Institute of Ethics Seminar
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# "The Common Good and Legal Practice"

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I will speak today on legal practice and the "common good".

While I have not been in private legal practice for as many as 14 years now, I hope I am not so far distant as not still to be able to discern its essence, and its peculiar problems.

It is important that I begin by describing the concept of "the common good"; with specific relation to the law. Then I will address what is fashionably, for some, a conundrum - whether lawyers can, consistently with their profession, foster the public good: my answer, unsurprisingly, is that they can, and that their ethical obligation compels it. Then I will touch on some of the temptations thrown up by aspects of modern practice; concluding with practical suggestions of how the profession may these days pro-actively work for the public good. First, the nature of the concept.

The scope of the "common good", as an ethical and jurisprudential notion, is reasonably well known, notwithstanding post-modernist coyness. St Thomas Aquinas, credited as its foremost proponent, said that "as parts of the full life of a community, all human beings fall into subordination to the common happiness in a way properly expressed in law". The idea was originally expressed by Aristotle. He emphasised "friendship", a concept then somewhat stronger than the modern relationship, as the "supreme virtue of social and political life"1. St Thomas Aquinas expanded that notion of friendship to encompass Christian ideals, primarily love of God and neighbour. In his account, God is "a conceptual resource that functions as both the Supreme value for human beings and the spiritual energy generating community feeling, as well as the ultimate authority prescribing natural law"2. Spiritual matters aside, all "adherents of the common good hold that human beings, given their nature, can expect to be fully happy only within a community of shared benefits and shared risks"3. If it matters to individuals in this secular realm, theories based upon the notion do not necessarily require individual sacrifice or exclude personal autonomy. Rather, they may even allow for protection from personal sacrifice, provided the welfare of the community as a whole is first ensured.

How does this concept of the common good impact upon legal practice ?

Put simply, the legal profession is, must be, primarily concerned with serving the public interest. That is indeed, in my view, the necessary essence of any "profession": what distinguishes a profession from other callings and the provision of services. Of the legal profession in particular, one notes that in the interests of the common good, the community has devised a set of rules, being the law, which Dean Roscoe Pound uncontroversially described however as "merely the skeleton of the social order"4. In other words, the law delineates the limits of socially acceptable behaviour. Over time, society s legal framework, even allowing for that limitation, has nevertheless become so extensive and complicated that it is now incomprehensible to most people. Lawyers, specially trained to understand and apply the law, have become essential to ensure that the law operates to maintain social order, and they thereby advance the common good.

The nature of legal practice may regrettably spawn conflict, and that may imperil the public good. Our own Professor Charles Sampford has suggested three "justifications" for or objectives of legal practice, which would give legal practice a social dimension. The objectives he suggests are - achieving justice, making the law more effective, and making law serve the purposes of individual clients.5

He goes on to suggest that "the potential for conflict in these three values and related justifications is clear". There may be conflict, for example, if a lawyer believes a certain law is unjust, but is, as is the fact, ethically obliged to adhere to it. Does service of a "common good" entitle that lawyer to take steps to counter the effectiveness of the law in the interests of justice? The ethical answer is clearly "no". The lawyer is absolutely bound to apply the law. That is not to exclude the lawyer s agitating for change in the law - as I have done recently in a modest way about the crime compensation scheme. And we know of many lawyers driven by strong social consciences to promote community reconsideration of arguably undesirable laws.

Sampford suggests a more serious conflict may emerge where the purposes of the individual client are pursued without regard for more general considerations of community justice. The significance of this conflict is aggravated by the circumstance that legal advice is often expensive, financially out of reach of many people, such that "legal practice can, on one interpretation and justification, involve a well paid exercise in ensuring that the effects of law and the demands of justice can be avoided by a minority of clients"6. He identifies this as the "greatest source of community concern and cynicism" concerning the profession:-

> "Obviously, if a lawyer strips a trust account or overcharges for services, the community will be unimpressed with the individual and the profession. But the pursuit of the interests of paying clients at the expense of giving effect to the law and achieving justice is a far more serious divergence. It goes to the heart of the lawyer s role."7

That prospect, if borne out, would strike down the lawyer s role as servant of the public and supporter of the common good. We were warned this occurred in the days of "bottom of the harbour" asset stripping. Who would know the extent to which it did? There are more easily detectable breaches: I came to know recently of a solicitor who sought to suborn a witness, I have known of solicitors who dipped into the client s money . . . and in the Court of Appeal we strike them off. Probably less detectable, less apparent breach of obligation does occur. I like to think such occurs infrequently. And that we emphasize the basic obligation is worthwhile in reducing that "infrequency" even further.

We are also warned that over the last century the temptation for lawyers to ignore public duty when faced with such conflicts has been growing. Legal theorists in recent times have tended even to ignore the importance of the common good. In the "Encyclopaedia of Ethics", the entry on the "common good" begins:-

> "More can be made of the notion of the common good than ethical theorists in the twentieth century allow, more indeed than natural law doctrine, before its eclipse in the eighteenth and nineteenth centuries, troubled to make explicit."8

Any shift in focus away from the common good sits conformably with changes within society generally.

Well known American legal theorist David Luban discusses contemporary culture, referring to Laurence Friedman s book, "The Republic of Choice", as, in his opinion, the best exposition of the subject. He agrees there has been a significant change in this culture since the nineteenth century, with "individualism" now paramount. While in the nineteenth century "virtues of self restraint and self-reliance" were emphasised as "necessary concomitants of a liberal economic order", modern society values "self-expression", regarding "uninhibited choice and floridly self-related life styles" as being more valuable than "adherence to a rigid schedule of virtue and duty"9. Luban provides, as an example of this change in society, recent advertisements for military service, promoting it as a "freely chosen form of individual self-expression", whereas in years gone by it was "regarded as a self-sacrificing duty to one s country"10. With heightened concentration on individuality may come an expectation that the legal system will more readily facilitate an individual s freedom of choice in all aspects of life.

Friedman suggests that in this climate the collective identity deems individuals "should not suffer harm because of events, traits and conditions over which they have no control". He extrapolates:-

> "When there is no real choice, no real losses, disadvantages, or punishment should attach. A person should accept the legitimate consequences of free choices. But any calamity or misfortune is

> unfair if it is *not* the result of free choice and is undeserved ; and any suffering that ensues is a form of injustice. Injustice cannot be tolerated in a just society. Hence occurrences of this kind should give rise to some sort of claim of right, some sort of compensation - some arrangement to restore the prior or proper situation."11

It may be accepted that in such a cultural setting, there may be less willingness on the part of individuals to accept misfortune, whatever its cause. Compensation is often secured by insurance. But sometimes insurance is not available, and "victims" look to other sources. Increasingly, people look to lawyers to identify those sources, and courts are asked creatively to extend existing boundaries of recovery. While this may lead to a perceived delivery of justice to the aggrieved individual, there will be somebody else to foot the bill. With many individuals seeking vindication of their rights, at the expense of others in society, is the common good necessarily being advanced? Courts asked to extend the field of negligence, for example, are acutely affected by considerations of public policy.

We should in short be concerned to watch the prospect of legal ingenuity promoting, at the expense of the general community, the satisfaction of individual novel demands which have no wider public justification. Yielding may lead to a rather self-centred monopolisation of valuable and scarce community resources. And so while the common law is not closed, and may creatively expand to encompass new avenues for recourse, the lawyer who promotes them must be anxious to identify a relevant "common good": the case law does illustrate the courts concern about such matters.

Litigation is not the only way through which individuals are seeking the assistance of lawyers to promote their own interests at the expense of broader, community interests. Robin West, while describing in harsh terms I would not endorse, offers examples:-

> "Lawyers embark on their careers expecting to be engaged in the pursuit of justice, and by the end of a life spent representing corporate clients, come to realize and lament that they have done much the opposite: they have spent their careers not furthering *justice* at all, but instead doing parasitic work on behalf of faceless corporate clients whose ends are to maximize profit regardless of social consequences, and who expect their lawyers to manipulate the substance and procedures of law to help them do so. The excessive, relentless, and zealous pursuit of the dubious ends of clients by whatever marginally lawful means are available, rather than a life committed to justice . . . is felt by the most successful members of the retiring bar as a serious, even profound, moral and existential cost."12

Now in part as myself a former commercial lawyer, I discard that comment as inappropriate here. I can more readily accept its applicability in the United States. That nation has frequently offered models we may or may not care to adopt, or allow to influence us. Of course Australian lawyers are exposed to ruthless clients. I believe they respond ethically. Some clients obsessed with their own interest, however dubious, may be extraordinarily persistent.

Should lawyers take a stand against such persistence by advising against proposals, or refusing to act, in the recognition of the common good ? Most lawyers would, all should, answer "yes". They may however with some discomfort point out that practically taking such a stand could be difficult. Why?

First, they would highlight their duty to their clients. For example, Professor Stephen Parker, has stated that barristers have a duty to "uphold fearlessly the interests of the client"13, quoting Lord Brougham s rather florid statement during the trial of Queen Caroline in 1820:-

> "An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destructions which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion."14

So much for a barrister s duty to the public. A related duty, which similarly arguably conflicts with the interests of the public, is that of client confidentiality. Professor Parker asks:-

> "What of the client who confides in the barrister her or his intention to commit, or to continue committing, an offence or serious tortious act against another? What of the client who confides about a past wrong for which someone else is avoidably being blamed? What of the barrister, who bears information that the client is a danger to himself, herself, or the public?"15

He suggests that no guidance in relation to these dilemmas is provided for barristers by their various rules of conduct. One may say the lawyer should urge the client to take the morally right course, although there can be no compulsion.

These are however in the end quibbles. The lawyer has a clear duty to the law, to the public, thereby to the common good, which must prevail over all others.

This duty, which Mr Justice Meagher recently described in the case of the barrister as the "first duty"16, was expressed in time hallowed terms by Lord Reid in *Rondel v. Worsley*:-

> "Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client s case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client s wishes or with what the client thinks are his personal interests. Counsel must not mislead the Court, he must not lend himself to casting aspersions on the other party or witnesses for which there is not sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce. And by so acting he may well incur the displeasure or worse of his client so that if the case is lost, his client would or might seek legal redress if that were open to him."17

Those words are 30 years old, but as applicable now as then.

Compliance with this duty ensures that the interests of the client, which may sometimes be morally questionable, will not be promoted over the interests of justice. The then Lord Chief Justice of England, Sir Alexander Cockburn, rightly modified Lord Brougham s statement of duty, to which I referred earlier, so as to incorporate this "higher" duty:-

> "My noble and learned friend Lord Brougham said that an advocate should be fearless in carrying out the interests of his client; but I couple that with this qualification and this restriction - that the arms which he wields are to be the arms of the warrior and not of the assassin. It is his duty to strive to accomplish the interests of his client per fas, not per nefas; it is his duty to the utmost of his power, to seek to reconcile the interests he is bound to maintain, and the duty it is incumbent upon him to discharge, with the eternal and immutable interests of truth and justice."18

What must be remembered, then, is that legal practitioners have predominant duties to the court and to uphold the law. The "law" is of course certain, and not dependent on flexible subjective interpretation. That is consistent with the judicial oath, which is not to do justice, but to render justice according to law. The law is appropriately fixed, and lawyers are bound to uphold it. That will, at least in theory, advance the "common good", a concept delineated - so far as the legal framework

need do so, by the legislature, and the courts.

Now of course the practical pressures of modern practice themselves give rise to temptation. Rents are high, some premises lavish, outgoings are relentless. But remember this profession has not resorted to contingency fees; many lawyers enhance access to justice through commendable speculative fee arrangements; pro-bono work is regularly done; lawyers agitate regularly for socially desirable legislative change.

The pivotally important aspect of a lawyer s advancing the common good these days is enhancing access to justice. Access to justice is a human right of fundamental importance, of essential constitutional significance. Accessible justice is a large component of the common good.

There are countless members of the community who lack access to legal solutions, for lack of knowledge of their rights and resources to pursue them. There are many who will not ever know there is a legal solution for their problems. There are others treated unjustly because of delay which occurs in the completion of proceedings once commenced.

Technological advances may provide our greatest current hope of generally increasing access to justice. The Internet for example will undoubtedly come to disclose more about avenues for legal recourse. For those who cannot afford computers there is I gather a real prospect that facilities will be available, sooner rather than later, through ordinary home TV s. Most homes have them. You may have heard that one in six houses in China have TV s. Almost all houses in Kosovo, even in the poorest areas, apparently have satellite dishes.

Lawyers will advance the common good if they are astute to modern inaccessibility to justice, and to ways of dealing with the problem, and if they are prepared to lend their considerable weight to the taking of the necessary remedial steps. Judges, lawyers, professional associations representing lawyers, the Attorney-General directly representing the people, are all acutely aware of these problems: in addressing them, they directly advance the public interest, the common good. It is important that this be acknowledged in the community context: ordinary fashionable glib criticism of lawyers conveniently ignores these sorts of considerations.

It is indeed important generally for lawyers to lend their learning and experience to the development of important social programmes with a legal complexion. It should not be thought that most lawyers  thoughts stop with the case immediately at hand. Lawyers are jurisprudentially educated to grapple with broader community issues. It is no accident that they frequently find themselves in positions of community leadership that is the result of recognition of the usefulness of their finely honed skills, and well developed social consciousness. Accessibility of justice is one of

those broader issues; and that issue falls within the broad spectrum of general human rights.

One question which interests many lawyers is the adequate protection of those rights. In this country we have no constitutionally enshrined bill of rights. We are nevertheless plainly a free and secure society, a robust democracy, with wide statutory protection against such things as racial and other discrimination and other forms of unequal treatment; our press is free; our judiciaries are independent; we have statutorily guaranteed freedom of information; and the High Court has felt able, through an ordinary common law approach, to confirm and secure particular rights, as with the fundamental right to a fair trial in Dietrich s case.

Recent polling suggests however that a majority of Australians would nevertheless favour a statutorily enshrined bill of rights as such, and the potential utility of such a thing, at least as an aspirational charter, would be obvious enough - although whether "aspirational" statements have a proper place in this area is itself debatable: many commentators say such charters are the place for precise and enforceable provision, not expressions of hope at risk of being dismissed as merely platitudinous.

Whether the common good would be served through an enshrined bill of rights would greatly interest most thinking lawyers. Through reliable contribution to public debate in these sorts of areas, lawyers may and do play an important public role. This is, I believe, to be fostered, not so that lawyers may "direct these debates, but aid them through the injection of their wide experience. Again, I find it disappointing when lawyers, who do as an aggregation of people display this broader public interest, are criticized for general insularity.

There is another particular feature of the modern legal landscape to which I will in this context refer. The nature of the more difficult social issues we lawyers have to explore and resolve is changing: they are becoming even more difficult. When does life begin and end; when may the palliation of pain properly cease; how to resolve abstruse novel aspects of ethnic land title; how to understand genetics issues, apart from the extraordinarily complicated aspects of electronic business, international financing, and so on.

Lawyers, judges are now more than ever obliged to develop new skills, and keep up to date, if they are to promote the public or common interest, and the resolution of many of these issues depends more than ever on a healthy and well developed social as well as legal conscience. We are all highly conscious of the need for what we call continuing legal and judicial education, and the primacy of an acute social awareness, and initiatives to these ends are quite intense. Again, it is important that the community appreciate this feature which - with others - militates against the misconception of a judiciary, a profession, which is out of touch.

When the Court admits new practitioners, I admonish them to acknowledge public service as the essence of their new profession. I encourage them to do all they can to make justice more accessible for all, and particularly to assist the marginalised, the friendless and the weak. I am usually addressing a youthful group. I have every reason to believe the response is predominantly of acceptance that that is the right way forward.

Lawyers are a product of society s desire for order, and that ultimately depends on the rule of law. A lawyer s primary function is to maintain and assist in applying the complicated set of rules which society has created in the interests of the common good. Lawyers exist, then, because of the common good, and continue to exist because they in fact continue to serve this vital public interest. Legal practice is an honourable profession essential to, and dependent upon, the common good. Despite changes within our broad community culture, which have, one hopes temporarily, diverted the individual s attention from wider community concerns, the legal profession must resist the temptation to act contrary to the ideals which gave rise to its conception. I believe it does, and even more encouragingly, that it embraces a determination creatively to foster the public good in many ways, some of which I have sought to illustrate today.

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1. L.C. Becher, "Encyclopaedia of Ethics - Vol.1", St James Press, Chicago 1992, p.177.
2. Ibid at p.177.
3. Ibid at p.178.
4. As quoted by J.L. Dennis, "For the Common Good" (1990) Trial (September) 55 at p.56.
5. C. Sampford, "Law, Ethics and Institutional Design" an essay in S. Parker and C. Sampford, "Legal Ethics and Legal Practice" Clarendon Press, Oxford, 1995 at p.22.
6. Ibid at p.22.
7. Ibid at p.23.
8. Op cit, note 1, at p.175.
9. D. Luban, "Contingency Fees" an essay in "Legal Ethics and Legal Practice" supra at p.104.
10. Ibid p.104.
11. L. Friedman "The Republic of Choice", Cambridge , Mass., 1990 at p.96.
12. R. West, "The Zealous Advocacy of Justice in a Less than Ideal World" (1999) 51 Stanford Law Review 973 at p.973-4.
13. S. Parker "Change and Responsibility" an essay in "Legal Ethics and Legal Practice" supra at p. 79.
14. Ibid at p.79.
15. Ibid at p.82.
16. Justice Meagher, "Honesty & the Bar: Some Reflections" Address to the St James Ethics Centre, 1998 Lawyer s Lecture.

17. [1969] 1 AC 191 at p.227.
18. As quoted in my lecture to the Law Week Committee in conjunction with St John s Cathedral on 3 May, 1990, "The Legal Profession in the  90's: Ungodly, or Still Honourably Serving a Vital Public Interest", at p.6.