Jurisprudence of Jurisdiction

Edited by **Shaun McVeigh**

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Preface

The contributors to this collection of essays were given a brief that was broad: it was to refresh the jurisprudence of jurisdiction. They were prompted to respond to the question 'What might be understood in jurisprudence by way of a return to questions of jurisdiction?' Behind this question lies the speculative claim that, without an account of jurisdiction, jurisprudence would be left speechless, left without the power to address the conditions of attachment to legal and political order. What was invited in this book was not so much a critique of the form of law, but an investigation of the modes or manners of coming into law and of being with law. Implicit in this is a refocusing of attention away from the litigious concerns of tribunals and fora towards an engagement with the inauguration, existence and practices of law.

Questions of jurisdiction have been central to Western legal and institutional thought, yet how to find a place within jurisprudence and the philosophy of law to pose such questions has not been obvious. At its broadest, the question of jurisdiction engages both with the fact that there is law and with the power and authority to speak in the name of the law. The encapsulation of jurisdiction involves consideration of the enunciation (or potentiality) of law, its technological and material modes of operation and its idiomatic expression. These concerns provide the frame of reference for the investigations into the jurisprudence of jurisdiction made in this book.

The approaches taken to jurisdiction in this book have not generally been limited to attempts either to justify existing accounts of jurisdiction or to reconcile the exercise of jurisdiction with state policy or party interests (important though these concerns are). Instead, two broad lines of investigation are pursued. In one direction, the contributions formulate and reconstruct jurisdiction as part of rival metaphysics of law; in another they perform as essays, or investigations, into the resources and repertoires of the jurisprudences of jurisdiction. In relation to the former, the essays consider afresh the ways in which philosophies of law and jurisprudence respond to questions of jurisdiction. They also serve as a reminder of the continuing importance of jurisdictional thought to both metaphysics and ethics. In relation to the latter, these contributions consider jurisdiction as exercise of a technology of law. As a question of technology, three themes are addressed: first, institutional relations between jurisdiction, state,

sovereignty and territory; second, the governmental relations between jurisdiction, judgement and the technologies of law; and third, the idiomatic representation of jurisdiction to law. Taking up these topics, the contributors to this book examine the institution of human rights and the new global and national orders of sovereign power, the judgement and government of death and desire, and the address of colonial and post-colonial legal idioms.

The return to questions of jurisdiction forms part of an emergent genre of scholarship within doctrinal, historical and critical jurisprudence. Its address is primarily juridical, but it also raises questions for all disciplines enmeshed in questions of authority and authorisation as these concerns retain their juridical affiliations. Much of the impetus of the work in *Jurisprudence of Jurisdiction* is critical: the concerns of the contributors circulate around questions of belonging to law, of working within the idiom of law and what (if anything) can continue to be said about attachments of law and its orderings of time, space and place. Beyond this, a collection of essays on jurisdiction is as eclectic as the domains of the critical legal study of law.

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Jurisprudence of Jurisdiction

For much of the history of the western legal order, the question of jurisdiction – the question of the power and authority of law – has been the first question of law. This book investigates the difference that jurisdiction continues to make to the ordering of normative existence. It also follows the speculation that without an account of jurisdiction, jurisprudence would be left speechless, with no power to address the conditions of attachment to legal and political order.

The starting point of this book lies with the claim that a sharper focus can be given to normative legal ordering through questions of jurisdiction than can be through those of moral responsibility or social action. This is so because jurisdiction articulates both the potentiality of law and the conditions of its exercise. It provides the idiom of response to the fact that there is law and to the fact that law institutes, judges and addresses a form of life. From this viewpoint the contributors to this book examine the institution of human rights, the new global and national orders of sovereign power and of trade and information, the judgement and government of death and desire, and the address of colonial and postcolonial legal idioms. In doing this the contributors also provide for the elaboration of questions of jurisdiction as part of the resources and repertoires of jurisprudence.

This book provides a point of entry to an emergent genre of writing within doctrinal, historical and critical jurisprudence that has returned to questions of jurisdiction to think again about juridical order and change. In so doing, it also points to questions that must be asked for there to be any interdisciplinary study that addresses law.

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Part I

Introduction

1 Questions of jurisdiction

Shaunnagh Dorsett and Shaun McVeigh

Introduction

Questions of jurisdiction have been central to Western legal traditions, yet finding a place within jurisprudence and the philosophy of law to pose such questions has not been obvious. By contrast, the practice of the law is preoccupied with questions of jurisdiction and the arrangements of the authority to judge in matters of law. Despite this, the work of practitioners lacks anything but the 'thinnest' of descriptive accounts of what it means to engage with questions of jurisdiction. It is as if legal thought cannot, or can no longer, articulate the terms of its own existence. To introduce *Jurisprudence of Jurisdiction*, this chapter returns to some of the central topics of jurisdiction in order to investigate the modes or manner of coming into law and of being with law.

At its broadest, the question of jurisdiction engages with the fact that there is law, and with the power and authority to speak in the name of the law. It encompasses the authorisation and ordering of law as such as well as determinations of authority within a legal regime. Emile Benveniste has drawn out the inaugural character of the etymology of jurisdiction. The Latin *juris-dictio* links the Latin noun *ius* with the verb *dictio*. *Ius* is usually translated as 'law', and refers to the adjectival situation of conforming to law (*iustus*). Linked to the verb *dicere* – the saying or speech of law – *ius* becomes performative (and adverbial) (1973: 391). Within the institutional domain of the Roman courts, *ius* and *dicere* are linked to the office of the *iu-dex*, he who states the law, and *juris-dictio*, the saying or speaking of the law (*Digest* 2.1.1) (Benveniste, 1973: 392). In jurisdiction, then, might be found questions of the inauguration of law – its value and validity – and its articulation. It is with these concerns, and with the representation of the orders of law that are engendered through jurisdiction, that the contributions to *Jurisprudence of Jurisdiction* seek to engage.

The conceptual role that questions of jurisdiction play in legal thought has not received much attention in contemporary legal theory. At the risk of caricature, within the philosophy of law questions of jurisdiction fall for consideration somewhere between the concerns of philosophies of action and event, and those of moral responsibility. If located as a question of action and event, jurisdiction makes a brief appearance in relation to questions of sovereignty and of space but

gives way to the evaluation of law in general or vacates law altogether for the fields of international relations and political geography. Perhaps this reflects a preference, predominant since the nineteenth century, for explanations of law framed in terms of social and not legal existence, state centred or otherwise (Kriegal, 2001). As a part of a discourse of moral authority, jurisdiction takes its place as an embodiment of value, or as a partial step towards value. Such approaches risk losing the questions of 'why law?' or 'why this law?' and with them the question of the authority and form of law. To address such questions ties jurisprudence back to the diction or speech of law and returns the process of jurisdiction both to a structure (or metaphysics) of law and to a history of the institutions that carry the meaning of legal life.

For some, tying questions of jurisdiction back into metaphysics and to the difficulties of staging a relation to law gives too much to a long tradition of thinking about law which has little hold on contemporary reality. Our present, whether viewed as modern, ultra-modern or postmodern, can no longer be considered capable of being structured or represented in fully legal or ethical form (Murphy, 1997). What is needed is a form of investigation that pays attention to the ways in which the authorisation of law is linked to its purposes or desire (Goodrich, 1996). For others, failure to pay attention to the difficulties of escaping from the metaphysics of law ensures only its repetition (Gadamer, 1979: 494; Rose, 1984: 3; Derrida, 1989). However, to think that it is possible simply to have done with questions of jurisdiction would be to forego the possibility of questioning the concepts of limit and structure in law as well as the links between speech and law and voice and authority. It is with these questions of jurisdiction, and not with those of morality and action, that first questions of law can be posed. This formulation of a metaphysics of law, together with the inaugural gestures of law itself, forms the first theme of this book.

There is also an insistent materiality to questions of jurisdiction that can initially be approached in terms of an institutional practice or pragmatics. At the centre of these practices are the various devices, techniques and technologies that make the enunciation and life of the law possible, and the investigation of these forms the second major theme of the book. It would be no great exaggeration to say that the institutional histories of Western law have been written in terms of jurisdiction. Questions of jurisdiction were central to the accounts of the protocols of government of imperial Rome just as much as they were to the accounts of the medieval ordering of the spiritual and temporal relations of church and state and to the rise of the modern nation-state. The history of the common law is also – and often is simply only – a history of jurisdiction. Holdsworth, for example, devoted much of his 16-volume *History of English Law* (Holdsworth, 1922–1972) to detailed accounts of particular and plural jurisdictions: those of common law, stannary, forestry, ecclesiastical law and so on. Likewise, the history of common law legal ordering of British colonisation, as with other imperial projects, was in many ways one of jurisdiction. It is through jurisdiction that the authority of the common and imperial laws have been asserted, and it is through questions of jurisdiction that the legal settlement of the

colonies has been effected. Contemporary writings on international and universal jurisdictions are recent additions to this genre.

What is striking in the writing of the histories of jurisdiction is not so much the lack of substantive criticism but the lack of a language of analysis of jurisdiction. It is possible to develop ethical arguments about the moral value of universal jurisdiction or of the practical negotiations of the rival criteria of jurisdiction in the draft *Hague Convention on Jurisdiction and Judgments*, but there is as yet only a very limited discourse of jurisdiction itself (Macedo, 2005). Within legal doctrine, questions of jurisdiction are frequently merged with those of authority and its delimitation or, as in the case of private international law, figured in terms of justification (Whincop and Keyes, 2001). One consequence of this is that the technologies of law that establish authority are understood as descriptions of bare action or fact – technical commentary on the determination of forum and the recognition and enforcement of judgements. In all this, the character of jurisdiction as an instrument is frequently occluded. What is lost is the staging and representation of law as a work of figuration. A claim that the technologies of law do more than describe legal actions should raise no controversy within legal thought. Viewed as process, jurisdiction encompasses the tasks of the authorisation of law, the production of legal meaning and the marking of what is capable of belonging to law. If nothing else, the work of categorisation of persons, things, places and events; the procedures of summons, hearing, decision and sentence; and the forensic concerns of argument and proof serve as devices of attachment to law.

The analysis of the artefactual character of law has more recently been found in the domains of anthropology, sociology and cultural studies. In this book, these concerns are returned to law and addressed through jurisdiction. This allows for the consideration of the state, for example, as an assemblage of devices and techniques not only for the delimitation of relations of authority and the exercise of power, but also for their representation. In this book, rather than assuming a natural link between sovereignty, territory and land, the links between sovereignty, state and territory are studied in terms of techniques of authorisation and grounding. As a technology, jurisdictional practice institutes a relation to life, place and event through processes of codification or marking. It is through jurisdiction that a life before the law is instituted, a place is subjected to rule and occupation, and an event is articulated as juridical. In all this, of course, the long polemics of jurisprudence have disputed the representation and manner of being subject to a jurisdiction.

The concern with the diction, speech or idiomatic representation of law forms the third major theme of this book. The elaboration of how instruments give voice to law has been one of the tasks of jurisprudence. At issue are not so much the administrative aspects of government, but the broadly semiotic aspects of jurisdiction (Goodrich and Hachamovitch, 1991). The idiom of jurisdiction can be understood in terms of the interpretation and judgement of institutional meaning. However, to analyse the communication of law as jurisdictional enunciation, it is also necessary to consider what is passed on in the pragmatic performance of jurisdiction.

The contributions

The chapters presented in this book broadly follow the three lines of aspects of jurisdiction already outlined. In one direction, they formulate and reconstruct the metaphysics of jurisdiction and in so doing examine the inaugural gestures of jurisdiction. In another, they perform more or less as investigations into the resources and repertoires of the jurisprudences of jurisdiction and the technologies of government. In so doing, they investigate the attachments of jurisdiction. Finally, they direct attention to the idiom of jurisdiction and the representation of the symbolic or semiotic ordering of law.

Situations of jurisdiction

The metaphysics of jurisdiction addresses the speech of law and what allows the law to emerge or cohere as law. It seeks to formulate and respond to questions such as: 'How does jurisdiction (and so law) arise in its original form?' and 'What utterance inaugurates a jurisdiction and establishes a power to legislate in its act of speech?' Questions of jurisdiction address the relation between metaphysical and juridical thought and between the legal and the social domains. In this book, the two opening chapters are used to provide a point of entry into contemporary formulations of the relations between the metaphysical and juridical thought of law.

For Costas Douzinas and Maria Drakopoulou, questions of jurisdiction do not simply have answers in the history of law and practice, but rather form a part of the 'interior' sovereignty of law (Douzinas) or are statements that inaugurate law (Drakopoulou). Both authors, of course, make strong claims for the importance of jurisdiction to the conceptual formation of the political and legal domains. In the 'Metaphysics of Jurisdiction', Costas Douzinas engages the relationship between universal jurisdiction and the conflict of jurisdictions and sovereignty. For Maria Drakopoulou, in 'Of the Founding of Law's Jurisdiction and the Politics of Sexual Difference: The Case of Roman Law', the question is more morphological: 'what is engendered and given shape through jurisdiction?' Both draw questions of jurisdiction into the formation of the modern subject. For Douzinas, paying attention to the metaphysics of jurisdiction allows for the development of a critical, acoustic, subject. For Drakopoulou, the concern is more to reveal the synchronic morphology (the shape) of law's being, rationality and power – and the way sexual difference 'provides the conditions of possibility of the "visibility" of law's power'. The immediate objects of Douzinas' polemic are the claims to transcend sovereignty made in the name of universal jurisdiction. Against this, Douzinas posits conflicts of sovereignty as the presupposition of jurisdiction. The opening of political and legal thought is the coming together, or becoming common, of a community, which 'appears by expressing itself in a sovereign way by giving itself the law'. This initial gesture Douzinas names as *bare* sovereignty – the circumscription, or naming, of being in common. Insofar as there is a question of community at issue, there can be no escape from the