Preface
The Centenary Oration: Scholarship, Professionalism and Legal Education+

THE HON SIR GUY GREEN*

Prologue

Early in the seventeenth century two great forensic confrontations took place in different parts of Europe. The first was on Sunday, 10 November, 1608 between James I of England and the Lord Chief Justice Sir Edward Coke in the course of the hearing of a case in the Court of Common Pleas. The case involved that most barren of legal controversies, a demarcation dispute about the jurisdiction of two courts. The King said that he would decide the matter and that he had the power to do so because the judges were but delegates of the King, and the King was the law, and thus when he spoke it was in fact the law speaking. Coke denied those claims and asserted that even the King was under the law, that all cases "ought to be determined and adjudged in some court of justice, according to the Law and Custom of England" and that although the wisdom of the King was undoubted, cases were not to be decided by the application of some intuitive notion of justice but according to law, "which law" Coke said, "is an art which requires long study and experience before that a man can attain to the cognizance of it".[1] A contemporary account of those proceedings suggests that the effect of this brave assertion of principle by Coke was somewhat mitigated when, as a result of the King's anger at this judicial presumption, Coke prostrated himself on the floor "humbly beseeching his Majestie to take compassion on him and to pardon him if he thought that zeale had gone beyond his dutie and allegiance".[2] That was probably a pretty sensible tactical withdrawal by Coke, but nevertheless that dramatic day in Westminster Hall was of great significance, marking as it did the emergence of the modern concept of the rule of

---

+ An oration delivered in the Sir Stanley Burbury Theatre at the University of Tasmania on 30th October, 1993 to mark the Centenary of the Law School at the University of Tasmania.

* KBE, Chief Justice of Tasmania and Chancellor of the University of Tasmania.

1 *Prohibitions del Roy* (1607) 12 Co Rep 63; 77 ER 1342.

2 Bowen, Catherine Drinker, *The Lion and the Throne*, London, Hamish Hamilton, 1957, at 263.

law and the development of the judiciary into an independent constitutional organ of the state as well as affirming that the law is not for amateurs - even if they are Kings - but is an exacting discipline requiring serious study.

The other confrontation occurred on 22 June, 1633 in the Church of Santa Maria sopra Minerva in Rome when Galileo Galilei was tried for advancing in his "Dialogue concerning the two chief world systems", the Copernican heresy that the earth is not the centre of the world but moves around the sun. Galileo was convicted of that charge but, more significantly, he was also convicted of the distinct charge of adhering to the heretical doctrine that, in the words of the learned cardinal inquisitors, "an opinion may be held and defended as probable after it has been declared and defined to be contrary to Holy Scriptures".[3] Galileo was forced to recant although legend has it that as he did so he defiantly muttered under his breath "*Eppur si muove*" ("and yet it moves"). I regret that the evidence to support that story is not strong, but whether or not he uttered those words does not really matter. What is of importance is that by that book and his other works Galileo established the idea that observation and reason, rather than religious dogma, should inform our thinking about the world, and thus brought about a revolution in our attitude towards the kind of knowledge we should be seeking and how we should go about obtaining it - a revolution which not only gave birth to modern science but profoundly affected the methods and underlying philosophy of all scholarly disciplines.[4]

It would be understandable if by now some of you were beginning to wonder uneasily whether you have come to the right theatre this afternoon; the connection between seventeenth century English politics and the behaviour of the solar system and the celebration of the centenary of the law school of the University of Tasmania not being immediately apparent.

Might I ask you to treat those two episodes in our history as a prologue to this address, the relevance of which I hope will become clearer later on.

The History and Role of the Law School

In 1990 the University of Tasmania celebrated the centenary of its foundation. And now in 1993 we are celebrating the centenary of the foundation of the law school of that university. But the gap of three

---

3 Redondi, Pietro, *Galileo: Heretic*, Princeton University Press, at 260.

4 Singer, *A Short History of Scientific Ideas*, Oxford University Press, at 259.

years between those two anniversaries is not as significant as it might appear. Although the university was founded in 1890 it was initially only an examining university which awarded degrees but did not offer any courses of study. The university did not start operating as a teaching university until 1893 so, for all practical purposes, the law school can be regarded as one of the foundation faculties of the university.

The character of the new law school was epitomised by the background and personal qualities of its founders described by Professor Davis in his excellent history of the law school as the "three remarkable men who inaugurated [this] notable school of law":[5] Andrew Inglis Clark, who was a considerable intellectual force, a distinguished lawyer, judge and politician and one of the founding fathers of the Commonwealth of Australia; James Backhouse Walker, a Hobart solicitor, who was largely responsible for founding the university itself and was an early Vice-Chancellor; and the distinguished legal academic and historian from Cambridge, Professor Jethro Brown. Given that variety of experience and talent it is not surprising that, from the beginning, they committed themselves to establishing a law school which would be both a professional training school and an academic department of the university of the highest international standing. That commitment to quality and that commitment both to academic scholarship and to professional training have remained central characteristics of the philosophy of the law school right up to the present day.

It may be thought that in the light of its history the role of the law school should now be taken to be so well-settled that there is not much to be gained from exploring its rationale any further. But I suggest that there are good reasons why it is worthwhile revisiting that perception of the role of the law school from time to time, perhaps especially on occasions such as this when we are viewing the law school in the context of its history over the last 100 years. First, it is important that we do so because the continued acceptance of the idea that a law school should be both an academic faculty of the university like any other, as well as a professional training school, cannot be taken for granted. In Australia there has been considerable debate about the issue and pressure has been brought to bear upon law schools to place greater emphasis upon one role at the expense of the other.[6] There is even an iconoclastic body

---

5 Davis, Richard, *100 Years, A Centenary History of the Faculty of Law, University of Tasmania 1893-1993*, Law School, University of Tasmania, 1993, at 1.

6 Pearce, D, Campbell, E and Harding, D, *Australian Law Schools*, Commonwealth of Australia, 1987, Vol 1, para 1.71 ff.

of opinion that law schools should not assume either role but should reject both traditional scholarship and responsibility for professional training.[7] Secondly, reflection upon the relationship between the legal profession, the law school and the university is worthwhile because I suggest that that relationship has deeper and more interesting ramifications than might at first be apparent and also because an understanding of it helps us to define more sharply what should be the policies of the law school and the objects of its curriculum.

Let us begin by briefly rehearsing the main reasons why legal professional training should be founded upon a university law school education. First of all, the legal profession, like other professions, has long since been seen to be linked with universities because, unlike the expertise required of those in non-professional occupations, the expertise required of professionals is derived from a substratum of fundamental knowledge of the kind only taught in universities - thus creating a linkage which has been recognised since the mediaeval universities of Europe spawned the three original learned professions of medicine, law and the clergy.

Secondly, the point needs to be made that both academic lawyers and practising lawyers are concerned with the same legal system. Certainly, their areas of interest and the purposes for which they are studying the system might be different but it is still the same system. That is a blindingly obvious point but it needs to be emphasised because the positions taken by some academics and some practitioners in debates about academic and vocational training are sometimes so polarised as to give the impression that they are talking about quite different systems.

Finally, in essential respects the modes of analysis, research and reasoning employed by the academic and the practitioner are identical. And, in particular, the process of logically deriving legal propositions from basic principle or tracing them back to their policy or historical roots which is the hallmark of academic legal research is exactly the same process as that in which a practitioner must engage when he or she is confronted by a novel situation or conflicting judicial decisions.

Priority of Scholarly Values

If one accepts that the law school is both a professional training school as well as a part of the university the question has been raised as to which should have priority in the event of a conflict

---

7 Pearce, Campbell and Harding, work cited at footnote 6, at paras 1.58, 1.117 and 1.118.

arising between the aims or values of the two. In my view, the possibility that such a conflict might arise is more apparent than real but, in the event of its occurring, I do not think there can be any doubt about the answer.

A very distinguished Australian legal academic and Vice-Chancellor, Sir David Derham, had no doubt that in fundamental respects professional schools in a university must not only adhere to the same scholarly values as those to which the university as a whole is committed but, in the event of a conflict, must subordinate their own special interests to those values. At a seminar in 1966 Sir David in robust, uncompromising terms said that[8]

> the universities, in the pursuit of their primary aims, are entitled to require that professional schools will not be independent of those university rules and policies which are designed to achieve those aims. They are entitled to demand indeed that their professional schools adopt those aims.

It follows, he said, that amongst other things the universities must demand "that professional education in universities is based on a fundamental body of scholarly knowledge" and that it follows "that the acquisition of professional skills, though proper to be an important part of university professional school activities, must take second place to the achievement of the primary aims".

Mr Justice McGarvie (as he then was) commented that "it had the ring of novelty about it when Professor David Derham said ... that universities are entitled to require that its academic lawyers should be engaged in the achievement of those primary aims" but, his Honour concluded[9]

> the years since have shown the wisdom of his words. Legal educators whose academic work fulfils each of those university responsibilities will increase the prospects that members of the community will have justified confidence in the law and its application.

Those views must surely be right. A law school curriculum which does not fully serve the needs of the practising profession in every particular can always be topped up with additional post graduate courses. But a degree awarded on the basis of a course of study in which scholarly values have been compromised or in which an essential element of the discipline has been neglected will

---

8 Derham, DP, "The Nature of the University and its Requirements", in *The Role of the University in Preparation for the Professions*, University of New South Wales.

9 McGarvie, the Hon Mr Justice RE, "Legal Education: Pulling its Weight in the Nineteen Nineties and Beyond", (1991) 17 *Monash University Law Review* 1, at 5.

always be a defective degree which no university should ever contemplate awarding.

The Law School and Values

But given that there is general agreement that law schools should provide professional training, there is no unanimity about one particular aspect of that role and that is the question of the extent, if at all, to which law schools should concern themselves with the transmission to undergraduates of basic professional values.

At first sight the idea that a law school, or indeed that any part of a university, should be the vehicle for inculcating values is somewhat shocking. It seems quite alien to the principles of scholarly detachment which are rightly regarded as fundamental elements of the ethos of our universities.

Certainly, I am not suggesting for a moment that we should countenance the inclusion of anything remotely like an ideological component in the law course. In particular, I am not suggesting that there is any room for what has become known as the critical legal studies movement in the law school. The critical legal studies movement originated in the United States and has had some influence in one or two law schools in Australia. Others have elsewhere presented convincing refutations of the movement's doctrines and shown its destructive potential for legal education[10] so I do not think it is necessary for me to discuss it in any detail.

It is sufficient to observe that, insofar as it is informed by a political agenda and is founded upon unproven assumptions about the nature and operation of the legal system, the critical legal studies movement is unscholarly and thus has no place in a university. The movement is also opposed to law schools being involved in professional training which is probably just as well, because it also advocates the deconstruction of the legal system and its institutions so that if its programs were to be implemented our graduates would not have anywhere to practise anyway. But although the critical legal studies movement should be dismissed from serious consideration insofar as it does not adhere to basic scholarly norms, neither it nor any other approach to legal education should be rejected merely because it is critical of the law, the legal system or those who work within it. The exercise of such a critical function is an important part of the responsibilities of

---

10 Pearce, Campbell and Harding, work cited at footnote 6, at paras 1.118 and 1.58; Walker, Geoffrey De Q, *The Rule of Law*, Melbourne University Press, 1988, at Ch 10; McGarvie, work cited at footnote 9, at 6.

universities and law schools. As the authors of the Pearce Report on Australian Law Schools rightly observed:[11]

> ... universities are concerned to evaluate social institutions. They have an important role as the critic and conscience of society. A university law school is concerned to evaluate and criticise the law, legal institutions and legal processes and to ask of them "what are you good for" and to assess whether they should be changed. In educating law students, accordingly, it is desirable to cultivate a student's intellect in a spirit of free enquiry and to encourage independent thought and enquiry about the law.

It follows, suggests the Vice-Chancellor of the University of Melbourne, Professor David Penington, speaking of the professions generally that:[12]

> Universities are not distinct from the professions: professional faculties are in fact part of the profession. [But] the relationship between the practice arm and the academic arm of a profession has always been a dynamic one. There is, or should be, a constant and creative tension between the two.

But, assuming that we reject anything like an ideological approach to the teaching of the law, the question remains as to whether there are some values which are so fundamental to the philosophy which informs the work of our universities and the legal profession that their transmission must be regarded as an essential part of legal education.

The authors of the Pearce Report addressed this issue at a number of points. After discussing the question of what role law schools should play in professional training, they moved onto a consideration of what they characterised as "another more subtle area of debate, which has really only been overtly addressed in quite recent times [concerning] the implications of the process of legal education for the values and outlook of law students". Not surprisingly, the authors concluded:[13]

> Obviously this subject is heavily value-laden and open to much disagreement. Undoubtedly some teachers do seek to transmit values other than those of objectivity, free and critical enquiry, and the right to hold one's own opinion. But it seems dangerous for an institution to adopt particular ideologies other than such traditional university values as are concerned with freedom of inquiry and thought.

---

11 Pearce, Campbell and Harding, work cited at footnote 6, at para 1.52.

12 Penington, David, "How Should the Professions and the Universities Respond to the Competency Standards Movement?", Address to the Australian Council of Professions, The Royal Australasian College of Physicians, Fellowship Affairs, May 1993, at 36.

13 Pearce, Campbell and Harding, work cited at footnote 6, at para 1.74.

That concession that, while eschewing an ideological approach, it is acceptable for university teachers to prosecute traditional university values such as those which are concerned with freedom of inquiry and thought, appears to be modest and uncontroversial. But, in fact, it has significant ramifications. The principle which supports it is that although, generally speaking, academic research and teaching should be free of dogma or ideological influences, there are some values which are so fundamental and so well-entrenched that it is proper to include their inculcation as part of the teaching of undergraduates. If that is accepted - and I think that its acceptance is implicit in the way undergraduates are taught in all western universities - then the question is raised as to whether there are equivalent values which can be regarded as so fundamental to the concept of legal professionalism that they too should inform decisions about the content of the law course and the way in which it is taught. In order to answer that question we need to consider what is entailed in the concept of professionalism. Sociologists who have considered the question refer to many characteristics, including the institutionalisation, social status, values and skills of lawyers, their monopoly of legal practice, and so on. But on analysis many of those indicia are revealed as derivative so that, in the end, three core characteristics may be isolated. The first, as I have already mentioned, is that professions are traditionally linked with universities. The other two core characteristics which lawyers have and share with other professionals is that they hold themselves out as possessing certain skills and that they adhere to a common set of values, the essence of which is that their primary function is public service.[14] Subject to the addition of a reference to the linkage with universities, those characteristics are drawn together in this admirably succinct definition by a Canadian judge:[15]

> A profession is a self-disciplined group of individuals who hold themselves out to the public as possessing a special skill derived from training or education and who are prepared to exercise that skill primarily in the interests of others.

It would be understandable for those involved in legal education or the practice of the law to take the position that although reflection upon the essential attributes of the legal

---

14 *Legal Education in New South Wales: Report of Committe of Inquiry*, 1979, at para 3.5.3; Dingwall, Robert and Lewis, Philip (eds),*The Sociology of the Professions*; Vollmer, Howard M and Mills, Donald L (eds), *Professionalization*, New Jersey, Prentice-Hall; Goode, William J, "Encroachment, Charlatanism, and the Emerging Profession: Psychology, Sociology, and Medicine" (1960) *American Sociological Review* 902.

15 In Penington, work cited at footnote 12, at 35.

professional might be an interesting and appropriate activity for, say, sociologists, little useful purpose is served by legal academics or practitioners wasting time on introspection and theorising about what they are and why they do what they do. But, in fact, it has always been important that lawyers should reflect upon the core characteristics of their profession, and I do not think it is overstating the case to say that at the present the very survival of the profession, certainly in anything like its present form, could depend upon its doing so.

The legal profession is currently under attack to an unprecedented degree. Of course, to some extent that is not a new experience for lawyers. It is inherent in its work that the legal profession will always have powerful natural enemies. It is a critical condition of the maintenance of the balance of our society and of the rights of individuals that the immense potential power of entities such as the media, the police, the various agencies of the executive government, and large corporate bodies such as companies, financial institutions and unions, is always firmly made subject to the constraints and regulation of the law. But in the end it is the individual lawyer who has the responsibility to give practical effect to that fundamental principle. It is the individual lawyer who has to invoke the remedies of equity or administrative law or the laws of contempt, defamation, contract, trade practices and the like, which are the instruments by which powerful entities like that are kept within the law. The fact that the lawyer often represents the only impediment to what would otherwise be the unconstrained exercise of power by those entities does not endear the lawyer to them, to say the least, save of course in those cases where they happen to be the ones who want to do the constraining.

But in addition to the fact that lawyers are unpopular and liable to attack because they are the agents by which the law asserts its authority, there are other forces operating in our society today which make the profession more vulnerable than has ever been the case before. Intemperate or ignorant attacks on lawyers have become endemic. For example, in an extraordinary outburst one Attorney-General (not, I should say, of Tasmania) speaking of lawyers, recently claimed that "our values are distorted. We are, as a community, rewarding one of the most unproductive sectors of our society. Lawyers are necessary," he went on "but basically produce nothing. Indeed, by encouraging litigation they may be inhibiting productivity. Yet it is the legal profession which is seen by the best students as the road to at least economic security and possibly considerable wealth".

As the President of the Law Council of Australia observed:[16]

> It is a matter of serious concern when the first law officer of an Australian State has such an extraordinary, unrealistic and inaccurate view of the legal profession and of its role in society.
>
> I hope I am not similarly guilty of lack of realism, but I would have thought that the Attorney-General's grudging acknowledgment that lawyers are necessary is an enormous understatement. Indeed it is hard to imagine how society could survive, how business, trade and commerce could proceed, how our laws could be interpreted, applied and improved, how ordinary daily life could proceed, how major disputes could be resolved ... without people committed to the study and application of the law, to the maintenance of the rule of law, and to the acquisition of the skills needed to help the community build and sustain a society governed by law.
>
> That an Attorney-General's approach to policy should be underpinned by such a view about lawyers ... is a matter that should concern all Australians.

Other attacks either ignore the significance of the fact that lawyers are professionals, or are calculated to deprofessionalise the practice of the law. We are witnessing the promotion of the extraordinary idea that lawyers are somehow an impediment to the attainment of justice, rather than its most powerful agents, and that really what lawyers do can be done just as effectively by a new class of assorted counsellors, mediators or lay advocates.

This is not a new idea. Roscoe Pound in his history of lawyers observed that:[17]

> Throughout the history of civilisation there have been abortive attempts to set up or to maintain a polity without law. Every Utopia that has been pictured has been designed to dispense with lawyers. This has been manifest particularly in the ideal schemes imagined after Revolutions. The organized legal profession was abolished following the French Revolution and again after the Russian Revolution. In each case the attempt proved vain.

Pound spoke also about attempts to deprofessionalise the professions, instancing what he described as the "frontier idea" which was "... expressed in the Constitution of Indiana in 1851 - 'Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice'". That provision, he said "is characteristic of the era of deprofessionalising the professions [as] the only requirements for [the] practice of law were to be of good moral character and being a

---

16 *Australian Law News*, October 1991, at 4.

17 Pound, Roscoe, *The Lawyer from Antiquity to Modern Times*, West Publishing Co, 1953, at xxv.

voter. The practitioner need not be educated and need not be trained in the learned art he was to practice".[18]

A similar trend can be seen in the creation of statutory tribunals in which lawyers are not permitted to appear and which even eschew any rules of evidence or procedure, notwithstanding that it has not been shown that such tribunals administer justice better than do proper courts, and anecdotal evidence suggests the contrary. Indeed, sometimes one cannot help gaining the impression that some governments and reformers of the law seem more concerned about getting rid of lawyers and legal forms than they are about ensuring that parties to disputes get justice.

A similar ignorance of, or refusal to, recognise the significance of the professional status of lawyers was evident in the debates leading to the recent enactment of legislation providing for the mutual recognition of licensing and registration requirements for various occupations throughout Australia. An inevitable result of that legislation is that in some States the standards required for the practice of various occupations will be lower than was previously the case. In the case of many occupations that levelling effect will not entail significant social or any constitutional repercussions. But I would have thought that the fact that lawyers are professionals fulfilling a uniquely important constitutional role and a uniquely important role in our society generally, would have required that at least the question be asked as to whether it was appropriate to include them in the same scheme. But on the rare occasions when any suggestion was made that a distinction should be drawn between lawyers and other skilled workers, it was met by irrelevant invocations that we are all Australians, or was superficially dismissed as "ridiculous" or as an attempt to get "a bit of extra dough for the State governments" or as merely an attempt by lawyers "to protect their own little patch".[19]

The approach taken in the development of the Mutual Recognition Bill, and in some current reviews of the legal profession and the administration of the courts, reflects the misconception that modern theories of management and resource use applicable, say, to a business or a government department can be extended to the processes involved in the administration of justice. But it is quite inappropriate to apply such theories when we are reviewing legal institutions or defining their role. Courts and the legal profession are not factories producing a product - they are institutions

---

18 Pound, work cited at footnote 17, at 8.

19 Parliament of Australia, House of Representatives, *Hansard*, 12 November, 1992, at 3350; Parliament of Tasmania, House of Assembly, *Hansard*, 12 May, 1993, at 2424.

providing a quite different kind of service to society in accordance with constitutional principles and professional values which bear little resemblance to the values and objectives of tradesmen, private business or government departments. As well, ideas about the allocation of time and resources which underpin economic theory and principles of good management are turned on their head in the administration of the law, where there is no necessary correlation between the importance or monetary significance of a case on the one hand, and its difficulty and the professional resources which are needed to determine it on the other.

Another reason why the significance of the place of lawyers in our society is not fully understood can be found in a failure to appreciate that the rule of law depends as much on the maintenance of an independent legal profession as it does on the maintenance of an independent judiciary. Such a failure was evident in the terms of reference of the recent New South Wales inquiry into the legal profession which included a direction that, in considering the extent to which public officers such as the Director of Public Prosecutions should be publicly accountable, the Commission was to have regard to the need to maintain the impartiality and independence of those offices,[20] but imposed no such rider upon the terms of reference insofar as they applied to the private profession. The contrast is marked and suggests that while the government recognised the importance of maintaining the independence of government legal officers, it attached no significance to the equally important need to protect the independence of the private profession.

Professor Penington has powerfully argued that the autonomy, integrity and, indeed, the essential characteristics of the professions in Australia, including especially the legal profession, are today under threat from yet another quarter. The main vehicle for that attack, he suggests, is through the government's competency-based education and training policy which he argues is[21]

> fundamentally inconsistent with one of the central and essential features of a true profession: a capacity for self-regulation in the interests of standards and of service to the community. Governments, on behalf of the community, have a legitimate role in ensuring, through a variety of legislative means, that such self-regulation is exercised truly in the public interest. This is, however, very different from the propositions which currently underlie the competency-based education and training movement. The fundamental concept of "competency-based standards" is inimical to a true profession. "Competency", in the sense of explicit,

---

20 New South Wales Law Reform Commission, *Scrutiny of the Legal Profession: Complaints against Lawyers*, Report 70, at para 1.3.

21 Penington, work cited at footnote 12, at 35.

> externally regulated standards of performance in the workplace, and "professionalism", are not compatible. Competency-based standards define acceptable minima, whereas professionalism seeks excellence in performance in the interests of clients in a wide range of foreseen and unforeseen situations.

This "assault on the professions", Professor Penington continues:

> is part of a larger agenda, which seeks to control the whole of the Australian workforce through tripartite bodies comprising union, industry and government representatives. Just as the centralised wage fixing system is being abandoned as a result of the shift to enterprise bargaining on the part of both government and the ACTU on the one hand and employers on the other, a new version of the corporate state is being reconstructed. While the professions may, at present, appear insulated from the paradigm of a powerful tripartite body, the National Training Board, it would be foolish to pretend that this situation will remain unchanged.

No one would suggest that the legal profession is above criticism or cannot be improved. As well, the profession cannot regard itself as exempt from the demands modern society places on all our institutions to be more accountable and to justify their place in our society. But returning to the point with which I started this part of my address, in order properly to equip themselves to vindicate their place in our system and defend themselves against attack, it is necessary that lawyers have a clear understanding of the core characteristics of their profession and why they are worth defending. And while the practising profession itself has to make much of the running in defending itself, the law school cannot remain aloof. It has two important contributions to make. First, in order to have a clear understanding of the essential virtues and characteristics of the legal profession one needs more than the vague synthesis which comes from experience; one also needs to engage in the sort of disciplined study and research which is provided by a university. And it is the law school which is the most appropriate faculty to assume that role because although, say, sociology or political science have valuable contributions to make to the study of the professions, it is only legal scholars who have the understanding and the techniques necessary to relate general concepts of professionalism to the way in which the legal system operates. The second contribution which the law school can make is to encourage its students to reflect upon what being a legal professional entails; what are the essential values to which lawyers adhere; what is the role of lawyers in our society; and what part do they play in the working of our constitutional arrangements, and to give them the knowledge and the intellectual skills which will equip them to engage seriously in an examination of those issues. I would not regard the assumption of that responsibility as compromising the law school's commitment to scholarly detachment. It amounts to no more than giving students an

understanding of a critically important part of the legal system which should be regarded as an essential part of any comprehensive course of legal education.

The Deeper Concepts Which Unify the University, the Law School and the Profession

Without detracting from the significance of the various aspects of the relationship between the law school and the university, and the law school and the profession, to which I have referred so far, I would suggest that there is a more fundamental unifying concept which underlies the philosophy and values of all three.

It is to be found in a shared commitment to detachment and objectivity, and the concomitant idea that questions should be determined by the employment of a methodology and in accordance with principles which are known in advance and are consistently applied. That is a concept which is familiar to the world of scholarship, but what is interesting is that in essential respects it is also indistinguishable from the basic principle embodied in the concept of the rule of law: that all laws should be prospective, open and consistently applied.[22] Translated into practical terms, that means that you do not rig the experiment or selectively choose the data so as to ensure that you get the result you want, any more than you adjust the mode of trial or selectively choose the evidence in order to ensure that you get the verdict you want. I see a close analogy between the canons of scholarship such as the conventions of rational discourse; the elements of the scientific method; and the duty to publish and expose one's work to critical scrutiny, on the one hand, and the adjectival rules of the legal system; the ethical rules of the legal profession; and the obligation of judges to sit in open court and expose their reasons for judgment to the critical scrutiny of the parties and the public, on the other. The validity of that analogy is supported by the way in which, over the centuries, the evolution of the law has been paralleled by the evolution of science and philosophy. The rejection of dogma laid down by an authority like the church as the source of knowledge about the natural world was, in essence, derived from the same philosophical root which rejected the idea that the king was above the law and was the sole source of the law. The development of that philosophy culminated in the great intellectual revolution of the seventeenth century "in which the old scholastic-mediaeval world view was overturned by such ideas as those of Galileo, Leibniz, Newton, Bacon and Descartes". That is usually characterised as a scientific revolution

---

22 Walker, work cited at footnote 10, at 22.

but, as Professor Geoffrey Walker has observed in his comprehensive examination of the idea of the rule of law:[23]

> This intellectual revolution was not confined to a narrow scientific circle but transformed all the basic modes of thought in religion, literature, philosophy, social theory and law. Many lawyers took part in this movement, some like Sir Francis Bacon as leading contributors, and some as interested amateurs, such as Sir Edward Coke. Others, notably Sir Matthew Hale, took the insights of the new scientific method and put them to work as a means of rationalising and systematising the then jumbled mass of the common law.

According to Professor Walker this process has continued right up to the present so that he suggests:

> Many characteristics of the legal system that we take for granted can be directly traced to the impact of the seventeenth-century scientific revolution. They include the division of law into substance and procedure, the division of substantive law into criminal and civil law, and a wide range of other classifications that give the law some pattern and logic. The new theories of knowledge and certainty replace the old search for absolute legal truth with the modern idea of proof beyond a reasonable doubt. The impartiality of juries and even to some extent of judges was strengthened by the new spirit of objective scientific inquiry.

It is that adherence to rationalism and detachment and their common rejection of dogma and political and intellectual authoritarianism which unite the university, the law school and the profession, and which connects them with those great confrontations between Coke and the King and Galileo and the Inquisition to which I referred in my prologue.

It might be thought that in the modern western world dogmatism and authoritarianism no longer represent a threat to the maintenance of scholarly detachment or the disinterested application of legal principle. After all, we are no longer subject to religious authorities which dogmatically lay down astronomical laws; nor are we any longer subject to kings or governments who claim that, by divine right or otherwise, they are above the law. But, nevertheless, universities and the legal system cannot afford to be complacent. Their dependence on public funding makes them vulnerable to pressures or the temptation to determine policies and priorities according to political doctrine rather than university or professional values. As Professor Peter Karmel recently observed, "the goals of universities are becoming more and more subordinated to government policy expressed in terms of national goals ... [which]

---

23 Walker, work cited at footnote 10, at 55.

... reflect party political ideologies".[24] As well, both legal and academic institutions are exposed to the threat that if they do not conform to a particular political agenda governments could marginalise them by diverting their functions to new, more malleable, academies, tribunals or para-legal functionaries. I am not suggesting that that is happening in Australia at the moment, but one cannot dismiss the possibility that an unscrupulous government - particularly one which is dominated by a doctrinaire political party - might not make the attempt.

But probably the greatest danger of an incursion of dogma or intellectual authoritarianism into our universities and legal institutions is to be found in the influence of the politics of populism in our society. By "populism" I mean that form of politics which encourages the expression of the raw sentiments of a section of the community other than through the ordinary processes of a representative democracy. Populism presents an insidious threat because it gains a spurious air of respectability from its resemblance to democracy, but in fact it has been rightly described as a pathological strain of democracy which is capable of destroying it. At its worst, populism leads to the rule of the mob of the kind which became the engine of horrors such as the terror of the French Revolution or the lynch-murders of thousands of Negroes in the United States.[25] But less violent expressions of populism are just as capable of subverting a country's institutions and principles, as we know from the experience of what has become known as the McCarthy era in the United States. I am not going to rehearse the history of that dreadful episode in any detail. For present purposes it is sufficient to remember that it had the support of, or was acquiesced in, by a large proportion, if not a majority, of the American people and that, amongst other things, it had the effect of undermining constitutional guarantees of free speech and assembly and the privilege against self incrimination, and that it resulted in courts handing down decisions which were patently influenced by the hysteria of the times, including the bizarre case of the large insurance company which was forced into involuntary liquidation because of the political stance of its directors.[26] But, of most significance for present purposes, it resulted in the subjugation of the legal profession to such an extent that even obtaining counsel to

---

24 Comment (1993) 24(16) *ANU Reporter* 2.

25 Demaris, Ovid, *America the Violent*, Maryland, Penguin, 1971, Chs 5 and 6.

26 Sabin, Arthur J, "Inter Arma Silent Leges - A McCarthy Era Example" (1993) 67 *Australian Law Journal* 644.

represent an alleged "subversive" was a difficult task. An American Professor of Law has recalled that:[27]

> There was considerable risk, personally as well as professionally, for an attorney to represent professed communists who had been brought before federal, State and local investigatory bodies, or organisations prosecuted for being "subversive". Many of the lawyers who represented such clients later found themselves facing disbarment and unable to find other clients. Some were even gaoled for contempt because of their representation in such cases.

Here in Australia we managed to avoid most of the excesses of the McCarthy era, although it was a close-run thing. But it must be acknowledged that some of the more florid examples of the passion for political correctness which is currently sweeping this country, and the disproportionate influence which some of the more vociferous single interest pressure groups are having upon our society, suggest that perhaps a new form of McCarthyism is not all that far below the surface in Australia even today.

Conclusion

Let me conclude by re-affirming the view that the supposed dichotomy between the two legal cultures, the academic and the professional, is largely false. There are important differences between them but, in the end, they are concerned with the same discipline; they are dependent on each other; they employ the same methods of analysis; and they share the same basic values. And, at a deeper level, they both share with the university as a whole a special commitment to even more fundamental principles from which those two great distinguishing characteristics of our civilisation, the rule of law and the rule of the intellect, are both derived.

From its inception 100 years ago the law school of the University of Tasmania has accepted and admirably discharged its responsibility to give concrete expression to those great principles. That was made manifest by the decisions made by those three remarkable men who founded the law school, and it has been made manifest by the work and the philosophy of all those who have served it ever since.

The University of Tasmania and the State of Tasmania have very good reason indeed to celebrate the centenary of the establishment of their law school, and I am confident that they will have ever greater cause to celebrate its bicentenary in the year 2093.

---

27 Sabin, work cited at footnote 26, at 649; Griffith, Robert, and Theorharis, Athan (eds), *The Specter*, New York, New Viewpoints, 1974.