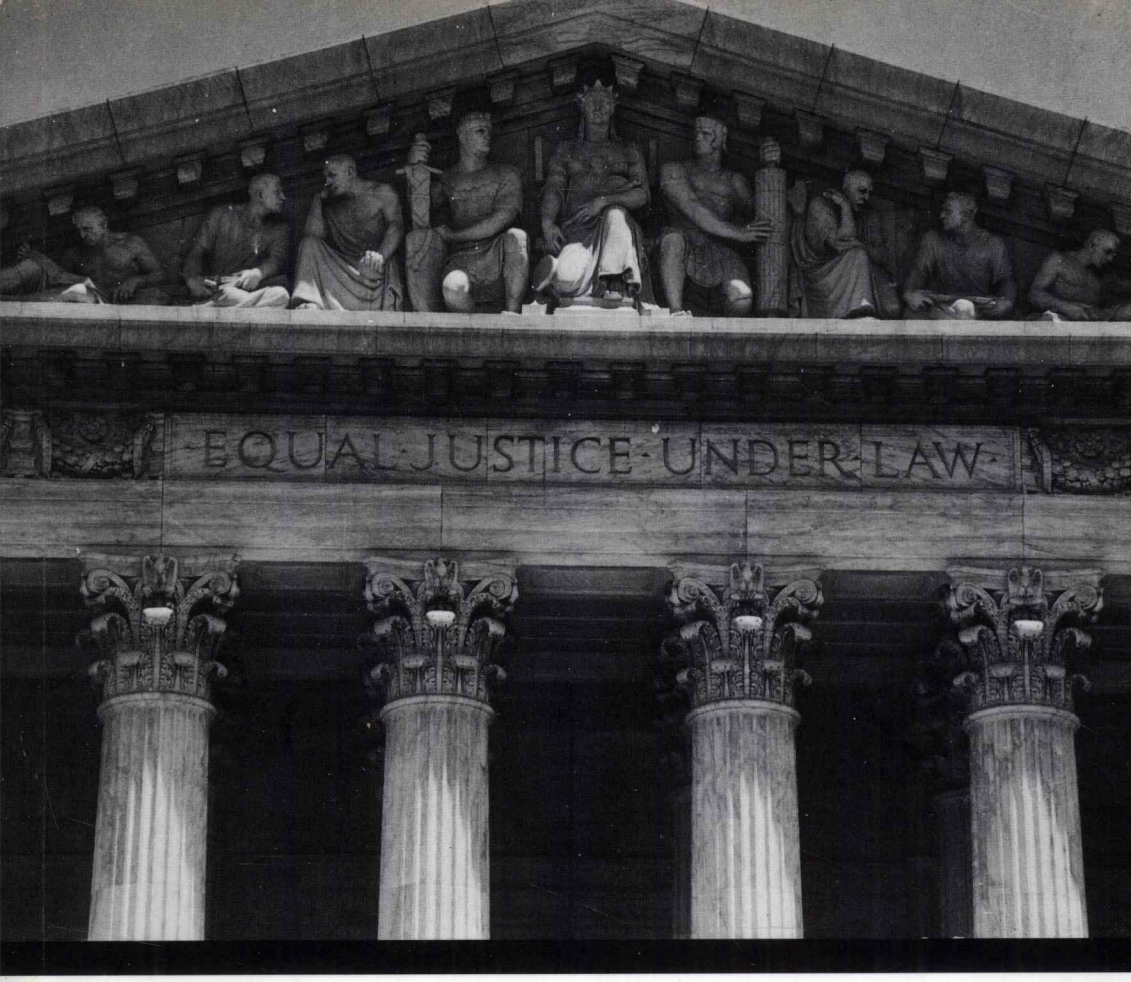


# *JURISPRUDENCE:*

## Themes and Concepts

S Veitch • E Christodoulidis • L Farmer

# Jurisprudence

## Themes and Concepts

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# 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, 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 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. Thus 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 in 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 might at first glance 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, but 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 judicial interpretation, the debates can become much more meaningful. 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 discrimination that 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 consequence 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 might address different aspects of their overall theoretical positions 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 issue. 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 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 the 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 are set in 'boxes' in the 'general themes' and come at the end of each 'advanced' theme, along with further reading, which is aimed 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. 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 here is thus to provide the student 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.

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

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In Part II, section 2.4 was written by Kay Goodall, who also contributed to the writing of 1.1.

In Part III, sections 1.4 and 2.1 were written by Gavin Anderson.

All remaining parts were written by the editors. They too are alone responsible for the organisation of the book.

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# Abbreviations

**Part I**
**Chapter 1**

| | |
|---|---|
| EC | European Community (or Commission) |
| ECHR | European Convention on Human Rights |
| ECJ | European Court of Justice |
| EEC | European Economic Community |
| EU | European Union |
| MP | Member of Parliament |
| UDHR | Universal Declaration of Human Rights |
| UK | United Kingdom |
| UN | United Nations |
| US | United States |

**Chapter 2**

| | |
|---|---|
| ECHR | European Convention on Human Rights |
| EU | European Union |
| GDP | gross domestic product |
| ICC | International Criminal Court |
| MEP | Member of European Parliament |
| NGO | nongovernmental organisation |
| TRC | Truth and Reconciliation Commission (S Africa) |
| UK | United Kingdom |
| US | United States |
| WTO | World Trade Organization |

**Part II**
**Chapter 1**

| | |
|---|---|
| CLS | Critical legal studies |
| UK | United Kingdom |
| US | United States |

### Chapter 2

| | |
|---|---|
| BNP | British National Party |
| EAT | Employment Appeals Tribunal |
| EOC | Equal Opportunities Commission |
| EU | European Union |
| PVS | persistent vegetative state |
| UK | United Kingdom |

## Part III

### Chapter 1

| | |
|---|---|
| EU | European Union |
| NGO | nongovernmental organisation |
| WTO | World Trade Organization |

### Chapter 2

| | |
|---|---|
| ADR | alternative dispute resolution |
| EU | European Union |
| IMF | International Monetary Fund |
| ISA | Ideological State Apparatuses |
| PFI | private finance initiatives |
| PPP | public private partnerships |
| UK | United Kingdom |
| UNIDROIT | International Institute for the Unification of Private Law (Fr) |
| US | United States |
| WB | World Bank |
| WTO | World Trade Organization |

# Contents

Part I

# Law and politics