

THE UNIVERSITY OF NEW SOUTH WALES

FACULTY OF LAW

THE HAL WOOTTEN LECTURE 2008

Living in the Law

By

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. The previous two lecturers have
generously embraced the convention, although Dr Ramos Horta I
confessed that, invited to give a lecture bearing my name, he assumed
was dead ; shaken when I walked into the room , he compared the
in the program and hastily revised his tenses. Modesty excludes the
convention tonight. Instead I will say something about the origin of the
Lecture.

One ancient means of honouring the founder of an institution was to
bury him or her under the doorstep. When I left the law school 30
years ago it was between the ninth and twelfth floors of the Library
building and had no doorstep , even had I been ready. The School
instead named its Moot Court after me, and placed in it my portrait
painted by a talented young artist who I was told attracted faculty
approval by painting the Barwick High Court as the Last Supper.

The new Law School building has a state-of-the-art Moot Court which
required half a million dollars to equip. I was first to agree that the
eponym should be the generous donor , but I was still not ready for
doorstep that now existed.

opportunities that a life in the law can provide, and the varied ways in which people respond to its challenges.

One of those challenges often comes to law students or young graduates, who are beset by doubt whether the law is for them, whether indeed it can provide a worthwhile life for anyone. There is no lack of generic criticism of lawyers. It flows through the classics – Shakespeare, Burke, Dickens, Thackeray to name a few- through the great social critics like Marx, through the realists and ultimately into postmodernism where the critical legal theorists deconstruct us from within. Equally there is no lack of evidence of the agonies suffered in wrestling with the choice of such a profession. For long it was a literature of personal anecdote and rhetorical affirmation, then from the 1980s and 1990s it was subjected to largely subjective theoretical analysis, followed more recently by statistical collection and analysis, so that it increasingly merges with epidemiological study of mental illness and depression, where lawyers head the tables.

The challenge was for me an intensely personal matter, to be resolved within me. There were no counsellors or mentors, or kindly souls to manipulate my learning or working environment. As so often in my life I turned to other men's flowers, taking comfort in William Henley's

The world in which we live has changed mightily, and I applaud those who use the new techniques of science to identify and solve or ameliorate problems that have taken a serious, even deadly form. But tonight I will revert to anecdote and rhetoric to tell of my youthful wrestling with such issues, and my early life in the law that did much to shape not only my career but the vision of the law school that these lectures are intended to commemorate.

It is 66 years since I entered law school, found a job in the State Crown Solicitor's Office, and began a life in the law. I became a lawyer by accident. Growing up as a lower middle class boy in the Great Depression, law was not within my horizons. I owed two things to the widowed mother who saw me through Sydney Boys High School by working long hours as a dressmaker. One was to obtain a 'safe' job. The other was to 'improve' myself by further study. The pursuit of these objects landed me in the NSW Public Service attending the only university in the state where law was not taught.

My legal education left m

birthright for a mess of pottage; what have you said to show that I can reach my own spiritual possibilities through a door such as this? How can the laborious study of a dry and technical system, the greedy watch for clients and the practice of shopkeepers' arts, the mannerless conflicts over often sordid interests, make out a life? Gentlemen, I admit at once that these questions are not futile, that they may prove unanswerable, that they have seemed to me unanswerable. Yet I believe there is an answer...I say no longer with any doubt – that a man may live greatly in the law as elsewhere; that there as well as elsewhere his thought may find its unity in an infinite perspective; that there as well as elsewhere he may wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable.

Although he emphasised the role of scholar, which is not for all of us, the inspiration was irresistible. He went on:

Thus only can you enjoy the secret, isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought, the subtle rapture of a postponed power, which the world knows not because it has no external trappings, but which to his prophetic vision is more real than that which commands an army. And if this joy should not be yours, still it is only thus that you can know that you have done what it laid you to do, can say that you have lived and be ready for the end.

An American wag has translated these last words into the proposition that that "those of us to whom it is not given to 'live greatly in the law' are surely called upon to fail in the attempt." Perhaps that was how I felt – but it was enough. Life in the law was what you made it, not what some miserable lecturer in Legal Ethics reduced it to. It was not about achieving eminence or wealth but realising oneself. It was the antithesis of the life Leonardo da Vinci decried as leaving behind nothing but full privies, an image that haunted my darker moments.

Today I can detect in Holmes's language the voice of the veteran of the Civil War, speaking to restless young men who had never known the challenge and adventure of any similar experience. I could identify with them because medical rejection from military service had excluded me from the wartime experience of most of my peers, many of whom might have reacted to Holmes by saying they had had more than their fill of wreaking themselves upon life and drinking the bitter cup of heroism.

Holmes offered neither argument nor authority, apart from his own. It was pure inspiration. He claimed no magic for a career in law, only the negative virtue that it did not prevent the good life: that you "can live greatly in the law as well as elsewhere. It was up to you. He made no moral claim for a life in the law; I was to discover that he was the protagonist of the bad man's theory of the law, and supported eugenics and capital punishment. Although his affirmation of the power of the human spirit to survive a life in the law buttressed me against despair, he did not draw me away from my existing values. When Holmes said 'I think "Whatsoever thy hand findeth to do, do it with thy might infinitely more important than the vain attempt to love one's neighbor as one's self, for me he posed a false choice.

Between the ages of two and nine I was largely brought up by my mother's parents, who taught me to read and write and share the homely values that had brought them through the life of pioneer dairy farmers on the North Coast. My grandmother communicated to me her love of nature, often expressed in poetry, and her love of the Jesus of the Gospels. As a small child myself I was captivated by the man who welcomed little children; stood up for the poor, the meek and the peacemakers; admired the lilies of the field above Solomon in all his glory; showed his suspicion of the corrupting effect of wealth by likening the rich man trying to enter the good life to the camel passing through the eye of the needle; silenced the self-appointed custodians of other people's morals by inviting the one without sin to cast the first

stone; and provided a simple basis for morality and sociality: do unto others as you would they do unto you .

Happily my grandmother did not suffer the besetting vice of the religious - self-righteousness: she often quoted Burns plea for 'the gift to see ourselves as others see us' Her message was simply about making the most of life on earth. Those who made the pursuit of riches the purpose of life would find that they did not bring content and happiness in the here and now.

Everyone seemed to share this view. While few of us managed to live up to it, we saw that as our own shortcoming . The relatively wealthy seemed more embarrassed by their wealth than boastful of it; those who acted otherwise were seen as having been corrupted by it. You were judged not by what you had but by what you were and how you treated your fellows .

As my world expanded, I found these basic assumptions were shared by Christians, Jews, Muslims, Hindus, Buddhists, Aborigines, Melanesians, or those who like myself found no foothold in divine revelation or human doctrine , and did their best we could with the critical powers with which they were endowed and the experience and shared wisdom that life brought. I don't remember a religion or philosophy that taught that the chief end of man was the pursuit of wealth , and I still feel shocked by the legitimacy that this view has acquired in recent times.

This outlook was supported by the other great influence in my youth, an atheistic uncle, the only one of four uncles to survive the Great War. Brought up in the sheltered world of strictly Methodist dairy farmers, he found himself as a very young man in the trenches in France, often dependent on men he had once looked down on. He returned a champion of the common man, contemptuous of those who thought

themselves superior , and impatient with rank, pretence or what he called 'humbug' .

I grew up with a love of nature and books,

will soon start to discover these things. Whether I liked it or not, by my 23^d birthday I was a lawyer. But could this make a life?

My legal career, having begun by accident, continued by a series of accidents. On the few occasions I have had a plan for my future, even a plan to abandon the law, it has foundered on some unexpected opportunity I could not resist. I sometimes say that my career has been built on my inability to say no when invited to do something I was not qualified to do.

My first job after graduation was a 'brains trust' position advising the senior partner in one of Sydney's largest and most powerful firms, a position for which Professor Williams had nominated me before I showed my true colours. It carried a promise of a career in the firm or a good start at the Bar after a year in the job. I was a young man who liked to murmur John Masefield's *Consecration*, in which he warned his readers that he would sing 'not of the princes and prelates with periwigged charioteers/ Riding triumphantly laured to lap the fat of the years', or of 'the portly presence of potentates goodly in girth', but rather of 'the scorned-the rejected- the men hemmed in with the spears', 'the slave with the sack on his shoulders pricked on with the goad/ The man with too weighty a burden, too weary a load'. I found myself serving the princes and prelates and potentates of business and industry, who not infrequently seemed to ask what was the least they were obliged to do for the man with too weary a load, or the government trying to improve his lot. It was a legitimate question that I could answer to their satisfaction. But Holmes

representatives of some of the most powerful commercial and industrial interests, finding that more often than not they were ready to be fair to the man with too weary a load; some even shared my taste for Masefield.

My frustration was greater because 1946 was a time of hope and optimism before the chill of the Cold War. The troops were home; post-war reconstruction was under way; the five freedoms of the Atlantic Charter were revered; Germany and Japan were being rebuilt as democracies; decolonisation was in the air.

One day the phone rang, and Colonel John Ker introduced himself as Principal of ASOPA, the newly founded Australian School of Pacific Administration, which would train staff for the civil administration of Papua and New Guinea, particularly Patrol Officers and District Officers who would be administrators and magistrates.

The charismatic colonel painted an inspiring picture of the part ASOPA would play, through teaching, research and policy influence, in the decolonisation of New Guinea. I accepted a tutorship, giving no thought to the fact that I was sacrificing my powerful employer's promise to give me a good start at the Bar at the end of the year. The five years I spent at ASOPA, mostly as Senior Lecturer in Law, were rewarding in many ways, but I will speak of only one formative experience.

I was attracted to Anthropology, which seemed to offer more scope than law for understanding and getting close to New Guineans and helping to improve their lot. The senior anthropologist at ASOPA, Ian Hogbin, devised a plan for me to switch to Anthropology by undertaking a doctorate based on a field study of what was then called Primitive Law. In 1947 I found myself in the village of Kawaliap, among the Usiai in the middle of Manus, three days walk from the nearest European. No one spoke English, but having studied Melanesian Pidgin

The Usiai were never admitted to the secrets of wealth and power . They knew there must be a key, but it was hidden , and every time they thought they found it they were disappointed. Perhaps the key was Pidgin, but learning it changed nothing. Nor did working on the plantations, going to school, or converting to Christianity. They knew that it was not the colour of their skin s, because, although they were not allowed inside t he American naval base, they could see from afar that Black Americans shared its fabulous wealth. If only the white man had shared the key, today we would be able to sit down as brothers and eat at one table.

That night changed my relationship with Kawali ap. For the first time in my life I felt the warmth of acceptance into a small community. But it was no longer possible to play the detached academic studying these people. I could not remain a holder of the key. How could I find a way to help these people gain access

bargained it down to ten. In upholding our case the arbitrator said he had been much assisted by my evidence.

Almost exactly ten years later I attended a celebration of New Guinea's independence in Sydney, hosted by Prime Minister Michael Somare and Minister for Education, Ebia Olewale. I wondered how I would be received, for both had been among the angry young witnesses I had cross-examined. Guests were assembled on a large open floor; the lift door opened and out stepped Somare and Olewale. They surveyed the crowd and walked directly to me. With a puckish grin Somare sought my sympathy on the problems of balancing a budget when public servants wanted higher pay. It was for me one of many lessons that conflict is often not between good and bad, but between competing goods, in this case racial equality and the viability of an independent state. Much legal work is resolving conflicting claims, each of which has some legitimacy. When I left the Bar I had completed without shame the trifecta of opposing equal pay for New Guineans, equal pay for Aboriginals, and equal pay for women.

Four years after independence the Supreme Court sentenced the Minister for Justice to eight months gaol for contempt, Somare released her, and the Supreme Court judges (all expatriates) resigned. The Opposition accused Somare of wrecking the system; no reputable lawyer would accept appointment as a judge in New Guinea again. He asked me to be Chief Justice, no doubt calculating that if an Australian Supreme Court judge was willing to accept office, the crisis would be over. New Guinea still tugged my heartstrings, and I was sympathetic because I felt the judges may have over-reacted, but in any event Somare had been taught his lesson, and the important thing was to get the legal system back on the rails. However for personal reasons, the last thing I wanted was to be away from Sydney in the next few years.

I agreed to go to New Guinea at the end of the year and stay twelve months, calculating that with a grateful government supporting me I would be able in a year to do a lot to rebuild the Court and develop the

profession. My appointment was announced, I found some immediate appointees, and the crisis passed. However before I took up office Somare was defeated on a vote of confidence over other issues, and I had no wish to spend a year overcoming the suspicions of the new government. I helped persuade a young indigenous lawyer to take the Chief Justiceship, where he performed admirably. Both the Court and the legal profession developed, I understand, as institutions of integrity supporting the rule of law in a country where corruption and chaos have been rife. Perhaps my little nudges in developing an indigenous legal profession, supporting debate on New Guinea's future, deflecting a major fiscal issue and assisting the Supreme Court over a constitutional crisis went some way to vindicating John Kerr's prediction and Holmes's affirmation, as well as redeeming my commitment to Kompen and the Usiai.

In persuading me to come to the Bar in 1951, when chambers were unavailable, John Kerr generously offered me a desk in his spacious room. The close professional association that continued till he became a judge in 1966 shaped my career at the Bar. Briefed by Jim McClelland he was appearing for Laurie Short to wrest the Federated Ironworkers Union from Communist control. I spent much of my early years at the Bar acting for clients fighting thuggery, conspiracy and undemocratic manipulation of unions, and took part in developing a jurisprudence of union government that brought more effective rule of law to institutions that I consider vital to a liberal democracy. There was a political side, reflecting a bitter Cold War struggle between Communists and anti-Communists. I became entwined in the affairs of the Labor Party, and when the great split came in 1956 I vowed never again to join a political party. I like to be a maverick, a word coined by American cattlemen for the animal that bears nobody's brand.

Successful clients who had learnt to rely on me were suddenly in charge of big unions, with all the business of industrial regulation in Higgins's 'new province for law and order', and turned to me for advice and

representation. What started as a trade union practice soon broadened. I was the first to transcend a fairly rigid division between employers' and union barristers, acting not only for major unions, but governments, employers like BHP, CSR and newspaper and television proprietors, and industry groups like meat exporters, stevedoring companies and retail traders. This made real for me the vaunted independence of the Bar. I had no connections with employers; they sought my services and there were plenty of others in the queue.

A great value of independent lawyers is that they can tell clients what they may not want to hear. Clients often come to lawyers wrapped in their own self-righteousness, unable to recognise any merit in their opponent's case. The best service of the lawyer is often not just to explain the law but to make

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Burke's humanity, reason and justice went along with working on great social, political and economic issues. One recurring theme in my practice was the conflict between workers seeking to retain purpose and sociality in their work or defend treasured practices, and those who sought to override them in the pursuit of maximum efficiency and profitability. Charlie Chaplin long ago satirised this conflict in *Modern Times*, but I participated in its re-enactment as bulk-loading and containerisation took over the waterfront, computers took over newspaper production, division of labour spread in the meat industry, and tradesmen resisted the unpicking of their trades. Along with automation and the incipient information revolution went conflict between egalitarian ideals and claims of a new elite.

I needed ways to switch off from practice. My refuge was as a small weekend farm, where I personally did the fencing and pasture improvement and managed cattle and horse breeding. Each of my portrait painters, commissioned to paint the Dean of Law at UNSW and the Chancellor of the NSW Institute of Technology, decided that the real me was a Kangaroo Valley farmer. I took part in public debate, for example over Barwick's amendments of the Crimes Act, against the campaign for a Royal Commission into the Professor Orr case and about the conviction and death sentence of the Aboriginal Max Stuart in South

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My values did not change. A comfortable income was a by-product of my practice, not its purpose. When my services were in great demand I did not feel tempted to charge high fees. I had a client who wanted me to charge more, but never one who thought my charges excessive.

On two occasions I rejected opportunities to take up what would have been more lucrative work. Jim McClelland was known as the 'kingmaker' because of his power to make the fortunes of barristers from the vast pool of common law negligence claims available when our once struggling clients gained control of unions. 'Nello' as it was affectionately known, was immoderately lucrative to barristers, because they received not only well-paid briefs for the largely formulaic work in drafting pre-trial documents, but a brief on hearing, carrying a fee for the preparation of the case and the first day's hearing, paid even when the case was settled, as it usually was. Jim was insistent that that I, who had done so much to help the clients win control of the unions, should participate. He would allot me all the work from the great steel city of Wollongong; it did not matter that I was busy doing the industrial work for the unions – indeed this was all the more reason why I should benefit. I would have the fees from all the cases that were settled, and if I was not available when the odd one went to trial, another barrister would take the brief. It was perfectly legal - the way the system worked: what did I have to lose? I was te16.t dindrdr Tw0 Tw (to)]TJ
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abandon my specialisation in industrial law he would brief me across the whole range of his diverse practice. It would have given a young barrister great prestige, high income, and the kind of practice that could lead to appellate judicial appointment. The downside was greatly increased pressure and hours and the risk of becoming a slave to practice.

I also declined two offers of appointment, one State one Federal. That the drop in income was not the major reason for refusal is shown by the fact that shortly afterwards I found irresistible an offer to become foundation dean of law at UNSW at about half the judicial salary. There was a limited right of private practice, but I did not expect to make much use of it, as I thought the Law School would be all absorbing. It turned out to be not altogether all absorbing, as I became involved in the establishment and running of the first Aboriginal Legal Service. This cut into other activities, as I was forcibly reminded when (h)5(e)4(j)7(ud)8(i)4(c)4(fh)-2(th

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things worked out, I enjoyed a very free hand in distilling out of that life a vision of what a law school

the central character of

however worn the clichés, whether from the New Testament or Shakespeare or Humphrey Bogart, or Henley's concluding lines:

I am the master of my fate:
I am the captain of my soul.

In conclusion let me say to the students and young lawyers , 'Don't let the bastards get you down, and don't forget about climate change', and to all of you , thank you for coming and listening .
