

## THE REVOLUTION IN LAW — TOWARDS A JURISPRUDENCE OF SOCIAL JUSTICE

**Matthew Foley**

*“The revolution in our law is not a revolution substituting organic togetherness and community values for the commercial-individualistic model of law which reached its apogee in the attitudes of both 19th-century German Civilians and common lawyers like Dicey; it is a revolution replacing contract between the parties by contract dictated from above, law by administration, politics by ombudsmen, property by handouts, individual legal responsibility by statistical analyses and consequent ‘treatment’ or manipulation”.*

Alice Erh-Soon Tay, (Kamenka, Tay and Brown 1978:4)

*“It is no longer sufficient for the law to provide a framework of freedom in which men, women and children may work out their own destinies: social justice, as our society now understands the term, requires the law to be loaded in favour of the weak and exposed, to provide them with financial and other support, and with access to courts, tribunals and other administrative agencies where their rights can be enforced”.*

Sir Leslie Scarman, (1974:28-29)

### A. INTRODUCTION

Law in the Western industrialised democracies is engaged in a process of change not only as to its content but as to its very nature and purpose. Jurists such as Sir Leslie Scarman argue that the law must change in accordance with the imperatives of social justice. Others, such as Professor Tay reply that the trend of the changes sought may destroy much of what is inherently valuable in the legal tradition.

The debate may not be easily interpreted as a mere division between the forces of orthodoxy and the forces of radicalism. Voices in the debate may be heard to differ on the scope and effective limits of law, on the methods of inquiry to be adopted and particularly on the relationship between social explanations and legal explanations of human life and behaviour (Kamenka and Tay 1980:3-26). The divisions between the “tough-minded” and the “tender-minded” are at least as important as the radical-orthodox dimension (Eysenck 1954).

These misunderstood divisions may cause confusion in communication among

lawyers, and may render communication with non-lawyers mystifying or crudely over-simplified). Whether by virtue of mystification or by crude over-simplification, a hiatus in understanding between lawyers and the community does not make for rational and critical discourse concerning the issues of social justice which are, rightly, so much a part of the parlance of political and everyday life.

The debate does not occur in a social or cultural vacuum, but is very much tied to the increasing demand for access to legal services. Auerbach has identified what he sees as "the disintegration of legal authority" in America in modern times. He argues for a challenge to professional values, hinging on "not whether ethics should be taught . . . but which ethic should be taught (to lawyers): the ethic of the market place and client loyalty, or the ethic of equal justice" (Auerbach 1976:301). It is, however, precisely this kind of ethical assertion, advancing a generalised notion of justice, which most offends those lawyers trained in the intricacies of the individual case which characterise the common law and equity.

The aim of this paper is to clarify some of the terms of reference of this debate. It does not purport to advance a general theory of law and justice. It sets out to make some sense of this debate by addressing three areas. First, it addresses problems of method of jurisprudential inquiry in coping with social and legal explanations of human affairs. Second, it examines several hypotheses as to the nature of the new legal order, if any, which is emerging. Third, it attempts to identify relevant substantive issues to be considered by any satisfactory jurisprudence of social justice.

### B. METHOD OF INQUIRY

In order to establish a cogent method of inquiry in jurisprudence it is necessary to negotiate a host of dilemmas. Much acrimony in debate is generated by the failure to understand the methodological foundations of various arguments and modes of inquiry. In order to achieve a clear basis for discourse it is not necessary that all scholars of legal phenomena should agree as to the appropriate method of inquiry or as to the conceptual level at which a problem may be attacked. The physiologist does not reproach the anatomist for the latter's concern with structure rather than dynamic function; but this tolerance and acceptance of the other's discipline is somewhat easier in older, more established disciplines whose boundary disputes have been waged for centuries and are now largely settled.

This century has seen an explosion of interest and research into the nature of law and its interaction with society. In these circumstances cries of intellectual trespass between different disciplines are likely to be raised before any consensus may be reached as to the relationship between different methods of inquiry.

Running through these disputes are a number of characteristic dilemmas repeated in slightly differing forms. Central to these methodological dilemmas are the following:

- value free versus value laden inquiry;
- empirical versus theoretical inquiry;
- integration versus separation of social and legal inquiry.

#### *Value Free versus Value Laden Inquiry*

Perhaps the most fundamental dilemma confronting those who would inquire

into the nature of law is the question of whether the inquiry should aim to proceed independently of a system of values or whether the inquiry should include a consideration of the values which may be embedded in law.

This dilemma is as old as the western intellectual tradition itself. Plato spoke of the "ancient feud" between poetry and philosophy. The platonic notion of "essences" set out a view of intellectual inquiry which could transcend by the use of reason the confused jumble of the "shadows in the cave" which constitute the variegated phenomena of everyday life. This tradition rejected the mysticism and morality of the pre-Socratic philosophers such as Thales and Heraclitus.

The positivist tradition in Britain, as articulated by Austin, proposed a theory of law which did not deny the existence of morality and social values, but held that such matters were beyond the proper scope of jurisprudential inquiry. In modern times this view has been most forcefully put by Hans Kelsen, in his search for a "pure theory of law". This theory aimed to consider legal norms "not as natural realities, not as facts in consciousness, but as meaning-contents" (Kelsen 1934:474; 1935:517). Kelsen saw this as a necessary response as he argued that "jurisprudence, in a wholly uncritical fashion has been mixed up with psychology and biology, with ethics and theology" (Kelsen 1934:474; 1935:517). Kelsen's ambitious aim to arrive at "meaning-contents" in his consideration of legal norms was predicated on the view that logic can somehow give rise to meaning independent of social or moral values. This raises the question, in turn, of the meaning of "meaning".

This conundrum was addressed by Max Weber, in an effort to lay down methodological foundations for the science of sociology:

'Meaning' may be of two kinds. The term may refer first to the actual existing meaning in the given concrete case of a particular actor or to the average or approximate meaning attributable to a given plurality of actors; or secondly to the theoretically conceived *pure type* of subjective meaning attributed to the hypothetical actor or actors in a given type of action (Weber 1947:88-100).

Weber, like Kelsen, argued for a "value-free" approach to inquiry. He argued in favour of an empirical approach rather than a dogmatic one, urging that a deeper degree of understanding could be achieved through a divorce of the technical and moral components of inquiry.

Even if, however, the epistemological and psychological foundations of the meaning to be arrived at by logical positivistic inquiry may be said to be flawed, may it not be that the value-free approach is a useful working postulate for inquiry? This is not an a-empirical question. Navigation is not to be despised because it simply tells the mariner where s/he is going rather than where s/he should go. If it may be shown that the value-free mode of inquiry is a useful one in some circumstances then it should be embraced for such specific purposes notwithstanding its ultimate ontological weakness. The inability of the anti-positivist school to accept this pragmatic distinction has done much to confound the issues at stake in social and legal inquiry. This unwillingness may spring from a rigid attitude towards the relationship between empirical and theoretical modes of inquiry.

### *Empirical versus Theoretical Inquiry*

The value-free approach in jurisprudence has led to the development of logically elegant grand theories.<sup>1</sup> At the same time it has maintained as for example in the work of MacCormick, a close relationship between legal theory and the legal reasoning derived from empirical data (MacCormick 1978). The value-free approach in sociology has also spawned grand theories (as evidenced in Talcott Parsons' *The Social System* (Parsons 1951)) and has made a vast contribution to human knowledge through empirical studies. These studies have been all the more significant in view of the development of technology of social inquiry (eg the social survey) along with statistical tools allowing for greater cogency in description and greater accuracy in inference from "social facts".

Many of the so-called theoretical disputes may simply be problems of fact for which the relevant data-gathering technology has not been available or has not been used. Many of the fundamental principles of the criminal law, for example, were subjected to empirical investigation in research studies launched by the recent Royal Commission on Criminal Procedure (England) chaired by Sir Cyril Philips (England 1981). The Royal Commission sought papers from some of the most experienced criminologists in Britain. They were presented on topics ranging from confessions in Crown Court trials (England 1980: No 5) to a survey of prosecuting solicitors' departments (England 1980: Nos 11 and 12), a psychological approach and case study of current practice on police interrogation (England 1980: Nos 1 and 2), and an examination of current practice and resource implications of change in arrest, charge and summons procedures (England 1980: No 9).

In the area of sentencing, described as the "most painful" and "unrewarding" of judicial tasks (Kirby 1980:732), the Australian Law Reform Commission broke new ground by conducting a national survey of judges and magistrates (Australia 1980a:341) and even a national survey of offenders (Australia 1980a:509).

Drawing upon the British and Australian experience, the Chairperson of the Australian Law Reform Commission, Justice M.D. Kirby has stated that "from now on, the path to reform in the justice system plainly lies down the track of empirical research about how the law actually operates in practice, not just how it appears in the books" (Kirby 1981a:7). It should, however, be remembered that the empirical data thus obtained needs to be evaluated — a process which must of necessity depend upon the values adopted by the researcher.

The determination to study the law as it operates, rather than merely as it appears in the text books, was a characteristic of the emergence of sociological jurisprudence. The programme of the Sociological School of Jurisprudence, as outlined by Roscoe Pound in 1911 included eight principal points, the first of which was "study of the actual social effects of legal institutions, legal precepts and legal doctrines" (Lloyd and Freeman 1979:383-385). It should be noted that Pound's method of inquiry was not altogether value-free.

The empirical and theoretical strains in sociological jurisprudence have given rise to two discrete developments. The empirical strain appeared most clearly in the writings of the Realists. In America, Karl Llewellyn saw empiricism as essential to the methodology of Realism which he described as the "newer jurisprudence":

The essence of method of the newer Jurisprudence . . . is to take accepted

doctrine, and check its words against its results, in the particular as in the large (Llewellyn 1962:123).

By this emphasis the Realists saw themselves as placing weight upon the art and craft of the judge's office in a way which the older Jurisprudence, relying upon the objective doctrines of law, had ignored.

An even more rigorous emphasis on empiricism is to be found in the work of the Scandinavian Realists. The north-western European jurists, writing in a climate where government intervention in economic and welfare matters was widely accepted by the population, did much to debunk abstract notions of justice in favour of the wishes of the people. Lundstedt went so far as to advocate the "method of social welfare" as the guiding motive for legal activities. He defined this method as meaning "in the first place the encouragement in the best possible way of that — according to what everybody standing above a certain minimum degree of culture is able to understand — which *people in general actually strive to attain*" (Lundstedt 1956). Lundstedt specifically excluded from this method any consideration of what human beings *ought* to aim to strive for or, indeed, whether human beings ought to propose any goal for their labour, hardships and troubles.

Counterposed to this view has been the development of a sociology of law which rejected what it saw as an excessive pre-occupation with empirical, problem-solving investigation and sought instead to develop a more generalised critical theory of law. The legal sociologists, Campbell and Wiles, articulated their goal as "not primarily to improve the legal system, but rather to construct a theoretical understanding of that legal system in terms of the wider social structure" (Campbell and Wiles 1976:53). The different ideology and methodology of the legal sociologists have prompted some to interpret the emergence of a sociology of law as a radical departure from sociological jurisprudence (Lloyd and Freeman 1979:369-374). However, this development parallels a general change in the nature of sociology, rather than being an idiosyncrasy of scholarship in the area of law and society. The past two decades have seen a revitalization of interest in critical theory in sociology with a renewed emphasis upon Marxist theory.

The methodological debate as to whether legal inquiry should focus on the development of a generalized theory of law or whether it should be based upon the empirical evidence of cases and social surveys becomes an issue of more than purely academic interest when the question of human rights is discussed. There has been in Australian jurisprudence and within the legal system generally a reticence to move from the positivist position towards an embracing of the Declarations and Conventions on human rights put forth by international bodies such as the United Nations and the International Labour Organisation. Former Australian Prime Minister, Sir Robert Menzies, for example, argued that the real basis for the protection of human rights was to be found not in lofty statements of principle but in the nature of representative and responsible government itself. In 1975, however, the Commonwealth Parliament passed the Racial Discrimination Act which included as a schedule the International Convention on the Elimination of all Forms of Racial Discrimination. This generalised statement as to the elimination of racial discrimination thus became embodied in the substance of Australian law. More recently the Human Rights Commission Act 1981 has been enacted by the Commonwealth Parliament. This Act sets up a Human Rights Commission which

includes within its terms of reference the International Covenant on Civil and Political Rights, the Declaration of the Rights of the Child (1959), the Declaration of the Rights of the Mentally Retarded (1971) and the Declaration of the Rights of the Disabled (1975) (Handley 1981:203-205). The incorporation of the Covenant and Declarations into Australian law raises an interesting question with regard to the approach by Australian courts to statutory interpretation. If particular legislation is inconsistent with or contrary to any human right as set out in the Declarations or Covenant, might a court be prepared to read down the legislation so as to conform with the rights and freedoms recognized in the National Covenant, or declared in the Declarations? Such an approach has been adopted by the English courts on the status of the European Convention on Human Rights. Lord Diplock observed in *The Eschersheim* [1976] 1 All ER 920, 924:

If there be any difference between the language of the statutory provision and that of the corresponding provision of the convention, the statutory language should be construed in the same sense as that of the convention if the words of the statute are reasonably capable of bearing that meaning (See also Warbrick 1980:852).

In many circumstances arguments based upon a grand theory of human rights may well arrive at the same conclusion as arguments based upon an empirical investigation of particular circumstances. Consider for example, the demands made in recent years by New South Wales prisoners. Their protests against what the Royal Commission chaired by Justice Nagle found to be brutal excesses of the prison system were often able to be couched within the framework and rhetoric of the Universal Declaration of Human Rights (New South Wales 1978: Vols 1, 2 and 3). This adds a certain legitimacy to the demands of disadvantaged groups affected by specific legislation such as prisoners, mental health patients, Aborigines, and the intellectually handicapped. The rhetorical advantages of such an approach, however, may well mask the fundamental differences between a method which proceeds from legal theory to the particular fact-situation and a method which proceeds empirically from particular fact-situations towards the generation of legal principles and legal theory.

One issue which brings into sharp focus the difference between a method of inquiry based upon a theory of human rights and a method of inquiry based upon an empirical investigation of what is wanted by the people affected is the issue of Aboriginal Courts in Aboriginal reserves and communities. Aboriginal Courts are constituted on Queensland reserves under Section 62 of the Aborigines Act 1971-1979 and Regulations 45 to 55 of the Aborigines Regulations of 1972. The operation of these courts was subject to criticism by Professor Garth Nettheim in a 1973 report to the International Commission of Jurists (Nettheim 1973). It was pointed out that appeal provisions from the Aboriginal Courts were very limited and that this conflicted with Article 10 of the Universal Declaration of Human Rights which provided that:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and

obligations and of any criminal charge against him.

This criticism prompted the Commonwealth to pass a law giving the right of representation to Aboriginals appearing in an Aboriginal Court and further providing that an Aboriginal was not to be convicted of an offence in an Aboriginal Court unless the same rights of appeal were available to him/her as would be available from a Magistrates Court: s 9 Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975. In 1979 the Queensland Parliament amended the Aborigines Act to provide for appeals from Aboriginal Courts in the same manner as from decisions of Magistrates Courts: s 32A Aborigines Act 1971-1979. It is not at all clear, however, whether this change was actually desired by the Aboriginal people on the reserves. In a state-wide survey of Aboriginal reserve residents conducted by the writer on behalf of two Aboriginal groups it was found that 90% of Aboriginal reserve residents wanted the Aboriginal Court to have more power to deal with minor law and order matters on reserves (Malezer, Foley, Richards 1980:102). Attempts by non-Aboriginal solicitors to appear in Aboriginal Courts to defend persons charged with an offence have been resisted by the Aboriginal members of the Court on the grounds that they wished to manage local law and order matters themselves, according to their own customs. This poses a nice problem for jurists. What is the proper method for determining the nature of the jurisdiction of the Aboriginal Court? A rote application of human rights theory would strengthen the due process provisions at the expense of local self-determination, whereas Lundstedt's "Method of Social Welfare" would allow the local people affected to determine the procedures of the Aboriginal Court (Australia 1980b:No 17)<sup>2</sup>. This methodological difference should be distinguished from the debate on the cultural basis of law which also poses profound problems for an Australian jurisprudence (Australia 1980b:4,8-22).

### *Integration Versus Separation of Social and Legal Inquiry*

Social and legal explanations do not always sit comfortably together. This may be because the explanations operate at different conceptual levels, or because they may be based upon the mutually incompatible postulates of free will and determinism, or even because of simple inter-disciplinary suspicion.

An explanation, couched in terms of an individual person's actions may be quite meaningless to the holistic social theorists: correspondingly the notion of particular persons' actions as being part of "the social system" (Parsons 1951) may well be regarded as valid by the lawyer, but as irrelevant to the legal explanation of human affairs. As Schur has put it, "lawyers and sociologists don't talk the same language" (Schur 1968:8).

The difficulties in reconciling the different conceptual levels of legal and social explanations were evident in the recent case of *R v Alwyn Peter* (Supreme Court of Queensland, 8 Aboriginal Law Bulletin 7; Plunkett 1981; Wilson 1982). Evidence was led in this case of a "sub-culture of violence" existing on Aboriginal reserves in Queensland. An analysis of criminological statistics was presented in evidence to the court by an eminent criminologist, Dr Paul Wilson. The Crown had accepted a plea of guilty to manslaughter. The charge had originally been murder, but had been reduced to manslaughter in view of the provisions of s 304A of the Queensland

Criminal Code relating to diminished responsibility. Evidence was led of the criminological, anthropological and social environment in which the defendant had been raised and had lived at the time of the commission of the offence. This evidence was admitted by Mr Justice Dunne as going to the question of mitigation of sentence as it related to the personal moral responsibility of the defendant at the time of commission of the offence. The court received evidence that:

The background to the fatal violence done by Alwyn Peter includes a number of powerful predisposing elements in his social situation: a breakdown of tribal controls and links with land, conflicts with other tribal groups brought into a common reserve, the institutionalising of paternalistic administrative controls, chronic ear disease, inadequate educational opportunity, little conventional employment opportunity and problems with alcohol. Such factors are giving rise to profound problems of domestic violence throughout Queensland Aboriginal reserves (Foley 1981).

Assuming the above social explanation to be true, how does it alter the legal explanation of this case? The lenient sentence and the judicial reasons attaching to sentence (*R v Alwyn Peter*, above) indicate that these circumstances were taken into account in mitigation. There is nothing, however, within the Queensland Criminal Code to extinguish the criminal responsibility attaching to this homicidal act, although the effect of s 304A was to reduce the legal charge from murder to manslaughter. Thus, while the case was of intense interest both to social scientists and to the general public, (Peterson 1981; Wilson forthcoming) its interest to lawyers is confined to factors of mitigation, not in themselves profoundly different from pre-existing principles in this area.<sup>3</sup>

This case illustrates not only the different conceptual levels at which social and legal explanations of human affairs may operate, but it also illustrates the difference between postulates of explanation of human affairs based, respectively, on determinism and free will. The social scientist looks to the social factors determining a given behaviour in a particular set of circumstances. The lawyer generally looks to the exercise of human free will in a given situation and asks whether it was reasonable in all the circumstances. It is not only the crusty lawyer who finds these two kinds of explanations difficult to reconcile, but also the social scientist. The binary nature of social and legal explanations was eloquently stated by George Mead, the originator of the "interactionist" perspective in sociology:

... the two attitudes, that of control of crime by the hostile procedure of the law and that of control through comprehension of social and psychological conditions, cannot be combined. To understand is to forgive and the social procedure seems to deny the very responsibility which the law affirms, and on the other hand the pursuit by criminal justice inevitably awakens the hostile attitude in the offender and renders the attitude of mutual comprehension practically impossible. The social worker in the court is the sentimentalist, and the legalist in the social settlement in spite of his learned doctrine is the ignoramus (Mead 1918:592).

It cannot be ignored that social and legal tradition are themselves embedded,



respectively, in different institutions of learning. This may give rise to an inter-professional jealousy and suspicion. Thus Lord Hailsham, while overtly supporting a "cross fertilization at every point between the serious student of civics and the academic and professional lawyer", has described law as "the bony structure of sociology . . . without which social studies will become the flabby and irresponsible thing that, in the Universities, sociology too often is" (Roshier and Teff 1980:5). This kind of intellectual apartheid based upon inter-professional suspicion may be overcome by a rapprochement between the two institutions of learning themselves. It has been accepted that commerce/law and economics/law represent legitimate marriages of disciplines for the intending student. Less accepted is the notion of social science/law or social work/law as a course of study aiming to integrate the two kinds of explanation.

One other factor prejudicing the development of cogency between social and legal explanations has been the difference between law as a professional discipline and the social sciences as a merely academic discipline. Even the most isolated legal theorist must be found persuasive and ultimately helpful by the practitioners of law. For the most part, the social scientist has been free from the pragmatic responsibility of intervening in social life and problem-solving. In this regard the social work profession holds a unique place among the social sciences. Its penchant for the esoterica of theoretical pursuits must always be tempered by its commitment to social work practice. Social workers thus tend towards the pragmatic, problem-solving approaches in social science, retaining a scepticism towards the grand critical theorists who identify social structures as ultimate impediments to change.<sup>4</sup> As Professor Chamberlain has pointed out, "social workers are aware that on Monday morning the apathetic and angry, the bruised and bewildered, the defiant and deprived, the hurt and the hungry will be on their doorstep. In the face of that misery they reject an analysis which says that nothing can be done until the basic structures of society are changed — but that the structures themselves prevent change" (Chamberlain 1981:12). This common sense of professional responsibility may therefore provide a ground for sharing some integration of social and legal explanations of human affairs.

In striving for such an integration, which should be the broader concept — "law" or "society"? Or should they be co-extensive? Kamenka and Tay have pointed out the inherent dangers in subordinating the concept of law to the concept of society (Kamenka and Tay 1978:48-80). They stated that their subordination leads to a devaluing of the rule of law in favour of broad social policies and can lead, as in the case of Hitler's Germany and Stalin's Russian, to profound breaches of the rule of law including wholesale incarceration and mass murder while at the same time the jurists were expostulating lofty concepts such as Pashukanis' theory of the withering away of law in favour of a just society. The converse view, that the concept of society should be subordinated to that of law is now far less popular than in former years. It is arguably a consequence of the view of the natural law theorists that society should shape itself around the given laws of nature. Although unpopular in the west, this view is gaining force in some Third World countries, particularly those where fundamentalist Islamic influences are strong.

It is increasingly usual in studies of "law and society" for law to be regarded as merely one element within the study of society. Perhaps a wiser approach may be

to regard law and society as co-extensive concepts, focussing on different aspects of the same universe of inquiry, just as, say, the concepts of "physics" and "chemistry" address different aspects of the physical world without requiring subordination of one concept to the other. The methodological implications of this approach are of particular importance in analysing the position of welfare in the new legal order.

### *C. A NEW LEGAL ORDER?*

The changes in the form and content of law over the past century have prompted some to argue that a wholly new kind of legal order is emerging. Legal theorists have advanced differing views as to the nature this new legal order. This section examines some of the more important hypotheses about the place of property, equity and community in the new legal order.

#### *"New Feudalism"*

The sociological jurist Roscoe Pound saw the development of modern law as a trend towards a new feudalism. Pound believed that law developed in stages, focussing on a particular task at each stage. "Primitive" law was, according to Pound, concerned with the basic establishment of order within the community. The next stage was one of "strict" law in which the principles of certainty and uniformity could be seen to develop. The third stage incorporated a moral component based on reason and expressed in equity and natural law. The fourth stage was concerned with the development of the rights of the individual. The fifth, and current stage is concerned with securing social as opposed to individual interest in the sense of seeking to satisfy the sum total of human demands. This stage sees the growth of public law and the emergence of the State as the grantor of benefits. In this respect, Pound argued, the legal position of the individual depended not so much on his ability to contract but on his status in relation to the State. It was this character which was of a feudal kind, with the State playing the role of the latter day feudal overlord.

#### *"New property"*

Parallel to this view is that advanced by Reich in which he discerns and argues for the emergence of a "new property" (Reich 1964:733). Reich identified claims against the State based on one's status as a citizen or employee as the new wealth that the individual has in the collective society. Reich expressed concern about the inadequacy of legal machinery to uphold such claims against the arbitrariness of State bureaucracies. This view has been most influential in the development of a Welfare Rights movement throughout the western industrialized democracies. In Australia the effect of this kind of thinking may be readily identified in the provisions for a Social Security Appeals Tribunal and in the establishment of an Administrative Appeals Tribunal following, inter alia, the report of the Commission of Inquiry into Law and Poverty chaired by Professor Ronald Sackville (Australia 1975).

Both Pound's approach and Reich's approach are based on the application of metaphors to explain new situations. Just as the metaphysical poets of the

seventeenth century used elaborate metaphors to try to explain the new situations arising in their rapidly changing society, so have contemporary legal theorists made extensive use of metaphor to explain current changes in the legal order. This has the inherent danger of being an oversimplification. Is the concept of property, for example, best able to explain the kind of claim which, say, a disabled person has against the Australian government for payment of an invalid pension? Even where there is provision for avenues of appeal and for judicial review it is submitted that the control of administrative discretion amounts to something fundamentally different from a conventional claim to ownership of property. Hanks has identified the continuing tension between rights and discretion in the area of income support, notwithstanding the procedural developments of recent years (Hanks 1977:376-379).

### *“Social Equity”*

The trend towards a new legal order based upon status rather than contract was identified in the work of the French sociologist Emile Durkheim. Law, according to Durkheim, reproduced the principal forms of social solidarity. He identified two basic types of solidarity — a “mechanical” solidarity to be found in homogeneous societies and an “organic” solidarity which emerged with the complex division of labour and functional interdependence characteristic of modern heterogeneous societies. Durkheim saw law as moving from being punitive towards being restitutive. Durkheim argued that the sanctity of contract would give way progressively to a “social equity” (Durkheim 1949). This may be seen in the significant restrictions which have been placed on the freedom of contract by modern legislation and case law concerned with restrictive trade practices, consumer protection, employment protection and residential tenancies. Although Durkheim was undoubtedly prescient in identifying the impact of “social equity” upon law, it should be noted that equity originally developed as a gloss on the common law. Equity was not in itself a complete system of law, whereas the current welfare state does offer complete systems alternative to traditional law, *eg* the New Zealand national insurance and compensation scheme, designed to replace the torts-based approach to accident compensation. The brave new principles of the social welfare administrators have implications for the legal order more far-reaching than a mere equitable gloss.

In recent years Durkheim’s work has been subject to re-examination (Clark 1976; Cotterrell 1977). A significant criticism of Durkheim’s analysis may be found in the work of Chambliss and Seidman (Chambliss and Seidman 1971:13-15). These authors undertook a comparative study of the role of law in simple and industrialised societies. They arrived at exactly the opposite conclusion to Durkheim. They concluded that the intimate relationships found within simple societies required restitutive forms of law, while the impersonal relationships of modern industrial society are more associated with repressive forms as evidenced, for example, in the vagrancy laws.

### *“New community”*

Another hypothesis as to the nature of the new legal order is that the changes in law represent a new “community” approach. This has been evident to some extent in legislation, in new forms of judicature and in the delivery of legal services.

Legislatures throughout the Western world over the past twenty years have introduced a wide range of enactments overtly aimed at the promotion of "community welfare" (see for example the South Australian Community Welfare Act 1972-1979, the Victorian Community Welfare Services Act 1970 (as amended) and the Northern Territory Community Government Act 1980). Some jurisdictions which have couched legislation in terms of service delivery are now re-casting this legislation to accommodate broader concepts of community rather than specific services aimed at particular target groups such as children or the aged.<sup>5</sup> This represents a recognition by legislatures that the law cannot be immune to the social changes attendant on a highly integrated and urbanised economy. Even where legislation is still couched in terms of a particular target group, as for example in the United Kingdom Children and Young Persons Act, 1969 there is increasing emphasis towards the administration of such legislation by officers also administering legislation in a wide range of "community" areas. Thus in Britain, although separate legislation exists in respect of children, the aged and the mentally ill, the administration of services in these areas is, following the Seebohm Report, carried out by local Borough Councils whose Directorates of Social Services assume a broad responsibility for community welfare.

New forms of judicature are also emerging based on a "community" approach instead of the traditional adversarial approach of the court system. Some of these initiatives, for example the Small Claims Tribunal and the Small Debts Court, operate in a way not totally dissimilar from traditional courts, but without the usual formality of court proceedings. In these tribunals a referee makes a summary determination of justice between the parties with a minimum of delay and expense. Perhaps of more significance to jurists is the move away from a system of judicature based upon the assignation of fault. This may be observed to some extent in the Family Court. Established under the Family Law Act 1975 (Cth) this court encourages parties to reach agreement and provides a counselling service to assist conciliation between the parties. A significant development based upon a similar philosophy is that of the Community Justice Centres established in New South Wales (Community Justice Centres (Pilot Project) Act 1979). These Community Justice Centres have played a significant role in the resolution of neighbourhood disputes which are notoriously ill-suited to conventional fault-based tort remedies. The centres have also been used to mediate in disputes between corporate executives, in partnership disagreements and, more recently, even in industrial disputes (Richardson 1981:6; Victoria, 1981; Nyman 1981:521).

In the delivery of legal services there have been very strong moves over the past decade towards a pattern of service delivery based upon community accountability rather than upon conventional notions of the independence of the legal profession and the classic distinction between solicitors and advocates (Tomasic 1978: Ch 5; Bothmann and Gordon 1979). In Australia the first legal services operated on a community basis were the Aboriginal Legal Services (House of Representatives 1980). Starting in Redfern, Sydney in 1972 Aboriginal Legal Services were established throughout the nation, based on the concept that the accountability of the solicitor should lie not only to her/his client, but also to the committees and family groups representing the Aboriginal community as a whole. This has posed some difficult ethical dilemmas for the practitioners in such services. It has,

however, provided a most important vehicle for the delivery of legal services to a profoundly disadvantaged group of citizens.

The development of non-Aboriginal community legal services in Australia followed the pattern established by the pioneering work of the Kensington Community Legal Service in London and the "store front lawyers" of the "War on Poverty" programme in the United States of America. The objectives of these legal services are founded not on orthodox law nor even on "welfare law" but on "poverty law" (Bothmann and Gordon 1979). The Fitzroy Legal Service in Melbourne, for example, outlined four broad objectives. First, that it be a legal service for people in neighbouring suburbs easily reached and providing its services free. Secondly, that it function as a centre which would develop a local awareness of legal rights. Thirdly, that it should forestall legal problems by practising preventive law; and finally that as a corollary and extension of the second point, it should provide legal education and foster community involvement (Australia 1980c:30).

Weighed against this evidence of a "community" approach in legislation, judicature, and the administration of legal services, is the argument by Tay (above) that the community approach to law "masks the fact that almost every demand made by those who speak in the name of community is a demand for further extending the already momentous social role and growing claim to moral responsibility of the State and its administration" (Kamenka, Brown and Tay 1978:4).

Does then the movement towards a "community" approach to law reflect a real rapprochement of law and community or does it reflect a progressive accretion of powers by a paternalistic State? This question obliges us to consider in some greater depth what is meant by the term "community". In a word with such positive connotations, its potential for misuse is infinite. Tay and Kamenka refer back to Tönnies' classic analysis of community (Tönnies 1957). Tönnies distinguished between the *Gemeinschaft* type of community and the *Gesellschaft*. He identified the former as the organic, caring and sharing community characteristic of peasant life in a feudal society. Community has rested upon a natural harmony, on the ties of tradition, kinship and common acceptance of a religious order. Contrasted to this was the *Gesellschaft* characteristic of liberal capitalism in which the division of labour and the reliance upon commercial transactions gives rise to a system of law in which contract is all important and the feudal incidents of real property correspondingly less important. Much of the "community" approach to law in recent times proceeds on a rhetoric of avoiding the harshness of *laissez-faire* *Gesellschaft* law and returning to a more caring and sharing *Gemeinschaft* society. Such rhetoric is, however, only half the story. The means whereby the excesses of *Gesellschaft* law may be reined in, as for example in restrictive trade practices legislation, require the establishment of a large and powerful State apparatus to regulate economic life and to promote income redistribution.

It is this bureaucratic-administrative character of much modern law to which Tay and Kamenka object. Their objection does much to clarify the bureaucratic nature of the means by which community ends may be pursued in law. The objection does not, however, adequately explain the concern for social justice which runs through the above developments and which is apparent also in the reformist attitudes

adopted in some appellate courts. This concern is not simply about the establishment of bureaucratic-administrative structures to fetter the "freedom" of contract; rather it goes to the very nature of property and to the social responsibilities attaching to it. Thus Lord Denning in the English Court of Appeal observed in the leading case of *Davis v Johnson* (1978) 3 WLR 182:

I venture to suggest that the concept about rights of property is quite out of date. It is true that in the nineteenth century the law paid quite high regard to rights of property. But this gave rise to such misgiving that in modern times the law has changed course. Social justice requires that personal rights should, in a proper case, be given priority over rights of property. In this court at least, ever since the war we have acted on that principle.

Such a concern for social justice poses a major problem for the jurist of establishing certainty in a process of change. Although such an analysis must be fraught with difficulty it is not a task from which jurists can resile, for it is at the heart of much that is important in the letter and the spirit of the laws of our age.

#### *D. TOWARDS A JURISPRUDENCE OF SOCIAL JUSTICE*

The construction of a jurisprudence of social justice is a vast endeavour. What follows here is an attempt not to make a comprehensive statement of all the relevant issues, but rather to address certain fundamental questions which no satisfactory jurisprudence of social justice can avoid, namely:

- What principle or principles provide a starting-point for the pursuit of social justice?
- How broadly should the law's compass extend in the pursuit of change towards social justice?
- How should law relate to culture and technology in the process of change?
- How is legal power to relate to the moral order?

#### *A Starting Point*

Central to the goal of social justice is the desire to promote equality. It has long been accepted as a starting point in legal principles that all persons should be treated equally before the law. Counterposed to this ideal of equality is the social fact of inequality. The notion that justice is possible only with social equality has ancient origins. Thus, for example, Thucydides wrote of the Athenians' assertion to the Melians:

In this world justice only comes into question between equals . . . the strong do what they can and the weak accept what they must (Eggleston 1976:306).

A major attempt has been made in recent times to construct a theory of justice which balances the principle of equality with the principle of liberty (Rawls 1972). Rawls took as his starting point of inquiry the position of free and rational persons in a state of nature. He argued that behind such a "veil of ignorance" certain

fundamental principles as to equality and liberty would emerge. He rejected the utilitarian principles advanced by Bentham as their concern for the "greatest number" implied a corresponding lack of concern for those with the least prospects in life, notwithstanding the reformist character of much utilitarian thought. He attempted, like Kant, to construct moral principles upon the basis of rational thought. This attempt to derive moral meaning through hypothetical logical enquiry is, arguably, subject to the converse of the fallacy underlying Kelsen's theory. Why should it not be possible to postulate equality as morally axiomatic to the discussion of social justice? This is not to suggest that such a moral principle is arational; merely, that the attempt to derive it by rational inquiry from a state of nature behind a veil of ignorance is anthropological nonsense and unnecessary.

Rawls' fundamental principles for a theory of justice are two-fold.

1. Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system for all.
2. Social and economic inequalities are to be arranged so that they are both:
  - (a) to the greatest benefit of the least advantaged; and
  - (b) attached to offices and conditions open to all under the circumstances of fair equality of opportunity.

In construing these principles Rawls argues that the first principle should have absolute authority over the second and that the second part of the second principle should have absolute priority over the first part. Thus, for Rawls, liberty is more important in the just society than equality, and equality of access is more important than equality of outcome.

Rawls' approach has been characterized by the Polish legal theorist Wieslaw Lang as a reformist, bourgeois theory falling short of the Marxist postulates of social justice which find expression in the radical principle "to each according to his [or her] needs" (Kamenka and Tay 1979:116-148). Lang concedes that this radical principle applies only in true communist states (as yet unattained), and that in present socialist (pre-communist) states the transitional principle "to each according to his [or her] work" is the guiding principle of social justice. In the transition lies the rub. When the liberty of workers comes into conflict with the state's definition of the correct path to equality, as in contemporary Poland, a dilemma arises for Marxist jurists not dissimilar in kind from that which confronts Rawls.

The tension between the principles of liberty and social equality is nowhere more in evidence than with regard to property. This dilemma is not found only in the Western legal system (see Lord Denning's dictum in *Davis v Johnson*, above) it is also to be found in the dilemmas facing jurists in communist societies. The Austro-Marxist legal philosopher Karl Renner argued that the following analysis of Western law applied also to the tensions between public and private law in Communist states:

A twofold development is taking place. First ... the complementary institutions of private law have deprived the owners of their technical disposal over their property; and secondly ... the common law has subjected property to its direct control, at least from the point of view of the law (Kamenka, Brown and Tay 1978:79).

The problem of reconciling the "freedom" of social relations in the market place

with the tyranny of social relations in the factory remains a real one in both communist and capitalist systems.

### *Breadth of Change*

The goal of equality implies redistribution of resources not only between different classes but also between groups structurally disadvantaged by virtue of sex, race or age. This involves a broadening of the concept of justice. It may be possible to link this broadening with a corresponding diminution in the role of morals in law. Thus, for example, Hart cited the case of a man committing gross cruelty to his child as an instance of conduct which would be morally wrong rather than unjust (Hart 1961:153-154). In the two decades since Hart published that example the advocates of concern over domestic violence have forcefully argued the case for children's rights that parental abuse of children would be legitimately regarded as an example of injustice between different age groups, as well as being morally unacceptable behaviour. Indeed many of the changes of legislation in that area have been specifically aimed at rejecting a moralistic, fault-based approach to child abuse (*eg* Health Act Amendment Act 1972 (Qld); Connors 1977:233). Domestic violence directed against a female spouse would be even more forcefully argued to be an unjust exercise of patriarchal power.

It is an interesting paradox that the highly moral arguments used to support the case for social justice contrast with the desire to oust moralistic, fault-based approaches to interpersonal injury.

Tay and Kamenka take umbrage at this trend towards what they see as "shaping the whole of one's conception of society around the needs of homosexuals, deserted mothers and what Marxists used to call the *Lumpenproletariat* and the *Demi-monde*" (Kamenka and Tay 1980:807). This piece of ethnocentric petulance reveals an odd arrogance in legal culture towards the disadvantaged and the different. Any satisfactory jurisprudence of social justice must take into account the significance of legal culture. Friedman, for example, has argued that theories of jurisprudence based on equality, fairness and justice are often produced to satisfy the needs of the legal profession rather than those of the client or the community (Friedman 1975). Blackshield has argued in an analysis of "legal responses to cultural change" that the power of the law is closely related to the preservation of illusions regarding the law and legal institutions (in Tomasic 1978:121).

### *Law, Culture and Technology*

Burman has examined the question of how the law may address the principle of distributive justice in a multi-cultural society (Burman 1977). He concluded that "while it is conceivable — if unlikely — that multi-cultural society could arrive at generally agreed conceptions of the nature of law without having first to modify one culture to meet the other, there is still no reason to suppose that this would result in general agreement over the justice of the legal decisions of its courts" (Burman 1977).

In considering the place of legal culture within a process of change towards a more socially just order, one cannot ignore the impact of technological change upon the legal profession and society itself. In the high-technology culture of the twenty-first century the law will face challenges not found in the lexicon of Latin maxims.



Capital-intensive economic development has already led to chronic structural unemployment and increasing numbers of candidates for the invalid pension. Fifty years ago it was not contemplated that manufacturers of goods would be liable in tort to consumers at large. Perhaps fifty years hence we should not think it odd that the authors of economic development be held liable to account for the social costs of their development processes.

The administration of law in the computer age should allow for simpler and clearer procedures, for example in the registration of land titles and in the processing of income tax assessments. If, as Lord Denning once observed, the two great (and sometimes conflicting) aims of the law are to achieve order and to achieve justice, and if the microchip makes order that much easier to achieve, then the law in the microchip era should be free to devote more of its energies towards the achievement of justice.

Justice Kirby has recently pointed to the profound implications of microchip technology in the storing and processing of information affecting an individual's rights (Kirby 1981b). As with all technological revolutions, the revolution in cybernetics holds out the possibility of greater equality or greater inequality, depending upon its use. Weeramantry has forcefully argued the case for lawyers to approach cybernetics as an opportunity for the re-discovery of participation by the community in the administration of law (Weeramantry 1977). He notes that instant electronic referenda will become possible on many issues of public concern and as a consequence the processes of group representation, on which representative government is now based, may no longer be necessary. The simultaneous use of television and telephone call-in systems have been used in a number of local government decisions in the United States of America with considerable success. These have been to date largely concerned with single-issue matters such as the location of an airport. Weeramantry argues that computers may make it more possible for lawyers to be free of much mechanical drudgery and allow them to use the law to promote dignity, liberty and the good life. He warns, however, lest we should slip into a new totalitarianism which may arise from a default in sensing and communicating "the rapture of the forward view" (Weeramantry 1977:15; the Law Reform Commission of Australia discusses the intrusive nature of computer technology (Australia 1980d)).

### *Legal Power and the Moral Order.*

In considering the law as a potential vehicle for the promotion of social justice it is necessary to consider the relation of legal power with other kinds of power in society. Max Weber outlines three bases of power: charismatic power, traditional power and legal-rational power (Gerth and Mills 1946:224-229). Charismatic power refers to an extraordinary quality of a person, regardless of whether this quality is actual, alleged or presumed. Charismatic power is not managed according to general norms, either traditional or rational, but is "irrational" or revolutionary" in the sense of not being bound to the existing order. Traditional power refers to the accepted set of super-ordination/subordination relations characterising everyday life, as for example in the accepted relationship between a father and son. Legal-rational power is that embodied in the system of law and administration. Weber saw Western society as being historically engaged in a process of "rationalisation"

whereby charismatic power and mystical traditional power were converted into legal-rational forms of power, such as in bureaucracies. When these forms of power are cloaked with legitimacy they may be referred to as types of authority. This is not, however, the end of the process of consolidation of power. Unless legal-rational authority becomes consolidated into the moral order of the society and hence acquires the character of traditional authority, the process of change so achieved will not be successfully translated into a permanent change towards social justice. Indeed the existence of a legal-rational power without recognition on the part of the citizens of its moral basis may give rise to a resentment of the law and spawn problems in the power relations between the affected citizens. Thus, for example, Keon-Cohen has argued that the Aboriginal Land Rights (Northern Territory) Act 1976 may have gone "beyond the legislative limits" in re-ordering the power relations between black and white Territorians without satisfactorily addressing whether such a change was accepted as morally legitimate by non-Aboriginal citizens (Keon-Cohen:382). When the High Court came to consider this Act in the recent case of *R v Baume and Toohey ex parte Peko-Wallsend Operations Ltd. and others* (High Court, 8 December 1982 *per* Brennan J) the court was obliged to inquire into the Aboriginal people's relationship with the land which, the Court observed, was "primarily a spiritual affair rather than a bundle of rights". Brennan J observed that an understanding of the spiritual and moral basis of this law posed "a daunting task for one whose tradition, if unexpanded by experience or research would leave him "tongueless and earless towards this other world of meaning and significance"" (High Court, 8 December 1982:37; Brennan J cites with approval the words of the late Professor W.E.H. Starrer). This raises the question of how a legal order seeking to promote social justice may be consolidated into the moral order of a society.

If justice is couched solely in terms of rights, then this could amount to taking rights too seriously (*cf* Dworkin 1977). As Honore has pointed out rights may be intrinsically of a counter-social nature (Honore 1977). Is a concept of rights an adequate moral concept upon which to found relations between persons and groups in unequal positions? The rhetoric of rights may have immediate political appeal to disadvantaged groups but it is not itself a morally adequate basis for relations between persons.

As Kleinig has noted there is something morally unsatisfactory about relating to another solely in terms of the other's due (Kleinig 1977). Rights are species-specific and therefore do not provide an adequate basis for person-specific behaviour except insofar as any given person holds a particular bundle of rights. Concepts of love and care between persons must be incorporated in any discourse on human relations which makes a claim to be morally adequate. The "good neighbour" principle of avoiding harm to others advanced by Lord Atkins in *Donoghue v Stevenson* [1932] AC 562, for example, is intelligible only against the background of a morality of love for one's neighbour. When the English-trained barrister, Mohandas K. Gandhi, came to lead the people of the Indian sub-continent in their attempts to change the colonial legal order his programme of civil disobedience was based on the Hindu concept of "satyagraha" (truth-force) which took its ultimate expression in the form of love.

If, as Rawls argued, the desire to act justly is "a central concept of human development, a natural (and reflectively supported) extension of love for particular

people and loyalty to particular associations" (Rawls 1972) then the jurist must study not only the science of legal thinking but also the art of loving.

#### Endnotes

1. For example, see the works of Austin, Bentham and Kelsen.
2. It should be noted that there has been no request to date by members of Aboriginal Reserves for jurisdiction over more serious matters as these are regarded as "big trouble" to be dealt with by the normal Criminal Court System applying in the general community (Australia 1980b).
3. In his reasons for sentence Mr Justice Dunne pointed out that the standard sentence in similar cases was between four and six years imprisonment. Alwyn Peter was sentenced to two years and three months imprisonment with consideration for immediate parole. He had been in custody for twenty months at the time of sentencing.
4. For a discussion of the difference between the pragmatic stance and the theoretical stance in "Socio-Legal Studies" and "Sociology of Law", see Roshier and Teff 1980:2-7.
5. A Community Welfare Bill has recently been introduced into the New South Wales Parliament. Queensland still retains the Children's Services Act; but is, significantly, currently revamping the Act towards a broader concept of "family welfare" though not community welfare.

#### References

- Auerbach, J. *Unequal Justice: Lawyers and Social Change in Modern America*, (1976) Oxford University Press, New York.
- Australia, Law Reform Commission, *Aboriginal Customary Law — Recognition?* Discussion Paper No 17 (1980b) Australian Government Publishing Service, Canberra.
- Australia, Commonwealth Legal Aid Commission, *Legal Aid and Legal Need* (1980c) Australian Government Publishing Service, Canberra. (See also Cass, M. and Western, M.J.)
- Australia, Law Reform Commission, *Privacy and Intrusions*, Discussion Paper No 13 (1980d) Australian Government Publishing Service, Canberra.
- Australia, Commission of Inquiry into Law and Property, *Report* (1975) Australian Government Publishing Service, Canberra. Bayne, P. "The Makaratta: A Treaty with Black Australia" (1979) 6 *Legal Service Bulletin* 232.
- Blackshield, A.R. "Legal Responses to Cultural Change" in Tomasic, R. (ed) *Lawyers and the Community* (1978) Law Foundation of New South Wales and George Allen and Unwin, Sydney.
- Bothmann, S. and Gordon, R. *Practising Poverty Law* (1979) Fitzroy Legal Service.
- Burman, S.B. "Law in a Multi-Cultural Society", (1977) Paper presented to World Congress on Philosophy of Law and Social Philosophy, Sydney-Canberra.
- Campbell, C.M. and Wiles, P. "The Study of Law in Society in Britain" (1976) 10 *Law and Society Review* 547.
- Chamberlain, E.R. "Mission and Mirage: Social Work and the Law in Pursuit of Social Justice", (1981) Paper presented to Conference of Australian Association of Social Workers, Brisbane.
- Chambliss, W. and Seidman, R. *Law Order and Power* (1971) Addison-Wesley, London.
- Clark, M. "Durkheim's Sociology of Law" (1976) 3 *British Journal of Law and Society* 246.
- Connors, J. "Child-Abuse — Compulsory Reporting in New South Wales" (1977) 2 *Legal Service Bulletin* 232.
- Coser, L.A. and Rosenberg, B. *Sociological Theory — A Book of Readings* (1964) Collier-McMillan, New York.
- Durkheim, E. *The Division of Labour and Society*, (1949) The Free Press, Glencoe.
- Eggleston, E. *Fear, Favour or Affection — Aborigines and the Criminal Law in Victoria, South Australia and Western Australia* (1976) A.N.U. Press, Canberra.
- England, Royal Commission on Criminal Procedure, *Report* (1981) CMND 8092, H.M.S.O., London.
- Eysenck, H.J. *The Psychology of Politics* (1954) Routledge and Kegan Paul, London.
- Friedman, L.M. *The Legal System: A Social Science Perspective*, (1975) Russell Sage Foundation, New York.
- Gerth, H.H. and Mills, C.W. (eds), *From Max Weber: Essays in Sociology*, (1946) Oxford University Press.
- Handley, R. "The Human Rights Commission Act 1981" (1981) 6 *Legal Service Bulletin* 203.
- Hanks, P. "Income Support: Rights or Discretion" (1977) 2 *Legal Service Bulletin* 376.
- Hart, H.L.A. *The Concept of Law* (1961) Clarendon Press, Oxford.

- House of Representatives, Standing Committee on Aboriginal Affairs, *Aboriginal Legal Aid* (1980) Australian Government Publishing Service, Canberra.
- Kamenka, E. and Tay, A. (eds) *Law and Social Control* (1980) Edward Arnold, London.
- Kamenka, E. and Tay, A. (eds) *Justice* (1979) Edward Arnold, London.
- Kamenka, E., Tay, A. and Brown, R. (eds), *Law and Society — The Crisis in Legal Ideals*. (1978) Edward Arnold, Melbourne.
- Kelsen, H., "The Pure Theory of Law" (1934) 50 LQR 474 (Part I); (1935) 51 LQR 517 (Part II).
- Keon-Cohen, B.A. "Aboriginal Land Rights in Australia: Beyond the Legislative Limits" in Tomasic, R. (ed) *Legislation and Society in Australia* (1980) George Allen and Unwin, Sydney.
- Kleinig, J. "Human Rights, Legal Rights and Social Rights" (1977) Paper delivered at the World Congress on the Philosophy of Law and Social Philosophy, Sydney-Canberra.
- Kirby, M.D. "Crime and Punishment", (1981a) Presidential Address to Criminology Section, Australian and New Zealand Association for the Advancement of Science, Brisbane.
- Kirby, M.D. "The Computer, the Individual and the Law" (1981b) 55 *Australian Law Journal* 433.
- Kirby, M.D. "Sentencing Reform: Help in the 'Most Painful' and 'Unrewarding' of Judicial Tasks" (1980) 54 *Australian Law Journal* 732.
- Lang, W. "Marxism, Liberalism and Justice" in Kamenka, E. and Tay, E. (eds) *Justice* (1979) Edward Arnold, London.
- Llewellyn, K. *Jurisprudence — Realism in Theory and Practice* (1962) Chicago University Press.
- Lloyd D. and Freeman, M.D., (eds), *Introduction to Jurisprudence*, (1979) London, Stephens and Sons.
- Lundstedt, A.V. *Legal Thinking Revised*, (1956) Almquist and Weksell, Stockholm.
- MacCormick, N. *Legal Reasoning and Legal Theory* (1978) Oxford University Press.
- Malezer, L., Foley M. and Richards, P. *Beyond the Act*, (1980) Leader Press, Brisbane.
- Mead, G. "The Psychology of Punitive Justice" (1918) *American Journal of Sociology* 585.
- Nettheim, G. *Outlawed: Queensland's Aborigines and Islanders and the Rule of Law*, (1973) A.N.Z. Book Company, Sydney.
- New South Wales, Royal Commission into New South Wales Prisons, *Report* (1978) New South Wales Government Printer, Sydney.
- Nyman, T. "Community Justice Centres — part heard" (1981) *Law Society Journal* 521.
- Parsons, T. *The Social System* (1951) The Free Press, Glencoe.
- Petersen, D. "Paradise Lost" (1981) *Courier Mail*, Brisbane.
- Rawls, J. *A Theory of Justice*, (1972) Belknap Press, Cambridge, Massachusetts.
- Reich, C. "The New Property" (1964) *Yale Law Journal* 733.
- Renner, K. "The Institutions of Private Law and Their Social Functions" in Kamenka, E., Tay, A. and Brown, R. (eds) *Law and Society — The Crisis in Legal Ideas* (1978) Edward Arnold, Melbourne.
- Richardson, J. "Backyard Law Finds New Belief" (17-18 October 1981) *Weekend Australian* 6.
- Roshier, B. and Teff, H. *Law and Society in England*, (1980) Tavistock Publications, London.
- Scarman, L., *English Law — The New Dimension (The Hamlyn Lectures)*, (1974) Stevens, London.
- Schur, E., *Law and Society*, (1968) Random House, New York.
- Tomasic, R. *Lawyers and the Community*, (1978) Foundation of New South Wales and George Allen and Unwin, Sydney.
- Tomasic, R. (ed) *Legislation and Society in Australia* (1980) George Allen and Unwin, Sydney.
- Tönnies, F. and Loomis, C.P.V. (trans) *Community and Association (Gemeinschaft und Gesellschaft)* (1957) Harper and Rowe, New York.
- Victorian Council of Social Services, A National Conference, "Help Yourself to Justice", *Proceedings* (1981) Collingwood Education Centre, *Legal Service Bulletin* Melbourne.
- Weber, M., Parsons, T. (trans and ed) and Henderson, A.M. (trans) *The Theory of Social and Economic Organisation* (1947) William Hodge, London.
- Weeramantry, G. "Cybernetics and the Re-Discovery of Participation", (1977) Paper presented to World Congress on Philosophy of Law and Social Philosophy, Sydney-Canberra.
- Wilson, P.R. *Black Death — White Hands* (1982) Allen and Unwin, Sydney.