UTOPIA

THE JOURNAL OF THE ST THOMAS MORE SOCIETY

VOLUME No. 1 ISSUE 1 – SEPTEMBER 1990

"THE PEACE OF SIR THOMAS MORE"

by the Hon. Sir Gerard Brennan, K.B.E.

Thomas More is an enigma, his life an apparent paradox. He was at once a man of the world, but not of the world; a man of power, yet of humility; the King's good servant, who died as a traitor; one who clung to the processes of the law, though in the end they broke him; who loved his family as few men do yet let them go to fend for themselves as he rowed down the Thames to the Tower, his trial and the block. He was Lord Chancellor, a knight of the realm – and a saint.

Yet no man of More's stature is so inconsistent in opinion or deed that he changes the centres of his interest, allegiance and affection to achieve distinction first in this world and then in the next. There is a constancy in him which reconciles the apparent paradox and explains the enigma. Life is not lived in separate compartments; a human personality is an entirety which copes with and is informed by the associations and activities of the life in question. More's public life, his trial and execution cannot be understood except as part of a life which found its synthesis in his love of God, of his family and his fellows. Those loves gave him a tranquillity of spirit, an abiding strength, not only to bear the burdens of his public life but to act in his public life so that those burdens, that trial and execution were the inexorable consequences of his spirit. He was, above all, a man at peace. The crises of the times could not shatter it; it was proof against ambition, power and position; it gave him laughter and the love of friends. The peace of Thomas More suffices to unify his life and to perpetuate his memory – and without it his life would be full of contradiction and the veneration of his memory would be a mockery.

I cannot speak as a scholar of More's life and writings: I have read a little of what he wrote and of what has been written about him. Enough to be caught in the widening web of admirers, who seem thus far to have been attracted by the values he exemplified rather than by adherence to contemporary fashion.

He was born in 1477 or 1478, the son of John More – then an apprentice at law – and his wife Agnes, a daughter of Thomas Granger. He was sent to school at St. Anthony's in Threadneedle Street, a school of the highest reputation, and was received into the household of Cardinal Morton, Archbishop of Canterbury and Lord Chancellor under Henry VII. He studied at Oxford, then at New Inn, an Inn of Chancery. At the age of 18, he was admitted to Lincoln's Inn, to read for the degree of barrister.

By that time, his father was a barrister of Lincoln's Inn, with which the family had had a long connection. Thomas More's portrait hangs today on the walls of the dining hall of the Inn. I was shown it by Lord Denning who said "Sir or Saint Thomas More, whichever you prefer" – and that set me to wondering whether there was a dichotomy in his life reflected in the duality of his titles. I do not think there was.

But I digress, and it is necessary to note the closeness of his connection with his Inn for it was there that he learned the law. His paternal grandfather had been butler and steward[1] and had been admitted as a member of the Society of the Inn.

Thereafter he was called to the bar, became a bencher and on two occasions was appointed a reader. Thomas' father, also John More, succeeded his father as butler, was called to the bar, became a serjeant at law, a Judge of Common Pleas and a Judge of the King's Bench.

The family was not rich or of noble birth, and their association with Lincoln's Inn must have given to the young Thomas a considerable confidence in undertaking

Foreword

The publication of the first issue of "Utopia" calls for our congratulations and thanks to Mr Peter Hall, his editorial committee and the contributors. This publication is intended to replace the circulation of copies of papers, although these will be included when speakers provide copies and the occasion warrants.

This is an appropriate time to consider the value and purpose of the Society. No institution survives its usefulness without decay. Our patron found it to be his duty to stand against the tide of immediate economic and dynastic objectives to support moral values and the authority of Peter. To a lesser degree we also have a duty to let the light of truth shine in our profession and to remind ourselves and our fellow lawyers of the jurisprudence and moral values which are the basis of public law. Australia does not have an aristocratic class to guide its fortunes. The strength and stability of society surely depends in large part on an educated professional class which is learned and wedded to moral values, as was St Thomas More.

This year the Society has, with the approval of the Senate, created the first St Thomas More prize for an essay on "Law and Morals" available within the Faculty of Law at the University of Sydney. It has also invited people in various areas of life such as Rabbi Apple, the Hon. Mr Justice Morling, the Hon. Lionel Bowen, and Sir Maurice Byers to address the members.

The future of the Society lies in attracting younger lawyers to its activities and moulding its activities to their needs. As this is my last year in office, I wish to thank all members of the Council for their support and wish the Society well.

C. J. BANNON, Q.C. – President

the profession of his father and grandfather. Foss, in his lives of the Judges of England eulogizes the system of the Inns at that time:(2)

"This origin, so far from detracting in any degree from the merit either of the chancellor or the judge, must be considered as speaking loudly, not only to their credit, but to the credit of those to whom they owed their elevation; showing that, even in those days, virtue and learning met their due reward, and contradicting the general impression that none but rich men's sons were admitted members of the inns of court. It proves also that, at a time when the barriers between the different grades of society were far more difficult to be passed than in the present day, such a combination of talent with integrity and moral worth as distinguished the progenitors of Sir Thomas could overcome all the prejudices in favour of high descent which were the natural result of the feudal system."

Young Thomas was singularly favoured to begin life at the Bar. He had had a fine classical education and he had taken the eye of Cardinal Morton who opined "to divers of the nobility who at sundry times dined with him 'This child here, waiting at the table, whosoever shall live to see it, will prove a marvellous rare man'".(3) He had shown an acuity of mind which captured the attention of Erasmus who became his life-long friend. When Thomas was 21, Erasmus wrote of him: "What did nature ever create milder, sweeter or happier than the genius of Thomas More?"(4) Esteemed by the Establishment, admired by the intellectual elite, embraced by the Society of Lincoln's Inn and removed from the threat of poverty, his success seemed assured. The world was before him. He put it aside.

Lord Campbell in his "Lives of the Lord Chancellors" tells what happened next:(5)

"Though called to the degree of barrister, he had not begun to plead in Court; and he was now disposed for ever to renounce the pomp and vanity of the world, and to bury himself in a convent. His modern biographers very improperly shrink from this passage of his life; for if it were discreditable to him (which it really it is not), still it ought to be known, that we may justly appreciate his character. He was so transported with the glory of St. Augustine, and so enraptured with the pleasures of piety, and so touched with the peace, regularity, and freedom from care of a monastic life, that he resolved to enter the order of St. Francis. But before taking the irrevocable vow of celibacy, shaving his crown, putting on the grey serge garment fastened by a twisted rope, and walking barefoot in quest of alms, he prudently made an experiment how strict monastic discipline would permanently suit him. 'He began to wear a sharp shirt of hair next his skin. He added also to his austerity a whip every Friday and high fasting days, thinking upon himself. He used also much fasting and watching, lying often upon the bare ground or upon some bench, laying a log under his head, allotting himself but four or five hours in a night at the most for his sleep, imagining, with the holy saints of Christ's church, that his body was to be used as an ass, with strokes and hard fare, lest provender might pride it, and so bring his soul, like a headstrong jade, to the bottomless pit of hell.' With this view he took a lodging close by the Carthusian monastery, now the site of the Charterhouse School, and as a lay brother practised all the austerities which prevail in this stern order."

But he was not Jansenist. Nor was his time with the Carthusians a mere retreat from the world. It was a period of growth in scholarship, maturity and the love of God. He was much affected by reading a life of Pico of Mirandola, an Italian scholar of the renaissance renowned for his sanctity. He translated that life into English and the translation gives us an insight into what More was about:(6)

"Of outward observances he gave no very great force: we speak not of those observances which the Church commandeth to be observed, for in those he was diligent: but we speak of those ceremonies which folk bring up, setting the very service of God aside, which is (as Christ saith) to be worshipped in spirit and in truth. But in the inward affections of the mind he cleaved to God with very fervent love and devotion. Sometimes that marvellous alacrity languished and almost fell, and after again with great strength rose up into God. In the love of Whom he so fervently burned that on a time as he walked with John Francis, his nephew, in an orchard at Ferrara, in the talking of the love of Christ, he broke out into these words, 'Nephew,' he said, 'this will I show thee, I warn thee keep it a secret; the substance that I have left, after certain books of mine finished, I intend to give out to poor folk, and fencing myself with the crucifix, barefoot walking about the world in every town and castle I purpose to preach of Christ.' Afterwards, I understand, by the especial commandment of God, he changed that purpose and appointed to profess himself in the order of Friars Preachers."

Thomas himself did not undertake missionary works. He stayed with the Carthusians for a few years, and he deepened his awareness of the love of God. It was a time when life was seen in the perspective of eternity, and his sights were set on the ultimate union with the Divine Lover. He wrote of this love later in the Tower:(7)

"Thus should of God the lover be content,
Any distress or sorrow to endure,
Rather than to be from God absent,
And glad to die, so that he may be sure,
By his departing hence for to procure
After this valley dark, the heavenly light,
And of his love the glorious blessed sight."

That was not a new found vision, but an affirmation of the faith of his lifetime. It reveals the inner peace of Thomas More which explains all that follows. Given the love of God, he had his reason for living and his reason for dying; for loving and laughing; for working and playing. He was a man at peace – with God and eternity, with family and friends, with profession, King and the councils of power.

He left the Charterhouse, taking with him his hair shirt and the regime of rigorous prayer to which he adhered for the whole of his life. Erasmus thought he left because he wished to marry. That may be so, but there is another possible explanation which seems to be more consonant with the rugged self-discipline of More, and his rigorous examination of his own motives. He regarded the Carthusians as men of great spirit, but unless their regular and austere lifestyle was undertaken as a spiritual exercise, there was a risk that the monastic life would be a mere protection from the problems of the real world. That was a risk More was not prepared to run, for he was contemptuous of any who misused the monastic life:(8)

"Under pretext as it seems to them of a humble heart and meakness and of serving God in silence and contemplation, they unconsciously seek their own ease and earthly rest, and with this God is not well content."

Whatever the explanation, he had a certain nostalgia for the eremitical life style of the Carthusians. He told his daughter Margaret that if it had not been for love of his family he would have sought the straitened room of a monk's cell.

He began his practice at the Bar, where he acquired a particular reputation as an expert in international law. It is said that he was in all the important cases, and earned a large income. Not long after he commenced practice, he married Jane Colt, the eldest daughter of a country household. His son-in-law, Roper, tells the story of the marriage:(9)

"He resorted to the house of one Master Colt, a gentleman of Essex, that had oft invited him thither, having three daughters, whose honest conversation and virtuous education provoked him there specially to set his affection. And albeit his mind most served him to the second daughter, for that he thought her the fairest and best favoured, yet when he considered that it would be both great grief and some shame also to the eldest to see her younger sister in marriage preferred before her, he then of a certain pity framed his fancy towards her, and soon after married her."

Perhaps it was fitting that he should marry the eldest. He was 26 or 27 at the time, and Jane was 10 years younger. Roper's less than enthusiastic description of the courtship gives no indication of the love which developed between Thomas and Jane. They were married in 1504 or January 1505.

There is no doubt that More's first marriage was a great love affair. Lord Campbell says, "There never was a happier union. He settled her in a house in Bucklersbury, where they lived in uninterrupted harmony." But their bliss was not without burden. Thomas had set himself the task of educating Jane, for he had advanced notions about the education of women and he wished to bring her into the circle of Erasmus, Grocyn, Linacre, Colet and the rest, the intellects of the time and Thomas' intimate friends. Their life together in the early years has been described:(10)

"Life was hard in that first year to the girl-bride of seventeen, pent up in narrow streets and courts and pining for green fields and the old home; hard, too, for the young husband, ten years the elder, who, with sense enough to shrink from the rough methods of the time, yet tried to play the schoolmaster to his wife before their hearts were open one to another and their desires known. How their spirits must have risen as they rode down into Essex on a summer morning – summer was then the hunting season – past the great church of Waltham; she behind him on a pillion, and straining her eyes over his shoulder to catch the first view of Netherhall, as the road wound round the little hills which were to bring peace. It is good to remember that happiness came before the end. To More, when he wrote his own epitaph, she was 'chara uxorcola', and the years that they spent together were green."

Mr. and Mrs. More lived in a house called The Barge, near where the Mansion House now stands. Mrs. More gave birth to Margaret within a year of marriage, to Elizabeth in 1506, to Cecily in 1507, and to John in 1509. These were busy years, not only with the children, but receiving visitors – the fussy Erasmus was a houseguest for a time – and looking after the studious young barrister. Perhaps they were years of some anxiety – for the young Thomas had crossed Henry VII in the year when he and Jane were married, and the monarch did not forgive. But despite the activity, Thomas pursued his life of prayer, and the birth of the children gave him a simple sense of wonder at the power of Providence. For him, a miracle frequently encountered was nonetheless a miracle. He wrote:(11)

"I cannot understand why we should hold it more wonderful to revive a dead man than to witness the breeding, birth and growth of a child into a man. No more marvellous is a cuckoo than a cock, though the one be seen only in the summer and the other the whole year round. And I am sure that if you saw dead men as commonly recalled to life by miracle as you see men brought forth by nature, you would reckon it less wonderful to bring the soul back into the body which still has its shape and is not much perished, than from a little seed to make all the gear anew and make a new soul thereto."

In 1511 Jane died. The love affair was over, and he had four young children on his hands, the eldest only five. He immediately remarried the redoubtable Dame Alice, a widow who would preside over the household and help to bring up the children and, to an extent, share the extraordinary public life which stretched before him. More was a practical man, and once he saw the need for a wife to discharge the duties which Jane's death left unfulfilled, he offered marriage to Dame Alice. It was of course a marriage of convenience, but it was not devoid of affection and respect.

More prepared an inscription for the grave intended to receive the two wives and himself. He wrote:(12)

"Within this tomb Jane, wife of More reclines;

This for himself and Alice More designs.

The first – dear object of my youthful vow,

Gave me three daughters and a son to know.

The next – ah virtue in a step-dame rare,

Nursed my sweet infants with a mother's care.

With both my years so happily have passed,

Which the more dear, I know not – first or last."

His family was the centre of his concern – his children, and in later years their spouses and his grandchildren, and his assorted relations. His school for the family was a remarkable feature of the new home at Chelsea, then in the country,

Cardinal Newman –
Fourth Veech Lecture

NOTICE IS GIVEN of the Fourth Annual Veech Lecture, which will be given on Friday, 4 October 1990

Since 1990 is the Centenary of the death of Cardinal Newman, the Veech Lecturer this year is Dr Kenneth J Cable, AM, who will address the tope "What Newman means for Australians".

Dr Cable is formerly Head of the Department of History and Chairman of the Board of Studies in Divinity at the University of Sydney. A former President of the Royal Australian Historical Society, he is, inter alia, associate editor of "The Journal of Religious History", joint author of "Sydney Anglicans" (1987) and a contributor to "Colonial Tractarians" (1989).

The Veech Lecture, sponsored by the Catholic Institute of Sydney, is an annual event which serves to address the question of the relationship between faith and culture, particularly but not exclusively between Catholic faith and Australian culture.

The Lecture will take place at the Metcalfe Theatre in the State Library of New South Wales, Macquarie Street, Sydney, at 6.30 pm on Thursday, 4 October 1990. Refreshments will be served from 5.30 pm.

Admission is $20 per person. Concessions $12. As usual, tickets may be obtained through the Catholic Institute of Sydney, 151 Darley Road, Manly, NSW 2095.

which he built as his fortunes improved and his status was enhanced. At the school there were lessons in Latin, Greek, Arithmetic, Astronomy and some elementary science. The Dialectic method was encouraged to open the mind to controversy.

Learning was not only to be valued for its own sake, but because it "prepares the mind for virtue". There seems to have been nothing which More undertook that did not tend to the love of God, the advancement of virtue, or the service of the King. Learning was an aid to virtue – as More was to show by his brilliant and lawyerly arguments at his trial – and it was to be pursued for altruistic motives. It was not to be regarded as a passport to prosperity. He wrote to Gonnell, the tutor of his school:(13)

"Though I prefer learning joined to virtue to all the treasures of Kings, yet renown for learning when it is not united with a good life, is nothing else than manifest and notorious infamy . . . among all the outstanding benefits that learning bestows on men, none is more excellent than this, that, by the study of books, we are taught in that very study, to seek not praise but usefulness. Such has been the teaching of the most learned men, especially the philosophers, who are the guides of human life, although some may have abused learning, like other good things, simply to court empty glory and popular renown."

He wished to transmit the strength which his philosophy gave him to his children, and though he was familiar with the trappings of power and the adulation of the masses for those in high places, he would have none of it. Virtue was not to be practised to earn praise. He regretted that those who taught what is good frequently awakened "the expectation of praise as the proper reward of virtue", and he added:(14)

"Thus we grow accustomed to make so much of praise, that while we study how to please the majority, who will always be the worst, we grow ashamed of being good with the minority. So that this plague of vainglory may be banished far from my children, I do desire you, my dear Gonnell, and their mother and all their friends to harp on the theme, to reiterate it and pound away at it, that vainglory is a vile thing and to be treated with contempt and that there is nothing more sublime than that humble modesty so often praised by Christ and this your prudent charity will so enforce as to teach virtue rather than reprove vice and make them love good advice instead of hating it."

Virtue, or goodness, are attractive to More. He found no joy in the condemnation of vice or evil. But the attraction of goodness for the mind and will is not dependent upon the approbation of others. Goodness is to be pursued irrespective of its impact on others. Thus More asserted a moral independence which both manifested his inner peace, and left him to do what was right as he saw it.

Virtue is to be practised though it be unpopular, and the individual conscience is not to be bent by popular acclaim, nor by popular condemnation. The practice of virtue is supported by the practice of solitary prayer, for which More provided in the design of the Chelsea home. His advice was:(15)

"Let him also choose himself some secret, solitary place in his own house, as far from noise and company as he conveniently can and thither let him sometimes secretly resort alone, imagining himself as one going out of the world even straight unto the giving up of his reckoning unto God of his sinful living."

Why does the gregarious More insist on the solitary strength of virtue and the need for solitary prayer? It is surely because he sees that it is in the quietness of the spirit that man finds his unity with God and puts the associations and activities of his life into their true perspective. To the busy man, engaged in the great transactions of the time, searching for criteria by which to mould not only his own conduct but the affairs of England, there was a simple but lonely course to follow:(16)

"If you love your own health, if you desire to be safe from the snares of the devil, from the storms of this world, from the await of thy enemies; if you long to be acceptable to God; if you covet to be happy at the last – let no day pass you but you once at leastwise present yourself to God in prayer and falling down before Him flat to the ground with an humble affection of devout mind, not from the extremity of your lips but out of the inwardness of your heart, cry these words of the prophet: 'The offences of my youth and my ignorance remember not, good Lord; but after thy mercy, Lord, for Thy goodness remember me'."

The time for prayer and the time for study were snatched from the night, for he was not willing to make default in the performance either of his public or his familial duties. They were very time-consuming. As Chancellor he worked at a prodigious rate, and he cleared the list of cases – an ambition which few judges realize and none without extraordinary effort. His large extended family made their own demands, so there was little time for More's private affairs. He wrote to a friend in Antwerp, Peter Giles:(17)

"For while in pleading, in hearing, in deciding causes, or composing disputes as an arbitrator, in waiting on some men about business, and on others out of respect, the greatest part of the day is spent on other men's affairs, the remainder of it must be given to my family at home; so that I can reserve no part to myself, that is, to study. I must gossip with my wife and chat with my children, and find something to say to my servants; for all these things I reckon a part of my business, unless I were to become a stranger in my own house; for with whomsoever either nature or choice or chance has engaged a man in any relation of life, he must endeavour to make himself as acceptable to them as he possibly can. In such occupations as these, days, months, and years slip away. Indeed all the time which I can gain to myself is that which I steal from my sleep and my meals, and because that is not much I have made but slow progress."

His life at the bar, as Under Sheriff of London, a member of Parliament, Ambassador, Privy Councillor, Chancellor of the Duchy of Lancaster and Lord Chancellor must have been extraordinarily busy. Yet study and prayer, alone and away from the public eye, were integral to his life and account for the most notable features of his public career, a career marked by independence in every view he expressed, and informed by much consideration.

His public career began shortly after he left the Charterhouse and before he married Jane. More had become a member of the House of Commons, and a bill to grant Henry VII a large sum of money was being debated. But young More made "such arguments and reasons there against, that the King's demands thereby were clean overthrown".(18) The King was told that "a beardless boy had disappointed all his purpose", and the King took revenge by exacting an unjustified fine from his father. He was advised to confess the error of his ways and to seek His Majesty's favour. He did not take that advice. It is perhaps the more surprising that he took the stand which he did within a few months of some offices being conferred upon Thomas Granger, his grandfather on his mother's side, and upon his father. In 1503, Granger had been elected Sheriff of London and, after taking his Oath before the Barons of the Exchequer, he attended

a feast at the Palace of the Archbishop of Canterbury which was graced by the King's presence. Thomas' father, John More, a new Serjeant at Law, attended the Royal banquet.[19]

But neither gratitude for past favours nor expectation of favours to come, nor fear of reprisal prevented the beardless boy from taking his stand. It was a brave political act, undertaken by one who set no store by the losses he might incur or the advantages he might otherwise acquire.

His career at the bar was affected for the next five years, but thereafter his fortunes changed with Henry VIII's accession to the throne in 1509. He had studied profoundly especially during the five years of Royal disfavour and he was appointed Reader at Furnival's Inn, an Inn under the supervision of Lincoln's Inn. The appointment, twice renewed, was prestigious. He was in all the important cases. He was a master of the common law.

He became an Under Sheriff of London, the legal adviser to the Sheriff's Court. He retained the office for many years. Erasmus tells us:[20]

"No one has settled more cases than has More, and no one has acted with greater integrity. He usually remits the fees due from the litigants – three shillings from the plaintiff and as much from the defendant; no more may be exacted. He has made himself very popular in the City by this."

In 1514, he gave up his practice at the bar. He was made Master of the Requests, knighted and later sworn of the Privy Council. For the next nine years he was engaged in embassies to the Continent, frequently away from his home and family. He was engaged dutifully in the King's service, but he kept a low profile politically. He had no taste for the battles of power.

In 1523, Parliament was summoned, principally to vote some funds to the King. More became Speaker not merely by popular choice but by the patronage of the Royal Court. That did not sap the independence of his stance. He sought freedom of speech for the Commons. He told the King that the members of the House might be put to silence "to the great hindrance of your common affairs, unless every one of your Commons were utterly discharged of all doubt and fear how anything should happen of your Highness to be taken."

The Commons did not wish to grant supply in the amount sought by Wolsey, though More did not find Wolsey's proposals objectionable. In exercise of his great power, Wolsey came into the House – to be met with a frosty silence. Roper records what followed:[21]

"And thereupon he required answers of Master Speaker; who first reverently upon his knees excusing the silence of the House, abashed at the presence of so noble a personage, able to amaze the wisest and best learned in a realm, and after by many probable arguments proving that for them to make answer was it neither expedient nor agreeable with the ancient liberty of the House; in conclusion for himself showed that though they had all with their voices trusted him, yet except every one of them could put into his one head all their several wits, he alone in so weighty a matter was unmeet to make his Grace answer."

His response was couched in respectful terms, but the message was clear. More might owe his speakership to the Executive, but his office owed its loyalty to the House. Later, when they met, Wolsey said to More:[22]

"Would to God you had been at Rome, Master More, when I made you Speaker."

To which More responded honestly, but with that self-deprecating humour which turned wrath aside:

"Your Grace not offended, so would I too, my Lord."

Mr. Speaker Cameron[23] thought that More had sown some of the most productive seeds of the freedom and independence of Parliament. Nevertheless, he retained the favour of the King who appointed him Chancellor of the Duchy of Lancaster in 1525.

The King consulted More on the lawfulness of his marriage to Catherine of Aragon, for it had been suggested to Henry that it was not lawful for him to marry his brother's wife. More, who was rightly regarded as competent in these matters as in the common law, showed the King the authorities he had gathered together:[24]

"which, although the King (as disagreeable with his desire) did not very well like of, yet were they by Sir Thomas More, who in all his communication with the King in that matter had always most discreetly behaved himself, so wisely tempered, that he both presently took them in good part, and ofttimes had thereof conference with him again."

To be a royal confidante gave More no special pride. He knew that the King favoured him "as singularly as any subject within this realm", but he knew also, as he told Roper "if my head would win him a castle in France, it should not fail to go."

The good relationship between them survived for a time, and in 1529 More was sent on an embassy to Cambrai. By that time, however, the matter of the King's marriage reached a crisis. Wolsey, failing to secure an annulment, failed the King. He fell from power while More was in Cambrai. The King had the great seal in his hands by 20th October, but there was a fierce debate as to who should be the new Chancellor.

John Guy in his "Public Career of Sir Thomas More" tells us that –[25]

"by 25 October More had indeed emerged as the compromise solution between Suffolk and Tunstall. Henry VIII was enthusiastic. Not only was More uniquely qualified for the chancellor's duties, his former political obscurity was now a positive asset. No one could possibly have associated him with Wolsey's discredited clientage. More's personal position was, of course, already tortuous. The chancellorship, the highest office in the realm, was the consummation of the career begun when he entered the Council in 1517. On the other hand, Thomas was a declared opponent of the King's divorce, the greatest future political issue. More hesitated; he perhaps even refused, until the King angrily told him to accept."

More held the office until 16 May 1532. In the legal history of England, More's appointment marks a turning point. Professor Holdsworth states the significance:[26]

"It marks the transition from the administration of equity by ecclesiastics and canonists to its administration by laymen and common lawyers. In the earliest period the ecclesiastical training of the chancellors had led to the infiltration of ideas of the canon law. But now the legal training of the chancellors was to lead to the infiltration of ideas of the common law. The occasion for the transition was political; and both political and religious causes made it permanent."

More was a distinguished common lawyer, to be trusted by common lawyers at a time when the injunction was seen by many as an instrument of equity's avidity for new jurisdictions. And the gentleness of his character had made him popular both at home and abroad. Holdsworth says that:[27]

"More's beautiful character would have made him an ideal chancellor at any time. It was exactly fitted to the difficult position which he was then called upon to

fill. He was scrupulously pure, and strictly impartial, to the disappointment, on two occasions, of his relations. He is said to have quickly cleared off all arrears of business. He was easy of access, and made it a habit never to grant a subpoena till he was satisfied that the plaintiff had some real ground of complaint.''

When the common law judges complained of his use of injunctions, More did not cling to the Chancellor's power. He invited them to reform the rigour of the law themselves, and only when they refused did he warn them that as ''yourselves drive me to award injunctions to relieve the people's injury, you cannot hereafter any more justly blame me.''(28)

His strict impartiality was a by-word. He told Roper his son-in-law –(29)

''I assure thee on my faith, that if the parties will at my hands call for justice, then, all were it my father stood on the one side, and the Devil on the other, his cause being good, the Devil should have right.''

Lord Campbell recites a lovely story of administering public justice in a case involving Dame Alice herself:(30)

''It happened on a time that a beggar-woman's little dog, which she had lost, was presented for a jewel to Lady More, and she had kept it some se'nnight very carefully; but at last the beggar had notice where the dog was, and presently she came to complain to Sir Thomas, as he was sitting in his hall, that his lady withheld her dog from her. Presently my Lady was sent for, and the dog brought with her; which Sir Thomas, taking in his hands, caused his wife, because she was the worthier person, to stand at the upper end of the hall, and the beggar at the lower end, and saying that he sat there to do every one justice, he bade each of them call the dog; which, when they did, the dog went presently to the beggar, forsaking my Lady. When he saw this, he bade my Lady be contented, for it was none of hers; yet she, repining at the sentence of my Lord Chancellor, agreed with the beggar, and gave her a piece of gold, which would well have bought three dogs, and so all parties were agreed; every one smiling to see his manner of inquiring out the truth.''

The sensitivity of More shown by the respectful treatment of Dame Alice did not impair the impartial justice of the trial. His kindness to her was not bought at another's expense: it flowed from the confidence he had in his familial affections and in the justice of the law he dispensed. There was no conflict between justice and love: there was no ground for withholding either to advance the other. He was a judge at peace.

But the clouds of the King's great question were gathering. The King, manipulated it seems by the schemes of Thomas Cromwell, at first repelled the attempt of the Commons to bring the clerical Convocation into submission on matters seemingly distinct from the King's divorce. Articles of Submission had been sent to the Convocation of the Clergy by the King, stripping the Convocation of their legislative power to enact canons without the King's consent. There followed a political upheaval in the Parliament in the week before 14 May 1532, and it was prorogued on that day. It seems that Thomas More led the Pro-Aragonese faction which opposed Henry's plans. On 15th May, the Convocation was told that it must not assemble without royal writ. On 16th, the Convocation submitted, and the Articles of Submission were signed.

At 3.00pm on that day, More surrendered the great seal in the garden at York Place, Westminster.(31) He had been politically defeated. He left office, but there was no sense of personal loss. He told his large family that he had ''little left above a hundred pounds by the year: so that now if we wish to live together you must be content to be contributaries together'' and he proposed that, if they were reduced to penury, ''then may we after, with bag and wallet, go a begging together, hoping that for pity some good folks will give us their charity, and at every man's door to sing a Salve Regina, whereby we shall still keep company, and be merry together.''(32)

This was in keeping with his rejection of affluence. Years before, when some barns had burnt down he had written to Dame Alice counselling a resignation to the will of Providence:(33)

''Let us never grudge thereat, but take it in good worth, and hartely thank him, as well for adversitie, as for prosperitie. And par adventure we have more cause to thank him for our losse, than for our winning. For his wisedom better seeth what is good for us than we do ourselves. Therefore I pray you be of good cheere, and take all the howsold with you to church, and there thank God both for that he hath given us, and for that he hath left us, which if it please hym, he can increase when he will.''

Though he would have been content to live privately, not seeking to foment controversy, much less disaffection, the sheer integrity of the man and his presence at a time when expediency knew no bounds ensured his destruction. In concluding his writing on More's public career Guy observes:(34)

''Armed with both humanist technique and secure faith, More combined a clear vision and direct insight to truth with a prominent public reputation. As such, he was an intolerable threat to the new regime, irrespective of Thomas Cromwell's genuine affection and respect for his former opponent. As expressed in his Dialogue of Comfort against Tribulation, written during the fifteen months of his imprisonment in the Tower, More aspired to an ideal of spiritual manhood which would transcend the accepted bounds of human capacity. He stood for moral crusade, and Henry VIII was adroitly cast in this work as the Great Turk. More's brilliant career in law and politics, in particular his active role in the events of 1529–1532, meanwhile ensured that his morality would soon become his executioneer. Yet by suffering torment for the truth he had discovered, More gave posterity an assurance that it was not an illusion. When the axe finally fell on 6 July 1535, 'the king's good servant' also earned his place among the very few who have enlarged the horizon of the human spirit.''

The Tower, the trial and the execution are familiar history. Throughout it all are the statements of a man at peace. Come what may, that peace was indestructible. If it could have been disturbed, it would not have been necessary to condemn More. But as the peace of the man was indestructible, it was necessary to destroy the man himself.

Throughout the whole of the long proceedings, the only concern which More expresses is his ability to follow his conscience to the end. And when he finds that he has the strength, he is joyous at the discovery. When he had done with his interview with the Councillors about being discharged out of the Bill of Attainder, and it was clear that he was set on the course of destruction, he said to Roper:(35)

''In good faith, I rejoiced, son, that I had given the devil a foul fall, and that with those lords I had gone so far as without great shame I could never go back again.''

Warned of the risk he was running by the Duke of Norfolk who told him that the wrath of the king meant death, he replied:(36)

''Then . . . is there no more difference between your Grace and me, but that I shall die today, and you tomorrow.''

And when he left Chelsea for the last time, he said:[37]

"I thank Our Lord that the field is won."

When Dame Alice asked him to have some sense, to do the King's will and come home from the Tower, he simply asked:[38]

"Is not this house as nigh heaven as my own?"

And as the pressure upon him mounted he gave thanks that –[39]

". . . reason with help of faith finally concluded, that for to be put to death wrongfully for doing well . . . it is a case in which a man may lose his head and yet have none harm, but instead of harm inestimable good at the hand of God."

At the commencement of his trial, he prayed only that he be given –[40]
"my good, honest and upright mind to nourish, maintain and uphold in me even to the last hour and extreme moment that ever I shall live."

After the sentence was passed and he was back in the Tower he wrote his final letter to his beloved daughter Margaret who had thrown her arms around him as he was led back to his cell. He wrote on the eve of the Feast of St Thomas and the Octave of the Feast of St Peter and said –[41]

". . . and therefore tomorrow long I to go to God: it were a day very meet and convenient for me. I never liked your manner toward me better than when you kissed me last: for I love when daughterly love and dear charity hath no leisure for worldly courtesy. Farewell my dear child and pray for me, and I shall for you and all your friends, that we may merrily meet in heaven."

More did not die because he wished to take the side of the Papacy in the political battles of the day. He died because he could not be false to the truth as he saw it, and he died because he longed to go to God. He was executed because his integrity and spirituality could not be tolerated in the political climate of the time. It is an error to think that More is a saint because he was a martyr; rather he became a martyr because he was a saint. There is no paradox in More. His life is quite simple. It was a life given to the love of God, and that left him impervious to worldly ambition or desire. Putting no store by position, or power, or wealth, demanding no support from family or friends or patrons along the lonely paths of his conscience, he had the strength of one who wants nothing. There are few men who are so independent; few who do not find their wish to be independent sapped by their own perceptions of what is worldly wise.

More not only had the wit to condemn vainglory, he had the faith which saw temporal advantages as the seductive baubles taking the mind and soul from their eternal objective. The paradox is not in More's life but in the lives of most other men who seek to reconcile virtue with what we call reality, principle with the exigencies of practice, a private faith with a public agnosticism. We sense a tension between daily life and the spirit, and we do not find either is at ease.

But More was a man of peace. All the aspects of his life were in their place. The whole man might devote himself to the service of his King and country, to the work of the Court over which he presided, to the service of the law, to the love and education of his family. To the service of his God. His enormous energies were devoted without stint to all of these purposes, to the great benefit of each. His spiritual life did not attenuate his public efforts: his service to the State was enhanced thereby.

It was the State which lost by his death. It rejected the State's good servant, simply because he was God's good servant first, blind to the reality that if More had been retained and trusted as the King's Lord Chancellor, England would knew and understood the politics of the Continent, the proper bounds of the knew and understood the politics of the Papal Continent, the proper bounds of the knew and understood the politics of the Papal power, the aspirations of the English people, and the true interests of the King. Had that reality been grasped, what course might history have taken?

England lost him; the world acquired his memory. He speaks today with the eloquence of example. For the modern world he is the paradigm of independence, and that is a virtue prized by the Judiciary above all others. He shows us that an individual cannot be made independent by others who satisfy his wants; independence is secured by the individual who sheds them. Independence is not a worldly attribute; it is an attribute of a man at peace. The strength of such a man flows not from position, possessions or power, but from a concordance between conscience and action. More was at peace to the end. We may draw some strength from More's benediction of the troubled man who called out to him on his way to the scaffold. More, within minutes of his death, replied:[42]

"Go thy ways in peace, and pray for me, and I will not fail to pray for thee."

Whether we share the vision of the saint or have a vision of our own, none can resist the attraction of this man of strength and independence – this man of peace.

REFERENCES

(1) R. W. Chambers, "Thomas More", (London, 1935) p.52.
(2) Foss, "The Judges of England", (London, 1870) p.455.
(3) Lord Campbell's "Lives of the Chancellors" Vol. II, p.3.
(4) Allen, "Letters of Erasmus", Vol. I, p.118; cited Chambers p.75.
(5) Campbell, pp.6-7.
(6) E. E. Reynolds, "Saint Thomas More" (London, 1953) pp.53-54.
(7) English Works of Sir Thomas More, ed. W. E. Campbell, Eyre and Spottiswoode, 1931, Vol. 1, p.390; cited Bernard Basset, "Born for Friendship" (London, 1965) p.6.
(8) "Utopia and Dialogue of Comfort", Dent, Everyman's Library, No. 461, Revised edition 1962; cited Basset, p.75.
(9) Roper, "The Lyfe of Sir Thomas Moore, knighte"; cited Reynolds, p.55.
(10) Times Literary Supplement, 26 Dec. 1918, p.654; cited Chambers p.96.
(11) English Works, 2, pp.46-47; cited Basset, p.51.
(12) Cited Basset, p.94.
(13) Basset, pp.127-128.
(14) Basset, p.130.
(15) Basset, p.59.
(16) "Life of Picus", English Works, Introduction, I, pp.347-348; cited Basset p.58.
(17) Campbell, p.15.
(18) Roper, pp.7, 8; cited Chambers p.87.
(19) Chronicles of England, 1580, p.876; cited Chambers p.51.
(20) Allen, IV, No.999, p.20; cited Chambers p.103.
(21) Roper, pp.18-19; cited Chambers pp.204-205.
(22) Roper, p.19; cited Chambers p.206.
(23) Quadrant, December 1978.
(24) Roper, p.31; cited Reynolds p.204.
(25) Guy, "The Public Career of Sir Thomas More" (Brighton, 1980) p.32.
(26) Holdsworth, "History of English Law", Vol.5, p.222.
(27) Holdsworth, p.223.
(28) Campbell, p.35.
(29) Roper, pp.42-43; cited Chambers p.268.
(30) Campbell, p.37.
(31) Guy, p.201.
(32) Campbell, p.45.
(33) Campbell, p.24.
(34) Guy, p.203.
(35) Roper, p.69; cited Reynolds p.288.
(36) Roper, p.71; cited Reynolds p.289.
(37) Roper, p.73; cited Reynolds p.291.
(38) Roper, p.84; cited Reynolds p.298.
(39) Rogers, pp.540-2; cited Reynolds p.309.
(40) Harpsfield, pp.183-97; cited Reynolds p.341.
(41) Works, 1557, p.1457; cited Chambers p.345.
(42) Chambers, p.348.

UTOPIA
THE JOURNAL OF THE ST THOMAS MORE SOCIETY

ARBITRATOR AND LAW-MAKER

by Mr Justice J. T. Ludeke

When Sir Zelman Cowen spoke[1] on the occasion of the Five Hundredth Anniversary of the birth of Sir Thomas More he wondered, as so many have wondered, why More continues to attract so much attention and interest. Sir Zelman considered that being a capable lawyer and administrator was not enough, nor were scholarship and martyrdom. He concluded that the key to More's fame and attraction must be found in the special qualities of the man as person and writer, as a man for his times and in all times. In Sir Zelman's words "Pervading all was a profound integrity . . .".

There is some diffidence in looking to More for inspiration. After all, he was a saint, he wore a hair shirt, and while Lord Chancellor, he sang in the choir of his parish Church – a most difficult act to follow. But he remains a model for all men and for all those in public positions in particular, because, as Lord Rawlinson said in his Memorial Oration in 1978[2]:

". . . Thomas More delimited for us, for all time, the final duty which, in one way or another, in one degree or another, all of us at some time may be called to face. . . . he showed to the men of his time, and to the men of every time, the duty which each man owes to a power and an authority above and beyond the power and authority of men. He showed that a man at all times owes a duty to God, be the call of ease, power, position, wealth or family, never so great."

There are few more public positions than that occupied by the Federal industrial arbitrator, whose role is discussed in this paper. The arbitrators discharge duties which have much in common with judicial dispute settlement, and must also participate in the law-making function, often in an environment of great public controversy. More would look on their efforts with sympathy and understanding.

In 1956, in the Boilermakers' Case[3], the High Court of Australia by majority decided that Chapter 111 of the Constitution did not permit powers that are foreign to the judicial power to be conferred on courts established pursuant to that Chapter. It followed that the Commonwealth Court of Conciliation and Arbitration, established as an arbitral tribunal, could not ". . . constitutionally combine with its dominant purpose and essential functions the exercise of any part of the strictly judicial power of the Commonwealth".[4] In coming to this conclusion, the Court considered and approved the distinction between judicial power and arbitral power in the Federal system, a distinction drawn by Isaacs and Rich JJ in Alexander's Case in 1918. Their Honours had said of the function of arbitral power:

"That is essentially different from the judicial power. Both of them rest for their ultimate validity and efficacy on the legislative power. Both presuppose a dispute, and a hearing or investigation, and a decision. But the essential difference is that the judicial power is concerned with their ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist, or are deemed to exist, at the moment the proceedings are instituted; whereas the function of the arbitral power in relation to industrial disputes is to ascertain and declare, but not enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other."[5]

There emerged from the judgment in Boilermakers two propositions which at the time seemed as clear as commandments cut in stone: first, a Federal court, established pursuant to Chapter 111 of the Constitution, shall not exercise a non-judicial power; second, a Federal non-judicial tribunal shall not exercise judicial power. The sharp definition that these propositions appeared to have has become somewhat misted with the passing of the years. It was also said in boilermakers that "One thing that Alexander's Case did decide once and for all is that the function of an industrial arbitrator is completely outside the realm of judicial power and is of a different order."[6]

This confident prophesy has also lost some of its certainty; indeed, in 1956 it was not the view of the Court, but of four of its members. The three dissenting justices in the Boilermakers' Case had difficulty with the argument based on the separation of powers, which was central to the prosecutor's case, and their general conclusion was that there was no constitutional impediment to the Arbitration Court exercising both functions.

Over the years, doubts have continued to be raised about the premises on which the decision in the Boilermakers' Case rests; those doubts reached into the High Court in 1974 and were expressed by the Chief Justice in the Queen v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation. Sir Garfield Barwick said:

"The principal conclusion of the Boilermakers' Case was unnecessary, in my opinion, for the effective working of the Australian Constitution or for the maintenance of the separation of the judicial power of the Commonwealth or for the protection of the independence of courts exercising that power. The decision leads to excessive subtlety and technicality in the operation of the Constitution without, in my opinion, any compensating benefit. But none the less and notwithstanding the unprofitable inconveniences it entails it may be proper that it should continue to be followed. On the other hand, it may be thought so unsuited to the working of the Constitution in the circumstances of the nation that there should now be a departure from some or all of its conclusions".[7]

Despite this firm view and the implicit invitation, no party came forward to raise a challenge. Debate on the concepts raised in the Boilermakers' Case has generally been concern with "the maintenance of the separation of the judicial power of the Commonwealth or . . . the protection of the independence of courts exercising that power". It was perhaps inevitable that the interest of lawyers would be largely centred on the judicial function and it is understandable that among lawyers there should be little enthusiasm for non-judicial dispute settlement. Nevertheless, it is interesting to recall that for half a century, lawyers constituted the Commonwealth Court of Conciliation and Arbitration and for much of that time they were busy making awards and also carrying out a wide range of judicial functions; it was not until the High Court decided the Boilermakers' Case that scales fell from eyes. Award-making having been found to be non-judicial in character, it is of some importance to assess the role of the industrial arbitrator, and to understand the significance of the responsibilities accompanying the discharge of arbitral functions in the Federal system.

It should be said first that the man in the street could be excused for believing that the Presidential members and Commissioners of the Australian Industrial Relations Commission exercise judicial functions. Although most of their efforts are directed to facilitating ". . . the prevention and prompt settlement of industrial disputes in a fair manner, and

with the minimum of legal form and technicality'' as required by the Act, many of those disputes must be resolved by recourse to principles and procedures which have much in common with those followed in the courts.

There are of course, constitutional limits upon the jurisdiction which the Commission may exercise, but other restraints are derived from the doctrine of the separation of judicial power. Some limits are imposed by statute, others follow from judgments of the High Court. For example, there is no power to compel compliance with awards and decisions, this being a matter for the Federal Court of Australia: Part VIII of the Act. Again, a party may sometimes seek an order that an employer shall pay wages claimed to be due to employees, but this would be an attempt to enforce existing legal rights and is not open to the Commission: Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd.[8]

Although there have been indications from time to time of dissatisfaction with the ''excessive subtlety'' of the conclusions in Boilermakers, the Federal arbitral tribunal continues to operate within limitations such as these and the power of judicial determination continues to be withheld. This restraint includes ''the giving of decisions in the nature adjudications upon disputes as to rights or obligations arising from the operation of the law upon past events or conduct'' to use the words of Kitto J in R v Gallagher; Ex parte Aberdare Collieries Pty Ltd[9], a statement repeated with approval in the judgment of five members of the High Court in Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd[10]. The judgment in Cram goes on at the same place to note that ''. . . the arbitral function includes the determination of a dispute relating to past transactions, events and conduct.''

The subtlety of the differences that are perceived to exist between the judicial function and the exercise of arbitral power emerges in a passage from the Court's judgment in Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia[11]. In discussing the nature of the proceedings brought up for review from the Commission, the Court said:

''In our view the fact that the Commission is involved in making a determination of matters that could have been made by a court in the course of proceedings instituted under s.119 of the Act does not ipso facto mean that the Commission has usurped judicial power, for the purpose of inquiry and determination is necessarily different depending on whether the task is undertaken by the Commission or by a court. The purpose of the Commission's inquiry is to determine whether rights and obligations should be created. The purpose of a court's inquiry and determination is to decide whether a pre-existing legal obligation has been breached, and if so, what penalty should attach to the breach.

The power of inquiry and determination is a power which properly takes its legal character from the purpose for which it is undertaken. Thus inquiry into and determination of matters in issue is a judicial function if its object is the ascertainment of legal rights and obligations. But if its object is to ascertain what rights and obligations should exist, it is properly characterized as an arbitral function when performed by a body charged with the resolution of disputes by arbitration.''[12]

On one view of this passage, it could be said that the difference between the functions has been narrowed to a question related to time: the function is probably judicial if the adjudication is to ascertain existing legal rights and obligations, but it is arbitral if the inquiry is to determine what rights and obligations should be established for the future, notwithstanding that that may require determination of a dispute relating to past events.

In all this lies a strange paradox – while the Federal industrial arbitrator is excluded from adjudication upon disputes as to rights or obligations arising from the operation of law upon past events or conduct, the law in its present state recognizes the propriety of the arbitrator adjudicating upon existing disputes and making awards which operate as part of the law of the Commonwealth. Not all disputes are resolved by the making of awards, but it is the award-making function that is the outstanding feature and it is that which distinguishes the arbitrator from the person exercising judicial power. The distinction may be observed in several ways, and in particular may be seen in the exercise of discretion in the course of dispute settlement, since award-making is undertaken free of the difficulties associated with the exercise of discretion in the course of judicial determination of issues.

Many of the features of the arbitrator's role may be found in noting the functions that a court may not perform, for in a statement of what a judge may not do can often be discerned a general outline of the wide powers available to the industrial arbitrator. In Cominos v Cominos, in a challenge to certain provisions of the Matrimonial Causes Act 1958 (Cwth), a number of functions said to be outside judicial power were raised. In the judgment of Walsh J the following summary appears:

''The basis upon which it is submitted by counsel for the respondent that the powers conferred by the challenged provisions are not within the scope of judicial power is that the discretion given to the court is so complete and unfettered that it may be said that the legislature has attempted to delegate to the court a legislative function. It is said that judicial power cannot be exercised unless what the court may do is governed and bounded by some ascertainable test or standard. Where power is conferred in such terms that what the court may do is left entirely at large, it cannot be said that the court is required to exercise judicial power.''[13]

In that case, the Court rejected the challenge based on submissions such as those to which Walsh J referred, but the exercise of delegated legislative functions, the virtual absence of ascertainable tests or standards and the conferment of power in the widest terms, are all features of the jurisdiction exercised by the Australian Industrial Relations Commission. The settlement of industrial disputes by award involves the exercise of a discretion which is practically unfettered, although members of the Commission are bound to act in a judicial manner[14] and they are required to ascertain the facts and proceed to decision or award in accordance with the duty imposed by the Act, but the legislature has been singularly restrained in providing criteria to be observed in the process. Parliament's principal direction to the Commission is found in the following general injunction:

''90. In the performance of its functions, the Commission shall take into account the public interest, and for that purpose shall have regard to:

(a) the objects of this Act; and

(b) the state of the national economy and the likely effects on the national economy of any award or order that the Commission is considering, or is proposing to make, with special reference to likely effects on the level of employment and on inflation.''

It cannot be said that this section sets out a basis from which tests or standards may be ascertained, other than tests or standards of a very general nature, since the paramount requirement is that the

public interest shall be taken into account. An understanding of what constitutes the public interest at a particular point in time requires identification of considerations which may be material at that time, but irrelevant at another time. As it has been put by Sir Gerard Brennan:

"Decisions of the Commission are made in a climate of industrial relations and of economic conditions which presents a multitude of considerations which the Commission must evaluate in deciding where the merits lie."(15)

The "climate of industrial relations and of economic conditions . . ." have in common their propensity for change, compelling the Federal industrial arbitrator to exercise a broad discretion after forming subjective judgments. This conforms with the general intention of the Act that members of the Commission will apply to the resolution of industrial disputes their own knowledge and experience of industrial relations. This intention may be seen in a number of provisions, commencing with s.10, which defines the qualifications for appointment to the Commission: the President, Deputy Presidents and Commissioners must be persons who ". . . have skills and experience in the field of industrial relations". The intention may be seen in s.20, which directs each member of the Commission to keep acquainted with industrial affairs and conditions; in s.102(1), by which a member ". . shall do everything that appears to the member to be right and proper to assist the parties. . ." to resolve their dispute; and in s.111(1)(g), which authorises a member of the Commission in certain circumstances to take the serious decision to decline to further proceed in the steps towards determining the industrial dispute.

It is sometimes suggested that the clearest indication of the wide discretion vested in the Federal industrial tribunal may be seen in s.110(2) of the Act, which is in these terms:

"110(1) . . .

(2) In the hearing and determination of an industrial dispute or in any other proceedings before the Commission;

(a) the procedure of the Commission is, subject to this Act and the Rules of the Commission, within the discretion of the Commission;

(b) the Commission is not bound to act in a formal manner and is not bound by any rules of evidence, but may inform itself on any matter in such manner as it considers just; and

(c) the Commission shall act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal forms."

The substance of this apparent dispensation has been in the legislation for many years, although doubts have been expressed about its relevance as pertaining to the exercise of non-judicial power: see the comments of Williams J in Peacock v Newtown Marrickville and General Co-operative Building Society No. 4 Ltd(16). The section frees the Federal industrial arbitrator from many of the restraints that accompany the judicial process, but its provisions also present a challenge. The Commission is entirely in control of its own procedure and since the introduction of the Industrial Relations Act 1988 has formulated its own Rules, but paragraph (b) of subsection (2) places a heavy responsibility on the members of the Commission to exercise their wide powers with restraint and discretion. It is accepted that although the Tribunal ". . . is not bound by the rules of evidence, this has never been held to mean that (it) would act without evidence. If a tribunal were to so act, obvious injustices and insecurities could result"(17).

It is also understood that paragraphs (b) and (c) of subsection 2 are not intended to vest members of the Commission with authority to act in an arbitrary fashion, or capriciously, or to inform themselves in a manner which would transgress the rules of procedural fairness usually described as the principles of natural justice. In the event that a member of the Commission fails to observe those requirements, the appeal provisions of the Act provide a remedy.(18)

When the Industrial Relations Act is read as a whole, the unique character of the Commission becomes clear, and the breadth of the jurisdiction it exercises resists comparison with any other Australian institution. It follows that members of the Commission must accept responsibilities that cannot be defined merely by comparison with conventional judicial duties. Nevertheless, like judges, they cannot forget that everyone has "an underlying philosophy of life", described long ago by Benjamin Cardozo in his first Storrs Lecture in these terms:

"There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions." (19)

This has special significance for members of the Commission, because they move in "a climate of industrial relations and of economic conditions", they must conform with the statutory expectation that they will apply the skills and experience which qualified them for appointment, and above all they must uphold the oath taken or affirmation made at the time of appointment "to faithfully and impartially perform the duties of the office". The "stream of tendency" may sometimes be a positive and valuable aid to the performance of functions, and it may at other times be a burdensome influence to be resisted, but the Federal industrial arbitrator must always be conscious of it.

This view of the role of the Federal industrial arbitrator has not suddenly emerged as the intention of the legislature, but has always been the position. In 1906, the President of the Tribunal recorded his dismay at finding that "The whole matter is left absolutely to the discretion of the Court",(20) but His Honour also stated his belief that his discretion must be exercised after attempting to extract some rule of principle from the general scope and intent of the statute and from the nature of the subject matter.

The magnitude of the responsibilities cast on the Tribunal and the significance of the matters which may fall within the arbitrator's discretion were recognized by the High Court in 1953 in The Queen v Kelly; Ex parte Australian Railways Union(21). In discussing the original settlement of an industrial dispute, Dixon C.J. pointed out that

". . . the arbitral tribunal is at liberty, in deciding what kind of award it will make for the purpose of determining the dispute, to take into account the social and economic effects that may be produced. While an arbitral tribunal deriving its authority under an exercise of the legislative power given by s.51(xxxv) must confine itself to conciliation and arbitration for the settlement of industrial disputes including what is incidental thereto and cannot have in its hands the general control or direction of industrial social or economic policies, it would be absurd to suppose that it was to proceed blindly in its work of industrial arbitration and ignore the industrial social and economic consequences of what it was invited to do or of what, subject to the power of variation, it had actually done."(22)

Fullager and Kitto JJ concurred in the judgment of Sir Owen Dixon.

The High Court's admonition takes on a sharp profile when questions relating to s.109 of the Constitution arise. Far-reaching industrial social or economic consequences may follow the Federal industrial arbitrator's award when there exists a State law, or anything having the force of State law, that is inconsistent with the award. It is in this area that the profound influence exerted by the arbitrator becomes apparent.

Section 109 is as follows:

"109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

Although an award may not be "a law of the Commonwealth" in the sense that an act of Parliament is such a law, it has sometimes been so treated with little comment. In Colvin v Bradley Bros. Pty Ltd, a case involving direct conflict between a Federal award and legislation of the State of New South Wales, Latham C.J. stated that "A Commonwealth arbitration award prevails over a State statute creating an offence if the Statute is inconsistent with the award"[23], and in the same case, Starke J referred to the Commonwealth law having effect through the Federal Awards[24]. Later pronouncements of the High Court have stated it rather differently; in Ansett Transport Industries (Operations) Proprietary Limited v Wardley, Aickin J put it in these terms:

"In the case of an award or a certified agreement the 'law of the Commonwealth' with which the State law is to be regarded as inconsistent is the Conciliation and Arbitration Act itself, which gives to an award a statutory operation as a prescription of industrial conduct within the area of the dispute which the award settles."[25]

The Conciliation and Arbitration Act has been followed by the Industrial Relations Act 1988, which gives statutory operation to awards of the Industrial Relations Commission. In s.149 of the Industrial Relations Act the parties, organisations and other persons bound by awards are described; s.148 ensures that an award shall continue in force until a new award is made dealing with the same matters; and s.178 prescribes the penalties that may be imposed for contravention of awards and orders made by the Commission. Section 152 restates in more expansive terms the provisions of s.109 of the Constitution:

"152. Where a State law, or an order, award, decision or determination of a State industrial authority, is inconsistent, with or deals with a matter dealt within, an award, the latter prevails and the former, to the extent of the inconsistency or in relation to the matter dealt with, is invalid."

It may be that this is an unnecessary restatement of s.109, since once it is established that a valid award has been made, it would follow from the Constitution that if there exists an inconsistent State law it would be invalid to the extent of the inconsistency.[26]

Notwithstanding that there may be doubts about the need for s.152, and about the attempt in that section of the Act to extend the effect of s.109 of the Constitution, the paramountcy of Federal law in the form of a valid award made by a Federal industrial arbitrator is well settled. Such an award prevails over a State law which is inconsistent with it. It is in the resolution of inconsistency questions that confirmation is found that an award has the standing of a law of the Commonwealth and the Federal industrial arbitrator is confirmed in the role of law maker.

REFERENCES

(1) "Sir Thomas More – Lawyer, Scholar and Statesman": (1978) 52 ALJ 354 at 360.
(2) "Public Duty and Personal Faith – the Example of Sir Thomas More": The Right Honourable Lord Rawlinson of Ewell (1979) 53 ALJ 9 at 18.
(3) The Queen v Kirby; Ex parte Boilermakers' Society of Australia (1955-1956) 94 CLR 254.
(4) (1955-1956) 94 CLR 254 at 289.
(5) Waterside Workers' Federation of Australia v J. W. Alexander Ltd (1918) 25 CLR 434 at 463.
(6) (1955-1956) 94 CLR 254 at 281.
(7) (1974) 130 CLR 87 at 90.
(8) (1987) 163 CLR 140 at 148.
(9) (1963) 37 ALJR 40 at 43.
(10) (1987) 163 CLR 140 at 148-149.
(11) (1987) 163 CLR 656.
(12) (1987) 163 CLR 656 at 666.
(13) (1972) 127 CLR 588 at 591-592.
(14) The Queen v Commonwealth Conciliation and Arbitration Commission; Ex parte The Angliss Group (1969) 122 CLR 546 at 552.
(15) Re Griffin and others; Ex parte Professional Radio and Electronics Institute of Australia (1988-1989) 167 CLR 37 at 42.
(16) (1943) 67 CLR 25 at 55-56.
(17) The Tramway Employees (Melbourne) Award 1949 (1951) 72 CAR 25 at 26.
(18) The Sprinkler Pipe Fitters Award 1975: Print G7027; 16 April 1987.
(19) "The Nature of the Judicial Process" by Benjamin N. Cardozo: The Storrs Lectures, delivered at Yale University, 1921. Yale University Press.
(20) Merchant Service Guild of Australia v The Commonwealth Steamship Owners Association (1906) 1 CAR 1 at 24-25 per O'Connor J.
(21) (1953) 89 CLR 461.
(22) (1953) 89 CLR 461 at 474-475.
(23) (1943) 68 CLR 151 at 160.
(24) (1943) 68 CLR 151 at 161.
(25) (1979-1980) 142 CLR 237 at 277.
(26) Collins v Charles Marshall Pty Ltd (1955) 92 CLR 529 at 548-549.

UTOPIA
THE JOURNAL OF THE ST THOMAS MORE SOCIETY

ETHICS AND THE LAWYER

by Dr. Bruce N. Kaye – New College, The University of New South Wales

1. THE PROFESSIONS IN THE SOCIAL STRUCTURE

During the eleventh century there was a movement towards the formation of "guilds"[1]. These guilds were related to crafts and occupations such as shopkeepers, craftsmen, and merchants. Teachers formed such guilds and their guilds in turn, during the course of the twelfth century, became the beginnings of universities. Guilds were, by and large, secularised by the sixteenth century. During the course of the fifteenth century the Inns of Court as residential teaching centres were established. Apothecaries were grouped with grocers in a guild.

In 1292 Edward I in England instructed his justices to appoint attorneys and apprentices and also Serjeants-at-Law[2]. This was an attempt to establish officers of the court in order to improve the operations of the court. Changes were made yet again in these arrangements in the court system in England in the seventeenth century.

The Industrial Revolution led to the development of large scale organisations and hence the need for accountants, bankers, secretaries and other educated office bearers. In the eighteenth century the social system of patronage in England did not facilitate the formation of associations or professional groupings, but by the end of the eighteenth century that situation had changed. From the beginning of the nineteenth century there was a flood of associations for social interaction and study[3]. Lawyers had been very early in the field in 1739 with the formation of The Society of Gentlemen Practisers which later became the Law Society.

These professional associations were designed to demarcate the competent from the incompetent and hence they paid attention to standards and to the control of standards. They also demarcated the honourable from the dishonourable and so these professional associations developed codes of ethics.

The role of the state in the nineteenth century in relation to these professional groupings was to give statutory or charter grants for such associations.

Within the English legal system such incorporation gave the corporate body a discrete area of privilege. The situation in the United States of America particularly after the New Jersey Incorporation Act of 1880 was considerably more open and somewhat different in regard to such bodies.

In order to focus upon the present situation in regard to the professions, and to lawyers as a profession, it is necessary to try and develop a way not just of defining what a profession is, but of construing what a profession's place within the social structure might be, not only from the point of view of legal framework but from the point of view of the context of social values. Such a definition involves an interplay of social and political theory and also of historical development. This can be seen in the various ways in which people seek to define "professions". W. E. Moore[4], for example, defines it by four marks; a full time occupation, a commitment to a calling, esoteric but useful knowledge which is based upon education, and autonomy which is restrained by responsibility. Elliot Freidson[5] on the other hand seeks to define professions by way of historical development. Professions are often set in contrast to government, seen as bureaucracy, and business corporations seen as hierarchical, self-perpetuating organisations. Professions, on the other hand, are an institutional grouping of individuals who are concerned with the delivery of a service, primarily advice.

Lawyers today find themselves as inheritors of a number of traditions that converge upon their professional practice. They are inheritors of the tradition of professions and professionalism generally and they are also inheritors of the social values and traditions of the culture within which they operate. These two traditions interact with our current activities to provide not only resources, but certain significant challenges of an ethical kind for those in legal practice. In order to set the context for these challenges we need first of all to look at the two traditions to which I have referred, namely that of the professions generally and the legal profession in particular, and secondly that of the social values of our society.

The question at issue really, is how are we to define or justify professions as sub groups within society who have privileges not available to other individuals or groups within society. What kind of pluralism does our society express; certainly not simply individual plurality but also group and association plurality. Professions are an expression of that plurality. Professions also embody within their own history a tradition of values and a transmission of those values within society.

Within a social values context the granting of certain kinds of moral or ethical and indeed legal privileges to a sub-set such as a profession requires some justification in relation to the social values on the one hand and on the other hand a commitment on the part of the profession and its members to the particular values which are represented by that profession. There is, of course, a legal framework for most professions in one form or anther. In the case of the lawyers there is a quite precise legal framework. Such a legal framework is established in New South Wales by legislation and by the relationship of legal practitioners to the Supreme Court. While the legal framework may, and does indeed in New South Wales, imply certain kinds of social and professional values, nonetheless its very character is concerned with the definition of minimum standards of behaviour and conduct. The law in this context operates with sanctions and relates to the activities of professional lawyers. The inherent ethics or values of the profession and of the relationship of the profession to the values of the wider society of which the profession is a part, and which that profession serves, are not based upon sanctions in the same way as the law, but have to do with relationships and with matters of trust.

Professions, therefore, are best understood as a sub-set of society cast within a legal framework of facilitation and protection but which nonetheless implies certain value and ethical considerations because of the nature of the activity of the profession and because of the relationship between the profession and the social values of the society within which it operates.

This point leads us immediately to the question of social values and their moral philosophical background.

2. MORAL PHILOSOPHY AND SOCIAL VALUES

In some currents of contemporary society there is the view that governments ought to be value neutral in the way in which they conduct the business of state. The suggestion here is that values are the beliefs and attitudes of individuals within society and that the role of the state is simply to hold the ring. While in the contemporary ethos that kind of very individualist conception of ethics might seem appealing it is historically novel and even in the present circumstances extraordinarily difficult to defend. Societies do not drop from the sky without precedent history or traditions. They exist in an historical continuum, or at least a degree of continuity, and part of that continuity is an inherited commitment to certain kinds of values, which values are transmitted not only in the public culture and its mythologies but in the institutions and laws which operate in society. The law is not amoral; it expresses and defends or enables the cultivation of certain kinds of ethical values which are important in the society in which that law operates[6].

The long history of moral philosophy is replete with examples of the discussion of social values[7]. That point can be illustrated in many ways but perhaps in our context it might be helpful to consider Aristotle and Adam Smith. In the case of Aristotle (384-322 BC) the "good life" consists in well doing according to the notions of moral excellences. Virtue means for Aristotle a settled habit in a context of disciple and without internal conflict which strikes at the happy mean between excess and defect. The mean between excess and defect is derived by the reasoning judgement of the mind of practical wisdom. The virtues, which are the marks of the good life are:

- courage, usually restricted to war
- temperance, which is used in relation to the appetites hunger, thirst and sex
- wealth, which enables magnificence in generosity
- honour or reputation
- gentleness, which is duly limited resentment
- social intercourse
- friendliness
- truthfulness
- decorous wit

The last of Aristotle's virtues is justice, and he handles it separately and combines two senses in it. On the one hand there is justice as uprightness which stands against law breaking and hence has a social aspect to it. On the other hand there is, for Aristotle, justice as fair treatment, by which he means both distributive justice, in proportion to desert, and reparative justice by which a wrongdoer yields reparation to the one who has been wronged. The virtues for Aristotle are clearly virtues cast within the context of a civic community. Such civic justice as operates in a community is both natural in that it arises from the very nature of the human condition, and conventional in that it is influenced by the particular social or political environment in which the civic community is located.

Aristotle's conception of social values in terms of the virtues of people who live in a civic community has, until relatively recently, been somewhat out of fashion. However, he represents a dominant theme in the history of moral philosophy and in the discussion of the nature of human existence and of the good life.

A somewhat different connotation of the social character of the human condition is illustrated in the writings of Adam Smith, famous for his book on the wealth of nations. However, his earlier book, "The Theory of Moral Sentiments", published in 1759 prefigures much of what he says in the later book and puts before us a picture of human society which is strikingly realistic. Man, he says, seeks the approbation of others. Because of this he is a societal being. He enters into society and into relationship with others by a fellow feeling of sympathy with their condition. Approbation of others is implicit to the extent of that imaginative sympathy for the other person. This picture therefore of the human condition is of an interaction within a community of sympathetic people who give approbation and seek approbation in their social relationships. Civic relationships at the more formal level arise according to Adam Smith, from the mechanism of the giving and seeking of approbation and this is what he calls the social system.

However, within such a social system certain requirements stand in antipathy to that basic sympathetic human community. Justice implies the punishment of injustice and such a procedure is based upon the unsocial passion or sentiment of resentment, a desire to return evil for evil. Political society is thus based on a moralistic paradox. Political interaction, the social system, rests on a latent animosity without which the state could not exist. Yet the state exists in order to facilitate the societal character of the human condition. The common good in Smith's analysis and the private good are reconciled not by coercion or contract but by moral duty and freedom. Man is a "species member, moved by love of self and fellow feeling with others"[8]. Common good is chosen in freedom by societal man for ethical reasons. How then is the paradox with the social system resolved.

Adam Smith's account of moral sentiments is based on an analysis of what the human condition is really like. That is to say it is a naturalist ethic. However, he goes on to point out that there is a contrast between the natural course of events and the natural sentiments of mankind which he has been concerned with in elaborating his moral philosophy. The virtuous indolent do not prosper but industrious knaves do. That historical truth conflicts with the natural sentiments of the sociality of the human species. But this natural course of events serves a useful purpose, namely of rousing the industry and attention of mankind. The wealthy accumulate excess but they cannot consume it and therefore provide for labour in dispensing with their excess. In a passage used later in the economic realm in the Wealth of Nations he says "they are led by an invisible hand to make nearly the same distribution of the necessaries of life which would have been made had the earth been divided into equal portions among all its inhabitants, and thus without intending it, without knowing it, advance the interests of society, and afford means to the multiplication of the species"[9]. Of course Adam Smith's thought on this point has been taken up in a variety of ways, sometimes to defend not only a laissez-faire capitalism but also a laissez-faire social philosophy. That, of course, is not what Smith intended. He envisaged that these two tendencies, that of the moral sentiments of societal man, and the antipathetic instincts of the social system, interacted with each other. He envisaged a framework which enabled the moral sentiments of the human species to maintain and sustain social values within a system which in itself depended upon antithetical tendencies in the human species. It is an example of the conflict between good and evil, with Smith's optimistic outlook that the good would be sustained by the nature of human beings even though the social system depended upon immoral tendencies in individuals.

In a society such as ours, then, how is the good to be maintained? Aristotle considered that it would be maintained by education and the practice of the virtues.

Smith thought that it would be maintained by the practice of the virtues and by the effect of immorality as by an invisible hand sustaining the social system. Both presume an education which is concerned not only with knowledge but wisdom, and a facilitating structure within which human community life may take place.

In our society the fact of social values is often overlooked. Social values are expressed in our laws, in our institutions and in what de Tocqueville called "the habits of the heart". But there is also the fact of contrary forces in society which are antithetical to the good. The great strength of Smith's analysis is that he takes seriously that moral conflict. Society is an arena of conflict within a changing inherited framework. The weakness in his position is that he thinks the good will naturally endure in the social arena.

In order to have some sense of meaning in life, in order to have some sense of identity, human individuals develop an attitude towards themselves and to their social environment. We make an attempt to develop, even inchoately, an identity for ourselves in relation to the world around us[10]. We are social individuals shaped and influenced by, and in turn influencing our environment in its contemporary form and in the past which reaches forward to contact us. Our sense of identity is shaped by at least three factors; our knowledge, our awareness of the world around us and of ourselves, by tradition, our sense of the past, our relationship to it and our criticism of it as well as our acceptance of it, by our own choice and commitment to the values and the identity which give us meaning in life. Because we are social individuals our identity is shaped also by the plurality within which we live in our society; by the dignity which that framework, that plurality, facilitates and accords to us. In this context one's own personal philosophy or religion plays a key role in interpreting the world around us and in influencing our perception of our identity and our relationship to the social values of our society. The need for and the sources of social values arise from the nature of the human species.

When Charles Curran wanted a quotation to introduce the first chapter of his audit of the finances of The State of New South Wales he turned to the opening words of Book I of The Laws of Ecclesiastical Polity by the sixteenth century Anglican Theologian, Richard Hooker. "He that goeth about to persuade a multitude that they are not so well governed as they ought to be, shall never want attentive and favourable hearers."[11] If he had read further into Book I he would have learned upon what basis societies were founded and maintained, according to Mr. Hooker. Two forces operate, the sociability, or in Adam Smith's terms the "societal" character of mankind, and also the compact which gives the society its shape and framework. "Two foundations there are which bear up public societies; the one, a natural inclination, whereby all men desire sociable life and fellowship; the other, an order expressly or secretly agreed upon touching the manner of their union in living together."[12] Hooker develops his point in a way which highlights the significance of the Christian Tradition and values for public values and political philosophy. It is only a modern gloss which treats Christianity as a religion of the private domain with no interest in, or significance for the public arena. No-one should imagine that the past, least of all the distant European past, could or should be re-pristinated in present day Australia. Nor, on the other hand, however, should we imagine that we can escape a critical dialogue with our past, or the character of the human species, which demands not just society but social values.

The point we have so far reached is that professions may be thought of as a sub-set of society generally cast within a certain institutional or legal framework and given privileges the philosophical justification for which is that they represent and best advance the values of the society which they are established to serve. The question therefore of the position of professional ethics is to be seen in this larger context.

3. PROFESSIONAL ETHICS AND THE LAWYER

When, in 1729, the Society of Gentlemen Practisers in the Courts of Law and Equity was established they declared "their utmost abhorrence and detestation of all male (mal) and unfair practice"[12] . . . and determined to use their "utmost endeavours to detect and discountenance the same". The Law Society in England was formed in 1825 and is effectively the successor to the Society of Gentlemen Practisers. When in 1974 the Law Society in England published a guide to the professional conduct of solicitors, they began by saying that "one of the hallmarks of a developed profession is that it should lay down and maintain standards of professional conduct for its members based upon the best thinking of those members as to what constitutes proper conduct for a member of that profession"[14].

That peculiarly English statement of professional autonomy is in some contrast with the more sweeping preamble to the model code of professional responsibility of the American Bar Association as formulated in 1981. "The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law, so granted, makes justice possible, for only through such law does the dignity of the individual retain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible. Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct"[15]. One cannot but notice the Enlightenment emphasis upon the individual and public rationality.

Nearer to home the Law Society of New South Wales has taken a somewhat different but nonetheless broad view of the responsibilities of lawyers as members of a profession. The opening statement in the introduction to the New South Wales Solicitors' Manual says, "The true profession of law is based on an ideal of honourable service. It is distinguished by unique responsibilities. The function of the lawyer is to serve the community in the regulation of its social structures, in the conduct of its commerce and in the administration of justice"[16]. Whereas in the American Bar Association preamble the society served by lawyers is essentially a derivative construct in the service of the individual, the Law Society of New South Wales' statement renders society more real significance. In both cases the profession is conceived of as a body which exists, and has privileges, in order to be of service to the community. The precise way in which that service to the community is rendered and the precise manner in which accountability is effected is illustrated in the Law Society's manual and laid down in statute form in the Legal Profession Act of 1987. The terms of that act will be well known

to lawyers but I wish here to illustrate the conception of a profession as serving the social values of the community by referring to two aspects of the provisions in New South Wales for lawyers, namely privilege and misconduct.

Professional privilege extends to communications and material which is created for the purpose of obtaining or giving legal advice in connection with a solicitor serving a client. The High Court has held in Grant vs Downes that such legal professional privilege is confined "to those documents which are brought into existence for the sole purpose of submission to legal advisors for advice or for use in legal proceedings"[17]. Not all communications, therefore, between a client and a solicitor are subject to this privilege. There are, of course, certain limits to the privilege which exists in any case. The privilege can be waived by the client. Furthermore the privilege cannot be used for any criminal or unlawful proceeding or for an abuse of statutory power. In other words the solicitor's privilege of confidentiality is circumscribed and determined by the belief that the processes of the legal system serve the community good. The privilege therefore is restricted to that precise activity. It is not a general privilege and it serves only the common good through the belief that the legal process as expressed in the courts, the work of solicitors and of the profession is subsumed under and serves the general social values.

In the case of misconduct there are certain obvious public interest issues. Misconduct concerns the responsibilities of a solicitor to the court, his clients and his colleagues and it affects his professional and also his personal conduct.

In terms of definitions unsatisfactory professional conduct is defined as occurring where the practice of the law "falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner"[18]. Notice that what the legal practitioner is called upon to do is to satisfy a reasonable expectation from a member of the public. His first obligation as a member of the profession in behaving in a satisfactory fashion is to satisfy the public good.

In the case of professional misconduct this is taken to include "unsatisfactory professional conduct, where the conduct is such that involves a substantial or consistent failure to reach reasonable standards of competence and diligence"[19]. On the other hand professional misconduct also includes conduct which occurs "otherwise than in connection with the practice of law which, if established, would justify a finding that a legal practitioner is not of good fame and character or is not a fit and proper person to remain on the roll of barristers or the roll of solicitors". The sorts of things that are covered by professional misconduct include wilful failure to observe the provisions of the statute, responsibility for the acts of a dishonest partner, personal supervision of a trust account, awareness of important duties, the obligation to act competently and diligently, inexcusable negligence, a breach of fiduciary duty, the maintenance of standards protective of the profession and the public and benefitting under a Will without the opportunity of independent advice for the client. The solicitor is also bound by certain duties to the court.

In 1974 the New South Wales Court of Appeal considered the question of the responsibility of the solicitor for the actions of his partner in the appeal in Re Mayes and the Legal Practitioners Act (1974). The case concerned a partner who had misappropriated funds from a trust account which was being administered in an office of the partnership which that partner customarily oversaw. The other partner customarily worked in another office and accepted an explanation for a discrepancy in accounts from his partner without further investigation. Hardy J A found in the Mayes case that although he relied on and trusted his partner he had demonstrated "a complete indifference . . . to the performance of his statutory obligations in relation to the trust account"[21]. In other words the responsibility of a solicitor may not be deflected by it being delegated to another partner within a partnership. Each partner has a responsibility which cannot be dispersed. There is here an emphatic and irreducible personal responsibility on the part of each solicitor for the activities that take place within a partnership. Obviously in large partnerships the particulars will differ in degree from smaller partnerships but the responsibility of each for all is clearly underlined in this case.

The social significance of misconduct provisions is illustrated in another case which went to the High Court on appeal in relation to the striking off of Harvey as a solicitor. In the course of his judgement Barwick C.J. said that it is the role of the court "to ensure that those standards (required of him as a member) of the profession are fully maintained . . ." rather than punish the solicitor[22]. In other words the Chief Justice is saying that the task of the court in a matter of striking off of a solicitor from the roll for misconduct is the maintenance of the standards of the profession rather than the punishment of the individual for his actions. The striking of a solicitor's name off the roll is thus not in essence punitive, but protective of the profession. The profession is to be protected in order that it may properly, and with propriety, serve the good of the community.

Solicitors are to serve the interests of their clients because that is a service for the good of the community. Hence there is a social responsibility on the part of the solicitor in terms of his fiduciary duty to a client to act in a way which is in the client's interest. So where a solicitor draws up a will by which he will benefit without ensuring that the client has obtained other independent advice about the will from another solicitor, that first solicitor is guilty of a form of misconduct. The point at issue here is the entire independence and reliability, one might say the exclusivity of the advice tendered by the solicitor to the client.

The same precepts of honesty and candour and fair dealing in relation to a solicitor's duties to his client apply equally in terms of a solicitor's dealings before the court and with his colleagues in the profession.

One might note just finally that while professional misconduct is clearly related to the activity of the solicitor in his profession there is an acceptance that the person of the solicitor extends beyond the precise realm of professional activity and thus misconduct of a personal kind may be construed as relevant to his role as a solicitor. So there are various cases where the dishonesty of a solicitor in his dealings in other activities may be construed as being relevant to the question of his being enrolled as a solicitor. The point at issue here, from the point of view of social morals, is that the solicitor must be someone who may be relied upon in his person to perform the responsibilities of an officer of the court.

So, what the New South Wales requirements reveal is that the profession exists to serve the community and its good especially in relation to the administration of justice and the rule of law Not all activities of solicitors are susceptible to precise identification and demarcation and the fiduciary relationship between solicitor and client

inevitably raises questions of ethics both personal and community.

4. IMPLICATIONS

The question of ethics for lawyers arises immediately in relation to the nature of their professional activity. They are the servants of the social values of the community in which they operate. The question of how they maintain standards within the profession is also a matter of ethics. Standards may be maintained at a certain describable and minimal level by the imposition of sanctions of a legal and enforceable kind. However, the "general fame" and acceptance of the profession and its capacity to carry out its responsibilities in the community depend not only on the maintenance of those minimum standards of behaviour but on the respect and standing in which the profession is held in the community. When Dr Johnson made his unkind remark about the person who had just left the room being an attorney he not only raises a smile to our lips but he also implies something most unsatisfactory about the standard of the administration of justice in the community at large. The confidence in which we hold the profession is a reflection of the confidence which we have in the administration of justice and that in turn has to do with the social values which are implicit in our tradition and important to our existence as human beings.

The legal profession is in no different case as applies in society at large and in other sub-sets or groups within society which have corporate standards of one kind or another. The maintenance of ethical standards, as well as the maintenance of statutory standards is of great social significance. What is required in this context is not simply the maintenance of minimal levels of behaviour but rather the maintenance, by active prosecution on the part of the organs of the profession and the individuals within it, of an attitude towards the profession which enhances, develops and cultivates an ethical ethos in the profession. It is all too easy to imagine with Adam Smith that those antithetical forces to good which maintain the social system will in the natural course of events be overcome by man's instinctive natural sentiments of good. It is much more likely that the social system will come to undermine the sentiments of good in the human condition and because of that those forces need to be constantly redressed, by whatever professional or cultural means are available, reduced so that the good of the profession in serving the good of society may be enhanced.

To belong to human society implies some acceptance of the social values of that society. To be a lawyer is to be committed to the ethical standards of that society from which the lawyer's professional privileges are derived, and to the maintenance and enhancement of the ethics of the profession. Default in this area of ethics is a default in the terms of the Profession's existence in society and of our own genuinely societal human condition.

FOOTNOTE

1. See A.M. Carr-Saunders and P.A. Wilson, The Professions, London, 1964, especially Part II.

2. See W. Holdsworth, A History of English Law, London 1922-1972. For an accessible summary see Tulian Disney, Paul Redmond, John Basten, Stan Ross, Lawyers, Sydney, 1986.

3. W.J. Reader, Professional Man: The Rise of the Professional Classes in Nineteenth Century England, London, 1966.

4. W.E. Moore, The Professions: Roles and Rules, New York, 1970, pp.5f.

5. In R. Dingwall and P. Lewis (Eds), The Sociology of the Professions – Lawyers, Doctors and Others, New York, 1983. See also H.M. Vollmer and D.L. Mills, Professionalization, Englewood Cliffs, N.J., 1966 and J.C. Callahan (Ed.) Ethical Issues in Professional Life Oxford, 1988.

6. There is a long history of debate about this general question of law and morality. It was one aspect of the Devlin-Hart debate and it is a significant theme in social philosophers such as Aristotle and Aquinas, Marsilius of Padua and Richard Hooker, Grotius and Hobbes, Locke, Montesquieu and Hume, Bentham and Mill. For the Devlin-Hart debate see Patrick Devlin, The Enforcement of Morals, Oxford, 1965, H.L.A. Hart, Law, Liberty and Morality, Oxford, 1963, and for a critique of the debate see Basil Mitchell, Law, Morality and Religion in a Secular Society, Oxford, 1970.

7. For a discussion of current issues in moral philosophy on this point see J. Finnis, Fundamentals of Ethics, Georgetown, 1983, S. Hauerwas and Al.MacIntyre, Eds., Revisions, Notre Dame, 1983, and A. MacIntyre, Whose Justice, Whose Rationality?, Notre Dame, 1988.

8. Joseph Cropsey, Adam Smith in Leo Strauss and Joseph Croksay (Eds.), History of Political Philosophy, Chicago, 1983, p.641.

9. Adam Smith, The Theory of Moral Sentiments, Edited by A.L. Macfie and D.D. Raphael, Liberty Classics, 1982, IV, I, 10 (pp.184-f).

10. For an interesting discussion of identity by a socialist see Hans Mel, Identity and the Sacred, Oxford, 1976.

11. Richard Hooker, Of The Laws of Ecclesiastical Polity, Book I, .i., quoted from the Oxford Edition of Hookers Works, 1836, p.146.

12. op.cit. Book 1, x, i (p.184).

13. Quoted in A Guide to the Professional Conduct of Solicitors, issued by the Council of the Law Society, London, 1974, p.3.

14. A Guide to the Professional Conduct of Solicitors, op.cit., p.1.

15. American Bar Association, Model Code of Professional Responsibility, 1981, Preamble, quoted from J.D. Morgan and R.J. Rotunda, Ed., Model Code of Professional Responsibility and Other Selected Standards including California Rules on Professional Responsibility, New York, 1985, p.3.

16. F. Riley, New South Wales Solicitors Manual, Sydney, 1987 (1001).

17. In the majority judgement of Stephen, Mason and Murphy JJ, 1976, 51 ACJR, quoted from Riley op.cit. (2101).

18. Quoted from Riley op.cit. (4021).

19. ibid.

20. ibid.

21. Riley (4041).

22. Riley (4121).