

Book launch: Australian Society and the Law - Volume 1 The Citizen and the Law

Parliament House

Theatrette.

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Volume 1 The Citizen and the Law

Michael Peters

Justice John Bryson Friday 26 November 2004

Ladies and Gentlemen, Teachers and Scholars. I am really happy to speak to you at the launch of Michael Peters' book on Australian Society and the Law and its first volume The Citizen and the Law. The book is a text for the use of higher secondary scholars in the pleasant interval between the School Certificate and the year which must be dedicated to the Higher School Certificate, when all studies have to be specifically focused on examination subjects and the relation between examination performance and higher studies or career choices presents itself with gripping reality, even with the risk of excessive dominance over life and attention. Students in Year 11 have opportunities for wider reading, for reflection, for coming to an understanding of the world around them and for coming to terms with it. This is one of your opportunities to think over whether you are seriously involved in life, learning and scholarship, or whether you have just come along for the ride as a member of the human race. If you don't put much in, you may end up thinking that you did not get much out.

Although this is not always obvious and it is not true for everybody, on the whole in present day Australia we live in serene prosperity, and to be here and join in Australian society should be understood to be splendidly good fortune, an understanding which you can only reach if you have knowledge of the circumstances of life in other places of the world, and at other times earlier than our own, in our own country and far away. There are many qualifications to what I have said about how good life in Australia is, but you must not allow the disadvantages and qualifications to obscure the splendid overall generalisation. At the centre of Australian life is this characteristic: Australia is an egalitarian democracy, where all functions of government and public life are ultimately under the control of the people, the adult population at large who are the electors. In some aspects of life and government this ultimate control is rather remote, but it is always there. To be an Australian citizen is to share in our government, even if no more intensely than the ordinary duties of the citizen, to cast votes at elections and when casting votes to make a real choice, and to serve on juries, and other basic obligations including paying taxation, not a burden but a responsibility and a privilege.

Study of the law in its context in Australian society brings with it an understanding of some of the basic conditions of our national life and happiness. If you are to live your life out in Australia and bear these responsibilities you will need to have an understanding of the organisation of society. You need to know the institutions that exist to make the rules, the institutions which see that the rules are kept, and what the rules are that make the enormous complexities of the interaction of more than 21 million people over a huge area come out in a way which almost all of them find acceptable, which does not promote conflict which people are not prepared to put up with, which does not issue in civil disorder. Not in a great deal of civil disorder anyway, we do have the occasional brawl, but not to an extent which people are not prepared to tolerate. The citizen is committed to taking a part in all this; you cannot just sit back and let it go by and be run by others, without thinking for yourself about how it all works. If there is something you find very unsatisfactory and want to change, you need to know how it all works if you are to start to act in an effective way. You can see in the news from the Ukraine how close disorder is when people have cause to be seriously discontented.

Mr Peters' text takes the scholar through the legal system in Australia, the basic concepts of the legal system and the philosophies which have been put forward to explain law and its social action. It deals with the sources and origins of contemporary Australian law, how the legal system operates and the relationship between the individual and the State. This relationship is one of the central sources of conflict: the State has to be powerful enough actually to achieve public purposes and benefits to the community at large by rationally organising affairs, and by pursuing objectives which could only be obtained if they are supported by public authority: but the individual also has to be respected. Nobody can be crushed or brushed aside to achieve some useful end or public purpose; all has to be kept in a

reasonable balance, one which the community is prepared to accept. The community is made up of individuals, and achieving something important in the interest of the community is ultimately achieving something important in the interest of the individuals who are its members. So the legal controls over public power are a study of central importance. The study is as much about process as it is about outcomes. It is about how to make sure as far as possible that things are fully and carefully considered before the power of the State is committed to some course which will bear heavily on an individual; to due process, fair hearings, real consideration of what is involved on both sides before an outcome is decided upon. Nobody is given a public power just to enable him to confer an advantage on himself; all public powers exist to achieve public purposes and they must be exercised in good faith with the intention of achieving public purposes. The interaction between the individual and the State is a central study.

Mr Peters' volume also deal with topics which have claimed the attention of all reasonable people in modern times, in my lifetime. These topics reflect the concern of the law, not only the formal law but of the legislatures who make law, with the interests of people who have come to be perceived as disadvantaged, who have been dealt with on an unfair basis, who have not been treated in accordance with the ideal treatment which should be accorded by the community to members of the community, and to other people who come within reach of its power. As the decades go past and generations of people come and go, perceptions change of what is acceptable treatment for minorities. We are all aware that our perceptions have become more acute and that groups of people who in the past suffered disadvantages or injustices that went unnoticed are entitled to better treatment. Mr Peters' book introduces the far-reaching changes in law which have in the past few decades followed from realisation that Aboriginal and Torres Strait Islander people were not actually achieving a fair place and reasonable treatment in our community, under laws which on their face seemed to treat everyone in the same way. Mr Peters deals with the operation of the legal system in relation to native title; this is highly legalised and embodied into elaborate formal structures. He also deals with less organised responses to the realisation that indigenous peoples have not had outcomes that accord with the ideals of the community. This has had a particularly strong impact on public life and on the law in Australia, and other communities overseas with which we can see some things in common, including the United States and Canada, have had similar experiences. Mr Peters also deals with the law in the focus of migration and of persons who seek or claim to seek asylum in Australia from persecution in other countries, and with measures for achieving justice for women, for minority groups and for others whom we have come to see have not been given fair treatment. In past ages, even earlier in my own life, most of these were blind spots which we did not see. As you study history you will see that in other ages, not necessarily very long before the present, there were huge blind spots which have been remedied. Each generation has to examine itself and check its perceptions for what are its blind spots, what injustices it is not seeing, what it is complacent about, and where the community and its legislators should be concerning themselves with remedies. There are more realisations around the corner; we do not know now what all our blind spots are, and what will come, in the next twenty or thirty years or so, to be seen as calling out for remedy. That will be your business. You have the advantage over me of looking forward to a long future.

There are yet more dimensions for legal study beyond the need to understand your own citizenship and its responsibilities. Law is the key to a fascinating array of studies. It gives a new light to history. For a full understanding of the legal system in Australia now it is useful to be steeped in the long historical processes which produced it. Almost every institution that produces a good outcome for us to do with democracy, parliamentary government, the courts, the legal system and institutions, arose out a long evolution over many centuries, mostly in Britain and mostly in England. Law schools no longer work this way, but my legal studies were framed around English legal history, starting with the Conquest in 1066, indeed with a little attention to English law before then, and working through the evolution of the common law, the courts, of parliament, conflicts over the royal power, restrictions on royal power, the revolutions, the transformations of parliament from community power based on aristocracy, wealth and social position into a law-making body based on election by the people. The process continues; only last week the Queen announced, in the Speech from the Throne opening a British Parliamentary session, that there will be a bill to abolish the last hereditary peers in the British Parliament. The process of reform and, from our point of view the process of improvement, never stops. The way the Law School worked in those days gave me a life-long interest in history: I am always reading something, usually about English and Australian Law and government. You can see some papers I have written on English Legal History on the Web – Supreme Court of New South Wales – Speeches - Bryson JA. Understanding and appreciating how fortunate we are to live under our present institutions of government is enhanced by reading the conflicts and struggles which brought it about, and seeing the arrangements, to modern eyes unsatisfactory, which existed in the past. The study of legal cases reveals in detail what strange and to modern eyes unsatisfactory rules were thought to be quite sufficient and appropriate to govern a community which was the predecessor of our own, and what strange rules continued for centuries.

So as well as studying law to assist your citizenship you have before you, as one of many choices, the prospects of law as a career. I will tell you some things about my own career. You have to dispel the idea that practising law is a bastion of privilege and that the only people who can do it are people who are backed by wealth, social networks of power and influence and old school ties. In law, as in practically all other walks of life, having well placed uncles and inherited wealth, and knowing the right people and going to the right school, will not get you very far; it may get you some rewards, but they are usually not worth having, mere pickings. Anything that is really worth having has to be worked for and gained on the basis of work and ability. My own career is that when I left Fort Street School I worked in the State Public Service, and at the same time I studied law part-time at Sydney University; the law school was then in Philip Street, in the middle of the legal world and close to the courts and the barristers' chambers. The Law School will move away from there in the next few years; the system worked well in the old time but it is out of date now. Then I worked in some solicitors' firms in the City, a small firm that did the legal business of families and ordinary suburbanites, and a very large firm that acted for banks and international corporations and the powers in the land. Then when I was almost 30 I went to the Bar, and practised as a barrister here in Sydney for 20 years. I became a senior barrister, Queen's Counsel, and then, 18 years ago, I became a Judge of the Supreme Court. I had no well placed uncles, no influence, no family money to back me up, send me to Oxford, buy me barrister's chambers or libraries or any of that, nothing but my own resources; they were enough, and this can work for you too.

As a solicitor and later as a barrister I did a great deal of very ordinary cases. Reading Mr Peters' book you will be fired with enthusiasm for working on the front line in conflicts which achieve social justice, and you can let your imagination run to cases in which you get writs of habeas corpus, see that the unjustly imprisoned are released, win struggles for oppressed minorities and generally participate in high drama and important conflict. You should realise that a great deal of life is not like that. There are a lot of cases about very ordinary things in life; people who have been injured in car crashes, people whose builders have not performed as well as they feel they should have, people who do not want to pay the paper hanger because the panels of wallpaper are not quite straight, and a great deal of very ordinary business about conflicts over wills, family property, who should get grandpa's estate, whether a small private company or partnership has been properly managed and who owns what after friendly arrangements of 20 or 30 years have come to an end and people realise that they did not write down a clear agreement about what they were doing. All the very ordinary work has to be done properly, by people who have seen that they got themselves properly trained, know what they are doing, and are able to get interested in and bring enthusiasm and application to bear on business which is not inherently very dramatic.

If something is going seriously wrong in our society, the problem soon turns up in the courts. The courts are a part of the structure of Government. They are not part of the elected government. Judges are appointed by Ministers who have to answer to Parliament for their decisions. This is enough to make Ministers careful to appoint qualified people. The courts are independent. Powers are separated. There is no telephone justice, as there was in the Soviet Union, when the Party Secretary rang the Judge and told him what to do. Dispel the ideal of the Judge as very powerful. The Court itself is bound by the law. The Judge acts in a web of rules which determine what evidence he can receive, what facts he can consider, what hearing he has to give to people who may be affected and how he is to explain what he decides.

The Court acts in the open. Most business is done in a public room: there is no limit on who can go in and hear what is happening. The door is open. (Of course there are exceptions.)

The Court must, in every important decision state the reasons for the decision. The public can hear and read the reasons. The Press can comment on them: they have to be minimally polite, but they can comment forcefully. In most cases – not all cases – the parties can appeal. What the Judge decides must stand up to scrutiny: it must be seen to be right when new minds are brought to bear on the problem. Not only must the process be fair: it has to be seen to be fair. The Judge cannot decide a case if he has an interest in the outcome. The Judge avoids (but there are practical limits) cases where people he knows are parties, or are witnesses. At every stage there is a concern that the people affected by a decision have an opportunity to oppose it, to bring forward facts and arguments which should be considered.

The law is for you as a career if you can discipline yourself to plenty of intensely interesting work, with endless demands for your close attention and application and, let me add, reasonable rewards for your trouble. Law is a culture and a way of life. Professional life is disciplined life: self discipline. You must equip yourself with a broader view than just studies of law; you have to have a feeling for

language, you must train yourself for the ability to stand up and explain something, on the basis of having organised what you are going to say in your own mind, perhaps with a few notes; you have to have enough understanding of the art of persuasion and of other people to realise how you must express something, even something they are not at all happy about hearing, in a persuasive way, or if not that, in the best way that the situation admits of. You have to steel yourself to being associated with people who are unpopular, even deservedly unpopular, and you have to have the strength of character to see what their interests are and uphold them, fearlessly if there is anything to fear, to see, serve and assist the interests of people who are unpopular, oppressed, unfortunate, economically disadvantaged. If you are prepared for a life of study, a life of work, and a life which always presents you with something interesting to do, law may be the career for you. Open Mr Peter's book and you may be opening the first chapter in this career.