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Shaunnagh Dorsett and
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and Shaun McVeigh

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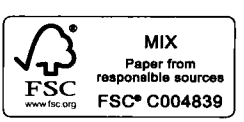

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Contents

Chapter 1

Introduction

We will have lived in a world of jurisdiction. We are brought into life and set in motion according to the authority of law, our conduct is shaped according to civil order, and our conscience created and turned to political faith in law and community. Jurisdictional thinking, so to speak, gives legal form to life and life to law. In the world of St Augustine, it gives us the structure of our existence. In the idioms of European traditions of law we cannot move but for the work of jurisdiction. Our deaths, too, will be marked by questions of jurisdiction and care of law (or its lack).

Consider some forms that a jurisdiction might take. The Popes of the medieval Catholic Church exercised a jurisdiction over the whole world – its peoples and lands. The authority of the Pope and the Holy Roman Emperor was expressed in terms of a universal jurisdiction. In part, this was a matter of divine authority and in part a matter of *imperium* and *dominion* – of rule (power) and property. By the Papal Bull *Romanus Pontifex*, 8 January 1455 (Davenport 1917: 23–24), Alexander VI granted the Monarch and heirs of Castille and Leon (now modern Spain) the exclusive right to acquire territory, to trade in, or even to approach the lands lying west of the meridian situated 100 leagues west of any of the Azores or Cape Verde Islands, limited only by existing claims from Christian princes. In this way the world, and the yet to be discovered New World, was divided and contested (Tuck 1979). Or, consider too the jurisdictional re-arrangement of the relation between the English crown and the Roman Church. In 1533 the Act of Appeals 24 Hen VIII, c 12 effectively secured the split between the Church of Rome and the Church of England. It declared in the preamble that England was an empire and forbade all appeals to the Pope in Rome on religious or other matters, making the king the final authority in all such matters in England, Wales and all other English possessions. The following year, the Supremacy Act 26 Hen VIII c 1 confirmed that Henry had always been the head of the

Church of England. The removal of the jurisdiction of the Church of Rome marked one of the decisive formations of English sovereignty.

Consider too the work of the courts of the common law. In *Le Case de Tanistry* (1608) Davis 28 it was determined that the *Brehon* law (the Irish common law as understood by the English) had been abolished by the introduction of the English common law, and that henceforth relations of kinship and to land were displaced by English law. This was a moment of jurisdictional force that marked and continued to mark the colonial inheritance of law (Dorsett 2002). Consider also *Prohibition del Roy* 12 Co Rep 63, 65; 77 ER 1342, in which Coke asserted the power of the judges to decide legal disputes before and over that of the king. James I claimed he could also could resolve legal disputes because 'the law is founded on reason, and that he and the others had reason as well as judges'. Coke replied that 'true it was that God had endowed his Majesty with excellent science, and great endowments of nature; but his Majesty was not learned in the laws of the realm of England, and causes . . . are not to be decided by natural reason but by the artificial reason of the law, which law is an act which requires long study and experience' (12 Co Rep 63, 65; 77 ER 1342, 1343; Cover 1993: 183). This assertion of common law jurisdiction is treated in modern law as one of the bases for the separation of powers.

Consider the jurisdiction of the student scholar at the University of Bologna. In 1153, the Holy Roman Emperor Frederick Barbarossa granted privileges and jurisdictions to teachers at Bologna by the imperial decree *Authentica Habita*. It allowed for each student scholar to recognise the jurisdiction of his professor in all matters affecting him; to claim imperial protection to travel to study; and a right not to be punished for the non-payment of the debts of other students. Students could choose between the jurisdiction of their teachers or of their bishops. This decree is today treated as the foundation document of the University of Bologna, and is often thought of as a statement of academic freedom and the foundation of legal study as a matter of conscience. The grant was also an act of imperial authority made in recognition that the jurists of Bologna had delivered legal opinions in favour of the emperor against local laws (Douzinas 2007: vi–viii; Barr 2010).

Many modern jurisdictional forms inherit, repeat and develop older expressions of law and legal relations. Consider the emergence of the doctrine of the responsibility to protect in international law (Orford 2011). If the primary reason for the state is to protect its population, the doctrine of responsibility to protect allows that if a state fails in this duty then the international community should take up the responsibility. It

marks out a distinct jurisdictional authority for executive action within the United Nations. Anne Orford has pointed to the way in which the jurisdictional arrangements imagined by the responsibility to protect doctrine are similar to those of the medieval Holy Roman Empire. States have responsibility for populations within a named territory, the United Nations has responsibility and jurisdiction over the international community as a whole (Orford 2011: 27) Consider too the exercise of jurisdiction of courts in the international domain. Take the decision by the government of Israel in the matter of the seizure and trial of the German Adolf Eichmann to take up a jurisdiction, to take responsibility and exercise authority, in the matter of 'crimes against humanity'. The issue became one of whether the state of Israel could take jurisdiction. The trial was for acts committed outside the bounds of the state, against a person who was not an Israeli citizen, by a person who acted in the course of duty on behalf of a foreign country, and for acts committed before Israel existed (*Government of Israel v Adolph Eichmann* 36 IRL 5, [8], Dist Court Jerusalem, affd 36 ILR 277, reprinted in (1962) 56 *Am J Int'l L* 805). The court asserted the power or right to punish because 'the crimes . . . afflicted the whole of mankind and shocked the conscience of nations [and] are grave offences against the law of nations itself. . . . The authority and jurisdiction to try crimes under international law are *universal*' (at [12]). We return to the Eichmann trial in Chapter 7.

Consider too the meeting of laws and the impoverished jurisdictional forms of the acknowledgement of indigenous laws by former 'settler colonies' such as Australia, Canada, New Zealand, South Africa and the United States. Australia's legal judgments and laws have given effect to forms of 'native title' that recognise indigenous laws within the legal ordering of the state. They did so reprising the jurisdictional questions in the *Case of Tanistry* (*Mabo v State of Queensland (No 2)* (1992) 175 CLR 1; Dorsett 2002), a matter we return to in Chapter 6.

Here is another formulation of jurisdiction from the work of Seamus Heaney. In his essay 'Feeling into Words', Heaney writes of the ways in which he found his 'voice' as a poet (Heaney 2002). In a number of formulations to which we will return, Heaney points to the way in which in technique 'entails the watermarking of your essential patterns of perception, voice and thought into the touch and texture of your lines; it is that whole creative effort of the mind's and body's resources to bring the meaning of experience within the jurisdiction of form' (Heaney 2002: 47). It is with the jurisdiction of form as much as forms of jurisdiction that we make our critical approach to law.

Perhaps, however, this is not entirely the correct way or place to start. Jurisdiction might be viewed as the most technical and prosaic ordering of legal authority. Jurisdictional knowledge is, in a sense, the practical knowledge of how to do things with law. Its formulations are part of the technique and craft of legal ordering and the art of creating legal relations. Its everyday concerns are concerns that have been around for centuries. They turn on matters of granting authority to act, establishing courts and tribunals, issuing summons to attend court, filing documents for hearings and exchanging arguments about the proper time and place to hear a case. A jurisdiction might delimit the scope of authority, determine the technical means of its representation or adjudicate on the proper form of lawful relations. It could also set in motion disputes about how to regulate the internet, how to manage personal and family relations in places governed by many rival claims to authority; and so on. In this orientation, jurisdiction takes on importance in daily life. It tells us how to do things with and against law. It also opens a domain of thought, or a jurisprudence, concerned with how to live with law and how to create and engage lawful relations.

A starting point for our thinking about jurisdiction comes from Peter Rush, who writes that jurisdiction 'refers us first and foremost to the power and authority to speak in the name of the law and only subsequently to the fact that law is stated – and stated to be someone or something' (Rush 1997: 150). Similarly, Coke (one of the few common law jurists to try to define jurisdiction) stated that 'jurisdiction is the authority to decide or give judgment among parties concerning actions to be taken over people and property . . . Jurisdiction is the power to give judgment on a public matter, and is instituted by necessity' (Coke 1644: Preface B and *Case of Marshalsea* 10 Co Rep 69). From this, and from the word 'jurisdiction' itself, we can take two things. First, jurisdiction connotes authority. Second, it is an act of speaking – of declaring the law. Jurisdiction is derived from the Latin *ius dicere* – literally to speak the law. Thus, jurisdiction is the practice of pronouncing the law. It declares the existence of law and the authority to speak in the name of the law. Coke himself excerpted this quote from the medieval jurist Azo. However, when he did so, Coke left out a few words at the end: 'and of establishing equity'. This is interesting because it reminds us that there are rival forms of authority and rival positions, as well as the contested nature of thinking with conscience (Goodrich 2008).[1]

Jurisdiction is, however, more than simply pronouncing existing law. In some formulations jurisdiction inaugurates law itself. Thus, to exercise jurisdiction is to bring law into existence, although as we shall see it does

so in a certain way and by certain means. We can, therefore, consider jurisdiction as the first question of law, because it asks whether law exists at all, and thus determines what can properly be considered law. It gives us a way of authorising law – of saying that something is lawful or belongs to law – only subsequently is it declared what that law is. While this is a start, however, there is much more that needs to be said. Jurisdiction engages law in a variety of ways. Perhaps most importantly, it both gives us the form and shape of law and the idiom of law.

Jurisdictional thought and practice provides the visible (and occasionally invisible) forms that law takes. Today the most obvious form of legal ordering is that of the sovereign territorial state. We are perhaps used to sovereignty as a political idea – it is the source of power and authority – but we pay much less attention to the material legal forms of sovereign, state and territory. We have become used to the representation of the authority of the sovereign, and of law, as abstract and virtual. In Western idioms, law is often viewed as a matter of right represented as rule or principle. In early modern times, authority was often represented in a material way. An obvious example is that of the king who in fact represented authority both through his actual person and through his institutional/legal form (Kantorowicz 1957: 336–342). We still do this in modern times, we just do not treat material representations as having legal significance. One example might be the flag or the map, both of which materially represent the nation and hence the authority of the nation state. We leave invisible the legal form. One of the observations developed in this book is that the abstractness and immateriality of law is greatly exaggerated. It is important to take disputes over the material form of law seriously.

Jurisdictional thinking gives us a distinct way of representing authority because it gives us the voice or idiom of law. This is the 'diction' part of the term 'jurisdiction'. When we think about an idiom we are thinking about the language and style of talking about law. Talk of jurisdiction does not simply describe law from the outside – it gives us the ways and means of talking about and practicing law. We might think of the practice of law as the craft of law. While we discuss this in more detail in Chapter 4, for present purposes the terms 'practice' and 'craft' simply indicate that jurisdiction is not just a descriptive concept – that jurisdiction, through institutions, actively works to produce something. So, as practices, the idioms of jurisdiction concern the means of creating and ordering law. For example, they provide the practical organisation of the business of the courts and the management of the scope or extent of authority to judge. The practical organisation of the courts can be thought

of as part of the technological or procedural ordering of law. Without such modes of thinking about law there would be no way of engaging with law as a practical activity with purpose. However, while jurisdictional thinking is never less than practical it is also and always something more. It is not just about which court to go to start a legal action, it is also about what is to count as a legal action and how a legal action can be characterized as belonging to law. Our modern understanding of jurisdiction tends to the technical. If you look at the textbooks of law, the law relating to jurisdiction appears in two ways. It appears first as a matter of the administration of justice and the ordering of courts, and second as a concern of conflict, of conflict of laws and conflicts of jurisdiction. Both ways assume the existence of law (as all law texts do in some way) and that the only question to be asked is which court administers that law or which law or court prevails in a conflict? In this book we have slowed down this way of thinking in order to get a surer sense of what is at issue in matters of jurisdiction. Jurisdiction is the first question of law and the first point of engagement for a critical approach to law.

As the first question jurisdiction asks is whether law exists at all, the question of which law follows on. So one form of critical engagement with law does not begin with the question of 'What is law?' or even 'What is justice?', it begins with the practical questions of: 'Under which law?', 'Who will decide?' and 'Who will interpret?'. Only then can we move to questions of 'How do we live with law?' and 'How do we live justly with law?'. Considered as questions of jurisdiction these questions become ones of lawfulness – of what it means to belong to, and to live with, law. Lawfulness, then, is a material practice, concerned with how we inhabit the world. In this book, the critical response to law we develop responds to these questions in terms of conduct. If jurisdictional thinking teaches us anything about contemporary forms and idioms of law, it is that the critical engagement of law takes place not just at the level of ideas or practice, but also at the level of conduct. Our motto then for this book might be that there is no talk of law without speech – and there is no consideration of lawful speech without form.

Chapter by chapter

Chapter 2 considers how we engage with law through jurisdiction. In jurisdiction might be found questions of the inauguration of law – its value and validity – and its articulation. So key questions might be 'Who speaks and who listens? and 'How are representation of the orders of law

engendered through jurisdiction?'. This chapter sets out a number of key ideas about jurisdiction. It looks at jurisdiction both as a practice of law and as a distinct form of critical engagement with law.

Chapter 3 asks how we can understand jurisdiction as a form of authority. This chapter engages with relations between sovereignty, territory and jurisdiction. It emphasises the importance of the twin inheritance of the medieval forms of spiritual and temporal jurisdictions. We also consider the plurality of jurisdictional forms. In doing this, we examine some of the resources of a jurisprudence capable of living with and re-ordering forms of common law authority.

Chapter 4 looks at how we tie the institutional practices of law to the conduct of lawful relations. This chapter is concerned with how the technologies of jurisdiction are engaged in the creation and arrangement of legal relations, and with how the technologies of jurisdiction give us the form of law and engage with the representation of law. Here we draw out the ways in which the technologies of jurisdiction represent the body of law and engage lawful relations. We suggest that without an account of the technologies of jurisdiction there is no way of tying the institutional practices of law to the conduct of lawful relations – whether critical or doctrinal.

Chapters 5, 6 and 7 put into practice some of the ideas of jurisdiction considered in the previous four chapters. Each chapter does this through a short series of studies which take up aspects of authority, authorisation and the technologies of jurisdiction. Each chapter is organised around a key mode of jurisdiction: persons, places and events. Each fundamentally asks the same question: 'How do we create and maintain lawful relations?'. So Chapter 5 asks how we make a legal person. This is investigated through the example of assisted suicide, and shows how even subjects as embedded in ethical dispute as the right to life (or to die), such as assisted suicide and euthanasia, are shaped through rival understandings of jurisdiction. We provide a particular example of a way of articulating (expressing) and conducting lawful relations jurisdictionally. In so doing, this chapter is particularly concerned with forms of personal jurisdiction and the law of persons.

Chapter 6 continues by asking how relations of place are articulated and expressed with law. What happens when sovereignty is the only language of authority and territorial sovereignty is the dominant mode of jurisdiction? Here we look at specific practices and the ways of understanding the meeting of laws as a jurisdictional concern. We concentrate here on the meeting of indigenous and non-indigenous jurisdictions in Australia. We do so in order to draw out the sense of the meeting of

jurisdictions as both a matter of technical ordering and of the conduct of lawful relations.

Chapter 7 moves from persons and places to events. We consider how events or activities become engaged in law. This chapter examines the forms of community and address of the jurisdictions that make up the international domain. We consider the mode and manner in which the contemporary jurisdictions of the international jurisdictions have created new political, legal and ethical forms of international life. We look to the quality of the international as a meeting place of law – a meeting place among or between nations. The meeting point provides a point of order from which to examine the way events cohere in law.

In the final chapter, we bring the jurisprudence of jurisdiction into relation with critical accounts of jurisdiction. By way of conclusion, we offer an account of the repertories of jurisdiction as a practice of responsibility for the forms of law. In order to do so, we return to the offices of jurist, jurisprudent and critic. The critical approach to law presented here is shaped around the ways in which it is possible to take responsibility for law through attending to the practices of jurisdiction.

Notes

1 Equity here refers of course not to Chancery, but to civil law – in other words for Coke equity refers to the rival authority of Rome.

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Chapter 2

Forms of jurisdiction

In this chapter, we start our consideration of jurisdiction by setting out a number of key ideas about jurisdiction. We present jurisdiction as a practice and conduct of law and as a distinct form of critical engagement with law. These ideas will reappear throughout the book.

Who speaks and who listens? Forms of jurisdictional engagement

In jurisdiction might be found questions of the inauguration or creation of law and its articulation – its value and validity. It is with these concerns, and with the representation of the orders of law that are engendered through jurisdiction, that this book engages. The critical concern addressed in this book is the quality of the engagement of lawful relations. In other words, how we come to belong to law, and the quality of that belonging. In this chapter, therefore, we consider four aspects of jurisdiction which give rise to our critical approach to jurisdiction.

Authority and authorisation

That law and jurisdiction are concerned with authority is a truism in Western legal orders. While authority can be understood in many ways according to different political and jurisprudential traditions, it has broadly been concerned with the explanation of the legitimate means of affiliation and subordination. For the political thinker, Hannah Arendt, authority can be contrasted with reason and with power. Reason, argues Arendt, is concerned with persuasion between equals, force is concerned with domination. Authority gives people reasons to submit – perhaps without servility (Arendt 1961). Much political thought, especially as it crosses into law, is concerned with justifying authority. The Western

tradition has developed many accounts of the authority of God, reason, the state, the people and custom. For example, the authority of the sovereign territorial state to subject people to government is today frequently justified by popular sovereignty and consent, while the English common law tradition has linked questions of authority to those of the inheritance and transmission of customary laws.

How relations between jurisdiction and authority are understood and disputed will depend on how you understand authority (and the political and legal theory of authority) and on how you understand jurisdiction. Within jurisprudence, questions of authority are often concerned with establishing legitimate sources of law and argument (Raz 2009; Finnis 2011). While this is a proper question for jurisprudence – 'How do we understand legal authority?' – the way in which the question is addressed can obscure that such questions are also ones of jurisdiction. Within jurisprudence we often reduce the matter of authority to one of source. Legal doctrine further reduces jurisdiction to a matter of rules of law.

It is implicit in our brief formulation of jurisdiction in Chapter 1, however, that if jurisdiction inaugurates the law it must also in some sense precede it. This raises a number of conceptual and institutional questions about the nature and sources of authority. In particular, the idea that jurisdiction inaugurates law brings with it subsequent questions of transmission – how authority gets passed from one place to another – and the sense that each jurisdiction works as its own source of authority.

The relationship between jurisdiction and questions of authority has a long and complex history. For Western legal idioms, some of the most important historical formulations of this relationship are found in medieval law. There the language of jurisdiction was used to draw distinctions between *auctoritas* and *potestas* (authority and power) and in a complex way between *imperium* and *dominium* (Berman 1983: 114–115). The concepts of authority and power have been inherited in various ways. For example, the language of *potestas* is associated with political power and that of *auctoritas* with legal authority or jurisdiction. So one of the distinctive formulations of sovereignty is the joining of those two in the formation of the modern state, a matter to which we return in Chapter 3. *Imperium* might be thought of as power without limit, while *dominium* is a delegated power.

Part of the critical approach to law has involved a questioning of the authority of laws, of state law and even of law in general. One aim of this book is to show that the language and work of jurisdiction is more complex than its current usage in legal thought and practice suggests. It

is necessary to pay close attention to the language of authority and of legal authority in order to criticise law effectively. It is also necessary to pay attention to the ways in which jurisdiction represents or authorises law. Fail to do this and you run the risk of producing accounts of authority that do not touch the institutional life of law or that miss the ways in which authority is exercised.

Representation

If we say that jurisdiction authorises law, the question which follows is what is being authorised? In modern law, we split this question between authority and authorisation. When we think of the exercise of a jurisdiction, we need to think about both the author and that which is being authorised. The author is the person who speaks (decides, determines, judges) the law (the institutional question). What is authorised is the law – but if we think of law simply as 'rules' then we miss much of the institutional existence of law.

Questions of authority and representation can be posed in many different ways in politics and law. The language of author and authorisation, representative and representation, and even person and personation, all gain their modern currency in 17th-century political and legal thought. The issue for the philosopher Thomas Hobbes was that of the political representation of the sovereign (Hobbes 1968: Pt 1, ch 16, 217–222). Hobbes' discussion combines a concern with the legal ordering of authority, a jurisdictional matter for us, and the representative form of authority (the outward appearance or the visible form of the sovereign). We are used to the idea of representation in terms of accounts of political authority, for example the theory of representative government and political representatives, but we can also think of law in those terms as well. So in terms of the authorisation of legal authority, the office of the legal representative and the characterisation of lawful relations can be understood in terms of persons and personality. However, when we characterise lawful relations in terms of persons and personalities, we often do not pay a lot of attention to the actual work of representation. A significant concern in this book is to link the work of jurisdiction to that of representation.

Representation gives us the visual form of law. Although we do not really think this way today, there is, clearly, a strong tradition of the representation of the authority of law. In early modern law (canon law or common law) there were rival accounts of how authority was derived and how it was understood. Broadly speaking, for canon law, for example,