

PRESENTATION OF LIFE MEMBERSHIP - BAQ

27 February 2014

Colleagues,

Brothers and sisters of the Queensland Bar,

I am deeply grateful to be made a life member of the Queensland Bar Association. I esteem it a great honour.

And an honour which is no less because, at the moment, not everyone views our profession as an honourable one.

Some people seem to think that our adherence to the cab-rank principle is no more than a convenient excuse to make money by helping the unworthy to escape justice. Those of us in this room know that it is in fact a most inconvenient principle.

It obliges us to represent some very unappealing people, whom, as it happens, the law presumes to be innocent. Without that very inconvenient principle, the doing of justice would be a hit and miss affair, and over time more miss than hit.

But we should not be dismayed that we are not better appreciated.

History strongly suggests that those who do what barristers do should not expect too much in the way of understanding and approval from the executive branch of government.

I say that entirely without rancour: it is just the way things are under our constitutional arrangements. Barristers tend to be the natural enemies of those with power; and sometimes the power we are obliged to oppose is the power of the State.

No-one who has power likes to be thwarted in the exercise of power for what seems to him or her to be the public good. That has been true throughout the history of the common law.

Even the great King Henry II, the founder of the common law, was known to bridle at the notion that he was king under the law.

His wife was, of course, the elegant and cultured Eleanor of Aquitaine, a woman of considerable learning and sophistication, who was well-schooled in the arts of government and an inspiration for, and sponsor of, medieval poets.

Henry on the other hand seems to have been distinctly less sophisticated, if one can judge by the fact that his favourite entertainer was a gentleman known as "Roland the Farter".

Henry's relationship with his lawyers was sometimes rocky. By all accounts he was a man of terrible temper: when thwarted, he would have fits of rage in which he would fall to the floor and tear the rushes, which served as medieval carpets, with his teeth.

Over the millennium since Henry II, there have been some truly ugly incidents involving the executive government and members of the legal profession.

In 1387, Richard II put some legal questions to the judges in a Parliament held at Nottingham. These questions related to the setting up by Parliament the year before of a commission of magnates to supervise the functions of the King's government. At that time Richard had agreed, under huge political pressure, to the setting up of the commission in order to obtain a grant of supply by the Parliament.

The principal question subsequently put by the King to the judges sought their opinion on whether the statute, and the commission ordained thereby, were "derogatory to the regality and prerogative of our Lord the King".

The judges answered in the affirmative. They went on to answer other questions posed by the King by opining that those who procured the statute and the establishment of the commission deserved to be punished as traitors, unless the King wished to "grant them grace".

The King was not so disposed; but the political tide then swung back, as political tides do.

At what has become known as the Merciless Parliament in 1388, the magnates who had been the targets of Richard's questions brought charges against the judges alleging that they had been guilty of treason themselves.

The bills of attainder were passed. Four of the judges were banished for life to Ireland. The Chief Justice of the Kings Bench, Sir Robert Tresilian, was convicted and sentenced to be drawn, hanged and attainted. That sentence was carried out.

Most poignantly, for present purposes, John Blake, the barrister who Tresilian had asked to draft the questions previously put to the judges, was also charged.

As Professor S B Chrimes recounts in (1956) 72 LQR 365 at 385, "For a long time [he] stood mute in the face of this accusation, but at last he made an excellent and irrefutable answer: 'I was retained ... of the King's Council and sworn to counsel and keep his counsel loyally, and I could do none other than obey'."

This excellent response did not save Blake from being sentenced to be drawn, hanged and attainted. And we think things are tough! We could be practising under the Stuarts.

Under the Stuart kings, the profession was right to fear the King's displeasure. The threat was as real as it had been under the most despotic of the Plantagenets.

When Justice Jeffrey was made James II's chief justice of the King's Bench he adjured his fellow judges:

"'Be sure', he said, 'to execute the law to the utmost of its vengeance upon those that are now knowne, and we have reason to remember them, by the name of Whigs; and you are likewise to remember the snivelling trimmers; for you know what our Saviour Jesus Christ says in the Gospel, that 'they that are not for us are against us'."¹

This seems to have been the last occasion when it was thought respectable for judges to be told to go about their work in accordance with the wishes of the executive government.

It was also the last occasion when the naïve notion that you are "either with us or against us" was applied to the work of the courts and the legal profession.

The very point of the legal system, and the profession which serves it, is that the profession is not "either for us or against us": whatever the private opinions of its members may be, in the honourable service of justice, each is obliged to be politically neutral and professionally detached. And that is how it ought to be.

We should not be unduly agitated by the occasional rocky moment. Things have been a lot worse in times past.

We should remember that Voltaire prayed to God that he would help him against those who attacked him by first making them ridiculous.

Even if the recent attacks on the Bar are meant seriously, anyone who reflects upon them for more than a moment will see them as ridiculous.

The Bar and its traditions of dedicated service to the administration of justice will endure – because they must.

Thank you for the honour you have done me. I treasure it. And as Voltaire might have said: "Bon courage".

¹ Sir William Searle Holdsworth, *A History of English Law* (London, Methuen & Co Ltd, Sweet and Maxwell, 6th Impression, 2003) vol VI, 509.