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# Jurisprudence: a personal view

> *Jurisprudentia est divinarum atque humanorum rerum notitia, justi atque injustia*. (Jurisprudence is the knowledge of things human and divine, the science of right and wrong.)
>
> (Attributed to Ulpian)

> . . . except law.
>
> (The Hard-nosed Practitioner)

> Perhaps sociology is not yet ready for its Einstein, because it has not yet found its Kepler – to say nothing of its Newton, Laplace, Gibbs, Maxwell or Planck.
>
> (Robert K. Merton)[1]

Italo Calvino is one of my favourite authors. As a jurist I often identify with two of his characters, Mr Palomar and Marco Polo. Mr Palomar wishes to understand the universe. He decides to start with particulars. He tries first to see and fix in his mind one individual wave as a precise and finite object. He fails. He tries to work out how to control his lawn, by focusing on a single square metre of it (in order to count how many blades of grass there are, how thick and how distributed). Using statistical analysis, description, narrative and interpretation, he fails again. He becomes neurasthenic. Maybe, describing a constellation of stars viewed from the earth is easier than describing a wave or a patch of grass. But 'this observation of the stars transmits an unstable and contradictory knowledge'.[2] They move, they change, there are faint glimmerings. He distrusts the celestial charts.[3]

Many scholars have Palomar moments. Calvino's vision is anti-reductionist. It is futile to try to master the world or the universe; enquiry is endless. Later we shall encounter Calvino's Kublai Khan who thinks that he can gain control of his Empire by reducing it to sixty-four orderly squares of a wooden chessboard. In counterpoint, his guest, Marco Polo, starts on boundless imaginary journeys by contemplating the grain of a single square.[4] Particularity and generality, simplicity and complexity are relative matters. On a continuum of simplicity and complexity I am closer to Marco Polo than Kublai Khan, but I do try to think in terms of broad pictures and frameworks and hypotheses in order to set contexts for more particular enquiries.[5]

This book is based on a particular vision of Jurisprudence, which many do not share. I wish to start by making that vision clear. This is how I summarised

my position recently: I am a jurist, although by necessity I dabble in other disciplines, including philosophy, anthropology and literature. My central concern here is with the health of law as a discipline.

I use 'jurisprudence' and 'legal theory' as synonyms. Some do not.[6] I treat the field of Jurisprudence as the theoretical part of Law as a discipline. The mission of a discipline is to advance and disseminate knowledge and understandings of its subject matters. The mission of the discipline of Law is to advance and disseminate knowledge and understandings of the subject matters of that discipline. These subject matters are neither static nor well-defined – nor should they be.[7]

The term 'Jurisprudence' is like the term 'Law' in phrases such as 'Law as a discipline' or 'the Harvard Law School' or a course on 'the Law of Torts'. These signify 'field concepts'; that is to say, they are rough labels or designations of fields or areas of enquiry with no precise or stable borders and very little analytical purchase.[8] 'Law' in Harvard Law School does not need and should not have a general theory or definition.

Jurisprudence (and Legal Theory as a synonym) is the theoretical part of that discipline; a theoretical question is a question posed at a relatively high level of abstraction; 'Legal Philosophy' broadly refers to the most abstract parts of Jurisprudence; in my view, this is just one aspect of Jurisprudence because understandings of legal phenomena and ideas require addressing questions at many levels of abstraction and generality from many different perspectives. For example, the topic of 'judicial reasoning', conventionally interpreted as reasoning about doubtful or disputed questions of law, can involve questions about reasoning in general (philosophical), judicial reasoning in general, judicial reasoning about questions of law, judicial reasoning about questions of law in common law/anglophone/American appellate courts or the US Supreme Court; reasoning about questions of law over a period of time in one court in a specific jurisdiction; or the reasoning style of one particular appellate judge. These are *all* theoretical questions, although the last two may be on the borderline depending on the approach adopted. Some of these questions need only a small acquaintance with legal matters; some require the lenses of more than one discipline. The more one moves down one or more such ladders of abstraction, the more engaging with such questions requires local legal and other knowledge.[9]

I view Jurisprudence as a heritage, as an ideology, and especially as an activity. The idea of *heritage* reminds us that Jurisprudence has a history and that, even within a quite narrow 'tradition', the total picture of extant texts, ideas and debates can be vast, complex and daunting. Most historical overviews of the Western tradition of jurisprudence extend back at least to classical Greece (Plato and Aristotle) and include different strands of Western Christianity (especially Natural Law), the secular enlightenment, grand social theory (e.g. Marx, Weber and Durkheim), several branches of philosophy as well as specifically jurisprudential studies.

Some student books attempt to classify and describe the main strands of modern legal theory in terms of crude, overlapping 'schools' and 'isms', such as Natural Law, the Analytical School, the Historical School, the Sociological School, Law and Economics, Realism, Marxism, Positivism, Feminism and Post-modernism.[10] For convenience of exposition it is sometimes useful to speak of three domains of Jurisprudence: Analytical, Normative and Empirical (including Historical) reflecting the idea that understanding law involves concepts, values and facts. In most enquiries in legal studies all three are combined. In some conceptual analysis, normative evaluation or empirical concerns may be paramount, but it is dangerous to treat any of these as separate sub-disciplines. Such 'domains' are merely broad kinds of field concepts.[11]

Looking on jurisprudence as a heritage emphasises continuity and the relevance of history. It brings into focus problems of selection and some of the difficulties of classifying and generalising about ideas and thinkers.[12] Viewing Jurisprudence as *ideology* is also helpful. The term 'ideology' is ambiguous: it can refer to a set (sometimes a system) of beliefs or, in Marxist usage, it can refer to beliefs that are distorted by self-interest. Both usages are relevant here: the first draws attention to the links between one's beliefs about law and one's more general beliefs about the world. My main aim as a teacher of Jurisprudence has been to stimulate students to align their own assumptions and beliefs about law to their other beliefs and to reflect on and refine both. The same kind of exercise is involved in critically examining the normative assumptions underlying a particular legal system or body of law, whether or not they are coherent.

The Marxist sense of 'ideology' is a useful reminder of the close connections between belief, self-interest and delusion. A central theme of critical legal theory has been to stress the close connections between law and politics and to put into question any claims to impartiality or objectivity in theorising about law. Some commentators even dismiss Jurisprudence as 'ideological' in this pejorative sense, as an inescapably self-justificatory or even obfuscating enterprise. By this they may mean that the main function of Jurisprudence has been to purport to legitimate law and its study by providing politico-moral justifications for legal systems, especially state legal systems. This may be partly true about some practices of legal theorising.

Viewing jurisprudence as heritage and ideology provides useful reminders of important points. However, in the present context, I see the field mainly in terms of the *activity* of theorising about the subject matters of our discipline; that is, posing, analysing, reposing, researching, reflecting on, arguing about and even answering general questions relating to these subject matters from different standpoints and at different levels of abstraction.

One kind of jurisprudential activity, especially in teaching, is entering into dialogue with significant texts selected from our vast heritage. The main objective is to clarify one's own views, but in order to do this sensibly one

needs to understand the texts historically, for instance in ways that R. G. Collingwood and Quentin Skinner have pioneered. Dead jurists have other secondary uses as targets of satire or caricature or crude classification into schools or as exemplars of a particular perspective or tendency.

Theorising is a questioning and answering and reasoning activity. Some of the products of this are more or less tentative or confident answers to questions of many different kinds. Some substantial, carefully worked out answers may deserve the name of 'theories'; but very often the products of theorising are answers to quite modest or specific questions or the dissolution of puzzlements or clarifying concepts.

The term 'theory' is also bandied about to refer to speculative hypotheses or working assumptions or presuppositions or as a form of self-aggrandisement.[13] The term 'theory of law', which is ambiguous, is in my view greatly overused and abused. It has one specific meaning, as an attempt to answer the question: what is the nature or essence of law? I am sceptical of that enterprise for several reasons: I don't understand the question; I doubt if law has a nature or essence; I also doubt that any abstract theory of this kind can have much analytical purchase or organising function for our discipline – it is likely to be too abstract and reductionist. However, the main point here is that theories – and especially theories of law – are not, and should not be, the main products of legal theorising. *Jurisprudence is not a one-question subject.*

I do not have, and do not aspire to, a General or Grand Theory of Law.[14] Most of my work involves middle-range theorising in between detailed particularity and very abstract philosophising.[15] For instance, in my project on Globalisation and Law I have been quite sceptical of Grand or universal reductionist theories of either 'globalisation' or 'law', and have chosen to focus on sub-global patterns, and topics that are most appropriately dealt with at lower levels of abstraction, such as legal pluralism, diffusion of law[16] and 'rethinking' specialised fields such as Evidence,[17] Torts,[18] Land Law[19] and Comparative Law.[20] At these 'middle-range' levels, unlike Merton, I have not tried to fashion neat theories, but have rather thought in terms of the interaction between very particular enquiries and more general working assumptions that need to be articulated and examined critically from time to time. For me working assumptions are like planks of a raft more or less tightly fastened together to provide a temporary and more or less stable platform on a boundless sea which in turn has varying moods. The planks may have various origins and may or may not fit easily together.[21] One job of the theorist is to help to articulate these often tacit working assumptions, to examine them critically and, where necessary, to adjust, repair or replace particular planks and only occasionally to risk jumping onto a new or completely different set of rafts.[22]

What is the use of theorising? There is no single general answer. Of course, sometimes it is useless, sometimes very important or even essential. It can be an end in itself. In the present context I wish to emphasise its potential

contribution to the health of the discipline of Law, the aim of which is to develop and disseminate understandings of the subject matters of that discipline. From that perspective, theorising has several functions or 'jobs':[23] constructing total pictures (synthesising); clarification and construction of individual concepts and conceptual frameworks; developing normative theories, such as theories of justice or human rights; constructing, refining and testing empirical hypotheses; developing working theories for participants (e.g. prescriptive theories of law-making or adjudication or advocacy in a particular legal system); and so on – wherever thinking at a relatively general level contributes to understanding.

For me the most important function is articulating, exposing to view and critically assessing significant assumptions and presuppositions underlying legal discourse generally and particular aspects of it – not only issues about law in general, but also the assumptions and presuppositions of subdisciplines, as has been happening recently in fields obviously affected by globalisation, such as Comparative Law and Public International Law. This critical function can usefully be applied to one's own work as well as to others – there is a need for self-critical legal studies (Chapter 19). One conclusion of my project on 'Globalisation and Law' has been that these complex and varied processes challenge some of the mainstream general working assumptions of Western traditions of academic law (Chapter 19). An important reason for this, as we shall see, is that for at least two centuries these traditions have very largely focused on the details of domestic municipal or state law of particular countries, such as English Law or German Law or American Law, and have not developed much equipment for dealing with enquiries that cross national or other jurisdictional borders.[24]

From relatively early in my career I had to make 'the case for law' in respect of funding legal education and research, mainly in developing countries, often in competition with the claims of agriculture, economics, population studies and so on. In that context I became an advocate for my discipline, using a fairly standard argument:

> [T]here are certain tendencies in Law as an academic subject which justify cautious generalization. For typically it is (a) part of the humanities, not least because it covers so many phases of human relationships and (b) it is intellectually demanding and (c) it is directly related to the world of concrete practical problems and (d) it is concerned, as perhaps no other subject is concerned, with process and procedure from the point of view of participants, and (e) it has a long heritage of literature and resources. While none of these elements is on its own peculiar to Law, perhaps no other discipline combines them in the same way and to the same degree: thus Law can be as intellectually exacting as Philosophy, but more down-to-earth; as concerned with contemporary real life problems as Medicine or Engineering, but with closer links to the humanities; as concerned with power and decision-making as Political Science, but

> more concerned with the how of handling process … This being so, it is important that it should be done well.[25]

This is of course a piece of advocacy, perhaps a bit overstated, but nevertheless sincere about the potential of my discipline. This is why I call myself 'a legal nationalist'. However, I shall argue that Law as a discipline has some way to go before it fulfils that potential.

Few of the specific ideas presented here are unique. For example, others have argued for a better integration of Analytical, Normative and Empirical Jurisprudence; or for viewing theorising as an activity; or for constructing contextual intellectual histories of our heritage of legal thought; or for acknowledging the ideological function of much legal theorising; or for viewing theoretical enquiry both as an end in itself and as having several different instrumental functions. Combining these ideas may be unusual, but the important point in this book is, first, that all of these ideas are directly relevant to the health of the discipline of Law and, secondly, that the biggest challenge facing both Law and Legal Theory is taking the implications of globalisation seriously.

This book is by someone who is an enthusiast for his discipline, who believes that theorising can contribute greatly to understanding law at many levels and that this enterprise should be of interest to anyone who wishes to understand law in these confusing times – which should, of course, be nearly everyone.