

The Quest for Truth and Justice
An address by Hon. Alan Demack AO, to the Christian Lawyers Society on 18 May 2001

The grand title for this address was born from remarks I made when my retirement from the Supreme Court last May was acknowledged in this room. I recalled that when I was a resident at Kings College, our Master liked to say that "theology is the queen of the sciences". I accepted that as a statement of fact and, over time, added "and the law is her chief handmaiden". I recorded that for me the quest for truth and justice is the highest human calling.

Tonight I have the opportunity to explain myself. This address is a personal journey. I feel I am now old enough to explain myself without having to justify myself.

My father was a personable dentist with a fine baritone voice. He was an active member of the Methodist Church in Caboolture. Four months after he married my mother, he was diagnosed as suffering from Bright's disease. Four months later he died, after weeks of agony. I was born six weeks later.

As I grew up, the congregation of the Caboolture Methodist Church helped me acquire some understanding of the father I had not known. My mother and her family, and my father's family, gave me the basic information, but, in a real sense, the congregation and its buildings gave a context for this. I think this is one reason why the community of people we call the church, and the buildings they use for worship, have always been significant for me. When I was old enough to read, I discovered that the pulpit Bible had been dedicated to the memory of my father. I think this helped me feel at home in the pulpit, and so I have, for more than forty-five years, regularly preached, first, in the Methodist Church and, since 1977 in the Uniting Church.

I mention these things as part of my formation. I have never felt any alienation from the Church, either in its local manifestation or as the one holy Catholic and Apostolic Church. I do not think this is because I am still searching for the father I never knew. Rather, the events which I have described were part of the context out of which my present attitudes to God, Jesus Christ, the Holy Spirit and the Church grew.

I enjoyed being a Methodist when I was young. I liked singing, and Methodism was born in song. However, as I passed through my teenage years, I sensed that there were intellectual inadequacies in the way the Christian faith was being expressed. The best that my mother seemed to have heard about my father's death was that "the good die young". A cousin of mine drowned when he was about eight years old. My best friend at primary school was mauled by a shark and died, aged fourteen years. I could not accept the bald statement that "God has a plan for every life".

At university I joined the Australian Student Christian Movement, and enjoyed the freedom to ask questions about the Bible and about how the Christian faith may be expressed. In 1955 we were very fortunate to be visited by Rev Ronald Gregor Smith, the director of the SCM Press in London. He introduced us to new ways of thinking about our faith, and particularly to a book that the SCM Press had published in 1952. It bore the title "Life is Commitment", and the author was J.H. Oldham. Oldham had had an

unusual exposure to the intelligent understanding and practice of the Christian faith. For twenty-five years he had been secretary of the International Missionary Council, which brought him into contact with Christian thinkers across the world. He had a part in the formation of the World Council of Churches. Also in the 1940s and 1950s he was involved with the Christian Frontier Council, in which people sought answers to the question of how the Christian faith bears on the issues people deal with in their daily occupations.

In the introduction to his book, Oldham stated his conviction:

"...that, if Christianity is to have a meaning for the ordinary man, it must prove itself as a faith by which men can live, and in which they can find reinforcement and sustenance, not merely in the relatively sequestered precincts of the parsonage and academic life, but in the performance of their daily tasks in shop and factory, administration and politics, and as participants in the acute conflicts of social life. Unless this Christian faith makes a difference to what they do, and to the way they think and feel in their daily occupations, it cannot have any great importance for their present life."

I found this a very satisfactory approach. I do not intend to discuss the contents of "Life is Commitment", because my purpose in referring to it was to show that it gave my life direction and purpose. As I looked at my life there seemed to be two possible callings - the Church or the law. After some years of prayer and thought amidst the on-going pressures of life, I settled upon being a local or lay preacher who practised law. Methodism allowed a disciplined place for lay leadership in worship so that, in the end, the two alternatives of Church and law were blended in the calling I accepted.

Looking at the Bible, it seemed to me that Genesis began with a hymn to the ordered mind of God. It was a hymn that reflected the liturgical practices of the Jewish people when it was written. It gave none of the answers to the questions science asks, but because it acknowledges a God of order, it recognised an order in nature that makes science possible.

Then, in the story of Adam and Eve, we see the human hunger for knowledge and freedom. The consequences are confusing both for God and for humankind. Out of this confusion comes the quest for justice through law. Alan Dershowitz, the Felix Frankfurter Professor of Law at Harvard University, has written recently about this in "The Genesis of Justice". He writes from a Jewish perspective, and it is a most entertaining and informative book.

Back in the years from 1955 to 1960 I did not have the advantage of reading Dershowitz or any author quite like him. There were, instead, the authors to whom Oldham referred, such as Buber and Jaspers. They emphasised the importance of relationships to people. We are not just individuals pursuing our own goals, ambitions and agendas. We are people whose lives are lived out in community. In the language of that time, "man is man with man". Seen in this light, law is an essential part of our human existence. It provides the framework for human interaction, so that we can be truly human. However, as St. Paul powerfully shows in his letter to the Romans, law cannot make people good. That is an inner disposition that remains beyond the reach of law.

So that was how I saw my Christian faith being expressed. Observation of people and history showed human beings seeking knowledge and freedom. The Bible expressed this in stories described as myth, in the best sense of that word. Observation of

people and history showed that, when human beings sought knowledge and freedom, varying degrees of chaos resulted, and law was embraced to bring some balance or justice to the equations. This pattern was also found in the Bible, and, to meet the human need for an inner disposition that did the right thing by others, God became a human being.

While all Christians agree that it is the death of Jesus which saves us, there is enormous variety in the explanations that are given. For me, the most satisfying explanation lies in the contemplation of Christ crucified. This contemplation stirs in us an awareness of how we break or damage our relationships with others, and encourages us to an inner discipline which seeks the good of others. This theory of the atonement gives some unity to the sense of call which I have. As a lawyer I can provide and encourage the structures in the community which allow people to sustain their relationships. In the conduct of worship I can proclaim how the necessary inner disposition, which is required to sustain relationships, can be experienced. In my own life I can show that inner disposition at work. It is not for me to say if this theoretical unity bears fruit.

When I had been at the Bar a few years, I was asked by a Student Christian Movement group to talk about being a Christian lawyer. I spoke of three areas of life which concern such a person. First, the Christian must be a competent professional. Second, the Christian must have a relationship with others in the profession which treats them as persons. Third, the Christian must be aware of the aspects of our laws which could be improved or altered, and should act appropriately. I do not think I would want to alter that basic approach forty years later.

What I have said to this point is personal background. It does not speak of truth or justice. To pay respect to the topic I should now turn to these two concepts.

The Gospel according to John records Pilate's question, "What is truth?" (John 18:38). We have no record of his tone of voice. Was it sarcastic, or sceptical, or reflective? Had Pilate, as an experienced administrator, come to realise that, in human situations, it is very hard to know what is true? He certainly, in John's account, shows that he handled procedural matters very well, and, from the perspective of a Roman governor of a troublesome province, he obtained a very satisfactory conclusion to what began as a very awkward situation. You will recall that he got from the assembly the amazing affirmation - "We have no King but Caesar." A splendid address of loyalty from people from whom he expected trouble.

Anyone who has any experience with human interaction knows that it is extremely hard to determine the truth in any given situation. People, who otherwise live creditable lives, will lie about things when there is some pressure or scrutiny upon them. It is appropriate to illustrate this from the legal history we share.

Having won a celebrated victory at Hastings in 1066, William established Battle Abbey as a kind of thank offering. Over some years, a dispute developed between the Abbot of St Martin of Battle and the Bishop of Chichester, within whose see the abbey lay. During the reign of King Stephen the matter came before the King, who, on the basis of charters read to him, commanded that the Church of St. Martin of Battle should be wholly free from all subjection and exaction of the Bishop of Chichester. When the Bishop, who had been too busy to attend court that day, heard of the decision, he objected that the charter did not have his attestation and so was not genuine. The dispute dragged on and, when it came before Henry II, a charter with the bishop's

attestation was produced. Scholars agree that both the first and second charters were forgeries. (English Law Suits from William I to Richard I, vol. 1, p.268 and vol. 2, p. 310, Selden Society vols. 106' 107).

So how are human beings to seek the truth in human affairs? Various methods have been used and are used. The common law, after trying ordeals and trial by battle, moved towards; the use of an investigative jury. In a period of religious fervour, torture was tried. Eventually, it established a system which used a jury, more latterly often only a judge, to assess evidence according to rules designed to achieve procedural fairness and to apply the evidence according to both an onus of proof and a standard of proof.

This system is questioned, but it seems to me to be much more likely to provide a satisfactory basis of fact, upon which the important decisions made by the courts are based, than any other procedure.

To make what I would call a biblical assessment of this, I begin with the conviction that the development of a system of law that settles disputes, which arise between citizens, is the responsibility of each nation. This is not something we can ask God to sort out for us. Jesus refused to act as arbitrator in a family dispute (Luke 12:13-14). However, those who exercise judicial power are answerable to God for injustices (Ps 82) – a point which is expressed most clearly in the Jerusalem Bible, which gives the psalm the title "Against the judges of the nations". In any case which requires judicial determination, the following rules of procedural fairness are important:

1. The allegations should be clearly made (Pilate accepted the concept (John 18:29), but the accounts of Jesus' trial do not make it clear what charge Pilate heard, though insurrection seems the most likely).
2. The person against whom allegations are made should have the opportunity to respond (God dealt thus with Adam, Eve and Cain (Genesis 3:8-13, 4:9)).
3. The persons making the allegations should give evidence and be cross-examined (the story of Susanna and Daniel, either Daniel 13 or separately printed in the Apocrypha).
4. The reasons for the decision and its effect should be clearly explained to the person adversely affected (Genesis 3:17-19).
5. The availability of a skilled advocate is important (Daniel's defence of Susanna is the usual biblical inspiration, but Dershowitz develops a powerful argument from Abraham's defence of both guilty and innocent in Sodom (Genesis 18:16-33)).

Of course, in jury trials we have not asked the jury to explain its verdict. However, the participants in the trial have heard the evidence, the addresses and the summing up. They are aware of the issues and the emphases made. It is rare to find a jury verdict which is incomprehensible, except when the case is examined by courts which have not seen and heard the witnesses.

We have moved away from the biblical idea of requiring more than one witness to establish the guilt of a person (Deut 19: 18). It is understandable that crimes which are committed by one person on another, in circumstances which involve secrecy, encourage the idea that the alleged victim's evidence may be sufficient. However, whether this will consistently produce a just result, as distinct from offering vindication, is an issue that will not be quickly resolved.

From what I have said, it should be clear enough that it is my conviction that, in forensic matters, the truth is most likely to be ascertained if our rules of procedural fairness and of careful analysis of evidence are followed.

An interesting example of the need to analyse evidence carefully has recently received media attention. It is said that a number of people who have worked in the Capalaba Post Office have developed cancer. An analysis of the individual cases is said to have shown no link to the building, but this has not disposed of the issue. The dramatic claim has raised a prejudice against the building which an analysis of the individual cases of cancer has not displaced. So it is with such matters as previous convictions, other offences, and rumour, which are excluded from consideration in criminal trials. If they are used as part of the proof of guilt, they replace a careful analysis of probative evidence with a surge of prejudice.

If truth is an elusive phenomenon, justice is a variable one. Today, the element of vindication is dominant. This mirrors the mood of the age. Each individual claims a bundle of rights, and it is assumed that justice requires that these rights are enjoyed to the full.

It will hardly come as a surprise, in view of what I have said about J.H. Oldham's book "Life is Commitment", that I do not accept that as an adequate concept. Our lives are lived out in a complex of relationships and, if our pre-occupation is with each individual's rights, we cannot achieve the harmony in community life that we need.

Forty years ago, I thought of the Old Testament as the source of the laws we needed to provide the framework for a just society, a society which balanced the needs of the individual with the need for community. I do not mean that I wanted to see every law found in the Old Testament applied to our contemporary life. Rather the Ten Commandments and other laws do indicate matters of perennial importance. For example, the rule "do not muzzle an ox when you are using it to thresh grain" (Deut 25:4), is of basic importance in industrial matters. Those who produce a product should share in what is produced.

Forty years ago I would have thought of the New Testament as speaking only to the Christian community. This was spoken of as providing "Koinonia ethics" - the rules for the fellowship.

However, the Matrimonial Causes Act brought a good New Testament word, "reconciliation", into legal parlance. It did not seem at the time that the churches were particularly pleased, but it did encourage me to look more closely at the New Testament as a source of ideas fundamental to just laws. The New Testament is very much concerned with that inner disposition which I mentioned earlier. It was Jeremiah's vision that God would put his law within the Israelites and write it on their hearts (Jer. 31:33).

So, not only is reconciliation a word that describes the process of restoration of a relationship between individuals and God, it was an appropriate word to use when seeking the restoration of a relationship that had been expressed in a marriage. It has now gained even wider currency as a word describing a process of establishing a just relationship between Aboriginal people and those who are Australians because of the effects of British imperial expansion.

It becomes apparent also that, in the criminal law, the concept of a mental element is important. This kind of "mental guilt" is examined at some length by Jesus in the Sermon on the Mount. So we do not decide that a person should be punished for a crime simply by looking at the external events. The mental state is also important.

In the law of contract, we look for the meeting of minds. In equity, we speak of clean hands and of fiduciary relationships. Fiduciary relationships are concerned with trust, and the ultimate example of trustworthiness is God.

So both Old and New Testaments encourage us to search for the concepts which are the material from which just laws can be cast. More recently I have come to look at the two commandments Jesus endorsed as templates for legislative action. It is pardonable to quote from Luke because he has a lawyer formulate them (Luke 10:27):

"Love the Lord your God with all your heart, with all your soul, with all your strength, and with all your mind",
and,
"Love your neighbour as yourself."

Good laws assist people to carry out those two commandments. For example, love of the Lord our God involves a proper regard for the creation God has given us. Doing that with our minds, involves the search for knowledge about the world and beyond. In 1983, I was appointed to chair a committee examining in vitro fertilisation and related matters. The process was then experimental and many Christians were opposed to it.

It seemed to me that when a married couple had unsuccessfully tried, over a period of time, to have children, then they were showing a proper love of God if they sought and followed the best information about fertility and reproduction. Loving God with our minds involves a willingness to understand the way nature functions and to seek a desirable result. The issues have now grown beyond offering a married couple the possibility of having children, but the way for Christians to resolve the matter seems to me to be the same. For reasons we cannot always explain, disease, in the widest sense of the word, is part of human experience. Our minds enable us to wrestle with the causes, and our love of God enables us to embrace the possibilities of healing which our minds uncover. As Genesis 3 reminds us, the human mind is hungry for knowledge. Part of the pain of life in this age is that neither in the acquiring of or in the use of knowledge is there universal blessing.

The commandment to love our neighbours as we love ourselves is encouraged by a great range of our laws. One of the things that puzzles me is the attitude commonly expressed in the community which decries the way in which the law of tort has encouraged us to act responsibly towards one another. If Pilate's question, "What is Truth?" is a lawyer's question, the other great New Testament lawyer's question has been "Who is my neighbour?" As with medical science, the answer has not always brought universal blessing, but who would want to live in 1901 in preference to living now? As we have applied the duty of care

to the daily activities people engage in, our society has become much more conscious of our interdependence, and its life has been appropriately adjusted.

When I began my law studies in 1953, the class was composed of young men. The Bar was male, the Bench was male and the magistracy was male. There were some female solicitors. We need to be candid enough to recognise the part that the Bible has played in this male domination of the third arm of government and the profession which supports it. Although in his letter to the Galatians St. Paul says that, in Christ, racial, social, economic and gender differences are no longer significant (Gal. 3:28), in other letters he advocates a secondary role for women. Christians have not reached a common mind on this, and I do not wish to debate the issue.

Rather, I wish to record the pleasure I had in 1973/1974 in chairing a commission of inquiry into the status of women. It seemed to me that Paul spoke most generally in his Galatian statement. God gives gifts to women and to men to be used in the service of both church and world. Gender is not a relevant consideration in deciding where and how those gifts are to be used. I am pleased that, since our report was published in 1974, women have been able to take an appropriate place in the third arm of government, and in the profession that supports it.

This, then, is part of the story of my quest for truth and justice. I have, obviously, made a number of assumptions about God, the Bible and the church. They are the assumptions that have undergirded what I have done. I have not talked about the things I have done or achieved. What I have tried to explain is why I have lived the kind of life I have. To me the most important intellectual effort we make is to understand the person and mission of Jesus, so that we are exposed to the mind of God. To respond to this, for me, involves the use of law as a means of seeking both truth and justice. It is a journey that is not completed in this age.