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PAUL LATIMER : 'INTRODUCING THE LAW'

FOREWORD

The Hon. Mr. Justice M. D. Kirby
Chairman of the Australian Law Reform Commission

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Teach the People Law

This is an interesting introduction to the law in Australia. It outlines the institutional arrangements of our inherited legal system. It explains the convenient categories and rules used by lawyers. It is illustrated with photographs of some of the chief dramatis personae. With cartoons and quotations, the text is enlivened by a good sprinkling of humour. The law is not a dull and dreary business. Being about people, their problems and disputes, it has its humorous and surprising as well as its serious side. Even in discussing so austere a topic as the doctrine of precedent, the author has found a few words of Mr. Justice L.K. Murphy to brighten up the text and to help us think critically of the rules of precedent (#325):

The doctrine is that whenever you are faced with a decision, you always follow what the last person who was faced with the same decision did. It is a doctrine eminently suitable for a nation overwhelmingly populated by sheep. As the distinguished chemist, Cornford, said : 'The doctrine is based on the theory that nothing should ever be done for the first time'.

Of course, anything that has lasted as long as the doctrine of precedent will usually have its reasons. Certainly the doctrine has its supporters. The object of this work is to expose such issues as precedent, the adversary trial, constitutional reform, the use of juries, civil and criminal procedure and so on, to the critical gaze of the community including those outside the legal profession.

Although I imagine this work will have its principal use in schools, where there is (especially in Victoria) a growing number of young Australians taking Legal Studies as a routine part of their education, I would hope that the text will attract readers beyond. Comparatively little has been done until the last decade to educate Australians about

their institutions of lawmaking and law enforcement or the rules by which they are governed. Now things are changing. A community, such as Australia, which keeps adding more than 1,000 Acts of Parliament to its statute books each year (to say nothing of the subordinate legislation, by ordinances, regulations and by-laws) yet does precious little to train its citizens in the fundamentals of their basic legal rights and duties, is surely not deserving of respect. There is a great deal of interest in the community in the law and its basic rules and procedures. One has only to turn on the television set to see the level of community fascination with the resolution of legal disputes, particularly in the courts.

I came to the law without a family background in the discipline. Until the moment I arrived at the Sydney University Law School, my images of the law, and my understanding of its institutions and personnel were shaped by my recollection of a few Charles Laughton movies rather than any instruction, even superficial, in the ways of the Australian legal system. Despite an exquisite education in the mysteries of Latin past participles a dexterity in iambic pentameters and a firm grasp on the binomial theorem, I entered the Law School, after 15 years of education (including two at the University) never having been in an Australian courtroom. The closest I had ever come to a jury was an ignominious part I took in a schoolboy production of Gilbert and Sullivan's 'Trial by Jury'. If this was my experience, what hope did other citizens of my generation have? The next generation has the experience of the electronic Perry Mason. Still later, discerning viewers will have seen the somewhat more authentic Rumpole of the Bailey. But, by and large, the myths and mysteries of the law have tended to be reinforced by the reticence of lawyers and judges openly to discuss, justify and criticise the system.

Now, times are changing. Television cameras have been allowed into a few Australian courtrooms.¹ A recent decision of the Supreme Court of the United States has upheld the right of State laws in that country to permit unobtrusive filming in court.² Serious discussion of this possibility in Australia is now to be found in our law journals.³ The move of the High Court of Australia to Canberra and various other developments (including the establishment of law reform bodies) have combined to heighten the community's awareness of the law. This work is a useful handbook to those who want to understand, in a systematic way, the organisation of the law and its institutions in Australia. I can only say that it would have been of great value to me at the outset of my legal career, had I enjoyed the advantage of a general introduction of this kind : simply written, easy to follow and, as is usual with this publisher, well laid out and attractively presented.

Reform of the Law

The other thing that will be striking to the reader of this book is the questioning stance taken by the author. This is, of course, not unique. Many texts nowadays, including at a university level, are scattered with questions for the teacher and student and an invitation to criticise current institutions, rules and practices. Many people will find this questioning approach, when applied to the law, a trifle unsettling at first. Society depends so heavily upon community acceptance of the law, that questioning and criticising it seems to some disloyal or even subversive of good order in society. Nothing could be further from the truth. Great perils await communities which do not pay sufficient attention to the legal implications of the forces for change at work in the community. Whether these forces involve growth of the size and importance of government, the changing face of business, changing moral and social values or the tremendous impact of scientific and technological change, the fact remains that our community must be ready to adapt its legal institutions and rules. Otherwise these will become a source of individual injustice or irrelevance and will promote resentment, cynicism and even disregard of the law.

It is partly to solve these problems that bodies such as the Australian Law Reform Commission have been established with the support of all political parties, to help the parliamentary process in the reform, modernisation and simplification of the law. The small resources of the Australian Law Reform Commission (ALRC) are mentioned (#1024) as are the other bodies which exist to help the law reform process. Many of the questions raised for readers of this work illustrate the very questions that have been assigned by successive Federal Attorneys-General in Australia to the ALRC for study and report to Parliament:

- . Aboriginal customary laws. At the very outset of the text mention is made of the view taken on the establishment of the colony in Australia that the country was one entirely without laws, if any, and that the laws of the Aboriginal people could be ignored (#104). Nowadays, it is increasingly recognised that Aboriginal society had its own very strict laws which promoted social cohesion and peacefulness in harmony with the environment. Attempts have been made by judges in particular cases to give recognition to aspects of Aboriginal custom, for example so that Aboriginal prisoners will not be punished twice (#935). Now, as is mentioned in the text, the ALRC is examining the question of whether there should not, 200 years after European settlement, be a more comprehensive approach to the recognition of Aboriginal customary laws in Australia.

- Sentencing. In the discussion of the criminal law, mention is made of the various options that are available for the sentencing and punishment of offenders (see #419, 716, 819). This perennial source of controversy was recently the subject of an interim report by the ALRC. Because of the very high costs of imprisonment to the community and to the individuals involved, that report called attention to the need to treat imprisonment as a punishment of last resort and to encourage the use of other forms of punishment such as compulsory community service, weekend detention, use of attendance centres and so on. At the time of writing, a Bill to adopt these proposals, the Crimes Act Amendment Bill 1981, is before the Australian Parliament, having already passed the Senate.

- Evidence. There is a very useful discussion of the common law adversary trial system which we have inherited in Australia from Britain (#602). The use of the jury is examined critically (#616). The rules of evidence are explained and their rationale examined (#629, 911). The reform of the law of evidence in Federal and Territory courts in Australia is a current matter of study by the ALRC. Already a discussion paper has been issued outlining the basic issues which stand in the way of a simpler and more modern law of evidence in Australia. Issues raised in the text must be confronted by the ALRC itself. What is the basic purpose of the trial? Is it simply to settle disputes as defined by the parties? Is it to ferret out the truth of all matters involved, whatever the parties want? The implications of the adversary system must be thoroughly explored.

- Criminal investigation. Elsewhere in this work the procedures of criminal investigation are described (#704). One of the most important reports of the ALRC was made in 1975 suggesting major reforms of criminal investigation by Federal police in Australia. Also at the time of writing, an important and novel Bill based upon that report (ALRC 2) is before the Australian Parliament. I refer to the Criminal Investigation Bill 1981. The Bill introduces procedures for tape recording confessions to police and rules to govern police procedures of arrest, search, seizure, identification parades and so on.

- Migrants and law. The special problems of persons in Australia who do not speak English fluently are mentioned (#926, 928). It is estimated that 94 community languages other than English are now spoken in homes in Australia. Despite the rapid changes of Australian society which attend the influx of so many people from non English speaking backgrounds, precious little change has occurred to the legal system. The ethnic communities are still significantly

under-represented in the legal profession. So far, few of them have made it to the judiciary which remains in Australia decidedly Anglo-Celtic. Many recommendations of the ALRC seek to deal with this changing social base. For example, clauses are contained in the Criminal Investigation Bill, presently before the Australian Parliament, which provide for interpretation to be available as a prerequisite to investigation of suspects by Federal police, who are not reasonably fluent in the English language. A basic right? Perhaps. But not presently guaranteed by Australian law.

- . Class actions. In the discussion of civil procedure (#717) mention is made of the ways in which proceedings can be brought in civil cases. Elsewhere, there is a useful discussion of legal aid. In the United States, a representative action, known as class actions, has been developed to permit the bringing of cases on behalf of large numbers of persons similarly affected by an alleged legal wrong. The claim by the alleged victims of the herbicide Agent Orange is an example. The need for such a procedure in Australia is also being studied by the ALRC. A discussion paper on the topic has been widely distributed. Some consumer groups see class actions as a powerful agent for enforcing social change through legal actions. Employer and manufacturing organisations, on the other hand, have described the class action as "business' final nightmare".
- . Child welfare. There is a short description of children's rights (#915) and mention is made of recent cases in which parents have been taken to court (#306). The most recent report of the ALRC to Federal Parliament deals with child welfare law reform. The report deals with the difficult issues of children in trouble, whether because of their involvement in criminal offences or because they have been neglected or abused. One commentator described the law relating to children as an area of constant law reform. 'We are never quite satisfied', he said. The same epitaph could be written for many areas of the law outlined in this work.

A Time of Change

The generation of students who will be the principal readers of this book will grow up in a world of rapid change. Some of the forces for change I have already mentioned. Some of them are referred to in the text. Against such forces of change, none of our social institutions (including the law) will be immune. The history of fundamental constitutional change in Australia is a sobering one. The table produced in the

text (#141) shows how few of the proposals for constitutional change have been accepted. Short of constitutional change, however, there are many opportunities for significant improvements : the removal of injustices, the provision of laws to meet new circumstances, the clearing out of the deadwood, the provision of attention to new problems or old problems seen in a different light because of new moral or social attitudes.

A basic knowledge of the law and its machinery is the first step on the path to orderly reform of society through the law. That path is said, in Australia, to be a hard one. Certainly, there are many frustrations. However, if this text contributes to a generation that is aware of its legal institutions and alert to the opportunities of change and improvement, that will be a most useful contribution to the improvement of our country. It is not much use boasting that we live under the Rule of Law, if that Law, when we find it, is out of date, irrelevant, inaccessible or a mystery to all but a few.

M.D. KIRBY

SYDNEY

8 January 1982

Please substitute paragraph symbol.

FOOTNOTES

1. See (1981) 55 Australian Law Journal 511.
2. Chandler v. Florida, 49 US Law Week 4141 (1981).
3. See 'Televising of Court Proceedings and the Judiciary' (1981) 55 Australian Law Journal 839; G. Nettheim, 'Cameras in the Courtroom' (1981) 55 Australian Law Journal 855.