

INTRODUCTION

The principal aim of this book is to encourage critical, responsible and creative thinking about law as a system of ideas and as a social institution. It aims also to encourage exploration of the interrelations between legal methods, ideas and practices and those of other disciplines and institutions with which law continuously interacts.

To this end, the book focuses upon a range of powerful critical thinking tools, in the form of ideas and techniques drawn from logic, science, ethics and political and social theory. Effective application of these tools allows for an appreciation of law in its historical, philosophical, economic, political and social context. It provides a foundation for critical assessment of the value and significance of particular legal principles and practices, and for principled proposals for future legal development and reform.

In later chapters, the book demonstrates such tools in action, developing critical analyses of the role of law in relation to a range of contemporary social issues. Problems with existing legal interventions are highlighted and possible alternative approaches explored.

The book has been designed, first and foremost, as an introductory textbook, following on from a basic introduction to the common law system. But no detailed or specialised knowledge of the legal system is required in order to understand and benefit from it.

At the same time, we believe that this material will be of broad interest, not only to law students, but also to legal academics and practitioners, social policy and welfare academics, students and practitioners, professional and business people and all active and concerned citizens.

It is all too easy for starting law students to be overwhelmed by the sheer mass of data they are expected to master in a relatively short space of time. Some law teachers and practitioners argue that this leaves no time for critical analysis. And some maintain that ‘the basics’ have to be mastered before meaningful critical analysis is possible.

The fact that some teachers have equated a ‘critical and interdisciplinary approach’ with woolly ramblings or faddish postmodern deconstructions lacking in all substantive content has appeared to provide further support for a strongly disciplinary and black-letter approach.

But the dangers of such positivism are substantial. To discourage critical thinking from the start is to encourage an uncritical acceptance of what are, in some cases, logically and morally unacceptable ideas, practices and consequences. To discourage interdisciplinarity is to encourage a view of law as a self-subsistent system of ideas and values closed off from all broader social significance, impact and responsibility, and shut off from effective comprehension, participation and critical assessment by all but qualified legal specialists.

In contrast to such a positivist perspective, we believe that it is crucially important for students to master basic tools of critical thinking and analysis at the earliest possible stage of their studies. This helps them to clarify, develop and apply their own values and priorities. Through empowering students, as active participants in the learning process, it makes the whole process a great deal more exciting and enjoyable.

Through challenging and questioning, rather than merely accepting, through exploring the interrelations of law with other disciplines, ideas and social practices, students acquire an altogether deeper, more grounded, more responsible and multidimensional understanding of legal ideas, methods, practices and institutions. They are in a better position to understand, anticipate and evaluate new legal developments and trends in an epoch of far-reaching change on a global scale.

Over recent years, courses on law and its social context have become cornerstones of undergraduate law school degrees. The Pearce report, an assessment of legal education released in 1987, criticised Australian law schools for neglecting the critical and theoretical dimensions of law required for a flourishing intellectual academic legal culture and an understanding of what role law and lawyers should play in society.¹

Most university law schools now insist that aspiring lawyers and others seeking law-related careers have at least some exposure to the sorts of questions canvassed in this book. A 1994 review of the impact of the Pearce report found that most law schools attached ‘considerable importance’ to the critical examination of legal issues in their social context, while noting that the expression and emphasis of such issues varied.²

Almost all students now do their law degree as a joint degree or as a second degree, rather than as a purely professional training course. However, the benefits of this paradigm shift in legal education have been diminished by the tendency of many students, acting under increasing economic pressure, to make their other degree a relatively narrow-focused business or commerce degree. These combinations can mean that students have little exposure to the methodologies and critiques of the social – or natural – sciences.

The need to counteract this tendency is amplified by the apprehension that, through no fault of their own, few students come to law school with any adequate grounding in intellectual history, let alone legal and constitutional history. The study of history in secondary schools has often been relegated in favour of more vocationally oriented subjects. To take just one example, in our several years of experience in teaching Law Foundation, the introductory law, theory and society course at the University of Western Sydney, we have yet to find a new school-leaver student acquainted with the name John Locke. Locke’s writings are central to understanding two pivotal features of the legal system: the separation of powers doctrine and the inviolability of private property.

Without historical and theoretical background, it is difficult to recognise that law is an instrument of social regulation that has been fashioned, and continues to be shaped, by deep-rooted economic and political factors. The existing socio-economic structure of society and its corresponding legal framework can therefore appear to have a permanence, inevitability and even naturalness that belie the historical record of convulsive changes (such as the fall of the Roman Empire, the English, American and French Revolutions of the 17th and 18th centuries and the emergence of communism and fascism in the 20th century).

Even within the realm of the existing western legal system, it is impossible to grasp the content and significance of pervasive doctrines such as ‘the separation of powers’, ‘natural justice’ habeas corpus and