

Is-Jurisprudence Versus Ought-Jurisprudence: A Discarded Distinction Today?

Jan-Erik Lane

Fellow with Public Policy Institute, Belgrade, Serbia

**Corresponding Author: Jan-Erik Lane, Fellow with Public Policy Institute, Belgrade, Serbia.*

ABSTRACT

The social sciences are very much interested in law and its impact upon politics and economics. Recently, moralism has recently entered jurisprudence to such an extent that the classical separation between the IS and the OUGHT appears discarded almost. However, the distinction between law and justice remains valid. It is essential in the political analysis of the constitution and constitutional reforms. When it comes to the central concept of rights, one must first clarify the existing rights and then move on to suggest reforms, augmenting the rights, Justice belongs to OUGHT jurisprudence and remains always key in political analysis, but it should not enter IS jurisprudence, because there are several justice conceptions.

Keywords: Norms, justice, rights, natural law, legal positivism, legal realism and legal pragmatism.

INTRODUCTION

The last decades have seen a great debate over the nature of jurisprudence, concerned with the essence of law as well as how it should be studied scientifically (Waldron, 2011). The two main contenders were Ronald Dworkin on the hand offering the natural law approach and Richard Posner on the hand, stating the opposite perspective.

It is often said that Dworkin prevailed, declared to be the "greatest" legal scholar around the turn of the 20th century. I will argue that this extremely positive evaluation is partly exaggerated and that Posner' realism is preferable to Dworkin' moralism. This confrontation has relevance for political science as well as practical philosophy, actually with origins dating back to ancient Greek philosophy.

To a considerable extent, the controversy focused upon constitutional law, which is most interesting for political science.

THE ISSUES

One may sat that two classical questions in legal and constitutional science are the following:

- 1) What is the subject matter of jurisprudence
- 2) Can law be studied in a value neutral manner?

The first question is about the ontological status of norms or rules, whereas the second question

concerns epistemology in jurisprudence: IS versus OUGHT.

Norms, Rules and the Stability of Legal Order

Everybody agrees on one point, namely that law comprises norms, but then the disagreements start about what norms, especially legal norms, and how to study them.

Law is said to consist of the norms that are enforced somehow. Enforcement makes legal norms differ from moral norms. A norm can also be a custom, a behaviour regularity, but most often a command, or directive. Typical of legal norms is the sanction against disobedience.

"Norm" is an ambiguous word, meaning either regular behaviour or normative sentence, or command. By "legal norm", one may refer to a paragraph in the constitution for instance, or an institution in society' legal functioning system. The same ambiguity is to be found when the legal order or system is called a collection of "rules", as a rule may be an instruction written down in a law book or the actual regularly that satisfies the written rule. When norms or rules are obeyed or backed by sanctions, one speaks about "institutions", or "institutionalization". A reasonable definition of "law" is that it refers to ordered couples of norm sentences and enforcement behaviour regularities, i.e. <norm, regularity>. Now, let us examine a doctrine that conceptualizes law as morals, denying the separation of moral and legal norms. Take the legal system or order of India as an example. If it is a matter of constitutional

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law, then one would have to be informed about three things:

- i) Written constitution, the text and supplements
- ii) The rulings of the constitutional court, i.e. the application and interpretation of its judges
- iii) The extent to which the norms or rules are met with compliance.

All of this is the IS-jurisprudence. The constitutional analysis would look into the existence of obsolete rules, the conflict of norms and the political struggle over constitutional change and interstate divergence over legal interpretation. The natural law scholars claim that there is a set of norms laid down in reason somehow. Right reason offers the law of humanity, transcending so-called positive law, i.e. country or national law. What is natural law that has become so popular in the new moralism in the social sciences?

Natural Law

The natural law scholars claim that there is a set of norms laid down in reason somehow. Right reason offers the law of humanity, transcending so-called positive law, i.e. country or national law. The natural law tradition stretches from Ancient Stoicism over Hugo Grotius to Ronald Dworkin. It is not jurisprudence but moral theory, backed by religion, as with Roman lawyers.

Natural law belongs to OUGHT jurisprudence. It has a long fascinating history including scholars like Lipsius, Locke and Nozick. Focusing upon the concept of rights, it developed slowly into a democratic theory, i.e. the human rights doctrine with Thomas Paine.

Origins of Natural Law

The origins are to be found in Greek-Roman philosophy from the Ancient period, especially with the Pre-Socrates and the Post-Socrates. Although most of the writings or manuscripts have been lost, one may draw an opposition between the Epicureans and the Stoics.

One school had its core in atomism and adhered to its implications, such as determinism and naturalism. The Universe followed its laws and humans were driven by the search for pleasure and the avoidance of pain. Only reason could the emotions towards enlightened self-interest seeking. Human life was basically determined just as nature, but the consolation was given by reason, recommending a life in emotional balance of rational insight. Law was merely the norms

imposed by the local community or government in place.

The other school had spiritual origins, which made it attractive to later Christian theology. The entire world is a soul, which humans are members of. This soul is a gigantic community of everything, nature and living organisms. To be a member renders every human immunities, i.e. the human rights from sociability. Life consists of reflecting over this universal soul and research harmony by accepting Stoic virtues. Stoicism is spiritual.

Based on a vast enquiry into the Old Testament, the New Testament and Greek-Roman philosophy with almost endless quotes, Hugo Grotius in *On Law in War and Peace* (1623) arrive at pinning down the essence of modern Stoic natural law thinking, namely the following properties of mankind and its immunities:

- i) Sociability of humans; ii) not harming others or taking their belongings; iii) compensate for damages inflicted upon others; iv) “*pacta sunt servanda*”.

Grotius finds these 4 principles to be valid for individuals in domestic affairs and states in international affairs, because they are Right Reason:

“From this Signification of Right arose another of larger Extent. For by reason that Man above all other Creatures is endued not only with this Social Faculty of which we have spoken, but likewise with Judgment to discern Things pleasant or hurtful, and those not only present but future, and such as may prove to be so in their Consequences; it must therefore be agreeable to human Nature, that according to the Measure of our Understanding we should in these Things follow the Dictates of a right and sound Judgment, and not be corrupted either by Fear, or the Allurements of present Pleasure, nor be carried away violently by blind Passion. And whatsoever is contrary to such a Judgment is likewise understood to be contrary to Natural Right, that is, the Laws of our Nature.”

This Right Reason philosophy is to be found with several political theorists over these three centuries in one version or another, with Lipsius, Locke, Rousseau and Paine- see Table 1.

Table1. *Natural law*

- i) Altruism
- ii) Respect for others' property

iii) Compensate for damages done

iv) "Pacta sunt servanda"

It should be emphasized that Grotius derives the four principles of altruism or sociability from universal right reason together with the Jewish-Christian legacy and Greek-Roman philosophy and Roman jurisprudence. He then applied them to both humans and human society, domestically and the international system of states, laying the foundations of public international law.

RIGHTS

Ronald Dworkin (1978) rejuvenated the natural law school by developing an OUGHT jurisprudence, clustering upon two moral concepts, namely: A) rights; B) equality as envy freeness. The term "right" is much disputed in jurisprudence and political theory. It can be employed in both IS jurisprudence and OUGHT jurisprudence.

The general analysis of rights was, however, offered by Hohfeld in the early 20th century - see Diagram 1 and Diagram 2 for the variety of rights, their opposites and correlatives (Simmonds and Steiner, 2000). It allows for both positive and normative applications

Diagram1. *Legal opposites*

Right	Privilege	Power	Immunity
No-right	Duty	Disability	Liability

Note: *Privilege is the opposite of duty; no-right is the opposite of right. Disability is the opposite of power; immunity is the opposite of liability*

Diagram2. *Legal correlatives*

Right	Privilege	Power	Immunity
Duty	No-right	Liability	Disability

Note: *A right implies that someone else has a duty. A privilege means that someone else has no-right. A power entails that someone else has a liability. An immunity implies that someone else has a disability.*

The Hohfeld distinctions are very helpful in analysing the rights that people actually possess in the legal order of a country, like e.g. India and China. The variety of right concepts may also be employed to state recommendations about urgent legal reforms to improve upon peoples' rights. Dworkin never separates between IS rights and OUGHT rights, where the gulf may be immense. Instead, he engages in moralism. Yet, all of this is IS jurisprudence, falsifiable or confirmable propositions. Here, "rights" is merely a key theoretical term for systematically analysing existing legal order ~ using Hohfeld.

R. POSNER

One can distinguish two basic elements in Posner' huge scholarship, namely his idea about law and economics on the one hand and his critique of Dworkin's moralism. I agree with the second but am skeptical about the first.

Posner examines existing law or legal order from the point of view of IS jurisprudence (Posner, 1992, 1996, 1999). He emphasizes the following features:

- a) Change and evolution;
- b) Inconsistencies;
- c) Lacunas;
- d) Conflicting interpretation;
- e) Biases.

We are far from Dworkin's rosy theory of Law' empire. We are forced to reject Dworkin's use of natural law conceptions in order to argue that legal disputes or issues are in principle solvable - "the right answer doctrine". Below we return to his "right" answer to income and wealth distribution, namely envy freeness.

Now, it should be pointed out that Posner' (2004) legal pragmatism is far from the model of IS jurisprudence, linking law with economic efficiency, a much criticized theme. We should mention legal positivism as well as legal realism.

LEGAL POSITIVISM

Legal positivism stems from Hobbes, who regarded law as the commands of the sovereign. This idea of law belongs clearly IS jurisprudence, underlining the will of the state behind norms. Kelsen (1960) developed a so called pure theory of law, eliminating all OUGHT jurisprudence, approaching law as a logically coherent system of norm propositions, starting from a Basic Norm, giving normativity to all norms.

Hart (1994) also looked upon law as rules, separating between primary and secondary rules. imperatives, prohibitions and recommendations. It was developed differently by Kelsen and Hart. The Hart framework is more flexible than Kelsen's. It makes no assumption of logical coherence and its secondary rules cover several rules of recognition for eliminating merely moral rules. "A rule of recognition" stands for the various markers of law as legality: Parliament, courts, public boards or agencies, etc. A few legal positivists have relaxed the distinction between legal norms on the one hand and moral

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principles on the other (Waluchow, 1994), but it is debatable (Kramer, 1999).

LEGAL REALISM

To the legal realists, law is real regularities in the behavior of state officials, comprising the "legal machinery". In their IS jurisprudence, the legal realists in Scandinavia focus upon enforcement, which to them means application and not any form of normativity, objective or subjective (Haegerstroem, 1953; Ross, 1966; Eckhoff, 1974).

Legal realists tend to distance themselves from legal pragmatism, not in the emphasis upon the decisive role of judges but on the notion of economic efficiency as inherent element in jurisprudence. Law is what the judges decide, whether the decision is efficient or not.

LAW AND ECONOMICS

Law and economics school enlarged the perspective of Posner, by theorizing how close law is to the market economy (Cooter and Ulen, 2012). The foundations of the market economy include contract law, labour law and public regulation. "The size of the market is determined by the range of law". And countries with common law or civil law will perform the best, economically.

To find theories of OUGHT jurisprudence, we must go to the concepts of justice, which following the great Danish legal scholar Ross is outside of IS jurisprudence.

The Law and Economics school focuses upon the legal prerequisites of the market economy, including low transaction costs, variability and observability of contracts as well as freedom of labour and the advantages of bourses. The more fungible assets are, the more they can be exchanged and properly valued in markets.

JUSTICE

Justice, both the word and the conceptions, figure prominently in political science, in both the micro and the macro contexts. And in political history, ideas of justice have been central from the pre-Socratics to the emergence of environmentalism and cultural discourses. Of course, other social sciences and philosophy share this interest in questions about what is just with political sciences, as the concepts of justice can be examined from several angles: domestic politics or economics, international economics

or politics, gender, culture, inter generations, etc.

The approaches of Rawls, Barry and Sen, whatever their major differences, contrast very much with an entirely different approach to justice and moral theories, namely that of Max Weber (1922), emphasizing conflict like Nietzsche when different ideas of justice clash in politics. The Weberian approach has been completely bypassed in modern justice discourse in Anglo-Saxon culture, despite the fact that it has many adherents, receiving alternative formulations with major authors like Kelsen, Haegerstroem, Kaila, Brecht, Foucault, A. Ross, the logical positivists, etc.

Perhaps there is some crucial insight in the position that principles of justice will ultimately depend upon the acceptance of evaluations, i.e. moral evaluations. Actually, prominent Anglo-Saxon authors like e.g. Hume and Ayer have argument similarly.

Scholars who argue that just principles is merely a set of contradictory ideas about justice, reflecting the interests of the scholar or his community, often rely upon the semantic approach to moral terms or words. Weber did not, but for others the non-cognitivist approach to moral words offered a decisive rebuttal of all attempts to arrive at one and only one Platonian idea of justice. In meta-ethics, it was claimed that sentences like "X is just" or "X fulfils justice" were moral propositions with strong emotive content or with normative recommendation. Thus, "justice" is a value biased conception or a propaganda device for influencing people.

RAWLS

Rawls developed his theory of justice, integrating various other concepts in consecutive books and articles. Here, there is only space for considering his original criteria of justice and its theoretical motivation. Firstly, we have the criteria:

(Q1) First Principle: Each person has the same infeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all;

(Q2) Second Principle: Social and economic inequalities are to satisfy two conditions:

They are to be attached to offices and positions open to all under conditions of fair equality of opportunity;

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They are to be to the greatest benefit of the least-advantaged members of society (the difference principle).

I will call the first principle “liberty under the rule of law” and the second one “equality under maxim in”. Both sets of criteria need no explication but can be applied both to political regimes and in public policies. The maxim in principle was radical at the time when liberalism or public choice dominated. It separated Rawls from the classical liberalism or neo-liberalism of Hayek and Nozick for instance.

Rawls justice criteria called for both liberty and equality – thus “liberal egalitarianism”. They were revolutionary for the political theory in the US but hardly much different than Social Democracy ideals in Europe. The originality with Rawls came with the argument for these two principles, namely choosing justice under a veil of ignorance.

The idea of a veil of ignorance is meant to meet the often made requirement that justice criteria are impartial, i.e. do not merely rationalize the person position of the chooser, endorsing the status quo if in a favourable position and calling changes in a negative position. In a veil of ignorance, the choosing person knows nothing, not even his/her personal characteristics – a remarkably strange construction.

However, the is abstruse construction can be turned into a game of incomplete information here Nature makes the first move, putting a real person into a positive or negative position with regard to life opportunities. Fearing the negative position, a rational choice is to bet upon risk aversion, meaning choosing justice principles that institutionalise liberty under rule of law firstly and secondly equality under economic efficiency. Now, things make sense, as these choices are Nash equilibria.

Now, the only objection that may be raised within this deontological framework is to question risk aversion. Maybe the person could be risk prone? Then Rawls’ theory collapses. In the Weberian approach, these two choices will be made on the basic of values, or subjective evaluations morally.

Rawls’ solution – the first and second principles of justice – is based upon the model of a game against nature in the so-called state of nature where people act under a veil of ignorance. Rawlsianism as a moral philosophy belongs under rational choice, as it is in reality based

upon a double game against Nature. What would ordinary person P choose if he/she is under a veil of ignorance – see the dotted line in Figure 1 and 2?

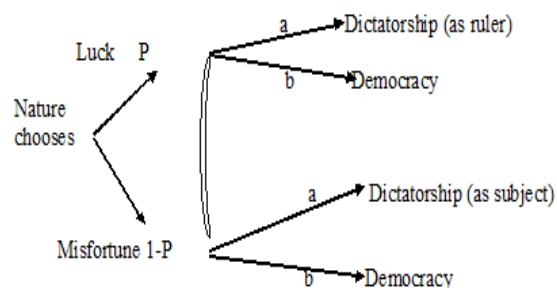


Figure1. Rawls first game – freedom under rule of law

In the first game concerning freedom, the actor will choose the maxmin, as he/she faces complete uncertainty about whether he/she is at the upper or lower node. The worst outcome – subjection – must be avoided.

In the second game that deals with the distribution of resources, the actor will again take maxmin, choosing the welfare state ahead of the welfare society, because he/she does not know which node he/she is at, upper or lower.

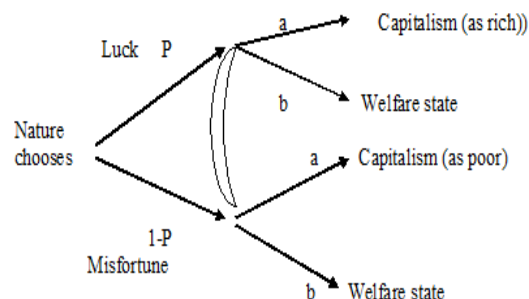


Figure2. Rawls second game – equality under efficiency

Since Rawls assumes that ordinary people are risk avert, it follows that they will never choose a risky strategy, preferring democracy to dictatorship and the welfare state to unrestrained capitalism. However, these moral conclusions about liberty under rule of law and equality with economic efficiency hold only under this naturalistic assumption, as risk prone people may prefer to gamble for the maxmax.

DWORKIN

Dworkin looks upon the key terms like “justice”, “rights” and “entitlements” from the point of view of normative jurisprudence. As a matter of fact, law and morals are inseparable. Thus, rights always constitute normative trumps, i.e. what people can rightfully claim from government. Let me quote:

(Q1) Moral principle is the foundation of law.

(Q2) Without dignity our lives are only blinks of duration. But if we manage to lead a good life well, we create something more. We write a subscript to our mortality. We make our lives tiny diamonds in the cosmic sands.

Compare this extreme moralism with Nietzsche's naturalism! The difficulty with dogmatic assertions like these Dworkin quotations is that there is not ONE morality, like a Platonic idea in the ideal world. Typically, there is conflict among the moralities people adhere to. Why would Dworkin's morality – liberal egalitarianism – be THE morality? There is always conflict over basic moral principles. Morals are contestation. Law is ambiguity and incompleteness, as Posner argues.

Typical of all Dworkin has written is the confusion of IS and OUGHT. What is the foundation of what law? What morals? Whose morals? Chinese law, South African law, Common or Civil Law?

When we are told to take "right seriously", what rights are we talking about: Hayekian rights regulating laissez faire, Barry's impartiality that is conducive to democratic socialism, etc. The debate over natural law – ordinary law still continues, with Dworkin as its strongest adherent today. His chief critique R. A. Posner today argues that natural law according to (Q1) and (Q2) is merely a set of moral prescriptions, and not LAW at all. I agree with Posner in his rejection of Dworkin's confusion of jurisprudence and moral philosophy. If Dworkin managed to smash legal positivism of Hart's kind with his rejuvenated natural law philosophy, he certainly did not crush the other alternatives, legal realism and legal pragmatism. Law is not a set of Platonic ideas, as jurisprudence is a practical discipline.

Dworkin developed his version of liberal egalitarianism, focussing upon the concept of envy and the policy implications of the requirement of justice = envy freeness. It led him to a very original theory of auctions and assurance. However, it has little relevance for the basic problematic of enhancing real equality in social life – Dworkin's goal. A society and polity based upon envy freeness is completely impractical. Social justice can never start from scratch at an isolated island and neglect merit, which is what Dworkin tries to bypass with the utopian auction and the unrealistic insurance scheme. Dworkin's moralism is utopian.

CONCLUSION

A lasting achievement in modern social sciences as well as in meta-ethics is the sharp separation between IS and OUGHT, which recurs not only in Hume but also with Weber. It is crucial in the analysis of law and politics. Before one puts forwards reform proposals or claims for more rights, one must carefully engage in IS jurisprudence, abstaining from moralism. Otherwise, the research findings are not falsifiable but merely matters of opinion. One should be suspicious about natural law approach, like that of Dworkin.

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