrote of a spiritual crisis in the legal profession in the United States.<sup>17</sup> What had been lost, he thought, was the sense that law requires more than technical proficiency and that the work of “deliberative counselling” a lawyer is called upon to do sets a goal of attainment of wisdom which is valuable in itself.<sup>18</sup> I thought when I read the book soon after its publication that it was too pessimistic. Today, I am not so sure.

A healthy profession is one that has a sense of the reach of law and the principles that flood across it. Today all branches of the profession are much more specialised than ever before. That may be efficient and sensible, but it is only if the specialist retains the sense of law as a whole. If lawyers drop out of the current of ideas, professional competence will inevitably be blunted. It is possible to see at times a lack of hard thinking and a reluctance to leave the beaten track. There may be loss of the insight that deliberative imagination is essential to law. This could slide into a loss of appetite for achieving right according to law or providing the client with information the client needs to make choices.

There are many pressures in modern practice which may deflect practitioners from their obligations to further the administration of justice and the rule of law. If lawyers do not ensure access to justice, if lawyers are not demonstrably committed to achieving right according to law, their standing to speak for law is diminished. The instrumental view of law in which it is seen as state-subsidised dispute resolution, increases the pressures of cost-recovery and corner-cutting. I do not suggest that we have to ignore better or more cost-effective ways of doing things. But we have to be careful. Dispute resolution may have little to do with achieving right according to law. It may impede the view of law described by Lord Devlin as a process by which a sense of injustice is removed from the community.<sup>19</sup> I think we should be slow to think that its loss may not harm our communities. We may also set up a vicious cycle for the profession. I am worried about the number of young lawyers who leave the profession because their work

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<sup>17</sup> Anthony Kronman *The Lost Lawyer: Failing Ideals of the Legal Profession* (Harvard University Press, Cambridge, 1995).

<sup>18</sup> At 309.

<sup>19</sup> Lord Devlin “The Judge as Lawmaker” in *The Judge* (Oxford University Press, Oxford, 1981) at 3.

does not seem to them to be fulfilling and is often mind-numbing. There are people who need help and helping others has always been what is worthwhile in legal practice. I know that the circumstances of practice 40 years ago were a lot simpler. The incomes of lawyers were lower. Our offices had lino on the floor, but we felt part of an absorbing and fascinating vocation – and we had a lot of fun. I think we need to recapture that sense.

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