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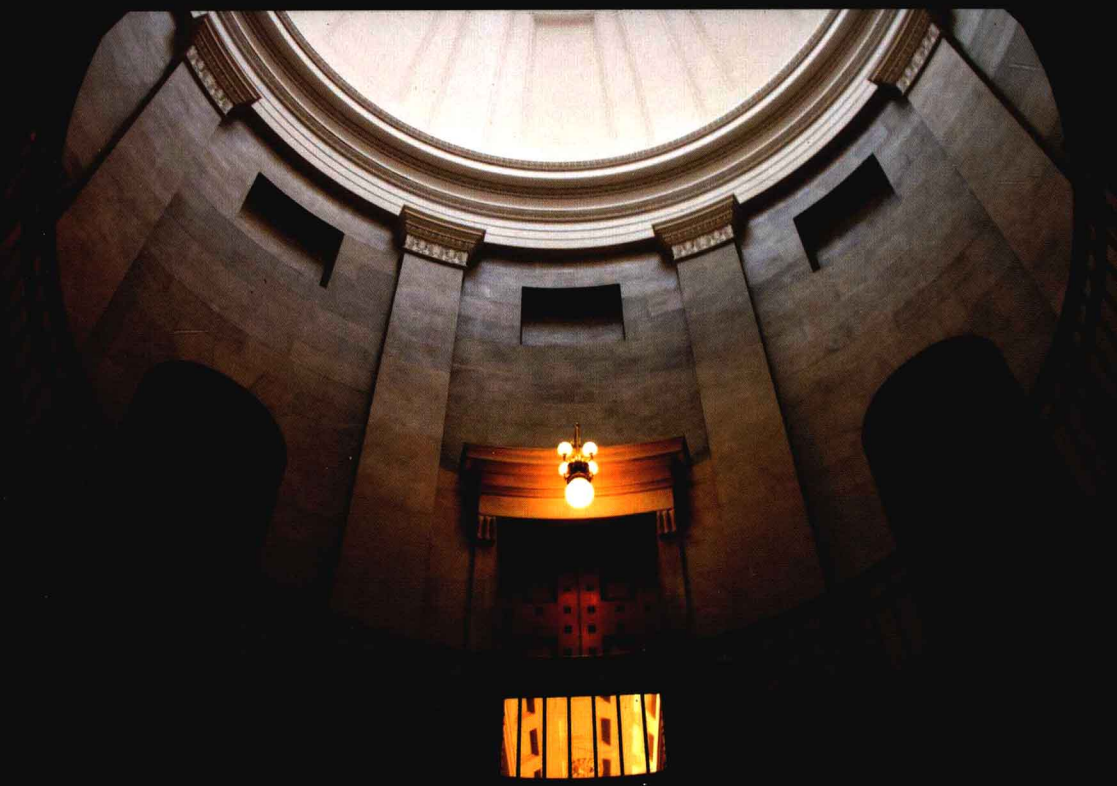
JURISPRUDENCE

THEMES AND CONCEPTS

SECOND EDITION



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Jurisprudence

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Jurisprudence

Themes and Concepts

SECOND EDITION

Jurisprudence: Themes and Concepts offers an original introduction to, and critical analysis of, the central themes studied in jurisprudence courses. The book is presented in three parts each of which contains general themes, advanced topics, tutorial questions and guidance on further reading:

- Law and Politics, locating the place of law within the study of institutions of government
- Legal Reasoning, examining the contested nature of the application of law
- Law and Modernity, exploring the social forces that shape legal development.

This second edition includes enhanced discussion of the rise of legal positivism within the context of the rise of the modern state, the changing role of natural and human rights discourse, concepts of justice in and beyond the nation state, the impact of emergency doctrines in contemporary legal regulation, and challenges to the rule of law in light of shifting and competing demands for new types of social solidarity.

Accessible, interdisciplinary, and socially informed this book has been revised to take into account the latest developments in jurisprudential scholarship.

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Acknowledgements and attributions

When we wrote the first edition of the book, we little thought that we would ever be writing a second. That we have been asked to is hopefully an indication that at least some students and teachers have enjoyed using the book and agree with its general approach to the subject. That said, we also received some constructive feedback on the first edition and we have been able to draw on this in putting the second edition together.

The main shape of the book remains the same. It is divided into three broad themes, which are themselves divided between the general and the advanced topics. We received some comments that in seeking to break with a certain approach to the teaching of jurisprudence, we had perhaps gone too far in not providing sufficient of an introduction to certain key theorists, such as HLA Hart, Hans Kelsen or Emile Durkheim, or that we had dealt with other topics of central importance, such as validity or justice, too quickly. We have accordingly sought to address these concerns. The content of the general sections has been rearranged, some sections rewritten to provide more systematic coverage, where necessary, and some issues which were perhaps a bit too complex have been moved into the advanced sections. There have also been changes made to the content of the advanced sections, with some new topics added, notably on law and deconstruction (in Part II) and on law and autopoiesis (in Part III).

As before we have benefited greatly from the generosity of friends, colleagues and students and we are pleased to acknowledge these debts. Some have contributed whole sections; others have assisted by updating or amending sections that were contributed to the first edition; and in some cases we have taken text from the first edition and reworked and updated this ourselves on the basis of feedback from students and colleagues. The more substantial contributions of certain colleagues are recognised in the attributions below.

In one instance the need to make updates ourselves has been forced upon us by circumstances. Neil MacCormick, who contributed enormously to the first edition by providing sections on sovereignty and the rule of law, died in April 2009. We have accordingly updated and lightly amended these sections as seemed necessary. More generally, though, Neil demonstrated through his life and work how jurisprudence could be seen as part of the project of government broadly conceived and he was always alert to the need to engage widely with political and social issues. It is in recognition of this spirit that we dedicate this second edition to him.

SV/EC/LF
November 2011
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In Part I, the introduction, the sections on sovereignty and the rule of law were originally written by Neil MacCormick. The section on the inner morality of law was originally written by Zenon Bankowski. The sections on 'rights' and on 'law, politics and globalisation' were written by Gavin Anderson.

In Part II, the section on law and deconstruction was written by Johan van der Walt.

In Part III, part of the sections on the transformations of modern law and the whole of 'legal pluralism' were written by Gavin Anderson.

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Abbreviations

ADR	alternative dispute resolution
CJ	Chief Justice
CLS	Critical legal studies
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EEC	European Economic Community
EU	European Union
GDP	gross domestic product
ICC	International Criminal Court
ILO	International Labour Organisation
IMF	International Monetary Fund
MEP	Member of European Parliament
MP	Member of Parliament
NGO	non-governmental organisation
PFIs	private finance initiatives
PPP	public private partnerships
PVS	persistent vegetative state
TRC	Truth and Reconciliation Commission (S Africa)
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNIDROIT	International Institute for the Unification of Private Law (Fr)
US	United States
WTO	World Trade Organization

Contents

Introduction

In a series of lectures delivered at the University of Glasgow beginning in 1762, Adam Smith, the Professor of Moral Philosophy, delineated the province of jurisprudence. He defined it in general terms as 'the theory of the rules by which civil governments ought to be directed', otherwise, 'the theory of the general principles of law and government' (Smith 1978/1762, pp 5 and 398). This he saw as comprising four main objects: the maintenance of justice, the provision of police, the raising of revenue and the establishment of arms. What immediately strikes the modern reader of this definition is its breadth. He includes subjects such as taxation or police and security that obviously concern relations between state and citizen, but which are all too often viewed as purely technical areas of government. Just as importantly a theory of law and government for Smith requires that we attend not merely to matters of the definition or application of law, but also of how these relate to politics and the practice of governing. His approach to these questions is striking, for he approaches the topic with a method that is (in contemporary terms) both historical and sociological: that is to say that he is concerned with both the question of understanding the historical development of forms of law and government, and that of how it relates to stages of social and economic development of the society to be governed

The contemporary study of jurisprudence rarely aspires to a comparable breadth in either subject matter or method. Anglo-American jurisprudence, indeed, has for a long time been more interested in law than government, has focused more on abstract rules than institutions, and has paid only patchy attention to the historical or sociological context within which law and legal and political institutions develop. While we do not have the space here to address the question of why it has come about that the scope of province of jurisprudence has narrowed so dramatically, we would argue that the contemporary approach is too narrow and too technical. It not only risks losing the interest of students, but more importantly risks undermining the relevance of the subject itself. The aim of this book, then, is to restore some of the breadth of subject matter and method that animated the studies of our illustrious predecessor here at the University of Glasgow.

Our starting point in this enterprise is that jurisprudence is the study of law and legal institutions in their historical, philosophical and political contexts. The study of law in this sense cannot be abstracted from the questions of the nature and theory of government; indeed, the two must necessarily be considered in their relation to each other. This book offers a range of competing interpretations of how the role of law is best understood, considering among other things the relation between law and politics, law and the economy, law and moral values, the role of judges in a democracy, and the virtues of the rule of law and threats to its realisation in practice. The book provides students with an introduction to, and overview of, the historical and philosophical

development of understandings of a range of profoundly important social concerns, with the aim of enabling them to analyse and reflect on the role of law and legal practice more broadly.

These are complex issues that invite complex answers. We have attempted to navigate through the complexity by organising the material around three broad thematic axes: law and politics, legal reasoning, and law and modernity. The first seeks to locate the place of law within the study of institutions of government; the second examines the application of law in particular cases, with specific reference to the relation with other disciplines or rationalities; and the third attempts to place the study of law within the specific historical context of the development of modernity. We shall have more to say about each of these themes shortly, but before doing so, we want to say a little more about our 'thematic' approach to this subject.

All too often, in our experience, jurisprudence is taught in one of two ways. Either it is presented as a series of imaginary debates between positions or approaches that seem to have little in common (natural law v positivism, conceptualism v realism, and so on), or it is taught as a stately progression from one great thinker to another (Bentham to Austin to Hart to Dworkin, and so on). The problem with the first approach is that it presents the debates in a rather abstract way, wrenching them out of any sort of context in which the debate might be considered meaningful. It is difficult, especially for a student encountering jurisprudence for the first time, to care much about the relative merits of natural law and positivism in the abstract, and so the exercise becomes one of the rote-learning of the 'strengths' and 'weaknesses' of the different positions. However, we consider that these kinds of debates can become much more meaningful when considered in the context of what they can say about different theories of sovereignty, of the relation between legal power and political power, or the day-to-day realities of the judicial interpretation and application of legal rules. Likewise, presenting ideas through the theories of thinkers who advanced them, can make the study of jurisprudence seem a hermetically sealed world, developing with reference only to its own history and where jurists engage only with other jurists. Against this we would argue that it is important to understand something of the historical context in which particular theories were developed, or of the problems of state and law that the theorists were addressing. Jurisprudence, in other words, should neither be understood nor taught as a purely abstract or philosophical subject. The most important jurists and the major jurisprudential theories have much to say about the pressing legal and political issues of their, and our own, time.

The way in which we have sought to address these shortcomings in this book is to address theoretical debates and issues through the three broad themes and a series of 'sub-themes' and concepts. The themes lay out certain broad contexts within which questions of law and government should be considered; and sub-themes develop issues and debates, showing how particular debates, far from being abstract or distant from the 'real world', are often addressing matters of central political or legal concern. Our aim in doing this is to try and make the subject of jurisprudence easier to understand by relating it to the kind of subjects that are already being studied in the curriculum of the LLB. Thus, for example, we take concepts such as sovereignty or citizenship which already have an established place within the law curriculum, but address them in a way that seeks to broaden and deepen the issues around them, so

that the student can see that they are not just matters of technical, positive law, but are also related to contemporary social and political issues.

This has three other consequences that we should note. We have, so far as possible, eschewed an approach that looks at the 'complete' theory of a particular philosopher, or indeed (within limits) an approach that looks at discrete thinkers at all. Instead, our thematic approach means that we focus primarily on issues, and thus what particular thinkers had to say about these issues, rather than addressing a corpus of thought. This means that the work of certain theorists, such as HLA Hart or Max Weber appear at different places in the book, where we address different aspects of their overall work in order to illuminate the topic under discussion. What is lost in the failure to cover the 'complete' theory is hopefully made up for by the fact that we are able to present a range of positions in relation to the issues. This also has consequences for the way that certain concepts are addressed, as the thematic approach means that certain issues will appear more than once, in different sections of the book, and will be addressed differently in the light of the context established by the overall theme. Thus, for example, the issue of globalisation is discussed in relation to theories of sovereignty and the rule of law in Part I, but is then discussed again from the different perspective of theories of legal modernity and globalisation in Part III. This should underline the point that there is not necessarily a single correct approach to an issue, but that the approach or understanding might depend on the context or perspective from which it is addressed. The third consequence relates to the range of issues covered. The book misses out certain issues that might normally be covered in a jurisprudence course – such as theories of punishment or responsibility – while also including others that are not, perhaps, part of the conventional course. This is not because we do not think that these things are important – far from it. However, in seeking to present a relatively short introduction to the subject we have preferred to focus on the issues that we take to be related to our three central themes – and which are also related to our own research and writing in the area. We are not so much setting out to define the scope of the subject as to set out a method and themes that will whet the appetite of the student and hopefully lead them on to a fuller study of the subject.

In doing so we are thus moving away from what has become in recent decades an unfortunate tendency to channel jurisprudence through the distorting lens of analytical jurisprudence. This tendency has resulted both in an increasingly narrow specialisation which separates the study of jurisprudence from other disciplines, and its marginalisation from other parts of the law curriculum. By seeking to challenge these unhappy exclusions we hope to engage students' curiosity about the role and worth of law, its promises and its drawbacks, its history and the challenges it faces now and in the future.

The themes

As we have suggested above, each of the themes is intended to set out a broad framework or context within which we can address more specific issues about the role and function of law. Each broad theme thus sets out a general problematic – the relation between law and politics; the nature of legal reasoning or argumentation; law and modernity – and discusses a range of theoretical issues and perspectives. There is a

certain logic to this approach for it is our starting point (with Smith) that a central aim of jurisprudence must be a theory of the general principles of law and government. Thus we begin by looking at the relationship between law and politics.

The articulation of law and politics is one of legal and political theory's most perplexing questions. On the one hand, law is an expression of political sovereignty, the product of political processes of will-formation and entrusted to the political apparatus of the state for its administration and enforcement. And yet at the same time it claims autonomy from politics, an objective meaning of its own, an expression of principle, even justice, somehow above and beyond the 'messy' world of politics. Moreover, in recent decades, legal organisation and society generally have seen massive shifts in the political landscape through the emergence of regional institutions such as the European Union, as well as the pressures that are associated with processes of globalisation. How law is involved in, and responds to, these developments requires scrutiny if we are to understand more fully the nature of the contemporary relationship between law and politics.

Under the second category we collect theories and issues that surround legal reasoning. The questions here are often more technical, but arguably no less political or controversial. The question is whether law invites and deploys a mode of reasoning that is peculiarly its own, characteristically involving the application of rules to cases, or whether and to what extent ethical and political concerns, perspectives and imperatives impact on legal reasoning. Again, the stakes are high, particularly given that there is a common expectation that legal rules, once instituted, are to be largely insulated from disagreements that we might call political or ethical, which might be thought to be more properly debated in the political rather than the legal domain. But if that is the case, is a politics of legal reasoning feasible, and if yes, is it also desirable?

Finally, in the category of 'law and modernity' we take a step back into the sphere commonly referred to as the sociology of law, to ask more general questions about the role that law plays in society, its function in maintaining social structures and its role in realising the project of modernity. Here we attempt to place some of the issues that have been addressed in the first two sections of the book in a social and historical context. How, for example, has the relationship between law and politics, or the modern state, developed? How is this conception of the state related to the social and economic structures of society, and how might it change in the context of developments such as globalisation? The aim here is to question whether the projects and ends of modern law continue to be adequate in contemporary social conditions.

How to use this book

This book is introductory. We expect it to work as a point of departure rather than an end point in itself, particularly since not all that can wisely be covered in such a course of study is covered here. Rather our aim is to engage students new to the subject by providing some initial coverage of themes and concepts we think important, and by provoking them into pursuing further reflections and research on topics raised here, among others. We have, for that reason, not attempted to be comprehensive in our coverage, but to focus on issues and debates, and to connect these to more general themes.

Each part is divided into general themes and advanced topics. It is intended that the general themes provide an overview of central aspects of the subject under consideration. The advanced topics focus on more specific sets of problems, which develop in some detail aspects of the main themes. They are also pitched at a more advanced level and presuppose that the 'general themes' have already been covered.

Throughout all three parts we have provided readings that we see as indispensable to the comprehension of the text: these follow each section of the 'general themes' and come at the end of each 'advanced' topic, along with further reading, which is provided mainly for purposes of further research on the topic. Each part also contains a series of tutorials that might be used as the basis for discussion of issues covered in that part of the book. There are three types of tutorial, each of which is designed to encourage different types of skill in the student. The first type are problem-solving, a form which is familiar to most law students, though perhaps less common in the teaching of jurisprudence. These describe a scenario, often based on actual cases, and ask the student to think through certain issues as they are dramatised in the factual situation. The second type are aimed at developing skills in the critical reading of texts. We have either provided extracts from a text, such as a judgment, or have directed the student to a journal article or section from a book, and provided a series of questions that should assist the student in reading and analysing the text. The third type are more open-ended 'essay'-style questions, in response to suggested readings either from this book or other texts. These can provide the basis for classroom discussion, or alternatively students might be asked to prepare presentations on the basis of the questions.

Finally we should note that there are two levels of tutorials. The first type are introductory in scope and are related only to issues covered in the general section of each part; the second type are identified as advanced level tutorials and are better suited to those courses which are exploring issues in greater depth and complexity. These might relate to the advanced topics, or offer a more advanced engagement with issues covered in the general topics.

The book can thus be used in a number of different ways. It is intended primarily as a textbook for a basic course on jurisprudence, which could focus on the three themes, allowing the teacher either to address the tutorials and advanced topics included in the book or to introduce their own according to their own interests. The purpose of the book is thus to provide the students with a basic introduction to some central issues in jurisprudence and to encourage them to tackle some of the primary texts in the area. Alternatively, the book may be used in a more advanced course, focusing primarily on the advanced topics, where we have given both an overview of the issues and sufficient guidance that they can go on and read some of the primary texts.

That said, there is of course no correct way to use the book; our main hope is that students find it lively and interesting and that it stimulates them to read more widely in the subject.

Reference

Smith, A, 1978/1762, *Lectures on Jurisprudence*, RL Meek, DD Raphael and PG Stein (eds), Oxford: Oxford University Press.