AUSTRALIAN BIBLIOGRAPHY OF LEGAL PHILOSOPHY

(compiled by Wojciech Sadurski)

January - June 1988

Australian Bibliography of Legal Philosophy, which appears twice a year, includes bibliographical information and abstracts of recent publications by Australian authors (in Australia and overseas), and by foreign authors in Australian periodicals. All authors are invited to provide the Associate Editor of the Bulletin of A.S.L.P. with the details of their most recent publications for inclusion in the "Bibliography".

(1) BERNS, S., "Hercules, Hermes and Senator Smith: The Symbolic Structure of Law's Empire", in Bulletin of the Australian Society of Legal Philosophy, 1988, 12, pp. 35-45.

Ronald Dworkin uses the metaphorical device of Hercules to offer an account of adjudication. This paper offers a feminist critique of his account as developed in Law's Empire. It explores the implicit significance of the choice of Hercules as his symbol for the judge and contrasts the image of the judge as estranged hero with two newcomers to Dworkin's account: the androgynous messenger Hermes, and the feminine, and imperfectly rational, Senator Smith.

(2) BLACK, A., "Dworkin's Jurisprudence and Hospital Products: Principles, Policies and Fiduciary Duties", in University of New South Wales Law Journal, 1987, 10, pp. 8-37.

The article utilises Dworkin's account of judicial reasoning in "hard cases" (the "Rights Thesis") as a framework for analysing the High Court's decision in Hospital Products v. US Surgical Corporation, (1984) 156 CLR 41. The article concludes that the more widely accepted legal usage identifying "policy" and "consequentialist" arguments ought to be adopted in the discussion of particular cases. On the basis of that usage, the article argues that in Hospital Products consequentialist arguments were treated by the Court as right-conferring.

(3) BRAITHWAITE, J., FISSE, B., GEIS, G., "Covert Facilitation and Crime: Restoring Balance to the Entrapment Debate" in Journal of Social Issues, 1987, 43, pp. 5-41.

Covert facilitation of crime by or on behalf of government agents has always been viewed with suspicion, but the recent use of this technique of enforcement against power elites has resulted in a storm of protests from civil libertarians The argument

of this paper is that, although there is virtue in the standard libertarian objections, the use of covert facilitation is essential to ensure that the law is applied effectively against crime in high places. The use of covert facilitation is advocated on the egalitarian grounds.

(4) FOGG, A.S., "Dworkin's Failure in Jurisprudence", in Bulletin of the Australian Society of Legal Philosophy, 1988, 12, pp. 17-34.

Dworkin's thesis in Law's Empire is badly flawed. There are considerable procedural difficulties in identifying shifts in Dworkin's argument over the years. Moreover, there now appears to be a distinction between cases which are merely hard and those which are extremely hard. The latter comprises cases where Mr Justice Hercules has the justified alternative of telling lies, if lying is consistent with his own sense of justice. In the category of merely hard cases such as Brown v. Board of Education, Dworkin misconceives the proper function of courts and the limits of equitable remedies.

(5) GOLDSWORTHY, J.D., "Nozick's Libertarianism and the Justification of the State", in Ratio, 1987, 29, pp. 180-89.

An examination of Nozick's attempt, in Anarchy, State and Utopia (1974), to provide a libertarian justification of the state. It is argued that the "principle of compensation", which he uses to justify the state's provision of universal protection, cannot bear the weight put on it, and that consequently the attempt fails.

(6) KAMENKA, E., "Human Rights and the Soviet Future", in The Soviet Union and the Challenge of the Future, vol I, SHTROMAS, A. and KAPLAN, M.A. (eds), New York, Paragon House, 1988, pp. 85-111.

The essay surveys the totalitarianism implicit in classical Marxism and its consequent failure to develop a theory of politics as the science of freedom and law as adjudication between legitimate but conflicting interests. There follows a discussion of severe limitations in the development of human rights ideology in the Soviet Union.

(7) KAMENKA, E. and A. E.S. TAY, "Zum Soziologischen Verständnis der Gerechtigkeit", in Formalismus und Phänomenologie im Rechtsdenken der Gegenwart: Festgabe für Alois Troller, KRAWIETZ, W. and OTT, W (eds), Berlin, Duncker & Humblot, 1987, pp 443-463

The essay distinguishes between Gemeinschaft, Gesellschaft and bureaucratic-administrative traditions

of law and justice, each with its own ideology and way of viewing the world, and explores the conflicts and relationships between them. The authors emphasise that all three strands can and do conflict and compete within any one society or legal system.

(8) **KAMENKA, E. and A. E.S. TAY, "Human Rights: Perspectives From Australia",** in The Philosophical Foundations of Human Rights, Paris, UNESCO, 1986, pp. 151-178.

This article discusses the theory and practice of protecting human rights in Australia, emphasising the Common Law traditions and the new attitudes and procedures evolved in the 1970s.

(9) **KAMENKA, E. and A. E.S. TAY, "Kiinan Oikeus Muinaisdynastioista Kulttuurivallankumoukseen" [Chinese Law from the Epoch of the Ancient Dynasties to the Cultural Revolution],** in Eripainos Lakimies-Lehdesta (Helsinki), 1987, 7, pp. 761-787.

The article traces the development of law and legal ideologies and attitudes in China from early times to 1975, devoting attention to Confucian theory and imperial codes, to law in the "Red Areas" in China before 1949, to the KMT modernisation of law along Western lines and to the radical changes in attitudes to law in the People's Republic of China in the period 1949-1975.

(10) **KAMENKA, E. and A. E.S. TAY, "Kinaa Koskevan Liiteen Kirjoittaneet" [Chinese Law in the 1980's],** in DAVID, R., Nykyajan Suuret Oikeusjarjestelmat [Contemporary Legal Systems], Helsinki, Suomen Lakimiesliiton Oy, 1986, pp. 299-320.

This Special Appendix to the Finnish translation of the 8th French edition of Rene David's book reviews the developments in legal theory, legal education and actual legislation in the People's Republic of China since the great turnaround charted by Deng Xiaoping in 1978.

(11) **KRYGIER, M., "The Traditionality of Statutes",** in Ratio Juris, 1988, 1, pp. 20-39.

This article begins by sketching necessary elements of traditions It then suggests why so many authors have thought to contrast statutes with other, allegedly more traditional elements of law Finally it argues that statutes are deeply embedded, along with cases, customs and other old-fashioned things, in the highly

traditional practices of law, and that this matters more than is commonly supposed

(12) KRYGIER, M., "Law as Tradition", in S. PANOU, G. BOZONIS, D. GEORGAS, P. TRAPPE, (eds), Philosophy of Law and History of Human Thought, Part I (IVR 12th World Congress Proceedings, Athens 1985), ARSP Supplementum II, Stuttgart, 1988, pp. 179-91.

This essay argues that to understand much that is most central to and characteristic of the nature and behaviour of law, one needs to supplement the "time-free" conceptual staples of modern jurisprudence with an understanding of the nature and behaviour of traditions in social life. The article is concerned with three elements of such an understanding. First, it suggests that traditionality is to be found in almost all legal systems, not as a peripheral but as a central feature of them. Second, it questions the post-Enlightenment antinomy between tradition and change. Third, it argues that in at least two important senses of "tradition", the traditionality of law is inescapable. A revised and expanded version of this article has appeared in Law and Philosophy, 1986, 5, pp 237-62.

(13) KRYGIER, M., "Tradition", in A.-J. Arnaud, ed., Dictionnaire Encyclopedique de Théorie et de Sociologie du Droit, Paris, 1988, pp. 423-25.

This encyclopedia entry outlines the elements of tradition, distinguishes several common conceptions of it, and suggests a number of ways in which tradition is important for the understanding of law.

(14) LAMOND, G., "Inventing the Law: Dworkin and Integrity" in Bulletin of the Australian Society of Legal Philosophy, 1988, 12, pp. 2-16.

A critical review of Dworkin's proposal that "law" is an interpretive concept. This paper argues that Dworkin's preferred model of "law as integrity" fails by his own criteria to be an interpretation of the existing legal system rather than an invention of a new one, and that "soft conventionalism" is more descriptively accurate. The paper notes, however, that at the level of constitutional legal theory "law as integrity" highlights the inability of positivistic accounts to provide a normative foundation for the law.

(15) PETTIT, P. "The Consequentialist Can Recognise Rights", in Philosophical Quarterly, 1988, 35, pp 537-51

There is a serious problem about reconciling consequentialism with rights, especially when rights

are understood as trumps But the problem is soluble. Provided that the goal meets certain specifications, provided in particular that it is an "essential by-product", a policy of promoting the goal can call for certain rights to be taken seriously.

(16) PETTIT, P., "The Paradox of Loyalty", in American Philosophical Quarterly, 1988, 25, pp. 163-171.

The loyal agent is hailed as a moral agent, so presumably an agent who acts on universalisable reasons. But the loyal agent is also regarded as someone who is dedicated to the interests of a person or persons to whom he is loyal. How can an agent be committed in this particular way, yet act on universalisable reasons? The paper tries to identify that paradox exactly and offers a solution to it.

(17) PETTIT, P., "Liberalism and Its Defence", in K. HAAKONSSEN, ed., Traditions of Liberalism, Centre for Independent Studies, Sydney, 1988.

This paper offers a brief characterisation of liberalism and looks at the ways in which it may be defended. It provides a critique of contractarian defences and any defences which appeal to natural rights or other deontological considerations. It suggests that the only interesting defence of liberalism will have to be on consequentialist lines. In this, as in so much else, liberals still have to learn from John Stuart Mills.

(18) PETTIT, P., "'The Prisoner's Dilemma' is an unexploitable 'Newcomb problem'", in Synthese, 88, 1988.

David Lewis has argued that every prisoner's dilemma is a Newcomb problem and a problem therefore in which evidential decision theory may have to recommend cooperation. This paper denies the charge, showing that while an outside observer may recognise the predicament as a Newcomb problem, the participants are not in a position to use that information in deciding what to do

(19) SADURSKI, W., Teoria sprawiedliwosci: Podstawowe zagadnienia [A Theory of Justice: Fundamental Problems], PWN, Warsaw, 1988, pp. 282.

The book discusses major contemporary theories of social justice with special emphasis on their role in advocating substantive standards of evaluation of legal systems and political practice. The structure of moral reasoning utilised in the book incorporates two methodological postulates: first, that the principles of social justice should be proposed partly from the "internal" point of view (that is, with reference to actual practices and beliefs held in a given

community); and second, that the dynamic model of moral reasoning should rely upon the mutual adjustment of the particular and the specific (in a manner similar to Rawlsian "reflective equilibrium"). It is argued that a general conception of social justice gives special weight to three distributive principles: distribution according to desert, satisfaction of basic needs, and retributive punishment.

(20) SAMPFORD, C.J.G., "Asymmetry in Legal and Social Interaction", in Archiv für Rechts- und Sozialphilosophie, Beiheft, 1987.

Most social theories assume that social interactions are generally "symmetrical" in that they are perceived in much the same way by the various parties to the interaction. This article argues that such views are mistaken and examines the reasons why most interactions are likely to appear different from the perspectives of those who take part and as such are "asymmetric". It argues that lawyers should be more aware of this than most social theorists because law claims to cover all of society and involves relationships between those of radically different backgrounds, values, and perceptions.

(21) SAMPFORD, C.J.G., "'Recognize and Declare' - an Australian Experiment in the Codification of Legal Conventions", in Oxford Journal of Legal Studies, 1987, 7, pp. 369-420.

This artice examines the Australian attempt to deal with the problems of constitutional conventions involving an authoritative, if unenforceable, statement of [most of] the conventions. It effectively attempts to provide a "rule of recognition" and is compared to the Canadian experiment which provides a "rule of adjudication" instead. The article considers various theories about the nature of constitutional conventions and whether they are consistent with codification. It discusses the authority of bodies which attempt to provide such authoritative statements and the status of the results. Most importantly, it considers the likely effect of codification on the conventions that are codified and those which are not, whether the aim of limiting or preventing constitutional crises is realisable, and hence whether it is an experiment that should be emulated or avoided.

(22) SAMPFORD, C.J.G., "The Senate and Supply: some awkward questions", in Monash University Law Review, 1987, 13, pp. 119-148.

This article asks the apparently foolish question: "Does the United States Senate's extensive powers over appropriations give it a power to force changes in the executive government and if not why not?" Answering

these questions provides new insights into the flawed reasoning of those who argued that the Australian Senate had such powers in 1975 and into the nature and origins of constitutional power in general. It also offers a new way of looking at the Australian Constitution and other "negotiated" constitutions - as "cut and paste" constitutions in which institutions and principles are borrowed from different and often unrelated constitutions because they are perceived to perform desired functions. Despite the apparent dangers of incoherence and inconsistency, the article argues that such constitutions can work quite well and that apparent failures of such constitutions may not be due to such "inconsistencies".

(23) SAMPFORD, C.J.G. and WOOD, D.A.R., "Codification of Conventions in Australia", in Public Law, 1987, pp. 231-244.

The article considers the historical and political background of constitutional conventions in Australia and how the codification was achieved despite the predicted difficulties in achieving agreement on the wording. It also foreshadows some of the issues discussed in the much longer article by Sampford in the Oxford Journal of Legal Studies (Winter 1987) on the likely practical and theoretical consequences of this experiment.

(24) SAMPFORD, C.J.G. and WOOD, D.A.R., "'Theoretical Dimensions' of Legal Education" in Australian Law Journal, 1988, 62, pp. 32-52.

The article argues that Australian (and indeed much Anglo-American) legal education lacks a theoretical dimension. It considers what that dimension involves, why it is lacking in Australian Law Schools and how it could be reintroduced into the legal curriculum without "marginalising" it.

(25) SMITH II, G.P., "The Province and Function of Law, Science, and Medicine: Leeways of Choice and Patterns of Discourse", in University of New South Wales Law Journal, 1987, 10, pp. 103-124.

The article discusses the following problems: (1) Scientific Freedoms v. Social Responsibility; (2) Sociobiology's Challenge and Opportunity; (3) The New Biology in America; (4) Toward a Standard of Reasonableness.

(26) STEVENS, R., "Coercive Offers", in Australasian Journal of Philosophy, 1988, 66, pp. 83-95.

This article argues that no proposal can be both a threat and an offer; that at least some offers are coercive, and that the widespread view that a necessary

condition for P to coerce Q is that P threaten Q, is false

(27) STEWART, I., "Closure and the Legal Norm: An Essay in Critique of Law", in Modern Law Review, 1987, 50, pp. 908-933.

The article investigates the conditions for and consequences of a critique of law, focussing on the concept of a legal norm under the concept of ideology while inverting the latter from a basis in the concept of alienation to a basis in that of "closure". It is argued that such an enterprise requires radical philosophical innovations and a radically novel conceptualisation of a legal norm. It is speculated that law and ideology may be the same. The argument refers particularly to the jurisprudence of Kelsen, Lenoble and Ost, and Kafka.

(28) A. E.S. TAY, "The Struggle for Law in China", in University of British Columbia Law Review, 1987, 21, pp. 561-580.

The article surveys the effect of Deng Xiaoping's new policies on the practice of and respect for law in the People's Republic of China.

(29) A. E.S. TAY, "Law and the Soviet State: Some Thoughts About the Future", in The Soviet Union and the Challenge of the Future, vol I, SHTROMAS, A. AND KAPLAN, M.A. (eds), New York, Paragon House, 1988, pp. 453-470.

The ideal of the rule of law is weakly developed in the USSR and the nature of the Soviet Union as an empire makes genuine democracy dangerous for the present rulers who have balanced, quite skillfully, Gemeinschaft and bureaucratic-administrative procedures with limited and circumscribed Gesellschaft guarantees. While the Gesellschaft forms are there for a future development of Soviet law in better times, their spirit is still missing.