

Speech for Legal Studies Conference, Bundamba State High School

My role today is to discuss the fundamental importance of the legal system in our society. I will start by describing what I mean by law and make some comments about the connection between law and justice. I will then discuss the role that law plays in society. In particular, I will focus on the way in which the law impacts upon issues of social concern.

What is law?

Every society has rules of one form or another. We may assume that even prehistoric societies had rules about such things as when and what to hunt and fish, how children were to be raised and who was the leader of the tribe. As society became more complex the rules that people created also became more complex. Eventually it became necessary to write these laws down. The earliest example of a written law that is still able to be read today is the Code of Hammurabi, who was King of Babylon in around 1800BC (ca 1792-1750). In this Code, which is preserved on a stone tablet in the Louvre Museum in Paris, Hammurabi declares that he made the laws:

[T]o bring about the rule of righteousness in the land, to destroy the wicked and the evil-doers; so that the strong should not harm the weak; so that I should... enlighten the land, to further the well-being of mankind.... When [the god] Marduk sent me to rule over men, to give the protection of right to the land, I did right and in righteousness brought about the well-being of the oppressed.

We can see from Hammurabi's Code that, from the earliest times, law was concerned with ensuring that justice would be done between the members of society. In particular, Hammurabi expressed his concern that the strong should not harm the weak and that the oppressed should be protected. This focus on justice regardless of the wealth or power of any person is seen today in the oath or affirmation taken by all judges when they take office, and I which I took myself when I became a judge. The part of the oath or affirmation that I am talking about states:

I do sincerely promise and swear or affirm that as a judge of the Supreme Court of Queensland I will at all times and in all things do equal justice to the poor and rich...

This principle reveals one of the fundamental reasons that we have laws, so that people's rights are not dependent upon their own power and influence but rather are protected by the legal system. One particularly influential legal thinker declared that without laws people's lives would be "solitary, poor, nasty, brutish and short."¹ We have laws for the protection of people; we have laws so that people's rights, and obligations, are certain; we have laws so that the governance of society is not subject to the whims or caprices of individuals but is guided by fair and equitable principles.

¹ Thomas Hobbes, *Leviathan*, (1651)

There are, of course, many rules in our society that we do not think of as laws. For example, the rule that a person should not eat with his or her mouth open is a rule that most of us are familiar with but which is not what we would describe as a law. The key distinguishing feature between laws and other rules is that laws are able to be enforced. Laws are enforced by government administrators, by the police, and also where necessary by the courts. We all know that the enforcement of laws often involves penalties such as fines or imprisonment. Therefore, the people who have the authority to enforce laws are entrusted with significant power to affect the rights and property of others. Legal thinkers recognise that the authority to create and enforce laws is a power that could very easily be misused.

Many of the world's most unjust and tyrannical regimes have attempted to use legal force to legitimise their own control. For example, Adolf Hitler's rise to absolute power in Germany was accompanied by a succession of legislation passed by the German Reichstag, or Parliament. The most significant piece of legislation was an Enabling Act, which permitted Hitler to rule as a dictator for four years. It is highly significant that Hitler required an Act of Parliament to legitimise his seizure of dictatorial power and the suspension of democracy.

A similar example of the use of law to justify oppression can be found in the former Soviet Union. During the reign of Stalin, Soviet Secret Police arrested hundreds of political opponents of the communist government and extracted confessions from them through torture. However, before these political opponents were sentenced to prison they were taken to a court and given a trial. These trials had all the outward appearance of fairness and impartiality but were in reality a means of rubber-stamping the oppression of those who disagreed with the government. Once again, the legal system was being used to lend legitimacy to acts of injustice.

To prevent the misuse of law, many countries and societies over the last few centuries have spent considerable time and effort ensuring that the limits of government power are clearly set out. In countries that inherited their legal system from Great Britain, including the United States, Canada, New Zealand, and Australia, an important principle in controlling the use of laws by the government is a doctrine known as the Separation of Powers. This doctrine calls for the division of government power between the legislature, the executive and the judiciary. The separation of powers prevents one group from having too much power and each branch of government acts as a check on the power of the others.

Another method of controlling government power is a constitution which clearly sets out the limits of power. One of the functions of the courts is to ensure that the actions of government are in accordance with the constitution and do not go beyond the powers granted by the constitution. Finally, the United States and Canada have sections in their constitutions that aim to protect the rights of individuals. In the United States this is known as the Bill of Rights and in Canada as the Charter of Rights and Freedoms. As most of you will know, we do not have a Bill of Rights or a Charter of Rights in the Australian constitution.

Having set out what we mean by law, and having briefly discussed limits on the use of law, I now want to turn to the role that law plays in modern Australian society.

The Role of Law

Law performs many functions in society. One function of the legal system is to maintain order and this function is performed through the criminal justice system. The police arrest people reasonably suspected of having committed criminal offences and those people are taken before the courts to be tried. In the Supreme and District Courts, whether or not they are found guilty of those offences depends upon the verdict of the ordinary citizens who form the jury for each criminal trial.

Another function of the legal system, performed primarily by the courts, is dispute resolution. Courts provide a forum for the resolution of disputes between members of society. Without the courts, disputes would be resolved based on the power or strength of the people involved, and not in accordance with fairness or justice.

Our legal system also has a vast system of rules relating to the ownership of property. Economic theorists see rules on property ownership as vital because they encourage people to generate wealth. The theory is that people have no incentive to be productive unless there is certainty that the fruits of their labour will be protected.

These are necessary and important functions of law and those of you who go on to study law at university will quickly come into an intimate acquaintance with this part of the legal system. However, I intend to focus today on a function of law which is relevant to every citizen. I am referring to the role that law can play in bringing about social change.

I want to begin with a famous example of a time when the legal system played a crucial role in important social change. In the southern states of America during the 1950s, racial discrimination against African Americans was socially entrenched. As a result of hundreds of years of slavery in the United States, many white southerners believed that African Americans were inferior. These racist attitudes were reflected in

the laws, many of which called for separation of black people and white people in a similar way to the Apartheid laws in South Africa.

For example, laws in a number of states demanded that separate schools be created for African American children. Black civil rights activists saw the segregation of schools as a barrier to proper education for their children and also as a potent symbol of racism. Activists began to campaign against the segregation laws, seeking support from the media, politicians and the general public. However, there was significant opposition in the southern United States to any steps that would lead to the desegregation of schools.

African Americans turned to the law in an attempt to have the injustice of segregation corrected. Turning to the legal system was a bold step in the fight against racism as it was the legal system that legitimised and enforced discrimination. Civil rights lawyers began a court action seeking an order that the segregation of schools was in contravention of the right to the equal protection of law. This right is contained in the Fourteenth Amendment to the United States Constitution. The US Supreme Court, which is the highest court in the country, found that the segregation of schools was a form of unconstitutional discrimination.²

² Brown v. Board of Education, 347 U.S. 483 (1953).

The court ordered that schools must immediately be desegregated, so that black students could be educated alongside white students.

This decision was immensely significant. Some people vehemently opposed it and refused to comply with the order of the court. However, once the decision was made, it was possible to enforce it with the entire apparatus of the legal system. In the succeeding years, desegregation took place in other areas of society, including buses, restaurants and parks. The law has continued to play an important role in ensuring equal rights for African Americans in a society where racism has by no means been eliminated.

In Australia, the law has also been involved in tackling the problem of racism. Ten years ago, the Australian High Court was asked to make a decision about the rights of Aboriginal people to possession of their traditional lands. The Court found that Aboriginal ownership of land had not been extinguished when Australia was settled by the English in 1788. Consequently, where there is continuing connection with the land, Aboriginal people continue to own their traditional lands unless a particular parcel of land has been granted to another person by the government. After this decision was made in the High Court, the legal system, in the form of Federal Parliament, introduced legislation to regularise the recognition of Aboriginal land rights. The recognition in

Australia of what is known as Native Title is regarded as a significant step in the re-enfranchisement of Aboriginal people and a stepping stone to greater Aboriginal autonomy.

These are only two examples of many where the law has played a role in social change. The legal system, with all its mechanisms of enforcement such as courts and the police, has powerful influence in society. Some people say that the law has too much influence. I discussed earlier the potential for the law to be misused and I also discussed some of the methods that we have adopted to prevent such misuse.

I turn now to consider specific ways in which the law can bring about justice. Australia is a tolerant liberal democracy. Nevertheless, we have our share of social and political difficulties. I am talking about problems like poverty, discrimination and our treatment of the disenfranchised and oppressed. The law has a role to play in addressing these issues of social concern. This is not to say that a change in the law will automatically bring about a change in people's attitudes. The US Supreme Court decision about desegregation of schools, and the subsequent opposition from many white southerners show us that achieving change is not always easy.

However, as the desegregation case also shows, it is possible for law to be the leader of social change. One method for the law to promote social

change is through legislation by Parliament. An example of this is the federal Sex Discrimination Act which made it illegal to discriminate against women in employment. In a democracy like Australia, Parliament, in theory at least, must act in accordance with the will of the people. Therefore, each and every Australian has the opportunity to influence social change through the law by letting the members of Parliament know the issues that are of concern. This is a method that all of you can use, and I encourage you to use, to achieve appropriate social change.

Finally, when legislation fails to bring about social change, the courts of many countries have been prepared to step in. This is especially the case in the United States and Canada where the courts are responsible for interpreting the Bill of Rights and the Charter of Rights. In Australia, where we do not have a Bill of Rights, courts are responsible for ensuring that the legislature acts in accordance with the constitution and that government officials act in accordance with legislation.

Courts play the part of interpreting the laws as set down by Parliament and decisively declaring the effect of those laws. In this process, courts do not make law or change the law. Judges and magistrates cannot make their decisions based on their own preferences. They must decide in accordance with the law and must ensure that they have sound, principled

reasons for their decisions. Nevertheless, in the process of interpretation, courts recognise basic human rights unless the legislature has specifically taken them away.

Crucial to the ability of courts to act as a check on the power of the legislature and executive is the notion of judicial independence. Judges at times have to make judgments about the legality or validity of acts done by the legislature or executive. It is important in such cases that judges are able to make a truly independent decision without fear or pressure. One way in which the independence of judges is ensured is the constitutional guarantee of tenure. This means that judges cannot be removed from office unless parliament makes a finding of “proven misbehaviour”. Judges cannot be removed just because the Government does not like the way they interpret or apply the law. As a result of judicial independence, courts are able to promote justice according to law by acting as an impartial voice in the resolution of social or political disputes.

Conclusion

In modern Australia, the role that law can play in social change is extremely wide-reaching. There is almost no activity undertaken by people in Australia which is not, in some way, affected by legal regulation. As law becomes more and more a part of people’s lives there

is great potential for law to influence those lives, both in positive and negative ways.

I encourage you all today, as members of Australian society, and some of you as future lawyers, to keep a firm grasp on the use of law to bring about just solutions; and the use of law to protect the weak and improve the conditions of the oppressed. Unless it achieves these goals, law has no justification.