

LIVING GREATLY IN THE LAW[#]

HAL WOOTTEN AC QC*

I

Over 60 years ago, as a disenchanted law student wondering whether I had made the right choice, I took comfort from the conviction with which Justice Oliver Wendell Holmes had answered a question he imputed to his audience of Harvard undergraduates in 1886. The question was: *how can the laborious study of a dry and technical system, the greedy watch for clients and practice of shopkeepers' arts, the mannerless conflicts over often sordid interests, make out a life?* – and he answered it with the ringing declaration that he could say – and say no longer with any doubt – that a man may live greatly in the law as well as elsewhere.

Holmes spoke in an age when the masculine by definition included the feminine, but in practice excluded it. One hundred and twenty years later I can say with equal conviction and a great deal more evidence, that a woman or man may live greatly in the law as elsewhere. Holmes had recently published his great work of scholarship *The Common Law*, and could not have known that he had 45 years as a judge ahead of him, so it is not surprising that he went on to emphasise the opportunities the law provided for the thinker.

However, to me a great charm of the law as a vocation lies in the varieties and combinations of ways it offers to men and women to live greatly – as thinkers, as scholars, as teachers, as counsellors and advisers, as advocates, as judges, as arbitrators, and fact-finders, as people who take their legal training with its skills and values into journalism, politics, business, administration, literature or service of the international community, to name but some of the spheres where we find men and women recognisable as lawyers.

Decision-making on the basis of rational argument, integrity and a passion for justice are not the monopoly of the legal profession but they are central to its values. In the dark days through which democracies have been travelling, it has heartened me to see how often it has been lawyers who have stood firm for these

These are excerpts from two speeches delivered at the University of New South Wales. The first excerpt is taken from Hal Wootten's acknowledgment of the second Hal Wootten Lecture given by The Hon Michael McHugh AC QC on 23 August 2007. The second excerpt is taken from Hal Wootten's speech at a gathering of the University of New South Wales Law School's foundation students on 27 February 2008. They have been recorded here for the valuable insight they provide into the role, importance and potential of the law, the legal profession and legal education.

* Emeritus Professor and foundation Dean and professor of the University of New South Wales Law School 1969–73. Hal Wootten AC QC was later a judge of the Supreme Court of New South Wales 1973–83 and remains a Visiting Professor at the Law School.

values, not only and indeed not always the courts at the top of the hierarchy, but all the way to the humbler servants of the law.

We have had reason to reflect that Atticus Finch and Rumpole of the Bailey are not entirely fictitious characters. When David Hicks was left to rot in Guantanamo Bay, and when Mohamed Haneef found himself in Brisbane Watchhouse with no one listening to his explanations, the calls that went out were unhesitatingly answered by unpretentious lawyers like Major Mori and Peter Russo, and, I am happy to say, they received the moral support of most of the profession.

When the tumult and the shouting dies, and the captains and the kings depart, there still stands the ancient sacrament of the law: the right of everybody to a fair hearing and a reasoned decision according to the facts and the law, by an honest and unintimidated judge. In the end this is often all the law can offer a person, whether individual or corporation, rich or poor, strong or weak, but it is a precious thing. Striving to make it a reality and to make the law applied in it more just and rational are at the heart of what it means to be a lawyer.

II

Every law school exists in different circumstances, each with its own distinctive location, history, opportunities, resources, traditions, myths, intellectual foci, social commitments, staff and student mixes.... [Despite] attempts to rank law schools, the better question is whether a law school, given its specificities, is making the best use of its talents in contributing to the collective responsibilities that law schools have to the local, regional, national and international communities that they serve.

I say 'serve' advisedly, because I passionately believe that law schools exist in a professional context. 'Serve' implies no subservience ... [This Law School] emerged amongst conflicting claims as to whether legal education should be 'practical' or 'academic'. I rejected this dichotomy in favour of 'professional'.

In return for the individual and corporate privileges and independence a profession enjoys, it undertakes a measure of responsibility for society's needs in its field: to provide needed services with skill and integrity; to conserve and enlarge scholarship; and to maintain standards. A law school contributes to all three responsibilities. There need be no conflict between its role as part of the profession, and its role as part of a university, with common commitments to excellence and integrity in scholarship and professional practice, and a common tradition of responsible independence.

For me a law school is important, very important, because of its role in maintaining and shaping the law and the legal profession, both of which are fundamental to the liberal, democratic, secular society under the rule of law, which I treasure for its potential to provide its members with justice, liberty and opportunities for individual self-realisation. The challenge is to ensure that a law school worthily fulfils its role.

It is part of the mythology of this law school that when the Vice-Chancellor invited me to be founding dean I replied that all I knew about legal education was how bad my own had been ...

Part of what I had in mind was the ineffective and demeaning teaching process my generation had endured, and which we decisively rejected, but another part was the substance of what was taught. With the great exception of Julius Stone, law was taught to me as an introverted discipline administered within its own parameters by an inward looking profession.

In first year we were solemnly taught Dicey's version of the Austinian doctrine of sovereignty, not as political theory but as the law. If Parliament decreed that all blue-eyed (or was it red-haired?) babies should be killed, there was nothing lawyers could or, it seemed, even should, do about it. Yet at the same time we were taught smugly that the Australian Constitution was superior to that of the United States because it did not contain a Bill of Rights. Who needed a bill of rights when we had the common law to protect us? Babies, blue-eyed or red-haired, could not be allowed to compromise the purity of the law.

It was part of the revolution in legal education in which this law school played its part, that lawyers came to look at the law from outside as well as inside, to ask how it was actually working, and to feel some responsibility for the outcome.

Law was taught to me as essentially a closed static system, not a process of sometimes rapid response to a changing society. For many the common law was still discovered rather than made by the courts, and legislation, other than deliberate reform of the common law, was largely ignored. Rather than making students experts in the law in force when they happened to do a subject, the new law schools sought to give them basic concepts and tools to manage the legal change that would continue throughout their lives.

A third major defect was the non-inclusive character of law unconsciously taught as something catering for white middle class males, the reasonable men in the Clapham omnibus, in the days before it was filled by Pakistanis and professional women on their way to work. Even corporations did not get treatment commensurate with their importance, and government departments, women and other deviants from the norm, got none.

[This Law School still uses words I wrote in its first handbook]:

... a [l]aw [s]chool should have and communicate to its students a keen concern for those on whom the law may bear harshly, either because they cannot afford its services, or because it does not sufficiently recognise their needs, or because they are in some way alienated from the rest of society. The poor, the aborigines, the handicapped, the deviants, all need their champions in the law as elsewhere.

... but I like to add that I was affirming the responsibility of the law to serve the whole of society, and singling out certain groups as those whose needs were too easily overlooked.

I hope that I am not smug and complacent when I look with some satisfaction at the profession produced by our revolution. If one looks for faults and areas in need of improvement, they are not hard to find, nor are they ever likely to be. But overall I think our legal profession is in reasonably good shape, given the challenges of recent decades. These include extraordinary technological, economic, social and demographic change, globalisation, racial conflicts, the

decline of family and church authority, the corruptions of consumerism and national prosperity, the commercialisation and commodification of nearly everything, growing inequality of wealth and power, tensions over national and international security, the constant invitation by advertisers and some politicians to be relaxed, comfortable and greedy.

To a very high degree the rule of law has been maintained, the judiciary has remained incorrupt and accessible, a free democracy has survived, the legal position of women, children and most minorities and the legal protection of the environment have greatly improved, and a rapidly growing market economy has thrived under legal regulation. Whether speaking through their professional organisations or responding individually as advocates or judges to the needs of citizens, not least Aboriginals, prematurely accused ‘terrorists’, victimised migrants and the desperate flotsam of humanity washing up on our shores, our lawyers have maintained a readiness to speak truth to power, or at least to tell power what it doesn’t want to hear, and to insist on the fundamental legal right to a fair hearing for all. Although we do not always achieve our aspirations, law graduates have with few exceptions been amongst those who care about the rule of law, about integrity in public office, about justice, fairness, equality and liberty, and about the protection of the vulnerable.

Through its teaching, its scholarship, its contribution to public debate, and above all the graduates it has produced, this Law School has played an honourable and distinguished part in producing this result ... But not only does much remain to be done; with the wisdom of those years, we know that the things we value in our society are never finally won; old threats and challenges take different forms and new ones arise. Technology has brought us to a level of wealth undreamt of in human history, and with it great unsolved problems – how that technology is to be curbed and channelled so that it does not destroy the very conditions of life on earth; how both that wealth and the burdens that accompany its production can be shared fairly between individual and social purposes, between managers, investors, workers, and those not in the workforce, between generations, between nations; how people can find new ways to give meaning to their lives as old ways erode; how our cherished values of the just, liberal, democratic society under the rule of law can be preserved as people of different faiths and assumptions and identities increasingly rub shoulders and live together in a globalising world.

The role of the Law School and its graduates will be no less important in the present and future than it was in the past.