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BY SUSAN BARTIE

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Dr Susan Bartie has recused the memories of three significant members of the Australian legal academy: Peter Brett, Alice Erh-Soon Tay and Geoffrey Sawer. She has done this in order to explore her proposition that members of the academic community in Australia, as elsewhere, have played an important role in the development of the country's legal rules and culture.

Self-evidently, in a federal country like Australia, lawyers, and especially judges, play a significant role in public life. Sometimes, as in deciding key questions on the location and contents of political power, they directly influence the course of political events. But even in the determination of the myriad of smaller and less controversial questions, their work affects the lives of fellow citizens in ways that other professions cannot match. Courts after all, are the 'third branch of government'. They are made up of lawyers, influenced by the advocacy of other lawyers, all of whom are taught their skills by still other lawyers. Potentially, law is a cloistered and

* Justice of the High Court of Australia (1996-2009; President of the Court of Appeal of New South Wales (1984-96); and Chairman of the Australian Law Reform Commission (1975-84).

closed world. But what influence within it do the law teachers really exert? By taking these three leaders, the author has sought to answer these questions. And to challenge a common assumption that the role of law teachers is negligible, even paltry.

Selecting law teachers in order to trace the influence of their minds and values, as revealed in scholarship and instruction, is becoming more important today than it was even in the recent past. A surprisingly gripping story has recently explored the lives and influence of two law teachers deriving from the unlikely shared experience at the law school in Lemberg, later Lwów in Poland, later still and now Lviv in Estonia. Professor Philippe Sands has traced the international crimes of genocide and crimes against humanity to these two students and scholars originally from that seemingly insignificant place. The crime of *genocide* (recognised in a United Nations treaty of 1948) was first propounded by Rafael Lemkin, who worked with the American prosecution team at the Nuremburg Tribunal. He later taught law at Duke University in the United States. *Crimes against humanity* were devised and propounded by [Sir] Hersch Lauterpacht, later an important teacher of law at Cambridge University in the United Kingdom. Lauterpacht's work helped shape the indictment at Nuremburg. Sands's powerful book is *East West Street.*[1] Anyone in doubt about the potential of brilliant lawyers and law teachers to influence the shape of the law and the directions of human history should read the story told by Sands.

Dr Bartie has not attempted the same exercise in her book. I do not expect to see her touring the cities of Australia, England and the United States

[1] P. Sands, *East West Street: On the Origins of Genocide and Crimes Against Humanity*, Weidenfeld & Nicolson, London, 2016.

(as Philippe Sands does). She is unlikely to launch a roadshow using photographic images and the accompaniment of melancholy *Lieder* as Sands has done, or even in her case, Australian bush ballads. Her objective is at once more modest but more broadly focused. By telling the stories of her chosen three Australian legal academics – one a Jewish migrant who changed his name Brett (né Bretzfelder); another Tay, a Chinese woman feisty and combative who came to Australia amidst scandal from Singapore; and the third a war orphan, Sawer - the author seeks to generalise about the impact on the contents of law of important legal scholars. Specifically, their impact beyond their classrooms and even beyond their universities. In short, their impact on the content and power balances of the disciplines that they studied and taught. It is an idea with a broader focus than that which Philippe Sands has adopted. But its purpose is to uncover the clues about the wider effects that law teachers in modern Australian universities may have had on their pupils, their discipline and their society.

There are several reasons why a book like this would not, and could not, have been published in Australia even a couple of decades ago, and certainly not when the three scholars concerned were busy at their work in the legal institutions they made their homes: the Melbourne Law School (Brett), the Sydney Law School (Tay) and the ANU Department of Law and the Research School of Social Sciences, (RSSS) (Sawer). A reflection on these considerations is essential in approaching the originality and novelty of Dr Bartie's objective:

* When each of the three scholars was at their prime, Australia was already formally an independent nation. Yet generally speaking, its lawyers with few exceptions, regarded themselves as members

of a branch office of the worldwide English-speaking community of law centred on London. For most of the lives of each of the three subjects of this book Australia's final court of appeal, in most matters, was the Privy Council in London. It was not the High Court of Australia. Its judges treated decisions of the English House of Lords as binding, although it had never been part of the Australian judicial hierarchy. The Australian Constitution was regarded as an imperial statute, binding in Australia for that reason. Case and text books on the shelves of judges and lawyers were mostly from England. That was where the spirit and the letter of our law were to be found by judges, scholars and law students;

* The years of the labours of the three were still the era of the common law. The mighty engine of legislation had not yet swamped the reasoning of judges in providing the bedrock of Australian law. To this extent, law was to be derived from an analysis of the ideas and values of judges, most of them English. Few Australian lawyers questioned this reality. Virtually none criticised it or found it odd;

* Amongst Australian judges of the time, one was particularly influential because of his powers of analysis and lengthy years of service: Sir Owen Dixon, High Court Justice and later Chief Justice. He propounded emphatically a traditional English positivism. The law, he declared, would have lost its meaning if it did not pre-exist the judicial decisions that revealed its content. 'Strict and complete legalism' was the rule.[2] The speculations and

[2] O. Dixon, "Concerning Judicial Method", in Woinarski (ed), *Jesting Pilate*, 1965, 155; R.P. Austin, "Academics, Practitioners and Judges" (2004) 26 *Sydney Law Review* 463.

hypothesis of academics were basically unimportant. They were rarely referred to by judges such as Dixon. The priestly cast of the judiciary had the only sure key that would unlock the certainties of law. The job of academics was basically to analyse and expound judicial reasoning. Criticism was not encouraged;

* For the first half of the 20th century there were very few full-time academics teaching law in Australia. In effect, we followed the English tradition of the Inns. Busy barristers at the fag end of working day (or some early in the morning) would rush from their chambers to teach their docile students from ancient cyclostyled notes. They would dazzle the students with occasional references, inspired by these lecture notes, to their exchanges with brilliant, flawless judges in cases they had won in court. The tenured legal academic was still a rare bird. They were generally clever, with a gift of taxonomy derived from a lifetime of analysing judicial reasoning. In that small circle of brainy lawyers with a modest role, the idea that three or five of them stood out would have been unsettling, certainly for more than half of the last century. Only slowly and gradually did the full-time legal academics grow in number, influence, and confidence to criticise judges, promote law reform and propound completely new legal ideas.[3] It was not an accident that two of the most important academic critics were Julius Stone (an import from England, via Harvard, by way of Auckland) and John Fleming (an import from England via Oxford by way of Berkeley, California). Nor is it a coincidence that the

[3] S.D. Clark "Regulating Admissions: Are We There Yet?" in K. Lindgren and Ors (ed), *The Future of Australian Legal Education*, Lawbook, Sydney, 2018 at 70-80; C. Crofts, "Teaching Skills for Future Legal Professionals", *ibid*, 479 and M.D. Kirby, "Closing Thoughts", *ibid* 509.

three academics studied by Dr Bartie in this book were also migrants, respectively from England, with time at Harvard (Brett); from Singapore, with time in Russia, China and New York (Tay); and from Burma of the Raj by way of Yorkshire (Sawer). But others soon arrived like Hal Wootten (UNSW), David Derham (Monash) and; Jack Goldring (Macquarie/Wollongong) who enlarged the footprint;

* Well into the last decades of the 20th century the intellectual ethos of Australian universities was uniformly and decidedly modest. Substantially, this was because of an inherited English tradition of good manners, understatement and personal reserve. Advancing one's academic career by publicity and public criticism of received wisdom was generally frowned upon at that time. Very few Australian legal academics then (and not a few now) felt that it was any part of their duty to speak out about the law, beyond the classroom. To engage ordinary citizens about the laws content. To question long held views about the law governing indigenes, women, non-White Australians and gay people in the law. This was not perceived as the role of the lawyer in Australia. Hence, it was not part of the role of the legal academic.

Dr Bartie is at pains to explain why she chose her three heroes and how she justifies thereby excluding others. Of course, any short list would be contestable. But, in truth, it was not really so difficult to identify the intellectual leaders. Although some others could have been added, the three selected are sufficient to respond to the central task that Dr Bartie has set for herself. For those who suggest that others might have been added, the answer comes back that most of the others set themselves

extremely modest goals for their scholarship and teaching. They distained big challenges.

I did not know Peter Brett. At the time that he was in his last years of teaching criminal law theory at the Melbourne Law School, I was commencing practice at the Bar in Sydney. His retirement and death coincided with my first appointment as a judge and as Chairman of the Australian Law Reform Commission (1975). I was not the beneficiary of the book that he wrote with Professor Louis Waller: *Cases and Materials in Criminal Law*.[4] In my day at the Sydney Law School we were taught criminal law by reference to the English text books of Rupert Cross and P.A. Jones.[5] No Australian cases or statues intruded into those English texts. Little wonder that Brett and Waller were angry and were determined to change this blind submission to English judgments. As change it did.

I did know Alice Tay. Indeed, with Eugene Kamenka, she assessed the thesis I wrote for my Sydney LLM in 1966. It was on the Karl Marx's thesis the "withering away" of the state on the attainment of communism. She gave me top marks. Despite this somewhat esoteric introduction, we later became firm friends. She was bossy and pushy. But she was also principled and grand. I loved the way she stood up for women and people of different races. Advocates of her ilk were rare indeed amongst the legal academy in those days. Alice Tay made a big impact on her chosen country. She challenged the legal formalists until some of them, at least, began to listen to her views.

[4] Butterworths, Melbourne, 1962.
[5] *An Introduction to Criminal Law* (3rd Edition), Butterworth & Co., London, 1953; *Cases on Criminal Law* (2nd Edition) Butterworth & Co., London, 1953.

Geoffrey Sawer I also knew. When I was offered appointment as inaugural Chairman of the Australian Law Reform Commission, one or two professors urged me to defer to the claims of Geoffrey Sawer. He himself, I think, considered that the post might come his way for his skills as a "constitutionalist".[6] Chief Justice Sir Anthony Mason says that Professor Sawer was not a positivist. He was a qualified realist, willing to acknowledge the influence of values on judicial (especially constitutional) decisions. But he was a minimalist. If institutional law reform were to take off in Australia, it needed publicity and advocacy. When that faded, so did the formula for success.[7] Later, Professor Sawer told me many times of how he supported my efforts to put law reform on the front page. He acknowledged that doing this was beyond his skills. But skills he had in challenging the law and its institutions in Australia. However, he did this from the vantage point of a greatly respected scholar who spoke the language of those who still wielded the law's power in this country.

Looking back on my professional life, which coincided with the growth of professional law schools in Australia, with many full-time teachers - slow at first and later with strong momentum - one can see the huge changes that have occurred.[8] Australia is no longer a branch office of the English law and its judges. Most of our law, perhaps in excessive quantities, is now made by Australian parliaments, not by judges. The positivism advocated by Dixon was never as absolute as his oft repeated words might have suggested. But now all judges acknowledge and recognise,

[6] A.F. Mason "Geoffrey Sawer: The Priceless Professor", *Canberra Times*¸21 December 1990. See *infra* Introduction fn 25.
[7] M.D. Kirby, "The Decline and Fall of Australia's Law Reform Institutions – and the Prospects for Revival" (2017) 91 *Australian Law Journal* 841.
[8] David Barker, *A History of Australian Legal Education*, Federation, Sydney, 2017.

especially in the High Court of Australia, that judges have choices, which they will exercise and to varying degrees disclose. Legal education today is focused on statutory texts and analysis. Now it would be unthinkable to teach criminal law principles and theory from a book of English judicial decisions. Law teachers are much more willing to engage with the general public, recognizing that the law belongs to them and should be constantly reformed. Modesty and understatement are still common personal virtues in the law. But those who speak up are no longer viewed as "letting down the side" or "talking through their hat".[9]

Legal academics, including the three singled out for special attention in Dr Bartie's book, are not the only causative agents, explaining these important changes. Still, they have played an important role. Dr Bartie is to be thanked and congratulated for elaborating their impact. And the ultimate lesson to be found in her analysis is that law teaching and scholarship in Australia constitute an important and influential part of the inescapable dynamic of the law. The dividends and intellectual rewards paid to law teachers come decades after their classroom encounters. They come when ideas, planted in the minds of law students, by words and writings, find their ways into the expositions and applications of law and justice that eventually help shape the societies in which we live.

Sydney,
7 February 2019

[9] M. Coper, "From the Law Schools: What Makes a Good Law School?" (2017) 91 *Australian Law Journal*, 628.