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Jurisprudence

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Introductory remarks

Doing and accounting

There is a widely held belief among those who think that doing law is not just a profitable business but also an ennobling vocation. It says that the law is not merely a system of coercion. Rather, legal obligation appeals to the will in so far as the will is responsive to reasons, more precisely, to reasons going beyond one's self-interest, narrowly understood. The law's claim to authority rests on its ability to bring about peaceful and (reasonably) just social arrangements.

Jurisprudence can be understood as the attempt to explore, first, whether such talk about "reasons" does indeed make sense—and is, thus, more than a mere ideological mirage or a professional pretence—and, second, to establish what we mean by saying that "reason" is relevant for the validation of legal obligation.

A note on the syllabus

The point of departure of this course is narrow. The narrowness is peculiar to "jurisprudence", which concerns itself, more or less exclusively, with the practice of raising and adjudicating legal claims. From this starting point the course will move on to conceptions in which attempts are being made at reconciling the often cumbersome practice of doing law with its built-in appeal to reason.

The *first part* of the syllabus introduces two remarkable instances of American jurisprudence in which morally exalted views about the practice of law are seriously questioned. Both texts—one modernist, the other one post-modernist—are animated by an enlightening mission, which I find peculiar to American legal culture.

The *second part* of the syllabus examines conceptions of legal thought in which enlightened scepticism about the practice of law is implicitly rebutted. In a sense, this second part offers a *very short tour* of the intellectual history of jurisprudence.

Most of the materials included into this part do not need any further explanation. One would find them in any standard jurisprudence course. It may call for an explanation, though, that instead of choosing H.L.A. Hart as the major proponent of legal positivism, as it is usually done in an anglophone milieu, I decided to have students read substantial portions a classical text by Hans Kelsen. In my view, of all the legal positivists Kelsen was the most fascinating. For Kelsen, legal positivism was a tool of dismantling ideological images rampant in legal thought. Most of the thinkers after Kelsen subscribing to legal positivism, including Hart, have fallen short of his penetrating style and have wounded up burying the critical vigour of positivism in an endless series of scholastic meta-controversies.

Note that the modes of accounting for doing law are arranged in a sequence. I suspect that each subsequent stage is a tad more defensible than the previous one. As we shall see, the problem with legal positivism is that it is too good to be true. The problem with natural law is that it is either trivial or presumptuous. Dworkin's turn to a jurisprudence that emphasises and seriously explores arguments from principle is, in principle (☺), to be welcomed. One may well wonder, however, whether its promise that there is one and only one right answer to every legal question does not presuppose some mythological place occupied by judges with no exposure to the moral diversity characteristic of modern pluralist societies. In other words, the difficulty raised by the Dworkinian approach is that instead of bringing legal thought to a happy end ("right answers"), it provokes contentious issues,

such as incommensurability, indeterminacy, and the need to return to unprincipled compromise.

In one respect, however, Dworkin may be right. The most fundamental point of the practice of legal argument is that of determining what rights we have. The *third part* of the syllabus turns, then, as is appropriate for a jurisprudence class, to an important controversial issue. In a world rife with cross-cultural and religious conflict I think that there is special urgency to examine issues raised in the context of a multicultural society. What are the rights of illiberal groups in a liberal society? What are the demands made on the law by a politics of recognition? How is modern public international law to respond to the existence of despotism, “rogue states” or, more generally, to firmly established, religiously homogeneous societies? The predicament posed by the latter is foisted upon us with particular exigency at a time at which the only legal system lacking state-like support appears to be in the process of disintegration.

Part One

American enlightenments (with a shot of cynical acid)

1. Oliver Wendell Holmes, 'The Path of the Law', reprinted in (1997) 110 *Harvard Law Review* 991-1009 (first published in 1897)
2. Pierre Schlag, 'Hiding the Ball' (1996) 71 *New York University Law Review* 1681-1718

Part Two

Doing law with legal elements ("legal science")

3. Thomas C. Grey, 'Langdell's Orthodoxy' (1983) 45 *University of Pittsburgh Law Review* 16-32
4. Alexander Somek, 'Legal Formality and Freedom of Choice. A Moral Perspective on Jhering's Constructivism' (2002) 15 *Ratio Juris* 52-62

Doing law with authority (legal positivism)

The point and ethos of legal positivism explained

5. H.L.A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593-600, 615-621

Does there have to be an obligation to obey the law?

6. Joseph Raz, 'The Obligation to Obey – Tradition and Revision' *In Ethics in the Public Domain. Essays in the Morality of Law and Politics* (2d. ed. Clarendon Press, 1995) 341-354

Positivism stated – the continental way

7. Hans Kelsen, *Introduction to the Problems of Legal Theory* (first published in 1934, trans. B. Litschewski Paulson & S. L. Paulson, Oxford UP, 1992) 1-19

Normativity and the separation of law and morality

8. Hans Kelsen, *Introduction to the Problems of Legal Theory* (first published in 1934, trans. B. Litschewski Paulson & S. L. Paulson, Oxford UP, 1992) 21-36

The hierarchical structure of the legal system and the problem of interpretation

9. Hans Kelsen, *Introduction to the Problems of Legal Theory* (first published in 1934, trans. B. Litschewski Paulson & S. L. Paulson, Oxford UP, 1992) 55-89

The demystifying potential of legal positivism: rights, the legal subject, the state, the private/public distinction, etc.

10. Hans Kelsen, *Introduction to the Problems of Legal Theory* (first published in 1934, trans. B. Litschewski Paulson & S. L. Paulson, Oxford UP, 1992) 37-53, 97-105

Doing law for a totalitarian regime

11. Carl Schmitt, *On the Three Types of Juristic Thought* (trans. J. Bendersky, Praeger, 2004) 43-99

Doing law with principles

Overcoming discretion

12. Ronald Dworkin, 'The Model of Rules I' In *Taking Rights Seriously* (2d ed., Harvard UP, 1978) 22-45

Principles: the “rights thesis” explained

13. Ronald Dworkin, ‘Hard Cases’ In *Taking Rights Seriously* (2d ed., Harvard UP, 1978) 81-100

Principles: adjudication beyond convention

14. Ronald Dworkin, ‘Hard Cases’ In *Taking Rights Seriously* (2d ed., Harvard UP, 1978) 101-123

After positivism and natural law theory

15. Gunther Teubner, ‘Altera Pars Audiatur: Law in the Collision of Discourses’ in: Richard Rawlings (ed.) *Law, Society and Economy* (Oxford: Oxford University Press, 1997) 150-176
16. Duncan Kennedy, ‘A Semiotics of Legal Argument’ (1991) 42 *Syracuse Law Review* 75-104

Part Three

What rights do they have? An introduction to the multiculturalist challenge

Discrimination and cultural identity

17. Brian Barry, *Culture and Equality. An Egalitarian Critique of Multiculturalism* (Harvard UP, 2001) 55-62, 90-109

Group rights

18. Charles Taylor, *Multiculturalism and the Politics of Recognition* (Princeton UP, 1992), 51-73

Feminism and multiculturalism

19. Susan Moller Okin, *Is Multiculturalism Bad for Women?* (Princeton UP, 1999)
9-24

The core of the challenge extended: the rights of non-liberal societies

A law of peoples

20. John Rawls, *The Law of Peoples* (Harvard UP, 1999) 10-30

Its principles

21. John Rawls, *The Law of Peoples* (Harvard UP, 1999) 30-43

Decent hierarchical peoples

22. John Rawls, *The Law of Peoples* (Harvard UP, 1999) 59-85

Ius ad bellum, ius in bello

23. John Rawls, *The Law of Peoples* (Harvard UP, 1999) 89-105