

The Secret Barrister: Stories of the Law and How It's Broken

The Secret Barrister is an anonymous blogger who writes about his¹ job: a junior barrister specialising in criminal law in the courts of England and Wales. His book is about day-to-day of life in the criminal courts and the wider problems faced in the English criminal justice system. The SB writes, he says, because he thinks that legal practitioners '... do a stunningly poor job of explaining to people what the law is, and why it matters. Too many of us are content to busy ourselves in our own work, safe in the knowledge that what we do is important, but without feeling the need to deconstruct for the man on the street why [it] ... has any relevance to their everyday life. We then wonder why there is an obvious disconnect between the legal system and the people it exists to serve and protect.'

Like medical dramas, criminal law is something we like to watch on television; unlike sickness and accidents, we tend to think that a brush with the courts won't happen to us.

This is one of the points that the SB makes in the first pages of the book. The state of the criminal justice system is not the subject of public debate in the way that health or education is. It should be; exposure to crime is as happenstance as a sudden illness or accident, and quality of service is as dependent on fortune as is access to the best schools. A trip to the Local or District Court has something in common with a trip to the hospital: anguished, expensive waiting. Nothing happens fast, and nothing is really explained.

Most of us make it through the frightening labyrinth of a public hospital because we trust in the doctors who will eventually tend to us. That trust is grounded in their

training and their experience. We have confidence that they are qualified to help us, because the government, and our insurers, ensure that they are sufficiently remunerated to keep their skills at a level that will keep us alive. We forgive their busyness and remoteness because we know the demands on their time.

That confidence does not extend to criminal lawyers. Somehow, they are lumped into the rich fat cat class of their commercial brethren, without any real information as to what they get paid, and how.² For reasons explained by Emmanuel Kerkyasharian elsewhere in *Bar News*, funding for criminal justice is in crisis in New South Wales, especially when it comes to legal aid. Recent announcements may improve a dire situation,³ but underfunding of barristers is a clear contributor to the quality of work they can deliver, and that contributes to the stressors on a court system that is already creaking under its own weight.

The SB deals with this issue and more in his book. His description of how the criminal justice system functions in England and Wales is a warning of what the NSW system could become if not properly attended to. The grim maths in chapters 6 and 7 has English criminal practitioners taking between £18.95 and £3 an hour, depending on where the case is heard and when it concludes. There is a disturbing financial penalty for cases that conclude with a plea or discontinuance before trial. Baby barristers will literally pay to work on a circuit brief because the train fare is not covered and is higher than the fee. The obvious solution is to take on more work,

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leaving less time to dedicate to preparation of any one brief.⁴

The SB brilliantly communicates the vast importance of a functioning criminal justice system to a functioning civil society, and the very real fear that if the community loses faith in state justice they might resort to justice by their own hand. He then demonstrates the extent to which the English system has ceased to function and the miscarriages of justice that occur as a result.

To illustrate the extent of the problem, the SB takes the reader through the various stages of a criminal trial in the UK, giving interesting historical context to each element of the judicial process. This

helps to explain why prosecutions proceed in the manner they now do, why this is important to secure fairness to the various participants, and how it goes wrong when the elements are overburdened as they are.

The wrongness is vividly expressed in experiences that will be all too familiar to those acting in the criminal courts. Prosecutors in the Magistrate's Court with a pile of files and a queue of defence lawyers vying for their attention 10 minutes before the hearing, no-one being able to communicate with each other before this. Frustrated, nervous witnesses told to go home and wait a few months because the case is not reached due to lack of judges, or worse, courtrooms. Delays in trials because CCTV evidence can't be played or AV links don't work on the antique court systems.

The SB then goes beyond the Australian experience and describes how the UK justice system has descended into Kafka territory. Error-ridden hearings before unqualified, untrained lay magistrates that are utterly unrepresentative of the communities they are called on to judge. Trials not just going over with stunning regularity because overstacked, understaffed Crown Prosecutors give late disclosure, but being dismissed altogether because the evidence was never gathered in the first place. In the Magistrate's Court, trials being dismissed on the first return because of inflexible case management rules, no matter if it is a mother seeking protection from a domestic abuser.

Savage cuts in funding and outsourcing of everything from the Crown Prosecution Service to victim's services to translators and transcribers to probation service trusts. Prosecution decisions being taken, against counsel's advice and the victim's wishes, because of a need to meet statistical outcomes. Accused persons, denied decent legal aid solicitors because their practices are collapsing, falling prey to vultures who cash the legal aid cheque, do no work and vanish before the trial. Or worse, defendants standing trial for murder without proper representation because barristers are on strike.⁵

This depressing fare is surprisingly digestible because the SB is such a great writer. His accounts are filled with the humanity of those he represents or prosecutes, and the people he works with. He educates us on the good in the criminal law as much as the bad. Chapter 6 contains a passage viscerally celebrating the work of criminal solicitors, without whom, he says, the accused and defence counsel would be lost. The SB's descriptions of the criminal world are frequently hilarious:

"To an extra-terrestrial touching down outside the city Crown Court, our way of resolving disputes where an individual is alleged to have breached our central social

code would be unfathomable. Get two people with plummy accents, stick them in black capes, shove horsehair wigs on their heads, arm them with books of rules weighing as much as a grown pig and use them as proxies to verbally joust in front of a bewigged sexegenerian in a big purple gown, while twelve people yanked off the street sit and watch and try to make sense of it all and decide who's in the right. The winner gets nothing. The loser ends up in a concrete box.'

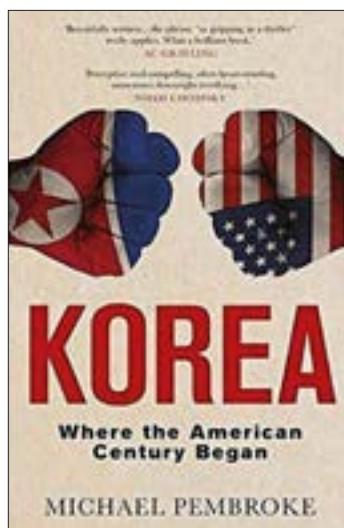
Ultimately, *The Secret Barrister* is a celebration of our system of criminal justice as much as a lament for what it is becoming. In chapters 8 and 9, the SB explores the many procedural and tactical dilemmas faced in a trial and the feeling counsel often gets that justice is not always achieved in the adversarial system. He then balances this out by considering the alternative: reposing all of the adjudication functions in the State in the manner of the inquisitorial system, and concludes that a system of independent fact finding with a non-State contradicitor, with all of its flaws and difficulties, is fundamentally the one that he would prefer.

The Secret Barrister is a little like a horror blockbuster in nerdy book form: a *Jurassic Park*, if you will. Both depict bunch of well-meaning, educated, reluctant heroes shepherding vulnerable people through a landscape of ancient monsters let loose by the greedy cynical rich, and if negotiated correctly, the T-Rex might just save you from the Velociraptor. *The Secret Barrister* might not be quite as entertaining as a Spielberg thriller but it's close, and the dangers it depicts are much more frightening.

Reviewed by Catherine Gleeson

END NOTES

- 1 We don't know the gender of the SB but as the barrister on the book cover appears to be male, I'll go with that pronoun.
- 2 A good example is a recent article in the *Sydney Morning Herald* about solicitors being forced to turn down legal aid work because the rates don't meet their practice overheads, entitled 'the \$150 an hour lawyers threatening to quit'.
- 3 The NSW Attorney-General announced on 19 June 2018 that \$10 million has been added to a \$29 million dedication in the budget to facilitate the early guilty pleas reforms.
- 4 The impact of this state of affairs on criminal and family barristers was measured in a recent report by the UK Bar Council, with stark results: more than half of these practitioners reported being under too much pressure from their work, when compared with civil practitioners, while barristers across the board reported that they found their work intellectually satisfying. A number of the responses from the Criminal Bar communicated the stress of not being paid properly, or at all, for the work that they do. The Bar Council *Barristers Working Lives 2017* https://www.barcouncil.org.uk/media/661503/working_lives_-_final.pdf at [2.5].
- 5 A murder charge was set down for trial at the Old Bailey in September without counsel: Pennick, E 'Murder case first to be hit by barrister action' *Law Gazette* <https://www.lawgazette.co.uk/law-murder-case-first-to-be-hit-by-barrister-action/5065517.article> April 2018.



Korea; Where the American Century Began

By Michael Pembroke

Success is achieved by a combination of talent and luck. There is no doubt that Michael Pembroke is a talented author and, with the timing of his latest book Korea – Where the American Century Began, he has been lucky.

He began writing this book in 2015, inspired by a longstanding desire to understand the battle of Maryang San in which his father had fought in the Korean war in 1951, but, as he states in the Preface: 'It is a wider account, a cautionary tale, an explanation of the modern era. It is a story of politics and militarism, hubris and overreach'.

By the time Pembroke finished the book in November 2017, Donald Trump had become President of the United States, had ridiculed Kim Jong-un as 'Little Rocket Man' and had threatened to 'totally destroy' North Korea. These developments are incorporated as part of a consistent and worrying narrative: whilst the United States has purported to act as the world's policeman since 1945, it has made mistakes and has not learnt from them. With a modicum of humility and compromise, the world could have been a much safer place.

As Pembroke notes, Korea's abiding problem is its geography. It is squeezed between China and Russia to the north and Japan to the south. A unified Korean kingdom existed from at least the seventh century; and, after the expulsion of Kublai Khan, the Chosun dynasty ruled from 1392 up to a Japanese invasion at the turn of the twentieth century. Britain, Russia, China and the United States were all involved in the events that led to the establishment of a Japanese protectorate in Korea, with

each driven by considerations of trade and establishing 'spheres of influence'.

After the Japanese surrender in 1945 and as Russia advanced through Manchuria and then southwards down the Korean peninsula, the United States decided that it had a strategic interest in declaring an artificial division at the 38th parallel in order to halt the Soviet advance; and then in securing and cementing that division by a military occupation. A unilateral decision was made without regard to the wishes and interests of the Korean people. Thus, the ensuing conflicts between the North and the South have been driven not by a desire to destroy or conquer the other, but rather by a wish to re-establish what had been taken away by the United States - a united Korea.

It was the North that moved first (with Chinese and Russian acquiescence), driving down over the 38th parallel in June 1950 and deep into the South. The Americans responded and pushed the North back to the 38th parallel in September 1950 and that is where matters should have rested, three months after they began. Instead, and in spite of warnings from China, the Americans continued over the 38th par-

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destruction was unleashed.*

allel, up through North Korea and with the intention of crossing over the Chinese border and into Manchuria.

Having lured the American forces deep attacked and, as Pembroke puts it, 'the nightmare unfolded' with nightly attacks and each worse than the night before as the Americans retreated or, perhaps more accurately, scattered and ran away. The annihilation of the American forces only ceased when the Chinese could not keep up with the American retreat, which left the forces in March 1951 (nine months after they had begun) divided at the 38th parallel, which was of course where they had started. And for the second time, that should have been that.

But American indignation and em-