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The Role of the Advocate and the Rule of Law
On 21 August 1949 the Soviet Union exploded its first atomic device. Ten days later the Peoples Republic of China was proclaimed. At about the same time, Australia was in the grip of one of its most serious strikes, the coal mines were closed and a Labor government stepped in and used the army to clear strikers. It was a time when, not only Australia, but also many other western nations perceived a direct and substantial threat from communists and their sympathisers.

It is, for the people in this room, a long time ago. Clement Attlee was the Prime Minister of the United Kingdom; Sydney Holland was the Prime Minister of New Zealand; Robert Menzies, was soon to become the Prime Minister of Australia.

Mr Menzies came into office with the destruction of Australian communism as one of his new government’s highest priorities. This was to be achieved through the *Communist Party Dissolution Act 1950*. The Act outlawed and dissolved the Communist Party of Australia and provided for the confiscation of its assets. Organisations affiliated to or controlled by the CPA could be declared unlawful and individuals who were or had after 10 May 1948 been members of the CPA could be declared to be so and thus debarred from employment in the Commonwealth Public Service or from holding office in a trade union. A person who was the subject of such a declaration had the onus of proving that he or she was not liable to the making of such a declaration.
This was part of the war on communism. It was a conflict in which the participants felt so strongly that they were prepared to cut away at longstanding provisions essential to the healthy survival of the rule of law.

This is an example of the faux wars which are now declared with ever greater frequency. There is the war on organised crime, the war on drugs and, of course, the war on terror. Let me make it abundantly clear. I accept that changes in the way in which criminals operate and the way in which terrorists can do harm to us require new approaches and a resolute determination to deal with these blights on our society.

It does occur, though, that parliaments can, in their anxiety to overcome these threats, propose measures which are inimical to the rule of law and, sometimes, the structure of democratic government. Looking back on the Communist Party of Australia, which owed its allegiance to the Soviet Union, it can now be seen that the threat was not as substantial as was then thought. That is the precious gift of hindsight. This process was well captured in the words of William Brennan, the former Justice of the United States Supreme Court when, in 1987, he said:

“There is considerably less to be proud about, and a good deal to be embarrassed about, when one reflects on the shabby treatment civil liberties have received in the United States during times of war and perceived threats to national security… After each perceived security crisis ended, the United States has remorsefully realised that the abrogation of civil liberties was unnecessary. But it has proven unable
to prevent itself from repeating the error when the next crisis came along.”

That statement can be neatly contrasted with what was said by Mr Menzies in the House of Representatives after the High Court had ruled that his government’s *Communist Party Dissolution Act* was unconstitutional. He told the House:

“We cannot deal with such a conspiracy urgently and effectively if we are first bound to establish by strict technical means what an association or an individual is actually doing. Wars against enemies … cannot be waged by a series of normal judicial processes.”

The decision of the High Court invalidating the *Communist Party Dissolution Act* has been described as perhaps the most important ever rendered by the Court. Had the validity of the Act been upheld and had it then been enforced in less than scrupulous ways, then its effect on the rule of law would have been disastrous. A former member of the High Court of Australia, Justice Michael Kirby, recently noted that apartheid South Africa provided a model of what Australia could have become had the legislation been upheld.

The ultimate foundation for the decision was the rule of law. It was an example of the constitutional principle that a parliament cannot recite itself into power and, at a more particular level, that only the judicial

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1. “The quest to develop a jurisprudence of civil liberties in times of security crises” Israel Year Book of Human Rights, Vol 18, Chapter 11
2. 212 Parliamentary Debates, House of Representatives, 13 March 1951, 366
power is permitted to bridge the gap between making a classification and placing a person within.\textsuperscript{4}

Of course, the decision does not establish a principle that a parliament may not reverse the onus of proof because, even if that is done, the court still has an opportunity to decide whether the constitutional fact exists.

Before you worship too long at the altar of this decision, you should bear in mind that the court made it clear that, while the Commonwealth could not enact such legislation, the States probably could. Nevertheless, this case is the example which I wish to use to support my thesis that in a settled western democracy the role of the advocate in the protection and maintenance of the rule of law is essential. While it is usually the courts, and depending upon their public persona, some judges, which become the objects of veneration, none of this could occur without advocates willing to develop a case and present it to the court. As Sir Gerard Brennan said,\textsuperscript{5}

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“the courts are the long-stop. The law which rules is the law according to the rulings of the courts, but it is applied in the offices and chambers of the legal profession. It is applied in drafting and advising; in consultations more than in litigation. But, because the courts are the long-stop and because the rulings of the courts determine the way in which the law operates, judicial decision-making is critical to the maintenance of the rule of law. So it is in litigation that the
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\textsuperscript{5} Role of the Legal Profession in the Rule of Law, the Rule of Law Perspectives from Around the Globe, LexisNexis, 2009.
practising legal profession works at the cutting edge of the rule of law.”

In a settled democracy, where the practice of law can result in a more than comfortable living, it is sometimes too easy to become more concerned about the prompt payment of fees rather than the integrity of the institution which allows the fee to be charged. While the courts do resolve the issues and while members of the judiciary do decide the cases which allow the rule of law to be maintained, they do not reach out into the community to bring the cases before them. Without the profession acting for those whose rights have been affected and without the members of the profession recognising that there are sometimes aspects of legislation which are inconsistent with the rule of law, then damage will be done.

It goes without saying that our society is threatened by terrorists, it is threatened by organised crime and it is threatened by the galaxies of unlawful activity which revolve around the sale and consumption of illicit drugs.

It is a necessary part of the role of an advocate that those elements of legislation, which are otherwise worthy but which do demean or detract from the rule of law, need to be identified. These actions can be very complicated. Whether a country has a Human Rights Bill or a Human Rights Act, such as the United Kingdom, or does not, such as Australia, it is the function of advocates to apply laws which have been validly made and to construe them in the usual way. That, in itself, serves to preserve the rule of law. The common law has always recognised that there is a balance to be maintained between the freedoms of the individual and the
protections of the group of individuals which make up a community. When the State moves to restrict freedom, or to diminish the values of the common law, then it is for the advocates to point this out; it is for the advocates to advance the arguments to the courts about these matters; and in order to do so, it is for the advocates to overcome the apathy which can arise from living in a settled democracy.