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THE INDEPENDENT BAR AND HUMAN RIGHTS

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1. While the roots of the Faculty of Advocates can be traced to earlier than 1532 when Scotland's College of Justice was established, for us in the Antipodes the development of the tradition of an independent bar finds its most fertile source in the Inns of Court in London. Serjeants and apprentices, utter barristers and inner barristers, learned and practised in a collegial environment, but not as partners. The members of the Faculty and the Inns were individuals. And it is individuality which has been the hallmark of the independent bar.

The Golf War

2. At the outset I must note that Scottish advocates made a notable contribution to the development of a human right recently the subject of the attention of the Supreme Court of the United States in *PGA Tour Inc v Martin*[1]. Long before that, in 1813, the House of Lords decided something about what the rights of golfers were in *Dempster v Cleghorn*[2]. The owners of the land over which the Golf Club at St Andrews had the benefit of an easement had introduced rabbits, more particularly English rabbits, to increase the number of these creatures on their land. This was apparently not good for golf. A complaint was made that a single pair would, "*from the extraordinary fecundity of the animal, soon fill the whole of the ground with rabbits*". Strong feeling occurred in the Court of Session which first issued an interlocutor that allowed the pursuers – the golfers – to kill and destroy all of the little creatures. Later that was recalled and the defenders were ordered not to keep them but the Court said that they did not have to kill them either. This may have

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1 532 US 661 (2001)
2 (1813) 2 Dow 40; [3 ER 780]

been a win for animal, but not human, rights. Lord Eldon LC held that[3] the case had to be remitted saying that:

> "[h]e regretted the existence of the necessity to send this back again; but it was a strong thing to say that all who chose to do so might play at golf on a man's ground, and, for that purpose, destroy all the produce which it was best calculated to yield, and prevent its being used for those ends to which alone it could be applied beneficially for the owner. If it were possible to feed black cattle there, he had before observed that, if these balls got into what they occasionally left behind them, they would be in a worse scrape than if they got into a rabbit scrape. He repeated, that since the time of the application to Augustus by the people of the Baleares for a military force to suppress the rabbits, he believed that there never had been a contest between men and rabbits carried on with so much spirit."

3. I have digressed. I want to trace a little history first – of the great fights for political rights and freedom from slavery in the 17th and 18th Centuries. Next, I will move to how *habeas corpus* was used last year to try to rescue over 400 people from "detention" by the Australian authorities on the *MV Tampa*. I will touch on how in the 20th Century the High Court of Australia and my country's bar have developed human rights by implications and assumptions. Then I want to speak of the critical cross fertilization and support which the independent bar and the independent judiciary give to one another. I will discuss the importance of recognizing the bar's place as an institution and two of its signal characteristics – the cab rank rule and its pro bono work.

The Foundations

4. As the bar developed, barristers entered the House of Commons. That traditional connection between lawyers and lawmakers has continued today[4].

5. At the commencement of the 17th Century, in the clash between the Stuart Kings, the Commons and the Courts one can see the emergence of an independent bar seeking to uphold fundamental human rights. Barrister, parliamentarians Sir Edward Coke[5], Selden, Hampden and others, relied on the great constitutional statutes that had been enacted and, in the case of Magna Carta, re-enacted ritually by new sovereigns.

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3 2 Dow at p 64; 3 ER at p 788

4 see Sir Robert Menzies' farewell address to Sir Owen Dixon CJ in 110 CLR at vii

5 after had had been removed as Chief Justice

They sought to use statutory recognition of human rights in the struggle. But the rights were more often honoured in their breach.

6. These constitutional statutes included the famous clause 40 of the Magna Carta, executed by King John at Runnymede in 1215[6] which provided:

> "Nulli vendemus, nulli negabimus aut deferemus rectum aut justiciam"

or in plain English "*To no-one will we sell, to no-one will we deny or delay right or justice*"[7].

7. There was also the Due Process Act of 1368[8]:

> "It is assented and accorded, for the good governance of the commons that no man be put to answer without presentment before justices or matter of record or by due process and writ original according to the old law of the land: And if anything from henceforth be done to the contrary, it shall be void in the law and holden for error."

8. So when Charles I tried to govern without parliamentary approval, the barrister parliamentarians set out to oppose the imposition of regal might reliant on Magna Carta. These constitutional battles led, at Sir Edward Coke's urging in the Commons, to the enactment of the Petition of Right[9] which provided a recital of what were seen then to be the fundamental liberties guaranteed by Statutes of the Realm, including Magna Carta and the Due Process Act of 1368. Clause 10 of the Petition of Right provided, among other things:

> "... and that none be called to make answer, or to take such Oath, or to give Attendance, or be confined, or otherwise molested or disquieted concerning the same, or for Refusal thereof, and that no Free man, in any such Manner as is beforementioned, be imprisoned or detained."

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6 which became cl 29 in the much resorted to re-enactment of Edward I: 25 Edward I, c 29, (1297)

7 *The Family Story*: Lord Denning (1981) Butterworths at 299-231; *Reg v Commissioners of Inland Revenue; Re Nathan* (1884) 12 QBD 461 at p 478 per Bowen LJ

8 42 Edward III, c 3

9 3 Car.I.c 1 1627

Charles I, when presented with the Petition, famously wrote "S*oit droit fait come est Desire*". The Petition was enrolled in the Statute roll. This was followed by the Habeas Corpus Act 1640[10] and the second Habeas Corpus Act 1679. In the meantime, there had been the great Ship Money case[11] where in 1637 the compliant Court of Exchequer Chamber infamously upheld the legality of a tax imposed by Charles I without parliamentary authority. In 1640 The House of Lords resolved extra judicially that the judgment was illegal and contrary to the Petition of Right[12].

9. Sir Winston Churchill saw the Petition of Right as the main foundation of English freedom because it denied the executive government the right to imprison a man, high or low, for reasons of State[13]. One of history's ironies can be seen in *Liversidge v Anderson*[14], another great case concerning arbitrary powers of detention which arose under a regulation[15] enforced by Churchill's war time government permitting as Lord Atkin's classic dissent, now accepted as the correct view[16], demonstrated, the Home Secretary to *think he* had reasonable grounds justifying detection, even if objectively no such ground existed. Before noting that Humpty Dumpty in *Through the Looking Glass* was the only authority in support of that view[17], Lord Atkin observed that in the case "*I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I*"[18].

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10 16 Charles I c 10

11 *R v Hampden* (1637) 3 State Trials 826

12 3 State Trials at p 1299 – the resolution was on 20 January 1640; on 27 February 1640 the House of Lords resolved to amend the record in each court which had given judgment for the ship money (ibid). The House then began impeachment proceedings against the judges who had made the orders.

13 Winston S Churchill: *A History of the English Speaking Peoples* c Lee Abridgment (1998) p 294

14 [1942] AC 206

15 reg 18B of the *Defence (General) Regulations* 1939

16 *Reg v Home Secretary: Ex parte Khawaja* [1984] AC 74 at p 110F-G; *George v Rockett* (1990) 170 CLR 104 at p 112

17 [1942] AC at p 245

18 [1942] AC at p 244

10. By the 18th Century the independent bar was able to appear before independent courts whose justices were granted tenure by the Act of Settlement in circumstances where on the ascension of William and Mary of Orange in 1689, the Bill of Rights was passed.

11. So in 1763 John Wilkes MP was arrested and held in his house by the King's messengers under a general warrant under the hand of the Secretary of State. The messengers also searched Wilkes' papers seeking information as to whether he had written an alleged libel in the *North Briton No 45*. At noon on the day of his arrest, Serjeant Glynn asked the Court of Common Please to issue a writ of *habeus corpus*, which Pratt LCJ granted. By the time the writ was drawn up, Wilkes had been moved to the Tower of London so that when the writ was returned before the Court, the messengers said Wilkes was not in their custody when they were served. The Chief Justice granted a fresh writ returnable immediately. Wilkes was brought to Westminster Hall and his plea of privilege of Parliament was upheld[19]. Wilkes then sued for trespass recovering £1,000[20].

12. Next, in *Entick v Carrington*[21], Lord Camden CJ speaking for the Court of King's Bench said, following detailed argument by counsel for the plaintiff whose house had been entered and whose papers searched by the King's messengers in ordinary under a purported warrant issued by the Secretary of State:

> "... our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser; though he does no damage at all; if he tread upon his neighbour's ground, he must justify it by law."[22]

At that time the rights to freedom of opinion and of speech were protected indirectly by reference to rights of property.

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19 *The King v Wilkes* (1763) 2 Wils 151

20 *Wilkes v Wood* (1763) Lofft 1

21 (1765) 2 Wils 265 at p 291

22 This is as apposite today as it was then see: *George v* Rockett (1990) 170 CLR 104 at p 110; Plenty *v Dillon* (1991) 171 CLR 635 at pp 639, 647

13. And in the age of the late 18th Century, there was a further consciousness of human rights among the common law world and western society generally. Tom Paine published "*The Rights of Man*" and Europe began to rise in revolution, commencing with the French. The first ten amendments of Constitution of the United States, that country's Bill of Rights, were adopted. They have had a most profound influence on the development of democratic institutions in that nation and elsewhere since. Particularly is this so after the landmark case of *Marbury v Madison*[23].

14. But it was not just with the right to be free of arbitrary search with which the 18th Century independent bar were concerned, for on 14 May 1772 Hargrave of counsel appeared before the Court of King's Bench on a return to a writ of habeas corpus requiring Captain Knowles to show cause for the seizure and detention of one Somerset in the great case of *Somerset v Stewart*[24]. Somerset was, in the verbiage of that day, a negro slave of a Virginian plantation owner who had been purchased on the African coast in the course of the slave trade. We know that trade was tolerated in the American plantation colonies, later the Southern States, and until their Civil War of 1861-1865. At the conclusion of his argument Hargrave said that he had considered this case for months, possibly years. He continued[25]:

> "But I felt myself overpowered by the weight of the question. I now in full conviction how opposite to natural justice Mr Stewart's claim is, in firm persuasion of its inconsistency with the laws of England, submit it chearfully (sic) to the judgment of this Honourable Court: and hope as much honour to your lordships from the exclusion of this new slavery, as our ancestors obtained from the abolition of the old'."

History does not record whether this case was conducted *pro bono* but it certainly bears the hallmarks of that fine tradition of the bar. Judgment was reserved, Lord Mansfield observing that:

> "If the parties will have judgment, *fiat justitia, ruat coelum*, let justice be done whatever the consequences."

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23 5 US 137 (1803); 1 Cranch 137; 2 L Ed 60

24 (1772) Lofft 1

25 Lofft 5-6

15. Later when giving the judgment of the court Lord Mansfield CJ said[26]:

> "The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: It's so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England, and therefore the black must be discharged."

The *M.V. Tampa*

16. 230 years later, on 26 August 2001, a wooden fishing vessel carrying 433 people from Afghanistan began to sink in the Indian Ocean about 140 km north of the Australian territory of Christmas Island. The *MV Tampa*[27] was in the vicinity on its way from Fremantle, in Australia, to Singapore. Her master, Capt. Rinnan received a call from the Australian authorities asking him to rescue a ship in distress. In the fine tradition of the sea, he did so taking onto his container filled decks the rescued people. He asked his guides, the Australian coast guard, where he should take the rescued people. Helpfully they said they did not know.

17. Capt. Rinnan began to make for Indonesia but a number of his guests objected and threatened to commit suicide if he did not change course for Christmas Island. Pressured, the master headed towards that destination but when the *MV Tampa* was close but outside Australian territorial waters, the Australian authorities asked him to change course back to Indonesia, threatening him with large fines, criminal and civil proceedings. The harbour was closed.

18. So there was Capt. Rinnan with over 400 desperate people at sea on top of containers without adequate food, shelter or hygiene being told by the Australian government, which had got him involved in the first place, to heave to. From then on the Australian government, the Prime Minister and other Ministers in a pre-election mode, began a series of manoeuvres to keep the human cargo out of the country. Next day several of the rescued people were unconscious, one had a broken leg and two of the pregnant women were suffering pains. The impasse deepened. Elite SAS

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[26] Lofft at 19; see too A Samuels: *What Did Lord Mansfield Actually Say?* (2002) 118 LQR 379

[27] a roll on/roll off vessel of 49,000 tonnes

troops boarded the vessel. Legislation was introduced in the Parliament, but defeated in the Senate, seeking to sterilize any possible proceedings.

19. Bravely, the Victorian Council for Civil Liberties and a solicitor, Mr Eric Vadarlis, began proceedings for writs of habeas corpus in the Federal Court of Australia[28]. The judge, North J, began hearing the case on Saturday, 1 September. Four senior and three junior Counsel acted pro bono for the applicants.

20. So the case of the slave freed after being held on a ship against his will[29] came to be called in aid[30]. And the trial judge decided that the rescued people were being detained unlawfully by the Minister and others and should be released and brought to the Australian mainland[31]. An appeal, however, was allowed[32] over the dissent of Black CJ who also relied on *Somerset v Stewart*[33] and Lord Scarman's speech in *Reg v Home Secretary; Ex parte Khawaja*[34]. The rescued people were taken to Nauru for their refugee claims to be assessed.

The 20th Century – An Australian Perspective

21. Probably the greatest case on political rights in Australia was *Australian Communist Party v The Commonwealth*[35]. That case was decided at the height of the cold war and struck down legislation which was designed to ban the Communist Party and to expropriate its property. It was argued by a former member of the High Court who was also a former Attorney-General and was then the leader of the opposition, Dr HV Evatt KC, who appeared for two unions and two individuals. A number of members of the independent bar including EAH Laurie, who appeared for the Communist Party, acted for those seeking to uphold freedom of speech and association. Ranged against them were other members of the independent bar such as GE Barwick KC.

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28 *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 100 FCR 452; [2001] FCA 1297

29 *Somerset v Stewart* (1772) Lofft 1 [98 ER 499]

30 see 110 FCR at 475 [93]

31 110 FCR at 490 [169]-[170]

32 *Ruddock v Vadarlis* (2001) 110 FCR 491; [2001] FCA 1329

33 (1772) Lofft 1

34 [1984] AC 74 at 111; see 110 FCR at 511 [76], 514 [91]

35 (1951) 83 CLR 1

22. In giving his judgment, Dixon J went to the heart of constitutional democracy in Australia. There was no express head of legislative power under which the *Communist Party Dissolution Act* 1950 could be justified, although a number were essayed, including the defence power[36]. Dixon J, in debunking an argument that the incidental power[37] could support such a law said[38]:

> "The power is ancillary or incidental to sustaining and carrying on government. Moreover, it is government under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think it may fairly be said that the rule of law forms an assumption."

23. That passage is pregnant with promise for the protection of the tenets of our democracy as we *assume* it to be. For one of the *sine qua nons* of the society which we as barristers, practising in independent courts, take as fundamental, is the rule of law. The conception of the separation of powers with its attendant assumption that the judicial power can be resorted to and enlivened to protect individuals from the might of private or public power has passed to us from King John and the Barons at Runnymede. It was a victory for the rule of law, for the courage of the independent bar, that in 1950 and 1951 our predecessors could argue that the Parliament could not outlaw a political party whose tenets and whose sympathies were in many ways utterly hostile to the Australian way of life. And, it was because the High Court was then and is now not only composed of judges of great ability but of the highest integrity and independence. It was then a court which had struck down the previous Labor Government's Bank Nationalization Legislation[39] which also upheld rights to private property and defeated an expropriation. It, like much constitutional litigation, sought to contain the power of the Parliament to affect individual rights.

24. Now, as we have entered into the dawn of the 21st Century, most western democracies have entrenched Bills of Rights in legislation. There is the European Convention on Human Rights which has profoundly affected the jurisprudence of the members of the European Union, most notably Great Britain, since its introduction as

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36 s. 51(vi)
37 s. 51(xxxix)
38 83 CLR at p 193
39 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1

having statutory force in 2000. A number of nations, such as Canada and New Zealand have enacted their own Bills of Rights. The United Nations have had a number of attempts, but the most elegant, and to my mind the most fundamental is the Universal Declaration of Human Rights proclaimed by the General Assembly in 1948. Thereafter with the drafting help of the former Communist nations whose love of human rights and dignity was well known at the time, the United Nations has promulgated the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and an Optional Protocol to the latter Covenant.

25. It is remarkable that in Australia there is virtually no discussion of, let alone demand for, a Constitutional declaration of human rights. That has not prevented the independent bar in our nation from urging upon the High Court of Australia arguments which have given rise in recent years to controversial and profound pronouncements about basic human rights. In *Mabo v Queensland [No 2]*[40] the High Court held that the doctrine of *terra nullius* was not part of Australian law and that therefore, Aboriginal and Torres Strait islander people were able to assert native title rights as against third parties, including Australian governments, where no inconsistent rights in respect of the same land had been created by government or legislation. Such inconsistent rights include sale or, in some cases, use of the land in a way that could not accommodate continuance in existence of a right to native title. That case was fought from 1982 to 1992 and involved a leading human rights silk, the late Ron Castan QC, deploying his considerable forensic ability for the plaintiffs to bring about a result which, at the time, was revolutionary in Australian legal and political thinking.

26. And it was the bar too, which led to a substantive development in Australian constitutional law, namely the implied constitutional freedom of communication on government and political matters which was finally recognized in *Lange v Australian Broadcasting Corporation*[41]. The gestation of that argument had commenced with draconian legislation seeking to muzzle criticism of the Industrial Relations

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40 (1992) 175 CLR

41 (1997) 189 CLR 520

Commission established under the *Industrial Relations Act* 1988[42]. That Act made it an offence by writing or speech to use words "*calculated ... to bring a member of the ... Commission into disrepute*". In *Nationwide News Pty Limited v Wills*[43] the High Court held that the section was unconstitutional because it went beyond any proportionate or legitimate protection which the Commission as an institution was entitled to have for the proper discharge of its functions and because the provision inhibited freedom of expression.

27. At about the same time in *Australian Capital Television Pty Limited v The Commonwealth*[44], the High Court struck down as unconstitutional provisions which had been inserted into the *Broadcasting Act* 1942 by the *Political Broadcasts and Political Disclosures Act* 1991 which sought to regulate the ability of people to advertise political thoughts and ideas during election and referenda campaigns. The High Court at the urging of the former Solicitor-General, Sir Maurice Byers QC, once again at the independent bar, found that the law infringed the freedom of communication on matters relevant to political discussion. That decision was greeted with equanimity, except by the government of the day, because the community in Australia valued the ability to receive political information, even if it was paid for by politicians and others, during election campaigns.

28. The next cases on the topic, however, plunged the High Court into deep controversy. They were *Theophanous v Herald & Weekly Times*[45], *Stephens v West Australian Newspapers Ltd*[46] and *Cunliffe v The Commonwealth*[47]. The first two of those cases concerned politicians who sought to sue newspapers for libel. The newspapers were permitted to plead a defence of qualified privilege pursuant to the further development of the implied constitutional freedom of communication which the *Industrial Relations Commission* and *Political Broadcasting Cases* had developed. The court, by majority, held that the limitations in the common law defences in defamation actions which protected the reputations of persons who were the subject of

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42 Commonwealth
43 (1992) 177 CLR 1
44 (1992) 177 CLR 106
45 (1994) 182 CLR 104
46 (1994) 182 CLR 211
47 (1994) 182 CLR 272

defamatory publications did so at the price of too significantly inhibiting free communication[48]. Although the court in those cases rejected the approach of *New York Times v Sullivan*[49] it developed a new constitutional defence of qualified privilege.

29. In contrast, in *Cunliffe v The Commonwealth*[50] the court upheld some amendments to the *Migration Act* 1958. That piece of legislation, with its continual amendments, has been one of the most litigated enactments in Australia in the last decade. The amendments in question prohibited anyone who was not a registered migration agent, including a lawyer, from providing assistance to anyone with migration, refugee or like problems except, in the case of lawyers, when they were appearing in a court unless they had been licensed at a considerable fee. The court found, by majority, that these provisions did not infringe any freedom implied in the constitution to communicate nor did they otherwise offend against any constitutional principle.

30. When *Lange v Australian Broadcasting Corporation*[51] was decided, the court gave a unanimous judgment in which it explained the necessity for the common law to develop in conformity with the constitution. The court expanded the defence of qualified privilege in a defamation action based on the implied constitutional freedom of communication on government and political matters. The court reasoned that because the constitution itself contained provisions which expressly provided for institutions of representative democracy, including elections and referenda, the people must be able effectively to exercise their constitutional rights to participate in the constitutionally prescribed system of representative and responsible government established under the constitution. In order to determine whether a law made by the Commonwealth Parliament[52] infringed the requirement of freedom of communication

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48 182 CLR at p 133; in the view of Mason CJ, Toohey and Gaudron JJ; Deane J would have agreed with their Honours but took an even more expansive view of the ambit of the freedom see at 182 CLR at pp 187-188

49 376 US 254 (1964)

50 (1994) 182 CLR 272

51 (1997) 189 CLR 520

52 or by similar reasoning a law of a State or a territory legislature

imposed by the Commonwealth's Constitution, two questions needed to be addressed, namely:

(a) does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect;

(b) if it does, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed for submitting a proposed amendment of the constitution to the informed decision of the people[53].

If the first question were answered "Yes" and the second "No" then the law was invalid.

31. In the area of administrative law, international instruments giving effect to human rights are also treated as a source from which courts can develop the common law in relation to how the executive should deal with the individual as was held in *Minister for Immigration and Ethnic Affairs v Teoh*[54]. There the High Court held that the executive government's accession to a convention[55], not ratified by Act of the Parliament, gave rise to a legitimate expectation that a minister would act in conformity with it and treat the best interest of the applicant's children as a primary consideration in dealing with an application for a permanent entry visa under the *Migration Act* by the applicant[56].

32. It is notable that Australia has no equivalent to Article 1 of the Bill of Rights, the First Amendment to the United States Constitution which provides that Congress should make no law respecting an establishment of religion, or prohibiting the free exercise thereof or abridging freedom of speech or of the press or the right of the people peaceably to assemble and petition the government for redress of grievances. By contrast, the Constitution of the Commonwealth of Australia contains an express

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53 189 CLR at p 567
54 (1995) 183 CLR 273
55 The United Nations Convention on the Rights of the Child
56 see too *Higgs v Minister of National Security* [2000] 2 AC 228 at p 241E-G

provision in s. 116 prohibiting the Commonwealth from making any law for establishing any religion, or for imposing any religious observance, or prohibiting the free exercise of any religion or the imposition of any religious test for qualification for office or any public trust under the Commonwealth. While the United States Supreme Court has broadly interpreted both parts of Article 1, namely the religious clause and the freedom of speech clause, the High Court of Australia has found a sweeping implied constitutional freedom of communication on government and political matter not too far distant from the express terms of the First Amendment to the United States Constitution but has given an extraordinarily narrow interpretation to the express provisions of the religion clause in the Australian Constitution[57].

Full Circle

33. It is perhaps an instinctual response which we as barristers adopt when confronted with situations in which human rights appear to be infringed that we look to fundamental guarantees that may avail the protection of those rights. So, in the 1980s in New South Wales delays in the criminal justice system had become so outrageous that accused persons were being kept in jail for up to 2 years after committal before they were brought to trial. Others accused of crimes who were on bail would have to wait, after being charged, sometimes 4 years before their cases were listed for final hearing. To return to one of the points with which I started, the original clause 40 of Magna Carta promised that to no-one would the Crown, among other things, delay or deny justice or right.

34. A series of cases was instituted, commencing with *Reg v McConnell*[58] which sought to challenge the failure of the executive government and the parliament of New South Wales to allocate sufficient resources to the judicial system to enable people to have speedy trials. Ultimately, the High Court held, in *Jago v District Court of New South Wales*[59], that there was in New South Wales no right at common law to the speedy trial of a criminal charge separate from a right to a fair trial. Although the provenance of the Sixth Amendment to the United States Constitution and the great constitutional instruments referred to above, including Magna Carta, the

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57 *Attorney-General (Vict) ex relatione Black v The Commonwealth* (1981) 146 CLR 559
58 (1985) 2 NSWLR 269
59 (1989) 168 CLR 23

Due Process Act of 1368, the Petition of Right 1627 and the Habeus Corpus Act 1679 are the same, quite different consequences appeared to have flowed[60] in different legal systems which inherited the common law.

35. Recently, Laws LJ has described the enduring significance of Magna Carta as being that the King is and shall be below the law[61] in a case in which distinguished leading counsel for the applicant succeeded in arguing that the English High Court of Justice had power to quash an ordinance made under an Order in Council. That order provided that a person born in the Archipelago of Diego Garcia was barred from returning to his or her place of birth. His Lordship[62] held that no reasonable legislator could regard the provisions as an Ordinance conducing to the peace, order and good government of the Archipelago when it effectively exiled persons who were born there and forbade their return[63]. It was therefore set aside.

The 2 Independences – Bench and Bar in Counterpoise

36. The independent bar and the independent judiciary interact with one another in cases involving human rights and freedoms. Of course, it can be said that the experience in the United States where there is no longer a private independent bar, but simply attorneys practising in law firms, shows that human rights can be developed through the court process without an independent bar at all. But, that ignores the value and status of the bar as an institution.

37. The institution of an independent judiciary is vital. That is a judiciary not removable at pleasure but only upon address by both Houses of Parliament or upon reaching statutory retirement age. This enables the judiciary to develop the confidence that it is insulated from the ebb and flow of every day politics or the consequences of its decisions. It makes irrelevant to judges their popularity with those in our society in whom reside other sources of power – the executive, the legislature, the press, large institutions and rich individuals. There is no doubt that in constitutional cases,

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60 see too *Adler v District Court of New South Wales* (1990) 19 NSWLR 317

61 *Regina (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067 at 1095 [36]

62 with whom Gibbs J agreed

63 [2001] QB at 1104 [56]-[57]

particularly, the reality that the courts are the third arm of government comes home and exposes the courts to criticism.

38. The independence of the judiciary is also reinforced by the independence which we as barristers aspire to maintain. The cab rank rule is vital to the freedom we have to represent the weak, the poor, the refugee, the person whose ideas we personally may despise – and to do so sometimes for no fee. As Lord Hailsham of St Marylebone once said:

> "... the only freedom worth having is the freedom to do that which others would wish you not to do. There is no merit whatever in possessing the right to do that which no one will seek to prevent."[64]

39. The bar, as an institution, is about representing those who seek that freedom. We cannot pick and choose our clients and for good reason. Unpopular or offensive people or persons associated with unpopular causes or undesirable opinions would be left without representation in Courts of justice. Justice would not be done. Far less would it be seen to be done. This is the foundation of our independence, as the great Erskine, when he accepted the brief to defend Tom Paine, said[65]:

> "From the moment when any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the courts where he daily sits to practise, from that moment the liberties of England are at an end."

40. Over 30 years before the House of Lords decided that barristers and advocates in England and Scotland are no longer immune from suit on reasoning which, with respect, is unpersuasive and undermines the independence of the bar[66], Lord Pearce said in *Rondel v Worsley*[67] in words which are true and, in my opinion, as correct today as ever:

> "I agree with Erskine that it would cause irreparable injury to justice if there were any departure from the code which has so long existed, that a barrister cannot pick and choose. To continue to compel him to take cases, yet at the same time to remove his independence and

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64 Sir Robert Menzies Oration 1978, Sydney "*How Free Should We Be*"

65 see *Rondel v Worsley* [1969] 1 AC 191 at p 281G quoted by Lord Upjohn

66 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615; [2000] 3 WLR 543; [2000] UK HL 38

67 [1969] 1 AC 191 at p 276B-E; see also per Lord Reid at p 227D-F

> immunity, would seem unfair and unreasonable. Moreover, in a human world such an unfair ruling rarely produces a satisfactory result. It results in evasions and the payment of mere lip-service to the rule – evasions which any fair-minded disciplinary tribunal would in the circumstances find it hard to condemn. And thus evasions would increase. In my view, such a rule would create a harm disproportionate to that which it seeks to remedy.
>
> The independence of counsel is of great and essential value to the integrity, the efficacy, the elucidation of truth, and the despatch of business in the administration of justice. These matters are of paramount importance. The suggested innovation must lessen that independence and do an increasing and inevitable disservice to the administration of justice. I would not, therefore, agree with it."

41. And, in *Giannarelli v Wraith*[68] Brennan J pointed out that the cab rank rule was of ancient origin and had been dated by Lord Macmillan[69] to a rule of the Court of Session in 1532 which provided:

> "No advocate without very good cause shall refuse to act for any person tendering a reasonable fee under pain of deprivation of his office of advocate."

42. Brennan J noted that a similar rule could be found in the law of medieval France and that, as noted above, Erskine had eloquently embraced it in his celebrated defence of Tom Paine. His Honour continued:

> "Whatever the origin of the rule, its observance is essential to the availability of justice according to law. It is difficult enough to ensure that justice according to law is generally available; it is unacceptable that the privileges of legal representation should be available only according to the predilections of counsel or only on payment of extravagant fees. If access to legal representation before the courts were dependent on counsel's predilections as to the acceptability of the cause or the munificence of the client, it would be difficult to bring unpopular cases to court and the profession would become the puppet of the powerful. If the cab rank rule be in decline - and I do not know that it is - it would be the duty of the leaders of the Bar and of the professional associations to ensure its restoration in full vigor."[70]

43. Witnesses have immunity; judges do and in this country, but happily not in mine, advocates do not enjoy immunity for what is done in court[71]. If you can sue a barrister for court work, why not a witness who does not come up to proof – or a trial judge who gets it wrong and is reversed? None can condone negligence in a barrister

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68 (1988) 165 CLR 543 at p 580

69 *In Law & Other Things* (1937), p 179

70 165 CLR at p 580

71 see *Cabassi v Vila* (1940) 64 CLR 130; *Mann v O'Neill* (1997) 191 CLR 204 at pp 211-212, 238

in court or elsewhere – but the immunity has a vital place. It gives the independent bar its capability to be fearless in upholding a client's rights – especially human rights. Advocacy is a skill. Its use can best be served by ensuring that the many forensic judgments which need to be made in the presentation of a case be done in the context that the barrister is answerable to his or her professional body and the court, but not in damages.

44. What is significant in this debate is the place of the bar as an institution in the administration of justice in modern democracies. Institutions develop over centuries honed by sharp experience. Their features ought not be discarded without good reason and careful consideration. For institutions like the independent bar can be strong. They can endure.

45. During the apartheid era in South Africa a small but vigorous human rights bar existed in that country which continually brought before the courts cases involving fundamental rights and freedoms which might be the subject of a gap in apartheid laws. Justice Arthur Chaskalson[72], the current President of the South African Constitutional Court, has noted that the powers of the courts of that country were curtailed by the apartheid laws but the courts themselves remained an independent source of authority within the white power structure and an important institution within which infringements of rights could be challenged, on occasion with some success. However, he noted that the result at the end of the day had been that the courts of that nation succumbed by and large to the steady but persistent erosion of powers through the narrowing of human rights by legislation and that in turn resulted in lowering the standing of the courts. He pointed out that the legal profession and the courts had not been able to penetrate the malpractices within the judiciary and the government of South Africa which were later revealed during the hearings and in the report of the Truth and Reconciliation Commission. He said:

> "The extent of the malpractices that were admitted at the amnesty hearings showed that the atrocities were widespread, that the security police considered themselves to be beyond the law, and that the courts had not been effective in preventing the abuses that had occurred. The Commission praised what they described as the few judges, lawyers, law teachers and law students who did not adhere to this pattern."

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72 Speech to the Public Interest Advocacy Centre dinner Sydney June 2000

46. And even well developed bars in democracies such as Great Britain and Australia are not able to overcome institutional corruption. In New South Wales the Wood Royal Commission into the New South Wales Police Service revealed quite frightening levels of police corruption and abuse of power. One of the most disturbing aspects was the widespread fabrication of confessions and planting of evidence in which the police engaged.

47. In recent days a similar commission has started in Western Australia and already one detective has come forward to say that in a well known case[73], confessions were fabricated.

48. The due administration of justice was also failed by what occurred in the case of the Birmingham six in a trial in 1975. There the defendants had alleged that they had been assaulted by police and that the alleged confessions which they had made were not voluntary. The jury convicted all six of the Birmingham bombers. An appeal to the Court of Appeal (Criminal Division) was dismissed in 1976. In 1987 a further appeal was brought on a reference by the Home Secretary which was also dismissed.

49. In the meantime they began civil proceedings alleging assault against the police which were dismissed on the ground that the proceedings were an abuse of process in seeking to call into question the validity of the convictions[74]. Lord Diplock criticized that action in trenchant terms and led the House of Lords roundly to dismiss it as an abuse of process. Yet the real abuse of process – a wicked one indeed – was buried deep. The Birmingham six had been not its perpetrators but its victims.

50. In 1990 the case was referred back to the Court of Appeal for a second time as a result of further fresh evidence which became available since the last hearing. That appeal was successful[75]. Lloyd, Mustill and Farquharson LJJ said[76]:

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73 *Mickelberg v The Queen* (1989) 167 CLR 259

74 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529

75 *R v McIlkenny* [1992] 2 All ER 417

76 [1992] 2 All ER at 432h

> "... the fresh investigation carried out by the Devon and Cornwall Constabularies renders the police evidence of the trial so unreliable that again we would say that the convictions are both unsafe and unsatisfactory."

51. These shocking miscarriages of justice are a salutary reminder of the vulnerability of human rights to abuse by organs of the state. A real question that arises is who guards the guards? The bar is an institution which has a great role to play in the maintenance of democracy and the preservation of freedom. Its accessibility to rich and poor, weak and strong and all manner of people, in the same way as courts are accessible and must do justice, is one of its virtues. Yet to be effective the bar must truly have both independence and the cab rank principle as an embedded parts of its value system. We must have - as we do - a willingness to appear, in cases without fee, for those who need representation. These are institutional imperatives if the independent bar is to perform the role which for centuries it has had in helping not merely to protect but also to develop human rights.

52. And as politicians become more supine in their defence of democratic traditions, including the role of an Attorney-General in defending the judiciary from attack, the bar has come to have an institutional but important place in seeking to provide another line of defence for the judiciary.

53. It was the New South Wales Bar in particular which spoke out against the recent unsubstantiated and disgraceful attack made by Senator Heffernan on Justice Kirby of the High Court of Australia. Indeed, it was an attack upon the court itself in many ways. The Prime Minister of Australia and the Attorney-General, both lawyers, refused to defend the High Court as an institution or Justice Kirby who had not been the subject of any motion before the Senate under cover of which such an attack may have been made in accordance with the procedures of the Senate. It seems to me that in future years one of the roles of the bar will be the defence of judges giving various kinds of decisions or in respect of uninformed or wrong headed criticisms. That is not to say that judges and courts should not be the subject of vigorous and even trenchant

attack for their decisions or their conduct where that is appropriate. That is a fundamental facet of our democratic way of life[77].

Pro bono publico

54. The bar's role as an institution also enables it to be a focal point for referrals by courts, interest groups and individuals in respect of the provision of legal services to those most in need of them. In Australia, the High Court, informally, and the Federal Court and many state courts, formally, maintain arrangements for keeping lists of practitioners who are prepared to act *pro bono* so as to provide assistance for persons whose cases are deemed to merit such referrals. Many members of the independent bar give freely of their time and resources in providing that assistance. The New South Wales Bar Association itself maintains a legal assistance referral scheme as does the solicitors' branch of the profession in our state. In Victoria a similar scheme is run jointly through the Public Interest Law Clearing House. The New South Wales Bar Association scheme received about 500 enquiries in the 2001/2002 year. They resulted in about 270 formal applications in which 157 were referred to barristers after they had been assessed to meet the guidelines of the scheme.

55. Other bodies such as community legal centres also utilise assistance from the independent bar. In a very real sense the bar's ability to meet and respond to these situations enables it to address a fundamental human right that many of us take for granted in today's society. That is the right to be able to appear and be heard in a court of law. The accessibility to the court system which the provision of *pro bono* representation provides is and can be vital. The New South Wales Bar Association also runs a duty barristers' scheme in the Local[78] Court in which barristers appear, effectively to take dock briefs, in that court on a daily basis.

56. The significance of the bar's institutional capacity to provide representation, including through *pro bono* and like schemes, has one very marked advantage over that of a solicitors or attorneys based legal profession. When a firm of solicitors, even

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77 *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322 at p 335

78 i.e. Magistrates'

ones which are prepared to set up *pro bono* or similar assistance schemes gets a new case, a conflict search must be undertaken. Frequently, large firms find themselves in the position of being unable, however meritorious the client is, to act because they will then be acting against a client of the firm or against a government or institution from whom they hope soon to seek work. The cab rank rule, by which the independent bar prides itself, ensures that that cannot happen when a barrister is asked to provide assistance. The barrister is free to take the brief.

57. Moreover, the solicitors' branch of our profession and many institutional and large clients understand the operation of the cab rank rule. It means that barristers will one day be acting for a bank or a government institution or a large corporation against an individual and on the next day can appear for another person against the institution for which they had been appearing on the previous day. Society is advantaged by thus not only by having a broader spectrum of representation but also because it gives the barrister the objective detachment of being able to advise whomever he or she acts for on the basis that he knows both sides of such a question.

58. Of course, in *Deitrich v The Queen*[79] the High Court of Australia held that an indigent person accused of a serious offence, who through no fault of his or her own, is unable to afford legal representation, is entitled to a stay or an adjournment of his or her trial to enable legal representation to be provided at the expense of the State. Regrettably not enough of the bar is available to take the dock brief which used to be the salvation of many an indigent accused – although there can be catastrophes with the inexperienced.

Commercial Human Rights?

59. One area which is not immediately obvious as a subject for human rights is commercial law. Yet now a new book has been published entitled "*Commercial Law and Human Rights*"[80]. As the commentator on the papers presented at the conference from which this book derived, Sir Anthony Mason that, the juxtaposition of

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[79] (1992) 177 CLR 292; cp: *Gideon v Wainwright* 372 US 335 (1963) where the Supreme Court held that the Sixth Amendment to the United States Constitution guaranteed the right to counsel to a person charged with a crime

[80] edited Stephen Bottomley and David Kinley – Ashgate, England 2002

commercial law and human rights was bound to raise commercial eyebrows. I would venture to say not just commercial ones. However themes that are developed include the emerging recognition of a equality of treatment and opportunity in the work place which is partly reflected in anti discrimination legislation. It remains to be seen whether basic human rights find their way into abilities to challenge taxation laws. And will what Gummow and Hayne JJ have described as "*an emergent tort of invasion of privacy*"[81] provide a further round of opportunity for development of such rights by the bar being able to take up new causes of action?

Another Golf War

60. In Washington DC last year a golfer, Casey Martin, won the case of *PGA Tour Inc v Martin*[82]. The question, of course, was whether he was playing golf in using a golf buggy or cart to get round the course in PGA Tour events. Apparently, all the others walk. That was where the *Americans with Disabilities Act* 1990 came into play. Scalia J dissented, but with style; saying:

> "If one assumes, however, that the PGA TOUR has some legal obligation to play classic, Platonic golf and if one assumes the correctness of all the other wrong turns the Court has made to get to this point then we Justices must confront what is indeed an awesome responsibility. It has been rendered the solemn duty of the Supreme Court of the United States, laid upon it by Congress in pursuance of the Federal Government's power [t]o regulate Commerce with foreign Nations, and among the several States, U.S. Const., Art.I, 8, cl.3, to decide What Is Golf. I am sure that the Framers of the Constitution, aware of the 1457 edict of King James II of Scotland prohibiting golf because it interfered with the practice of archery, fully expected that sooner or later the paths of golf and government, the law and the links, would once again cross, and that the judges of this august Court would some day have to wrestle with that age-old jurisprudential question, for which their years of study in the law have so well prepared them: Is someone riding around a golf course from shot to shot *really* a golfer? The answer, we learn, is yes. The Court ultimately concludes, and it will henceforth be the Law of the Land, that walking is not a fundamental aspect of golf.
>
> Either out of humility or out of self-respect (one or the other) the Court should decline to answer this incredibly difficult and incredibly silly question. To say that something is essential is ordinarily to say that it is necessary to the achievement of a certain object. But since it is the very nature of a game to have no object except amusement (that is what distinguishes games from productive activity), it is quite impossible to say that any of a games arbitrary rules is essential."

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81 *Australian Broadcasting Corporation v Lenah Game Meats Pty Limited* (2001) 76 ALJR 1 at 28 [132]; [2001] HCA 63; see also *Douglas v Hello! Ltd* [2001] QB 967

82 532 US 661 (2001)

Conclusion

61. To be a barrister is a privilege. To fight someone's case to establish their right to be equal before the law is an honour members of our honourable calling willingly accept every day; oftentimes for little or no fee. This we do before courts which value our independence and whose independence we, in turn, revere. Neither judges nor members of the independent bar can chose the easy cases – we must take whatever comes and give our all.

62. The hard won privilege of our independence should remind us of our responsibilities to seek to uphold fundamental human rights, however hard that may be. For if we are silent, who will speak?