The Constitutional Significance of the Australian Bar

By Walter Sofronoff[1] QC

2019 Maurice Byers Annual Lecture

I wish to state with precision the proposition that I seek to demonstrate as valid:

> The bar, as an institution, is an integral part of the system of administration of justice established by the Australian Constitution. As such, its continued existence, in its fundamental respects, is constitutionally guaranteed.

The community's acceptance of the legitimacy of governmental decisions lies at the heart of the ability of each of the three arms of government to function. When a Court resolves a dispute between citizens, or between a citizen and the State, the parties are not being rendered a dispute resolution service; they are being governed.[2] In this way, the judicial system is the third arm of government in reality. The result of that governance is a binding decision. Judicial decisions carry with them the implication of the use of force, or the actual and imminent application of force, whether by the actual arrival of prison wardens or by the potential for the arrival of bailiffs. Judicial decisions are accepted in Australia, despite their intrusive nature because they are accepted as legitimate. Their legitimacy depends upon the fairness of the process by which the decisions are made and by the perceived soundness of their content. For this reason, a decision reached by an unfair process will be set aside whether it is sound or not. A decision that is shown to be unsound will be set aside even if the process by which it was reached was fair.

Considerations of fairness and soundness arise when incompetence of counsel is a ground of appeal. Usually, the ground involves a contention that counsel has failed to tender some crucial evidence, has failed to cross-examine to elicit crucial evidence or has omitted to take a step to ensure a fair trial.[3]

However, this ground will fail if the appellate Court concludes that the step taken by counsel, although disadvantageous in hindsight, might have been taken by

Judicial decisions are accepted in Australia, despite their intrusive nature because they are accepted as legitimate. Their legitimacy depends upon the fairness of the process by which the decisions are made and by the perceived soundness of their content. For this reason, a decision reached by an unfair process will be set aside whether it is sound or not.

counsel deliberately in order to gain a perceived forensic advantage – even if, in hindsight, the client lost a chance of acquittal.

It is the duty of a trial judge to ensure a fair trial for the accused. Why do we not blame the judge for these mishaps? It is because neither the judge nor the jury has the authority to decide the issues that will be tried or the authority to tender evidence. It is within the independent judgment of the barrister, and within the barrister's sole discretion, to decide such matters. It was for this reason that, in *Giannarelli v Wraith,*[4] Mason CJ said that the administration of justice in our system depends in very large measure on the faithful exercise by barristers of their independent judgment.[5] His Honour said that the advocate is as essential a participant in our system of justice as are the judge, the jury and the witness.[6] Indeed, there are cases that simply cannot and will not be heard unless the parties are represented by counsel, as *Dietrich v The Queen* demonstrated.[7]

Criminal proceedings in civil law jurisdictions, like Germany, are based upon an entirely different assumption. It is that procedural fairness is best secured by the workings of a judiciary that has as an obligation to find the truth. It is assumed that an inquiring judge, who is not hamstrung by limitations imposed by the parties, is more likely to identify the relevant issues and to determine the truth. In common law countries judges and juries decide cases according to what the parties let them see; or, more exactly, according to what *counsel* lets them see.

Counsel's role is extraordinary. Although the barrister is the client's agent, the scope of authority is wider than other agents. Counsel has 'complete control over the way the case is conducted'.[8] Decisions about what witnesses to call, what questions to ask and not to ask, what lines of argument to pursue and what points to abandon are all matters within the sole discretion of counsel.[9] In an appropriate case, a decision by a barrister will prevent a case being brought at all, despite the client's wishes. There are, of course, well known and well understood instances when the client's decision is binding on counsel. The responsibility for deciding how to plead is that of the client, although the barrister's duty extends to advising on the matter, even in forceful terms.[10] Indeed, pressure upon an accused concerning the plea, if it amounts to intimidation, may amount to an offence.[11] Similarly, in a criminal trial, the decision whether or not to give evidence is one for the defendant alone.

There is a small and special exception to

the rule that a judge cannot call a witness. But it only applies when there has been a deliberate failure on the part of counsel to perform the barrister's primary duty to call a necessary witness. In short, it demonstrates that control really lies with the barrister.[12]

In *Strauss v Francis,*[13] Mellor J said:

> 'No counsel, certainly no counsel who values his character, would condescend to accept a brief in a cause . . . without being allowed any discretion as to the mode of conducting the cause. And if a client were to attempt thus to fetter counsel, the only course is to return the brief.'

There is an anecdote about Sir Maurice leading David Bennett in a matter. A question of policy arose that could affect the litigation. Bennett suggested that they take instructions. Sir Maurice's response was, 'I don't take instructions. I give them.'[14]

However, this freedom of action comes coupled with duties. These are familiar. Counsel must not mislead the Court. Counsel must place all of the relevant law candidly before the judge.[15] There is an obligation to identify the relevant issues and a barrister does not owe any duty to the client to argue any matters just because the client desires it.[16] Very importantly, a barrister must not make submissions in a way that conveys the barrister's personal opinion about the merits of the case.[17] These are limitations upon the zealousness with which counsel can fight for the client's interests.[18] It can be expected that a litigant, advancing his or her own cause, will stop at almost nothing in order to prevail. A barrister's zeal cannot go nearly so far. There is, however, a famous statement made by counsel in the course of his defence of Queen Caroline in 1820 in the House of Lords:

> ' … an advocate, by the sacred duty which he owes the client, knows in the discharge of that office but one person in the world, that client and none other. To save that client by all expedient means, to protect that client at all hazards and costs, to all others, and among others to himself, is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction which he may bring upon any other. Nay, separating even the duties of a patriot from those of an advocate, and casting them, if need be, to the wind, he must go on reckless of the consequences, if his fate it should unhappily be to involve his country in confusion for his client's protection.'[19]

'The advocate endeavours to persuade; the judge must decide. For that they must share or achieve a perception of what the matter for decision is, though not, of course, of its resolution. The isolation of that matter is the most demanding and the most essential of all legal skills. Presenting it clearly, concisely and attractively is the summit of oral advocacy.'

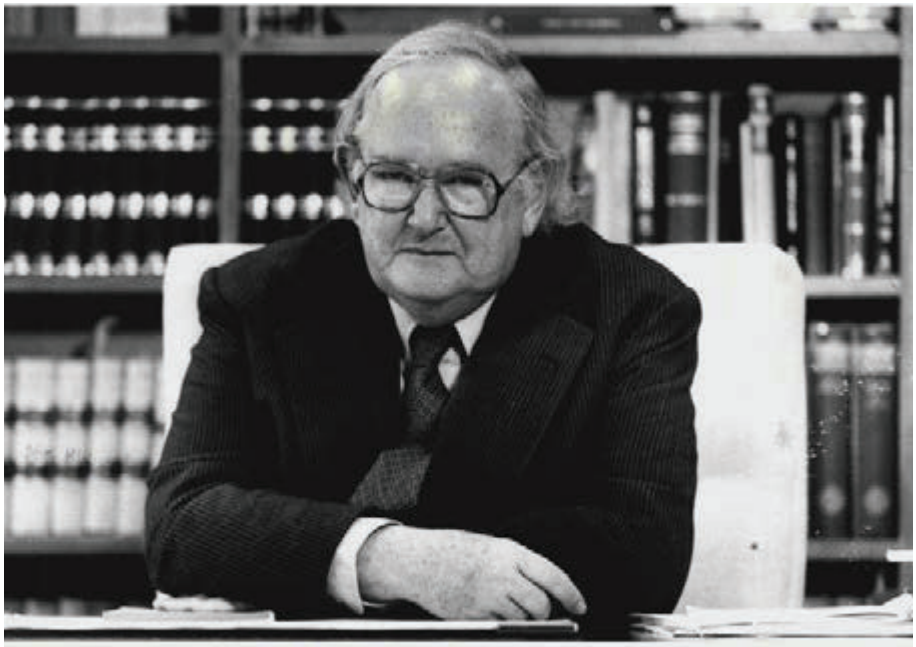
This statement has often been relied upon as a justification for an unbridled representation by counsel of a client's interests. An American commentator has relied upon that statement, and other things, to justify a conclusion that lawyers in an adversary system 'cannot be burdened with special responsibilities' and are mere agents who owe total loyalty and obedience to the client.[20] However, adherence to that statement as a standard of beheviour would lead swiftly to the barrister acting in accordance with it being struck off the roll in Australia. In fact, such commentators fail to appreciate that the statement was made in a wholly political context.

Mr Brougham, as Lord Brougham then was, spoke those words in opening his defence of Queen Caroline, the wife of George IV, in the House of Lords. The proceedings were, in formal terms, proceedings in the upper house of the legislature to enact a *Bill of Pains and Penalties.* If passed, the resulting Act would have resulted in effecting King George's divorce from his wife. In its terms, the Act would have held her guilty of adultery, stripped her of her royal title and effected a divorce. The proceeding was, therefore, entirely political in character. In a private letter, Brougham later explained why he had made that statement.

> 'The real truth is, that the statement was anything rather than a deliberate and well-considered opinion. It was a menace, and it was addressed chiefly to George IV, but also to wiser men, such as Castlereagh and Wellington. I was prepared, in case of necessity, that is, in case the Bill passed the Lords, to do two things – first, to resist it in the Commons with the country at my back; but next, if need be, to dispute the King's title, to show he had forfeited the Crown by marrying a Catholic … What I said was fully understood by George IV …'[21]

The statement was a political statement, calculated to intimidate persons who, while not parties in any sense, were instrumental in provoking the proceedings. The result of the proceedings was, in fact, a political victory for Queen Caroline. Moreover, no attempt was ever again made in England to pass a bill of attainder or to institute proceedings for impeachment. In any case, Brougham's statement cannot possibly be relied upon as a statement about counsel's duty when acting as such in a Court of law.

So, the rules of the Bar operate to restrict the behaviour of barristers beyond the restrictions of general common law rules



Sir Maurice Byers CBE QC

about dishonesty. Why do we have these rules? Certainly, if a barrister were a mere agent, a mere marketer of the client's case, these rules would be unnecessary. To answer that question we need to look more closely at the actual functions of the Bar.

This is how Sir Maurice described the work of the barrister and the judge:

> 'The advocate endeavours to persuade; the judge must decide. For that they must share or achieve a perception of what the matter for decision is, though not, of course, of its resolution. The isolation of that matter is the most demanding and the most essential of all legal skills. Presenting it clearly, concisely and attractively is the summit of oral advocacy.'[22]

The result of this joint undertaking is a judicial decision and the reasons for the decision. The reasons, which are the product of this collaboration between Bench and Bar, articulate the law. Albert Venn Dicey sourced the very content of the British constitution in 'the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts…'[23]

The conclusion must be that the system of justice in Australia entrusts barristers with the duty to isolate with precision the matter that is essential for decision and to array before the judge all the necessary factual and legal materials pertaining to that matter. Then, Bench and Bar work together, performing their respective functions, to ensure that the judge will be in a position to arrive at a sound decision and that the process leading to that decision is fair.

In *Ziems v Prothonotary of NSW,*[24] Kitto J described the relationship between Bench and Bar is one of 'intimate collaboration'.[25] Together they daily engage in the administration of justice. Together, they create and articulate the law. In his inimitable way, Sir Maurice remarked that 'occasionally that partnership may be distasteful to both'.[26]

It is indisputable, therefore, that the Bar engages in the administration of justice just as much as the Bench. On his appointment to the High Court, Sir Owen Dixon said that the Bar 'formed part of the use and the service of the Crown in the administration of justice.'[27] In *Ziems v Prothonotary of NSW,*[28] his Honour said 'the Bar is a body exercising a unique but indispensable function in the administration of justice'.

To use the words of Sir Maurice, 'When we appear before the Courts we are engaged in the administration of justice …'[29]

That is why the first object of the New South Wales Bar Association, according to its constitution, is to promote the administration of justice. The Australian Barristers' Rules state that the Rules have been made in the belief that a barrister has an overriding duty to the Court to act with independence in the interests of the administration of justice.

This conception of our profession has ancient roots. The original nucleus of the English Bar was the order of sergeants. This order was established centuries before there even was a Bar. The Brothers of the Coif, as they were called, devoted themselves to the profession of the law, bound by a solemn oath to give counsel and legal aid to the King's people.[30] Recall that the original meaning of the word 'profession' is a 'declaration, promise or vow made by one entering a religious order'.[31] A profession is the act of declaring a belief or practice. The word 'sergeants' in this context is a corruption of the Latin '*servientes*', meaning 'servants'. The serjeants were *'servientes ad legem'.* They charged the rich and gave their services *gratis* to the poor[32] How much service they actually gave to the poor is a matter for speculation. Perhaps, like the notion that a barrister's fee is a mere honorarium, it is a fiction which serves as a good mnemonic device to remind us that public service, not profit, is our real *raison d'etre.*

The English were not unique in the development of a coterie of devoted professionals. The Romans and the French also developed a profession although their nature was different. The French, as always, expressed the stature of their Bar most elegantly:

> *Un ordre aussi ancient que le magistrature, aussi noble que la vertu, aussi necessaire que la justice.*[33]

The purpose of the Australian Bar is, therefore, to 'profess', as the chief function of its members, the administration of justice according to law. The trouble is, as the editor of *Justinian* has frequent cause to remind us, barristers can be as shabby in their behaviour as anybody else. It is for that reason that the members of the Bar are braced and upheld in their proper behaviour by their rules. The reason for the rules about honesty and fair dealing, greater than the community normally requires, are obvious. But other rules serve a different end. They serve to maintain a distance from the lay client. The prohibition against a practice in which a barrister is paid a wage ensures independence from any single litigant. The barrister is not allied with any enterprise whose aims might conflict with a barrister's obligation to conduct a case in a way that serves the administration of justice. The general practice of taking briefs only from a fellow professional secures against a too-great identification with the interests of the client. The prohibition against partnership avoids the conflicts of interest that could impair a barrister's freedom of action. The

cab-rank rule, which is rarely invoked because its very existence means that it doesn't have to be, frees the barrister from embarrassment and ensures that the Courts can depend upon the same detached and honest assistance whoever the client.

For these reasons, a barrister, whose actual moral fibre might not be up to it, finds it easy to accept sole and total responsibility for a matter. By dint of mere fidelity to common rules of practice with which it is easy to comply, the barrister becomes a person whom the Courts can trust.

The Court is vitally interested in the maintenance of these rules and practices and is a zealous guardian of standards of behaviour. In 1780, Lord Mansfield asserted that the power of the Inns of Court concerning the admission to the Bar is a power that was delegated to the Inns by the judges.[34] In 1830, Lord Wynford, speaking for the Privy Council, observed that, there being no Inns of Court in the colonies, and it being essential for the due administration of justice that some persons have authority to determine who are fit to practise, the same power must be taken to reside in the colonial Courts.[35] Consistently with that idea, Chapter 10 of the *Charter of Justice* of 1823 established a Supreme Court of New South Wales and authorised the Court to admit as barristers or solicitors persons who had been admitted in Great Britain and Ireland and gave a limited right of local admission. In 1848 the New South Wales Parliament enacted the *Barristers' Act,* which incorporated a board with administrative powers to govern the process of admission. Accordingly, the judges of the Supreme Court were *ex officio* members, along with the Attorney-General and two barristers.

The reason why judges are the ultimate guardians of the standards of behaviour of the Bar is because it is they who depend so much upon the maintenance of the fundamental characteristics of the profession.

The engagement of the Bar in the administration of justice is not limited to the provision of assistance to judges. It is the Bar itself that, on the whole, furnishes candidates who are qualified to fill judicial office.

In England, until 1873, the judges of the Court of Common Pleas were invariably selected from the brotherhood of Serjeants. That is why, even in Australia, until very lately, judges referred to each other as 'brother'. Even today, almost every judge is appointed from the Bar and judges of the Supreme Court are almost always appointed from the highest modern rank of advocates, the silks who are the successors to the serjeants. In its day, the practice of appointing solely from the rank of serjeants was regarded as vital to ensure against the appointment to the Bench of political flunkies.[36] When, in 1990, there were serious political initiatives to abolish Queen's Counsel, Sir Maurice lamented the proposal. He said that the appointment of Queen's Counsel by the government served as a recognition by the executive of the central part that lawyers play in the administration of justice.[37] That is why the process of selection of those barristers who will be appointed senior counsel is so important to the community.

'…we have inherited and were intended by our Constitution to live under a system of law and government which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the parliament and the executive. But the rights referred to in such an enunciation are the basic rights which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom.'

This symbiotic and deep-rooted relationship between Bench and Bar is structural and not merely incidental. As a peculiar and remarkable phenomenon, it is very apparent to foreign observers. In 1894, an American observer of the English profession saw English judges as 'not a distinct branch of the profession, but … merely eminent members of it'.[38]

Judge Richard Posner, who had been Chief Judge of the US Court of Appeals for the Seventh Circuit, visited England and had a look the English profession. He delivered several lectures at Oxford that explained the results of his anthropology. He said that once you recognise that barristers are a form of judge, you can see that England has a career judiciary.[39] He said that this is bound to be unlike the 'lateral-entry, rather political, rather amateurish, high-variance, non-hierarchical judiciary that one finds in the United States. Advancement in a career judiciary depends on merit.'[40]

Judge Posner marvelled that :

> 'with the judges stripped of political functions, they are really technicians and it does not matter that they are un-representative of the population any more than it matters that engineers are un-representative.'[41]

One feature of this is the exceptional capability of Australian judges to fulfil the functions of their office. They have gained that capability by reason of their years of service as members of an ancient institution that was transported to our country and translated.

Let me turn to the Australian Constitution and its relationship to these matters.

I will begin by quoting something that Justice Jacobs said because it is relevant but, mostly because Sir Maurice relied upon this *dictum* in his oral argument in *Kable v The Director of Prosecutions of New South Wales.*[42]

> '…we have inherited and were intended by our Constitution to live under a system of law and government which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the parliament and the executive. But the rights referred to in such an enunciation are the basic rights which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom.'[43]

Kable decided that the Constitution requires and implies the continued existence of a system of State Courts with a Supreme Court at the head of the State judicial system. Covering cl 5 of the Constitution, s 118, ss 51(xxiv) and (xxv) and s 77 imply the continuing existence of a system of State Courts declaring the legal rights and duties of the people of Australia.[44] No State or federal parliament can legislate in a way that might undermine the role of the Courts as repositories of federal judicial power.[45] In the case of State Courts, this means that they must be independent and appear to be independent of their own State's legislature and executive government as well as the federal legislature and government.[46]

Let me invoke the spirit of Sir Maurice and put a rhetorical question in the way that he used to do in oral argument: