Is Jurisprudence a Reason for Irresponsible Law-making?

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- There now exist major hazards of a genetic, chemical or nuclear nature, which cannot realistically be managed by legislation.

- For example, if GM fish escape from a fish farm due to negligence, and breed or predate on the local fish population with a result of local extinction for that species, or a fully genetically modified species, it may be impossible to prove.
- There is no law to prevent it happening, and no redress for extinction.

- There is a case for the burden of proof to be reversed, with the onus on businesses to prove that their products and production methods are not hazardous.

- Another element, which I am currently considering, is why there is so little concern about or awareness of the inadequacy of the legislation, on the part of the legislators.

  Or- awareness, with acceptance?

- This is leading me to question how law is taught, as one possible answer.

  Jurisprudence is the part of the syllabus when students learn about the theories of what makes law, what law is. It presumably should be a space in which to question the origin and efficacy of laws.

What is jurisprudence?

Wikipedia on Jurisprudence:

- "Scholars of jurisprudence, or legal philosophers, hope to obtain a deeper understanding of the nature of law, of legal reasoning, legal systems and of legal institutions."

Wikipedia article mentions the work of

- Aristotle, Aquinas, Hobbes, Locke, Hume, Bentham, Austin, Kelsen, Hart, Fuller, Finnis, Raz, Dworkin, Hayek, Rawls.

Or: I Want to Become a Lawyer, Why Do I Need This Stuff?

The semester of philosophy which is in the middle of 3 years of learning cases-and-statutes.

Law student is happily going along learning about legal terminology then is suddenly expected to learn a lump of philosophical stuff. So s/he concentrates on linking people to theories or movements, without analysis. Then gets that lump of study and essay and exam over with, then back to the REAL stuff…

“I Hate Jurisprudence”

(title of Ch.1, J G Riddell *Jurisprudence* 1991 Butterworths)

Is there a problem with teaching?

The quote is meant to reflect the student but also applies to the teacher…

Is it too difficult or just boring?

“My introduction to jurisprudence was brought about by the need to master enough of the subject to be able to lecture on it during six months at the University of South Carolina. Without…support and encouragement I would never have been able to learn enough (just) to survive.” (Riddell Preface)

Is it too self-referencing: self reflexive?

"Books with such titles as *Morality And the Law*, *Law And Justice* have long been commonplace. In recent times authors have taken to triplication and we have books with such titles as *Law, Morality and Religion*; *Law, Morality and Society*; *Law, Liberty and Morality*; *Law, Liberty and Legislation*; *Rules, Principles and the Law*; *Justice, Law and Rights*; *Law, Reason and Justice*. (Perhaps in time we shall come to have quadrupling, *Law, Liberty, Justice and Morality*)" (Riddell p.5)

(Industry of irrelevance- has jurisprudence become something to laugh at?)

Has it too many commentators for the beginner to cope with?

"Do not read *Reading Rawls* until Rawls has been read." (Riddell p.7)

Is it too abstract and deliberately obscure?

- Riddell cites sentence from a publication (kept anonymous) in the late 80s:

"Just as the earlier argument against Nozick's invocation of the Kantian maxim did not show that the moral views he is advocating are compatible with consequentialism, so the argument against Nagel's interpretation of personal projects and relationships is not meant to show that he is mistaken in claiming that they are irreconcilable with an agent-neutral view of practical reason"

Riddell draws our attention to the fact that this sentence contains a mass of double negatives.

Is it too rigid and traditional?

- Riddell is critical of jurisprudence but does not challenge the manner in which it is taught- his book contents are a chronological overview of the work of Austen, Kelsen, Hart, Fuller, Dworkin, Finnis.

Is jurisprudence too detached and formulaic?

(http://www.docstoc.com/docs/3441716/Jurisprudence-for-dummies-a-guide-to-for-the-rest-of/)

- Australian "jurisprudence for dummies" website compares jurisprudence to another scientific method of classification:

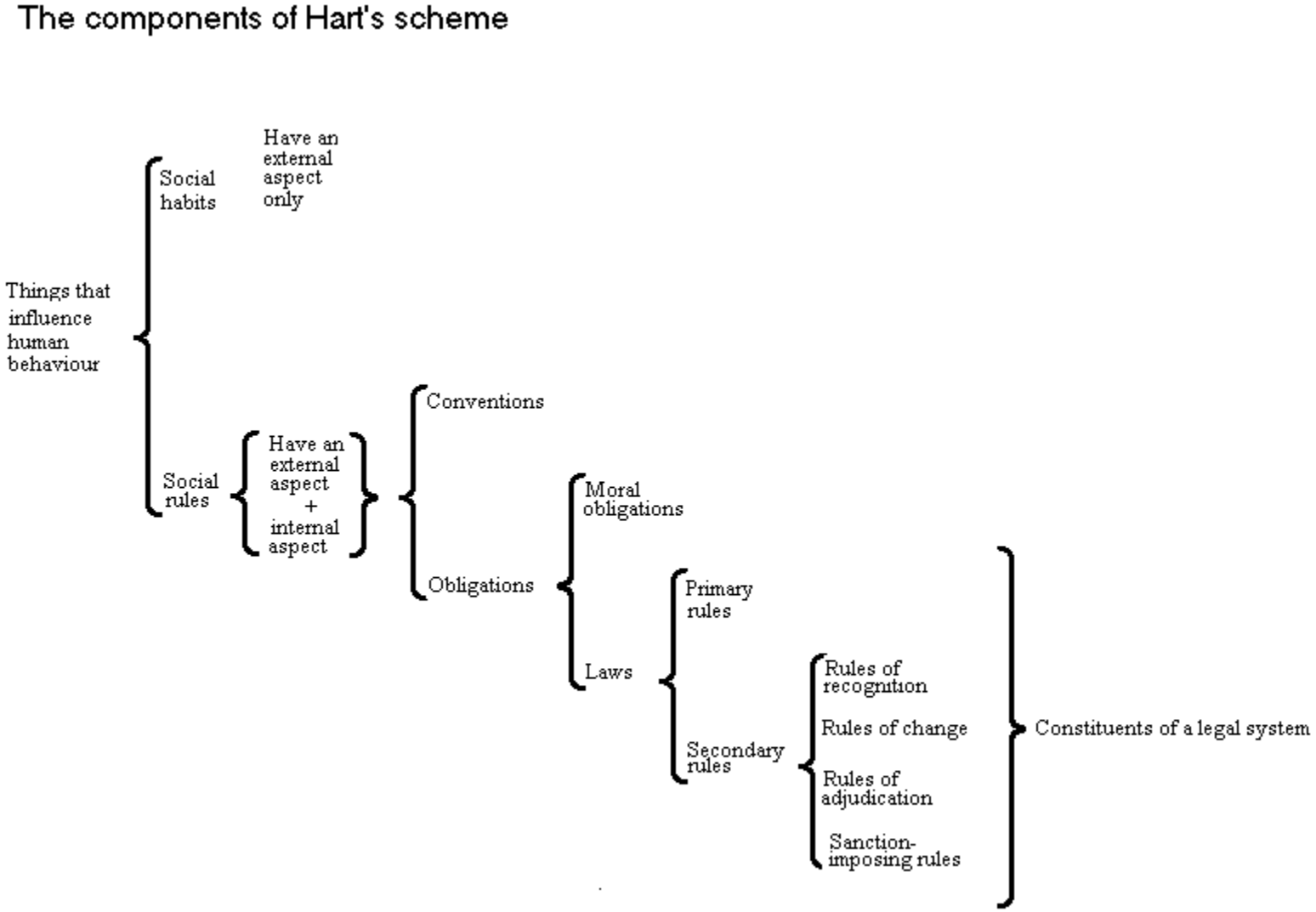
- "positivists design a framework that both defines and describes law. They then examine different legal systems to see whether they "fit" the definition. If this sounds a bit artificial, remember that taxonomic classification is also descriptive, designed to define and name living creatures based on their relationships to each other" (p.3)

- *Formulaic continued…*
- Kelsen's Pure Theory of Law- (a system of norms leading back to the *grundnorm* where political power is initially translated into law.
- (Hans Kelsen 1881-1973)

- "Jurisprudence-for-dummies" notes exemplify Kelsen's formula in action:
- "When the University of Queensland issues me with a parking ticket, it does so under regulations (norm 1) pursuant to the Statute of the University of Queensland (norm 2) which is an act of the Queensland parliament (norm 3) passed pursuant to the Queensland Constitution (norm 4) which derives its capacity to legislate from the plenary powers conferred in the Commonwealth Constitution (norm 5) which controls parliament's powers and may only be altered (thereby altering parliament's powers) by the process in s.128 (*grundnorm*)" p.20

(a flow diagram in textual form)

Formulaic continued- Riddell:



Classifications and formulae are undemanding, safe things to learn.

Maybe abstract jurisprudence is mentally challenging but psychologically comfortable?

If no-one attempts to answer the question “why is law inadequate for major hazards” then there is no way to ask the question, either?

= Awkward questions can be ignored.

Is Jurisprudence too wide-ranging, and too intimidating?

Wikipedia article on Jurisprudence mentions the work of

Aristotle, Aquinas, Hobbes, Locke, Hume, Bentham, Austin, Kelsen, Hart, Fuller, Finnis, Raz, Dworkin, Hayek, Rawls.

The article is a nutshell version of a Jurisprudence course

– From Hobbes’ theories to now = over 400 years of legal theorising, compressed into one or two semesters.

400 years of legal philosophy? How could students dare to question it?

How could students dare to question the teaching methods, the relevance, how laws are made, whether laws are effective and if not why not?

Is it counter-productive as it stifles query?

A new approach to Jurisprudence:

Veitch/Christodoulidis/Farmer *Jurisprudence: Themes and Concepts*
2007 Routledge Cavendish

"Anglo-American jurisprudence… 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.

[W]e 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." (Introduction p.vii)

Approach is thematic: Law and Politics, Legal Reasoning, Law and Modernity.

Veitch/Ch/F:

- Eg: Teubner structural coupling theory to explain why regulatory initiatives can sometimes be unsuccessful:

Involves "crossings of boundaries between the political, legal and economic systems. A political demand (for cleaner environment, for cheaper housing) is *translated* into a legal measure, operating a distinction between what is legal and illegal (penalties, fixity of rents), which is then *re-translated* by the economy into a language of prices and costs.

Teubner identifies the problem of regulatory failure as the mistranslations that have occurred from each system using a different register to translate the 'stimulus' they receive: in the political system in which the demand is generated it is about the use of power; the legal system 'picks up' that demand as one that has to do with acting legally or illegally; the economic system picks it up in terms of what makes good economic sense.

In this process the systems (political, legal, economic) do not operate causally on each other." (Veitch, Ch, F, p.220)

(Complexity of interaction between systems- compared to simple formulae)

Are there two types of Jurisprudence?

abstract v …"practical"? "real"?

(http://www2.law.ox.ac.uk/jurisprudence/jdg/)

The Oxford University jurisprudence discussion group: topics for discussion this semester:

- "Neutrality Isn't Neutral: On the Value-Neutrality of the Rule of Law"
- "Bringing the Agent Back Home: How MacCormick Smithified Kant"

- "To whom Is Criminal Responsibility Owed and Why?"
- "Constitutional Human Rights and the Passage of Time"

The latter two seem to be more accessible to the law student, as the first two use specialist language which can have a distancing effect.

Is there a language barrier?

- Jurisprudence Language: Cognitivism, Deontology, Epistemological, Ought, Positivism, Syllogism, Teleological,Utilitarianism.

- Law language: claimant, defendant, consideration, mens rea, actus reus, incorporeal hereditament, fee simple, promissory estoppel, restrictive covenant.

- Law student is already learning a specialist language for the law degree, then is plunged into a semester with a different language all of its own…

- **Ulrich Beck *Ecological Politics in an Age of Risk* 1995 Polity Press**
  (contemporary with Riddell, but compatible with Veitch et al)

- Social science is making the observations that jurisprudence should be making-

Eg: law can't cope with redress or compensation for major new hazards of genetic, chemical or nuclear nature, and legislation is inadequate, the burden of proof is nearly impossible to establish, and the courts are reliant on the judgements of experts. (ie scientists, not judges)

This is precisely the issue which will emerge for GM fish escapes.

- "The law and its legislative paradigms have not followed the historically changed facts that they regulate." (Beck p.118)
  (law is out-dated for modern hazards)
- "Even the classical tools of policy control, legislation and administrative regulations, are hollow at their core… they subvert their own responsibility…[and replace it with] scientific-technological expertise" (Beck p.117)
- (legislators' ignorance= cede power to scientist as expert)

- Q: it takes a sociologist to question laws, why aren't lawyers taught to question laws? What resource is there for observing that when a law fails there is no point replacing it with another law as that will fail too?

- Law teaching encourages unquestioning absorption of facts "cases-and-statutes" and even the linear history of jurisprudence presents the student with nicely parcelled philosophical study cards
- eg Bentham-Positivism-utilitarianism, Rawls-Veil-of-Ignorance and so on.

- Q: Do students see law studies as 2-part and separate: 'cases-and-statutes' which are relevant and urgent, and essential to the vocational nature of the degree; and jurisprudence which is a horse pill to be swallowed with as little scrutiny as possible?

- Beck remarks in 1988 that sociologists were not looking at the issues raised by major (genetic, nuclear etc) hazards:

Instead they had a “servile dependence on the authors of the classics (who really could not have known of this)” (Beck p.83) – could describe jurisprudence.

- Q: Are sociologists dealing with these issues now? If so how come jurisprudence isn’t? Why aren’t legislators looking at the failures of law to manage major hazards?

- Q: Could jurisprudence be taught differently, or be split into abstract and “practical”? Could law students be given workshops to discuss themes and consider social and environmental implications?

  Eg Teubner- Professor of Legal Sociology at University of Frankfurt

Multi-disciplinary nature of law teaching? Should law degrees include courses on 2-part jurisprudence, politics, science, sociology?

The End

Thank you!