# EXISTENCE WITHIN A LEGAL SYSTEM

## I

The question "What is Law?" has received many answers. "Law is the command of a sovereign", "Law is a hierarchy of norms", "Law is social engineering", "Law is fact", and so on. These answers, very different though they are, have one thing in common. They are all derived from a highly objective view of a legal system, in which the subject is treated so as to exhibit the actual facts and not the feelings of the writer concerned. These answers are given, as it were, from "outside". In other words the jurist places himself at a distance from his object of study and narrows his method of approach so that extraneous data cannot confuse the overall pattern. His study is both systematic and disciplined.

My central thesis is that it is equally important to look at a legal system[1] through the eyes of the untrained layman. The question then becomes "What is it like to be in a legal system?" From this starting point we are able to enquire into many things with which the jurist has not hitherto concerned himself. We may find out a person's attitude to the system. Does he fear this system? Does he understand how the system operates? Does he respect the institutions of the law like Courts and Parliament? What is the extent of his knowledge of substantive rules? Jurists have hardly ever been interested in these questions. Of those who have adopted an "inside" viewpoint; some who have been merely speculative and some who have made empirical studies in this area have barely touched on the more general, and to my mind, more important issues.[2] The bulk of jurisprudence has gone in the opposite dirction; it has tended to remove man-as-individual from its sphere of study and replaced him with man-in-terms of function. In theories of law, we read of "officials", "legislators", "citizens" and "judges", but rarely do we read of the individual person with his own attitudes, feelings and state of understanding of the legal system. The objective viewpoint in itself cannot be criticised since viewing law as a skeletal structure may be an aid to study. What can be criticised is the over-

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1. Although the idea of a "legal system" may be generally obscure (cf. Raz's *The Concept of a Legal System*—Clarendon Press 1970) I am using it here as a general term to encompass the various phenomena (institutions or the bare rules) which an untrained layman might associate with the word "law".
2. For example, surveys have been carried out to investigate the familiarity of persons aged beteen 16 and 24 with the incapacities of youth (sponsored by the *Latey Committee on the Age of Majority*) and public knowledge of consumer rights. (Cf. 1968 M.L.R. 361 esp. 372). An intensive analysis of compensation for motor accident injuries carried out by Harris and Hartz at Oxford (1967) has thrown some light on the attitudes to the profession and to the legal system in general, of persons involved in motor accident claims.

whelming predominance of this viewpoint. Others would go further and claim that this viewpoint itself brings about complacency and self-satisfaction among lawyers[3] but I do not wish to go that far.

My argument is that it is as important for us to know what it is like to be in a legal system as it is to try and study law from the objective, "outside" viewpoint. At the moment, the fault is one of imbalance. We know a great deal about what we mean when we use the word "law", we know something of the relationship between law and society in general, but we know virtually nothing of the individual's own experience of the legal system.

## II

Those who know a little of the thought of such philosophers as Kierkegaard, Jaspers, Marcel and Sarte will recognise the derivation of these sentiments. The philosophical movement known as existentialism begins and ends with a deep analysis of the subjective experience of the individual. Its concepts, methodolgy and conclusions are centred around man as an object of philosophical concern. As F. C. Copleston[4] says "it is man himself and man's own apprehension of being which seems to occupy the centre of the picture". Further "Modern existentialism may be regarded as a reaction against the reduction of the individual to an 'object' and against the mechanisation of life".[5] Put another way:—

> The thinker is concerned with the interior of the situation in which he is enclosed; with his own internal reality, rather than with the collection of qualities by which he is defined or the external relations by which his position is plotted.[6]

Transfer this emphasis to the philosophy of law and we have the central theme of this article. As well as thinking about "Law" as such we should also consider the individual's experience of this phenomenon. This is not to deny that jurists are existing individuals and are entitled to their own subjective experience of a legal system. Their experience, as it appears in their writings, will be of a different type from that of the untrained layman. It will be more systematic and rational with every attempt made to suppress emotion. However, the layman's view is still important. If his view is wrong, confused or deficient and this results in hardship or unhappiness, then in principle something should be done to rectify the situation.

The first modern affirmation of the prime place of the individual in philosophy was made by Soren Kierkegaard, a Danish cleric. His

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3. For example see Friedmann's comments at p. 289 of the 5th edition of his *Legal Theory*. Also see Max Weber's analysis of this trend at p. 298 of his *Law in Economy and Society;* 20th Century Legal Philosophy Series edition.
4. Aquinas Society Lecture No. 9, p. 2 (Blackfriars publication).
5. Copleston *op. cit.*, n. 4 p. 27.
6. Blackham, *Six Existentialist Thinkers,* p. 83.

line of thought was sparked off by a vigorous dislike of Hegel's "System" which seemed to Kierkegaard virtually to destroy the notion of man as a free, morally responsible agent, with his own experience of the world.

> . . . Two ways in general are open for an existing individual: either he can do his utmost to forget that he is an existing individual, by which he becomes a comic figure, since existence has the remarkable trait of compelling an existing individual to exist whether he wills it or not . . . Or he can concentrate his entire energy upon the fact that he is an existing individual. It is from this side, in the first instance, that objection must be made to modern philosophy, not that it has a mistaken presupposition; but that it has a comical presupposition, occasioned by its having forgotten, in a sort of world-historical absentmindedness, what it means to be a human being.[7]

Kierkegaard then goes on to claim that truth is subjectivity; that is, an individual's own experience of phenomena are decisive from him.

> Existence constitutes the highest interest of the existing individual, and his interest in his existence constitutes his reality. What reality is, cannot be expressed in the language of abstraction.[8]

Therefore abstract thought can (for Kierkegaard) never truly express reality. Indeed Kierkegaard totally discounts the significance of abstract thought.

> . . . the power of pure thought is illustrated by the remark of a lunatic in a comedy, that he proposed to go down into the depths of Dovrefjeld and blow up the entire world with a syllogism.[9]

Anthony Blackshield puts it well when he says of Kierkegaard "The emphasis on subjectivity and the corresponding antipathy to 'systems' mean that philosophical ideas are valid not to the extent that they are rationalised but to the extent that they are lived."[10]

The subjective experience of the individual is the foundation of existentialism. Following from this is the emphasis on individuality and a rejection of the type of thought which "type-casts" man. Gabriel Marcel is outspoken here.

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7. Kierkegaard; Concluding Unscientific Postscripts: Book Two, Part One, Chapter II, Section 4B. Found in "A Kierkegaard Anthology" ed. R. Bretall C 1946 Princeton Univ. Press p. 202.
8. Kierkegaard *op. cit.*, ed. R. Bretall, p. 212.
9. Kierkegaard *op. cit.*, ed. R. Bretall, p. 218.
10. A. R. Blackshield 'Some Reflections on Existentialism in Relation to Law" (1965) 10 Nat. Law Forum 67 at p. 80.

> Surely everything both within him and without him conspires to identify this man with his functions. The rather horrible expression 'timetable' perfectly describes his life.[11]

Therefore to see man as a mere cogwheel in a technical apparatus is highly inaccurate since it obscures the real nature of man. Existentialist thinkers go further and claim that to see man as an "object" is actually to endanger his individuality.

Further evidence of these concerns (individuality and the importance of a person's own apprehension of reality) is found throughout existentialist literature and philosophy. It is found in the method of Heidegger and Sartre which is phenomenological. This involves starting from the assumption that all sense-perceptions are fallible therefore we must suspend knowledge of anything physical, even ourselves. Then we can look closely at the way in which we can be said to be "in" the world. Thus human experience is no longer a means for analysing the contents of the world *but is itself an object for analysis.* It is found in the concept of "authenticity" which is common (in slightly varying forms) to all existentialists. Kierkegaard had a notion of being in "untruth" which roughly meant "going with the crowd" but which was the result of the individual's own choice. Sartre's concept of "inauthenticity" was where the individual surrenders his free choice and "goes with the crowd". Heidegger's inauthenticity was a person's normal, everyday mode of being where a person has "lost himself" in the everyday round of his activities, and could only become authentically himself when "triggered" by a mood of dread. Clearly the concept of "authenticity" and the disapproval of inauthentic living are affirmations of individualism. At first glance, the idea of authenticity might seem to run counter to general notions about law. Can one be law-abiding and still be authentic? Does the fact that one's life is to a certain extent dominated by rules imposed by the authorities prevent one from ever existing as an individualist? H. J. Blackham maintains that one can be both law-abiding and authentic on the basis of Jasper's view of ethics. "I am not under the ethical law, I adopt the ethical law" and that ". . . suicide and defiance of the law are no less consistent with my essence, than assimilation of the law and sensitively informed choice and activity."[12] Therefore it would seem that one can be an "authentic" law-abiding citizen as long as one does not merely allow the law to rule one's actions; but actively chooses the law as one's code of conduct. However, this view leaves ample room for disobedience of the law, since it is quite open to one to choose another code. Sartre, although the most nihilistic of the existentialists, speaks for them all when he says:

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11. Marcel in *Position et Approches,* p. 47 in the essay entitled "Concretes du Mystere Ontologique". Citadel Press Edn trans. Harari.
12. Blackham *op. cit.,* p. 50.

> . . . my freedom is the unique foundation of values and that nothing absolutely nothing, justifies me in submitting to this or that particular value, this or that particular scale of values.[13]

This "choosing" of the law as one's code of conduct can be distinguished from Professor Hart's "internal aspect" of rules. The "internal aspect" is an awareness in the group, that what they do is a general standard which ought to be followed by the group as a whole.[14] It is not necessary that this awareness should be as a result of conscious choice that such rules should be adopted. The "internal aspect" may itself arise out of habit; learnt mindlessly during childhood and carried on into adulthood. Whereas to be authentically law-abiding there should be at some stage, a conscious act of choice in which the citizen, aware of the benefits of a legal order, decides that this will be his code of conduct.

The corollary of absolute freedom is absolute responsibility, which is carried to extremes by Sartre. For the existentialist, a rule may enlighten but it never justifies the personal decision. One's decision is totally and irrevocably one's own responsibility whether it is a decision to obey a rule or to disobey it. For example a judge in appealing to a rule when justifying his decision is in a sense saying "I am required by rules to do X therefore it is not really my decision." Existentialism, on the one hand gives the judge complete freedom to act accordingly to his own scale of values and on the other hand denies that the judge can absolve himself from responsibility for his decision by claiming that he was bound to do so by rule of law. Sartre takes the idea to its logical extreme. A soldier is "responsible" for his war because he could end it (for him) by deserting or committing suicide. However Sartre makes it clear that this extended concept of responsibility has no relevance to the substantive legal issues involved.

> If therefore I have preferred war to death or dishonour, everything takes place as if I bore the entire responsibility for this war. Of course others have declared it and one might be tempted to consider me as a simple accomplice. But this notion of complicity has only a jurisdical sense, and it does not hold here.[15]

Indeed, there seems to be virtually no point of contact between existentialism and substantive legal issues. The philosophy of freedom and individualism does not help us decide which values are "best" for a legal system.

Both Friedmann[16] and Stone[17] briefly review the way in which existentialism has influenced jurisprudence on the Continent and in

13. *Sartre L'Etre et le Neant,* p. 76 (trans. Hazel Barnes London 1957).
14. H. L. A. Hart, *The Concept of Law,* p. 56.
15. Sartre, *op. cit.,* n. 13, p. 554.
16. *Legal Theory,* 5th End. pp. 199-201 and pp. 203-208.
17. *Human Law and Justice* (1965) pp. 89-99.

South America, but their surveys are incomplete. The greatest impact has been in the adoption of the phenomenological method but this in itself is not an existentialist innovation. Phenomenology was first developed fully by Husserl but was given an existential slant by Hiedegger, Sartre and Merleau-Ponty, although the extent to which Heidegger's work is existentialist is questionable. Heidegger himself has denied the label "existentialist" and stated that his philosophy is an analysis of Being and not Existence. Certainly his work does not indicate a concern for the individual, but only a very exhaustive analysis of concepts like "being-in-the-world", "being-in-itself" "Thrownness", "historicity" and "facticity".[18] These concepts are used to denote the various states by which a person's experience can be classified, but it is not within the scope of this article to explain them. It is sufficient to state that these classifications and the method useed to obtain them have been adopted and modified in theories of law by a number of jurists. However, the result has not been altogether successful, nor does it seem to me to be in line with the basic concerns of existentialism. Instead of emphasising individuality and a person's own experience of legal phenomena; we have a procession of abstract theories of law which try to give a general explanation of what law is without taking the individual into account at all. Werner Maihofer[19] tries to link the "is" and the "ought" by way of Heidegger's analysis of man as a "being-in-the-world", but unfortunately misues this concept. In order to show that man's being-in-the-world produces some insight into what ought to be, Maihofer must in some way connect man's involvement in the world with how the world out to be. He does this by showing that man exists in social pigeonholes in terms of profession, status etc., and that a man in such a pigeonhole ought to act in the way that others of his profession, status etc. have acted. Apart from sounding very much like a denial of individuality this line of reasoning is quite unsatisfying and is of little use in finding out what "the law" ought to be. As Julius Stone says in a cutting analysis of Maihofer's thesis:

> . . . Heidegger's conclusion does not necessarily have, and was not necessarily intended to have, the meaning in which it could really serve to remove the logical difficulty of deriving facts from values.[20]

Others have made use of the phenomenological approach including Heinrich Henkel[21] and Carlo Cossio.[22] Cossio's approach is especially

18. Sein und Zeit (*Being and Time,* trans. Macquarrie and Robinson, S.C.M. Press 1962) is best approached with some knowledge of Husserl's phenomenology. An excellent treatment of both Heidegger and Husserl is found in Molina's *Existentialism as Philosophy.*
19. "Droit Naturel et Nature des Choses" (1965) 51 Archiv. R-und Sozialph. p. 232, also 44 Archiv. R-und Sozialph p. 145.
20. (1964) 50 Achiv. R-und Sozialph 145 at p. 151.
21. See an account of his *Introduction to Legal Philosophy* by Karl Engisch in 1968 Ottawa L.R. Vol. 13 No. 1 (*trans.* Ilmar Tammelo).
22. See Latin American Legal Philosophy (20th Legal Philosophy Series Chapter II).

interesting since he tries to analyse the judicial decision in terms of the type of classification suggested by Husserl. However, I would deny the label existentialist to both these jurists, since neither is interested in the individual's own apprehension of the legal system.

Georg Cohn claims that his view of law is existential in his book Existentialismus und Rechtwissenschaft.[23] Cohn's stated aim is the abolition of conceptual jurisprudence, and its replacement by a "return to the basic". The "return to the basic" according to Cohn, is the recognition of the fact that law resides in "the concrete singular case". I find it hard to see any relationship between the concrete singular case and existentialism for although Jaspers talks of the "drive towards the basic",[24] he is speaking in the context of the philosophy of Kierkegaard and Nietzsche.

The Continental jurists seem to have either applied existentialist concepts without modification, misapplied them or have simply discarded the existential emphasis while retaining the phenomenological aspect. Part of the difficulty may lie in the poor communications between the Anglo-American and European juristic worlds. In the common law countries we are accustomed to a legal education closely tied to fact situations, whereas the Continental law student is more comfortable in the realms of principles and concepts. The common law jurist balks at abstract, generalised theories of law and is more at home with the more closely-defined aims and ideas of positivism.[25] As Lon Fuller says:

> It seems almost a law of the sociology of intellectual activity that neat and tidy theories win out over those that are complicated and beset by unresolved tensions.[26]

This difference can be clearly seen in the area where South American jurisprudence has absorbed existentialism. In the common law course of legal education there is no provision (nor is there room) for a discussion of personality, except in the limited sphere of corporate personality. In South American and European law schools a general study of personality is part of the course. In distinguishing between the concepts of personality and personality-in-the-law, the insights of existentialism and particularly phenomonology have been employed.[27]

Other jurists have shown affinities with existentialism. Gustav Radbruch, in saying that the relationship between fact and value is casual but not logical has taken a step towards an existentialist position:

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23. *Existentialism and Legal Science* trans. G. H. Kendall (1967) Oceana Publication.
24. *Reason and Existenz*: First Lecture, section 2(b). Routledge and Kegan, Paul and Noonday Press 1956.
25. See Stone: (1961) 13 Stanford L.R. 670.
26. The Path of the Law since 1967: Harv. Sesq. Papers p. 59.
27. See Latin American Legal Philosophy, pp. 144 ff.

> In discussing a theory (of values), the psychological causes of its origin must not be introduced unless the purpose be to terminate the discussion, to demonstrate that further discussion is futile because thoughts are shown to be so tenaciously tied to existence as to preclude any understanding.[28]

Lon Fuller has never indicated an existentialist influence in his work but he is certainly "in tune" with it. Kierkegaard was motivated by a desire to break free of Hegelian totalitarianism which endangered the notion of man as a free, responsible agent. Fuller also, rejects any explanation of law which does not take account of this view of man:

> Every departure from the principles of the law's inner morality is an affront to man's dignity as a responsible agent. Today a whole complex of attitudes, practices and theories seem to drive us towards a view that denies that man is . . . a responsible self-determining centre of action.[29]

Fuller's insistence on the importance of communication parallels very closely Karl Jaspers' view on the subject. Jaspers' philosophy has been called "a philosophy of communication"[30] and in his book "The Perennial Scope of Philosophy" Jaspers concludes "In today's misery we have learned to recognise the crucial claim which communication has on us."[31] Compare Fuller:

> If I were asked, then, to discern one central indisputable principle of what may be called substantive natural law—I would find it in the injunction: Open up, maintain and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel and desire . . .[32]

Fuller claims that preserving these channels is the task of the morality of aspiration, and Friedmann claims that on the basis of Jaspers' philosophy the law also has this protective function.[33]

I have shown that to apply the more extended analysis of existentialism to law has given rise to theories which are either unsatisfactory or contradict the basic concerns of this philosophy. I feel justified, therefore, in taking a simpler view of the impact of existentialism on our ideas about law. This impact is, to doubt the sufficiency of a positivist standpoint and to affirm the importance of the existing individual and his apprehension of the legal system in which he finds

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28. *Legal Philosophies of Lask, Radbruch and Dabin* (20th Legal Philosophy Series p. 55 (translation of Radbruch's Rechtsphilosophie).
29. *The Morality of Law,* pp. 162, 163.
30. *Karl Jaspers Bibliography* (ed. Schlipp), p. 211.
31. *Der Philosophische Glaube.* Fischer Bucherei (1962) p. 152.
32. Fuller *op. cit.,* n. 29, p. 186.
33. Friedmann's *Legal Theory* 5 edn. p. 200.

himself. As well then, as seeing law in terms of formal structure and in terms of function and process, we must also look at law in terms of its impact on the individual. How does the person untrained in law view the legal system in which he finds himself?

## III

To show the kind of study which may profitably be pursued, I have conducted a survey designed to reveal something of the layman's attitude to various aspects of the legal system. The survey was conducted by way of personal interview based on a questionnaire (see appendix). The sample consisted of 100 persons selected at random from the Porirua Electoral Roll and the answers given showed a high degree of uniformity in both attitude to, and knowledge of, the component parts of the legal system. The first five questions were designed to establish the amount of contact with the components of the legal system—court attendances, contact with police in the course of duty, consultations with lawyers and knowledge of Acts of Parliament. Two further questions were designed to show how familiar the interviewees were with Court procedure. The next set of questions was aimed at finding out the interviewee's attitude to the Courts. This was done by asking how he thought he would feel if he was before the Court on a charge of careless driving or as a witness. The next questions were directed to revealing attitudes to the legal profession, the judiciary (including the magistracy) and the police. Five questions relating to various rules of substantive law were asked, and finally, the subject was asked under what circumstances he would obey a Court Order. Of the 100 persons approached, only four refused to be interviewed. The remainder was composed of 48 men and 48 women. The survey was conducted during the months of June and July of 1970.

Attitudes to the various aspects of the legal system rarely reached the extremes of complete satisfaction or outright condemnation. Only one member of the sample felt that Courts, police and lawyers were members of a vast conspiracy determined to deprive him of liberty. Three people expressed outright satisfaction with the aspects of the legal system on which they were questioned, but it must be noted that all three had had absolutely no contact with either Courts, police or lawyers.

Satisfaction with the profession was generally moderate and many people qualified their remarks by saying that "some lawyers were crooked". 44% of the sample were almost wholly satisfied with the profession (apart from a few criticisms), 24% thought that there were "a few crooked lawyers", 19% thought that up to half the profession was crooked. 9% went so far as to say that over half of the profession were crooked and the remainder had no opinion to offer or refused to answer. Exactly what was a "crooked" lawyer was not often defined. The most popular criticisms of lawyers were: "they cost too much" (72%), "they are too slow" (44%), "they are in it for the money

alone" (22%), and "they are too aloof and difficult to approach" (12%). Other popular criticisms were "they have a brusque and indifferent manner" and "they stick together and are too cliquish". Some remarks about lawyers were unprintable.

Very few people had anything to say about judges and magistrates. 41% of the sample had no comment whatsoever and the views of the remainder were favourable apart from one or two who thought magistrates should be better trained. 73% of the sample thought that, if given a choice, they would elect trial by jury and a number, when asked to explain why they might feel nervous in Court, said that they did not have complete confidence in the magistrate to come to the right decision.

There was general satisfaction with the activities of the police. Although the survey was being carried out while the treatment of demonstrators at Vice President Agnew's Auckland visit was still a talking point, only 5% of the sample referred to this event. 15% of the sample thought that the police were inclined to over-react on occasions. Indeed, the rash of demonstrations taking place during the period when the survey was in progress may have influenced attitudes the other way. When asked whether police powers ought to be curtailed, extended or left as they are, 26% of the sample advocated an extension of police powers (implied by approving the police's current activities) and only 11% wanted a curtailment. The impression gained from these figures then, is that the majority of the sample feel that the police are "with" them, that many people have doubts about the legal profession and a significant proportion feel that the profession, in various ways, is "against" them and that attitudes to the judiciary are largely unformed but when formed, are generally favourable.

Running through these figures is a clear trend towards "contamination". That is, until a person is involved in Court proceedings or some other form of direct contact with the law, he has an idealistic view of the system, but as soon as he makes this contact he tends to become opinionated, more critical and sometimes resentful. This trend was especially notable among the women interviewees. 28 out of the 48 women who answered the questionnaire had had absolutely no contact with the legal system, but invariably their impression of its components was a happy one. A number said that they had complete trust in the Courts to come to the "just decision" every time (their actual words). This trend may in part be ascribed to human nature—people who have been before the Courts as defendants in criminal proceedings may be resentful but the contact by which people were "contaminated" was often due to events other than Court proceedings of which they were the object. For example, people whose only contact with the law arose through consultation with a lawyer were still critical of the other aspects on which they were questioned. A further illustration of this trend is seen in the fact that of the 15 persons in the sample who had performed jury service, only one would now opt for jury trial if he had the choice.

The most interesting aspect of the survey was the attitude to Court appearances. When asked how they would feel if before the Court on a charge of careless driving, 94% of the sample (i.e. 94 out of the 96 who answered the questionnaire) admitted some degree of nervousness. When asked why they thought they might feel nervous, only 36% replied that they feared the punishment. It seemed that apprehension of Court appearances is caused by other factors. 24% of the sample said that they thought they would be nervous because they would not understand the procedure. Of this group only two persons had appeared in Court; the contact of the remainder with the legal system was minimal. 24% of the sample would be nervous because they were not able to trust the Court to come to the correct decision and 10% said that they thought their nervousness would be caused by the unfamiliarity of their surroundings or the feeling that "they had no place in a Court". These figures show that a significant group is apprehensive of Court appearance because of the quite alien nature of the procedure and the surroundings. This seems to stem from a lack of comprehension of the processes of Courts in general and is something which ought in principle to be rectified. An educational programme seems to be the answer.

This attitude to Courts also shows itself in the attitudes to witness appearances. 60% of the sample openly admitted that they would be nervous. 12% said that they would not be nervous at all and the remaining 22% said that they would feel duty bound to appear and would suppress their apprehension; or something to that affect. Of the 60% who expressed nervousness at the idea, roughly half didn't know why they would feel nervous and one quarter felt they would be nervous because of the heavy responsibility weighing on them. Of the remaining quarter, most felt nervous because of the threat of a probing cross-examination and a few admitted they would feel nervous because of general unfamiliarity of the whole process.

One of the more disturbing figures gained from the survey was that 91 out of the 96 who answered the questionnaire could not recall by name any Act of Parliament or Regulation. Most could say only "Oh, you know, the one about not going into the pubs until you're twenty" or "the one about drugs". The effect of this lack of knowledge must be to hinder any attempt on the part of the layman to find out the law on any particular topic. Textbooks are generally available but some will be out of date and many would necessitate some knowledge of case-law technique for the layman to be able to interpret them. Publications like Consumer and some Trade magazines occasionally give some treatment of legal topics but in themselves do not cover a wide enough field. If one couples the 91% figure with the attitude to lawyers, an alarming situation is revealed. When asked at what stage they would consult a lawyer, 8% of the sample said that they would do so to have a chat about their problems in general; 26% when there was an aspect of law they did not understand; 21% when

they wanted to begin Court proceedings and 52% only as a last resort.[34]

The survey included five questions relating to substantive rules of law. The interviewees were asked to state whether they thought the statements given were true or false. The answers showed that most (68%) were aware that a constable could not lawfully detain a person against that person's will without arresting him. Roughly half (47%) were aware that a person could not sue in respect of a tortious action committed more than seven years ago. Most (86%) were aware that knowledge that the goods had been obtained by unlawful means was necessary to prove a charge of receiving stolen goods. Few (2%) knew the significance of the terms "Conditional Sale" and "Genuine Hire Purchase". Only a small group (36%) knew that an oral agreement could be binding.

The final question relating to Court Orders showed that a signficant portion of the sample either did not respect the Courts or did not realise the binding nature of a Court Order. Only 60% said that they would always obey a Court Order and 36% said that they would obey it only if it was fair. Most of the 36% were women!

## IV

Clearly the survey leaves many questions unanswered but it does illustrate the type of investigation required if we are to adopt the concern of existentialism as the concern of jurisprudence also.

The investigation of the individual's experience of legal phenomena has hardly begun. The survey indicates a significant element of fear in attitudes to Court appearances. This aspect of existence within a legal system should be more closely investigated since if people really do fear the law in some way we must find out why, and then rectify the situation. The survey indicated some correlation between unfamiliarity with procedure and nervousness at the thought of Court appearance, while no correlation appeared between knowledge of substantive rules and nervousness. This would suggest that a programme of education designed to familiarise people with the workings of the Courts might have the effect of lessening their fear of them. However, a far more thoroughgoing and extensive survey would need to be undertaken in order to prove first, that fear existed to an extent which warranted remedial action and secondly that fear arose out of ignorance of procedure and not some other cause. If in fact the fear of a Court appearance arises out of something other than ignorance then that fear may be very hard to combat. For example, if fear arose out of the possibility of punishment to a much greater extent than was indicated by the survey then there will be no remedy without

34. The overlap in percentages is due to the fact that a number of interviewees said that they would consult a lawyer both to begin Court proceedings and to ask about an aspect of the law they did not understand.

in some way reducing the punishments themselves. Although the survey indicated an opposite trend, it may be that persons knowing little of the workings of the Courts have a happy impression of their operation and therefore have little fear of Court appearance. If this were the case then it might be better not to awaken them, and thus protect them from being afraid for a greater length of time than is necessary.

The extent to which people "respect" the law should also repay investigation. The question in the survey relating to a Court Order did not clearly indicate disrespect since a number of persons could have answered on the basis of a misconception of what a Court Order was. Certainly, the attitude to judges and magistrates indicated either indifference or respect, but no clear correlation arose between respect and fear. Judging by some of the comments made about judges; respect for the judiciary arises out of a customary acceptance of their high standing in the community. In other words ,it is the position and not the man which is respected. Exactly in what way this respect for the position of judge is transferred to respect for "the law" or "the Courts" is difficult to say. Linguistic analysis has a valuable role to play here. Is it meaningful to say "I respect the law"? It may be that a person who says this means no more than he respects the judge who made it. Just as the analytic approach sometimes depends on empirical investigation in society[35] so the empiricist must sometimes analyse his conclusions in terms of the precise meaning of words. "Respect for the law" must be an extremely complicated concept. Can one "respect the law" and at the same time have little respect for Courts and Parliament? A survey asking people if they respect the law, why, and what they mean by such a statement might yield interesting results both for the person investigating attitudes to law and for the linguistic analyst. Such results might not be without significance also for those interested in a higher degree of obedience to the law.

The extent of knowledge of substantive rules is an area where we should know more. The survey showed perhaps a higher standard of knowledge than was expected, but in order to get a true picture, a greater range of questions is required. If there is lack of knowledge, does this handicap the citizen both in his attempts to obey the law and to take advantage of it?

Further study could be made of the possible relationships between a person's fear, knowledge and respect of the law. Does fear enhance respect or disrespect? Does knowledge of procedure have any effect on respect? Does the correlation between fear and knowledge indicated by the survey have any relationship with respect? The survey failed to give definitive answers to these questions, but an improved questionnaire and a larger sample could do so.

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35. See Hughes' criticims of Harts' *Concept of Law,* (1962) 25 M.L.R. 319.

With this type of study going on we are able to balance our view of the law. No longer are we restricted to a functional view of man. Man is no longer the mere cogwheel in a technical apparatus to which Marcel objected so strongly. Instead, we are approaching the point where man can be viewed from the reality of his situation and where we can see him as a responsible, self-determining centre of action.

J. Connell

## APPENDIX

My thanks go to Professors A. J. W. Taylor of the V.U.W. Department of Psychology and D. L. Mathieson of the V.U.W. Faculty of Law for valuable assistance in compiling this questionnaire.

Intro: My name is and I am a student of law at Victoria University. As part of my studies I am conducting a survey of attitudes to law in this district. I would be grateful if you would answer a few questions.

Be assured that anything you say will be held in the strictest confidence and there is no way in which anyone will be able to identify you with your answers.

1. Have you had occasion to attend the Magistrate's Court? If so, how many times?
2. How any times have you consulted a lawyer within the past two years?
3. How many times have you spoken to a policeman within the last two years?
4. How many Acts of Parliament or Statutory Regulations do you know of? Name them?
5. Have you had occasion to attend the Supreme Court. If so, how many times?
6. Does the Magistrate always give the accused a chance to explain his actions? (Yes/No/Don't Know).
7. Can you be committed for contempt of Court without a trial? (Yes/No/Don't Know).

1. What kind of feelings would you have if you were required to attend Cour on a charge of careless driving. (Verbatim).
2. Would you mind telling why you think you might feel that way. (Verbatim).
3. What kind of feelings would you have if you were required to attend Court as a witness. (Verbatim).
4. Would you mind telling why you think you might feel that way. (Verbatim).
5. Would your feelings be any different if you were in Court for:
   (a) Negligence
   (b) Breach of contract. (Verbatim).

1. What are your general thoughts about lawyers? (Verbatim).
2. What criticisms do you have of lawyers. Do they include:
   (a) Lawyers are too slow.
   (b) Lawyers cost too much.
   (c) Lawyers are only in it for the money and don't really care about their clients.
   (d) Lawyers are too aloof and difficult to approach. (Verbatim).

3. What are your general thoughts about Judges and Magistrates? (Verbatim).
4. When would you consult a lawyer:
   (a) Only as a last resort.
   (b) Only if you want to begin Court proceedings.
   (c) When there is an aspect of law you don't understand.
   (d) To have a chat about your problems in general.
5. Which would you rather be tried by if given the choice?
   (a) A judge alone.
   (b) A judge and jury. (Verbatim if reason given).

1. I cannot be sued in respect of a negligent act which I committed seven years ago. (True/False/Don't Know).
2. A constable must always arrest a person if he want to detain them against their will (True/False/Don't Know).
3. I go to a shop, try on a suit, say that I will buy it at the marked price and will call the next day to pay for and pick up the suit. I then discover that I can't afford it. I go to tell the shopkeeper but he insists that our agreement is binding and will take me to Court if I do not buy the suit. Can he do this? (Yes/No/Don't Know).
4. A T.V. set taken out under a genuine hire purchase agreement can be returned to the dealer at any time but only if the dealer agrees to its return. (True/False/Don't Know).
5. I can be convicted of the crime of receiving stolen property only if I know that the goods were obtained by illegal means. (True/False/Don't Know).

1. What are your feelings about the Police generally. (Verbatim).
2. The activities of the Police are controlled by law. Do you think:
   (a) That the law should restrict the activities of the Police a bit more?
   (b) That the law should be relaxed so as to give the police more scope?
   (c) The law is satisfactory now?
3. Would you obey a Court Order?
   (a) Always.
   (b) Always unless the Order is unfair.
   (c) Only if it is convenient.
   (d) Never.

# "MOUNT WESTRAY"

*From Gray Dawes Westray Group Newsletter November, 1969*

Older members of the Gray Dawes Westray Group may remember that in 1936 Jim Westray, a Grandson of the original J. B. Westray, was killed following a plane crash, in the MacPherson Ranges near Brisbane. This incident hit the headlines of the World Press at the time because the Stinson Monoplane aircraft was missing for 9 days before it was eventually searched for and found by Bernard O'Reilly. Jim Westray and two others survived the crash and he, although badly burned, was in the best shape and therefore went for help. The country is extremely rugged and he died after falling down a cliff. At the time the Australian people erected a Memorial Stone to Jim Westray which is situated beside the New England Highway on the New South Wales/South Queensland border. Last year the Queensland Placenames Board proposed that a previously un-named Peak in the MacPherson Ranges be named Mount Westray. This Mountain is part of the Lamington Plateau between two forks of Christmas Creek. The Mountain looks out over the Tweed Valley.

(Note: J. B. Westray & Co. (N.Z.) Limited, Insurance Brokers, is the New Zealand Company in the group.)