JURISPRUDENCE IN THE THIRD WORLD LAW SCHOOL
A BLUEPRINT

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The worldwide trend over the past two decades to down-grade jurisprudence in law school curricula is by no means conducive to the production of socially concerned lawyers for the world of the future. Law Schools in Third World countries have tended to participate in this trend.

The main thrust of this paper is that the Third World situation more than any other demands a continuing interest in jurisprudence, for the perspectives with which it endows the future lawyer are more acutely needed in the Third World situation than in any other.

One reason for the apathy of Third World law teachers in regard to jurisprudence has been the apparent irrelevance to their situation of the austere aridities of the Austinian approach, which dominated law school teaching in countries influenced by the British tradition. Where jurisprudence is still taught, teachers have been unable to break away from this mould owing to their continued dependence on concepts emanating from scholars brought up in the Austinian tradition. Thus it is not unusual to find in Third World law schools, courses of jurisprudence based upon Austin or Hart, involving no broader perspectives than the deep study of the works of these writers. Third World law teachers naturally share a feeling of diffidence in breaking out of these bonds for the reason that the materials on which they could base a socially more relevant course are not easily obtainable.

I would submit that some priorities of special importance for Third World law schools are the production of materials and the encouragement of courses with a substantial content of locally relevant sociological jurisprudence. These jurisprudential studies should include in a special way the cultural, religious and traditional perspectives of their particular society. A failure to provide such a course is arguably a failure by a law school to provide a training which matches the needs of the society on which it depends. Universities lose their relevance to their social setting and tend to become ivory tower institutions of learning if they neglect their duty of providing a socially relevant academic training.

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The universities of the United States avoided failing into this trap by organising their curricula to meet the needs of the community which surrounded them. For example, the land grant universities specialised in the research that was necessary for the agricultural communities in which they worked, as the marine grant universities oriented their work to the needs of the maritime communities in whose midst they were located. This is probably an important factor which led to the result that the universities did not develop as a world apart from the real world lying adjacent to them.

The University structures among Third World countries, inherited as they often are from the West, tend to be moulded to the needs of a social and political order which has passed away. Their adaptation to face a new social and economic order and to undertake the long neglected task of relating academic learning to local needs is in many cases overdue. I cannot speak here in relation to other disciplines, but in relation to the law, one of the prime ways in which this task can be achieved is by the structuring of a socially relevant jurisprudential course. I would go further and argue that this should be a core course around which the rest of the curriculum can be built; but without taking the argument as far as this, I would certainly submit that we cannot avoid giving our students the insights that jurisprudential teaching offers.

I would like to pay a special tribute to the University of Papua New Guinea for retaining its interest in jurisprudence and realising that a socially relevant jurisprudence course adapted to the needs of the country requires urgently to be produced. Papua New Guinea offers a rich background for the attempting of such a task by reason both of its strong traditional background and of its constitutional provisions requiring the evolution of an indigenous jurisprudence.

The jurisprudence course outlined below seeks to make the best use of Western philosophies which have grown up concerning the law, and at the same time to relate them to the problems of Papua New Guinea. I am sure that in every Third World country a similar process of adaptation can be achieved. The course that follows is only a suggested structure, which can be easily adapted for use in other cultural, religious or racial settings. It is hoped that it will perhaps encourage Third World teachers of jurisprudence to elevate the standing of jurisprudence in their respective curricula and help produce lawyers whose expertise in black-letter law will not crowd out their vision of the broader purposes which law must serve.

SUGGESTED COURSE STRUCTURE

Subject Matter	Relevance to Papua New Guinea
Lecture 1	
The scope of jurisprudence. Its recent expansion to accentuate the social dimensions of law. The principal modern writers and their texts. The nature and purpose of jurisprudential studies.	The importance to P.N.G. legal studies of the broader view of jurisprudence which travels beyond the narrow Australian mould and takes in social dimensions. The special values of jurisprudence to the PNG law student, e.g., insights regarding law as a tool of social engineering or as a means for promoting the greatest happiness of the greatest number.
Lectures 2 and 3	
The nature and purpose of law in general. The student is introduced to the fact that there are many possible divergent views on these topics and that each has some insights to offer.	There are at least half a dozen major theories of law that have special relevance to the PNG situation. Their relevance can be indicated in brief outline, e.g., the historical school, anthropological approaches, the American realist school. An outline of the main features of the PNG Constitution for the fuller understanding of which jurisprudential studies will be essential, e.g., national goals and directive principles, fundamental rights, separation of powers, the rule of law. All these can be analysed not only in terms of case law but also in terms of jurisprudence.
Lecture 4	
The principal problems in jurisprudence, e.g., positive law vs. natural law; individual rights vs. group rights; individual rights vs. State rights; stability vs. change. Each of these problems can be related quite intimately to	Does the PNG legal system embody the acceptance of a higher law principle? How does the group rights tradition of Melanesia accord with the individual rights of Western law? To what extent must ancient custom yield to modern

Lectures 5 and 6

The legal systems of the world - common law, civil law, Islamic law, Hindu law, Jewish law, Marxian socialist law, canon law.

The areas of their territorial application. Their basic differences in methodology. The value to jurisprudence of having a broad appreciation of their main outlines.

The nature of comparative law studies.

The danger of an exclusive reliance upon Western models when so many other and more ancient justice traditions exist. What are the main features of the Melanesian justice tradition?

Lectures 7 and 8

A more detailed view of the origins and development of the Roman law and its progressive evolution into the modern civil law. The work of the jurists, and its value.

The differences between the positions of the common law and civil law judges.

The Roman achievement compared to the Greek, and reasons for the differences.

Roman law forms the foundation of all the civil law jurisdictions in the world, e.g., the European, the South American, the Japanese. Its methodology brings into the administration of justice a greater deal of informality than in the common law. The judge is not like the august and distant common law judge but is more anxious to participate in the proceedings and ascertain the truth, more informally if necessary. Which of the two methodologies is more suitable to the PNG Constitution? Do we not have in PNG both the common law methodology of the formal judge and the civil law methodology of a fact-finding enquiry at the lower levels of the judicial hierarchy? The traditional system of justice in PNG was perhaps more in accord with the civil law system.

Lecture 9

Introduction to the Greek philosophers. Their importance to all subsequent legal thought.

The notion of justice according to law rather than justice by itself or law by itself underlies the modern lawyer's approach to legal questions.

Socrates, Plato, Aristotle in outline.

The city state, Athenian and Spartan philosophies of government.

This would be as true of PNG as of most other modern democracies. This notion comes to us in direct succession from the thought of the Greek philosophers.

Lectures 10 and 11

Plato - The Republic
The Laws

The consideration of Plato's Republic will introduce to the student many of the principal arguments for and against a regimented State. He will also be able to spot more readily some of the assumptions of freedom and equality in modern democratic states, which Plato would have questioned, e.g., the class system, the privileges of wealth, the power of the multinationals, the power of the media in moulding opinion. Many of these, relevant to the PNG Constitution, are commonly ignored in comfortable assumptions that democracy is equality. Plato's blueprint also raises pointedly the question of the selection and qualifications of rulers.

Lectures 12 and 13

Aristotle - the origins of natural law.

Aristotelian opposition to Platonic thought.

Aristotle's emphasis on the individual as contrasted with Plato's emphasis on the State has much relevance to the PNG constitutional and legal situation. Which do we prefer - the philosophy which elevates the individual or one which elevates the State?

Lecture 14

The transition from the Greeks to the moderns.

The dark ages.

The Islamic bridge between Greek philosophy and modern Western philosophy.

Avicena, Averroes.

The assumption that modern democracy and freedom of thought result entirely from Western philosophy discounts or ignores contributions made by the philosophers and philosophies of what is now the Third World. The stimulus given to European thought regarding reason and the individual, through the Islamic philosophers is one illustration. The revival of Aristotelian thought in the West and the resulting importance of the individual were due to these Islamic philosophers.

Lecture 15

Thomas Aquinas and the elevation of reason.

The new natural law.

Views in opposition to Aquinas, e.g., Duns Scotus.

In a secular State where there is not a complete acceptance of divine scripture as providing a higher law, a new natural law must be found. Aquinas based this on reason. Reason rather than the sole authority of scripture provides a rational basis for the higher law principles of the secular State. Here are to be found some of the origins of the human rights provisions of the PNG Constitution.

Lecture 16

The Divine Right of Kings.

The origins of the theory of sovereignty.

Jean Bodin
Sir Robert Filmer
James I

The doctrine of sovereignty on which modern constitutions such as that of PNG are based evolves from sovereignty theories developed during the emergence of the European nation state. An extreme original form of it is contained in the doctrine of the divine rights of kings which demonstrates the dangers of pressing this doctrine to its extreme.

Lecture 17

The struggle between Crown and Parliament in England. The philosophical issues.

The background to Hobbes.

The supremacy of parliament as the supreme repository of the people's legislative will cannot be understood without a knowledge of the struggle between Crown and Parliament in England and of Hobbes' philosophical justifications of the absolute power of the sovereign.

Lecture 18

Hobbes - basic principles.

Importance for later philosophy - theory of the State, positive law, natural law.

Hobbes' theories are based upon his concept of social contract proceeding from the theory that man in a state of nature is at war with himself and unable to live together in organised society, hence the social contract. How relevant is this to PNG tradition and experience? Can it be said that the PNG experience belies Hobbes's theories? Has there been in PNG a surrender of authority to any one person within the tribe? What is the extent of the chief's authority? What are the remedies of tribesmen in the event of misconduct by the chief? According to Hobbes, no amount of misconduct can justify dethronement of the leader. How does this doctrine accord with traditional PNG views?

Lectures 19 and 20

The Restoration

Locke

Importance for American and French Revolutions.

The American Constitution

Rousseau

The French Declaration of the Rights of Man.

The unsuitability of absolute power in the Sovereign was proved by the Restoration and the philosophy of Locke. Locke's theory of inalienable rights which the individual never surrenders to his Sovereign form a conceptual basis for the fundamental rights position in the PNG Constitution. It has found its way into this Constitution through its acceptance through

the American and French Revolutions, the American Constitution and the modern revival of natural law. Without this background the PNG Constitution cannot be properly understood. Also the general will theory of Rousseau needs to be discussed in the light of the aspirations of a new state with a general will to progress into the modern age as an equal member in the comity of nations. Rousseau's thought coupled with the French Declaration of the Rights of Man also flows naturally into the PNG Constitution.

Lecture 21

Grotius

The beginnings of international law. The nature of international law. Is there such an entity as international law?

Grotius takes natural law a step further than Aquinas for he bases it not purely on reason but also on the experience of mankind. When the basis of the old international European order was breaking down during the 30 years war, Grotius worked out a new natural law which provided a set of lasting principles based on human experience by which countries were to regulate their relationships with each other. Both as the founder of this new natural law and as the founder of modern international law, Grotius has intense relevance to PNG as it moves into the world community to become one of its newest independent states.

Lectures 22 and 23

Jeremy Bentham - basic philosophy.

Origins of utilitarianism.

His importance in subsequent legal history and jurisprudence.

Bentham is important for PNG as formulating a yardstick based on individual happiness and breaking down the privileges of the few to favour the interests of the many. The philosophy of utilitarianism has much value for PNG legislators of the future. It is worthwhile to

	bear in mind that there is no citizen of PNG or for that matter of any other modern nation state, who is not in some way a beneficiary of Bentham's thinking.
Lecture 24	
John Austin The theory of sovereignty Positivism v. Natural Law	Austin's theory of sovereignty and his formulation of the doctrines of legal positivism form a natural antithesis to natural law doctrines. A comparison of the two clarifies the student's thinking about the function of law in society and the role of the lawyer. To be stressed is the fact that we are growing out of the age of narrow Austinian positivism. This has special importance in a developing country like PNG where we must not limit our perspectives to formal black-letter law.
Lecture 25	
John Austin (contd.) The relationship between law and morality.	Is the strictly analytical style of modern British positivism to be the basis of thought of the new generation of PNG lawyers and judges? What modifications have later British philosophers made to the stark doctrines of Austin? Is law only a command of the sovereign or are there principles which have similar force although not enunciated in black-letter terms?
Lectures 27 - 30	
American opposition to British positivism. Reasons for the different American approach. Some great American jurists - Holmes, Roscoe Pound, Cardozo. American realism - Llewellyn, Jerome Frank, Gray.	A reaction to Austin's positivism is the desire to go beyond the black-letter law in the books. The American sociological and realist schools take the lawyer's perspective out into the field and into the midst of social realities. This perspective is vital for the PNG lawyer and

The contribution of American realism to world legal systems. Its importance for PNG. The dichotomy between the law in the books and the law in the field.	judge of the future. Without it he would be quite ill-equipped to meet the challenges of his times. He must also bridge the gap between sociology and law.
Lecture 31	
The historical school - Savigny, Maine.	The theory that the law and custom of a people is the spontaneous manifestation of the particular spirit of that people is of special importance to PNG. The Constitution's reference to "the memory of our ancestors - the source of our strength and origin of our combined heritage", "the worthy customs and traditions of our people - which have come down to us from generation to generation", "our noble traditions" - all these will be better understood by the PNG student through a knowledge of the work of Savigny. Maine's contribution outdated though it be in some respects is also relevant. For example, his statement that progressive societies moved from status to contract is highly debatable in the context of PNG and will clarify the issues regarding the nature of "progress".
Lecture 32	
Anthropological approaches - Malinowski, Hoebel, Pospisil. PNG anthropological studies. Implications for the concept of law. Modern African customary law studies and the lessons derived from it on the nature of law.	Anthropology is an important source of clarification of our ideas concerning law. Malinowski's work in the Trobriands revolutionised modern jurisprudential thinking regarding the nature of law by showing that custom, which does not proceed from any identifiable sovereign, can have all the force of law. These studies also throw light on the relationship between the individual and the group, on

	dispute resolution procedures, on the aims of punishment and on the sanctions which keep tribal societies together.
Lecture 33	
Modern approaches to the law/morality debate. Fuller, Hart, Devlin.	The Hart/Devlin debate is topical, for in modern systems it raises the issue of the extent to which law is to be used as an enforcer of morality. Fuller's internal morality of law provides a new yardstick by which the claim of a law to obedience can be measured.
Lecture 34	
Kelsen The grundnorm. Its importance in the PNG context. The Rhodesian problems.	The grundnorm theory of Kelsen is one which opens up the whole debate concerning the legitimacy of regimes. It exposes the limitations of purely legalistic discussions of the authority of laws and shows the relevance of power as the backdrop to legal systems.
Lecture 35	
Modern sociological developments - Pound, Stone, Unger.	Pound's use of the law as a tool of social engineering will be of much importance to the future PNG lawyer. His theory of interests will assist in evaluating the objectives which the law seeks to achieve. Stone's work helps in taking jurisprudence well beyond the narrow positivistic limits set for it in the past. Unger's attempts to link law and society will also be found useful.
Lectures 36 and 37	
The sources of law Precedent, Statutes, and Equity (covered already in Introduction to Law).	While courses on Introduction to Law will no doubt cover these topics, each of them has jurisprudential overtones which might be missed in the introductory course.

Juristic writing Religion Custom	Especially in relation to religion and custom, these need to be emphasised, for they highlight the importance of traditional orderings of society. In the PNG context the importance of these aspects cannot be over-stressed.
Lecture 38	
Rights and duties. Contract, Tort, Crime.	Concepts relating to ownership, possession, persons and property are taught in the introduction to law course but not with reference to underlying theories. For example, the theory of property raises questions of individual and group rights, natural law theories of rights passing upon capture and annexation, historical theories, positivist theories and sociological theories - the latter, in particular, stress the social needs which property should serve. In relation to persons, the concept of artificial personality, the multinational corporation and the uses and abuses of this concept are of intense practical relevance.
Lecture 39	
Rights and duties. Contract, Tort, Crime.	The Third World, speaking in general terms, strongly emphasises duties rather than rights. Western jurisprudence emphasises rights in a manner which may not command the approval of traditional Third World thinking . What modifications are necessary of Western thinking about rights when we are dealing with a traditional Third World setting in which the rights of the individual fall into place only if he performs his duties? Also, in the PNG Constitution there is a reference to basic social obligations of all

persons as well as a reference to their rights. This concept can be amplified through a jurisprudential analysis.

Lecture 40

Third World juristic problems.

Equality and freedom in the Third World.

The problems encountered by Third World legal systems, in enforcing principles of equality and freedom are vastly different from those of the Western World. It is a mistake to imagine that procedures and attitudes which have proved themselves in the West will necessarily succeed in this totally different background. Problems of minority languages and religions, urbanisation, social revolution, economic deprivation, readjustment to the demands of self-government - all demand an awareness that these are special problems for which standard Western approaches and solutions may not be effective. How can these new problems be faced without diminishing the basic structures of freedom and equality?

Lecture 41

Third World justice traditions - China, Africa, Asia, PNG.

The group concept.

Traditions of respect for human dignity and of a quest for the elusive idea of justice are to be found in all the major cultural inheritences of mankind. We have a lopsided view of the picture of justice if we concentrate only on the Western traditions. Third World traditions - African, Asian, Melanesian - all need to be looked at. Their emphasis upon the group concept, on duties rather than rights, on limitations of private ownership and on communal assets such as land, have far reaching jurisprudential consequences which cannot

	be understood in the light of Western justice traditions alone.
Lecture 42	
The mechanisms of dispute resolution. The limitation of formal justice.	Dispute resolution is an urgent need of every community. The more formality there is in this process the more difficult of access it generally is. Third World communities have traditionally favoured dispute resolution which, while being authoritative, is free of the formality, expense and delay of the structured court system of the West. To what extent does PNG need the combination of the formal Western-style mechanisms and the traditional informal mechanisms? How best can they be wedded? What insights does modern jurisprudential research yield regarding the strengths and weaknesses of informal dispute resolution mechanisms?
Lectures 43 - 45	
Human rights. The concept, its origin, its present status internationally, and nationally, in PNG.	How has the current human rights dialogue grown out of traditional thinking regarding justice both in the Western World and in the Third World? What criticisms can be made of the Universal Declaration of Human Rights from the standpoint of the Third World? What is the commitment of PNG to human rights both from the standpoint of its black-letter constitutional provisions and from the standpoint of the moral sentiments of the community? What is the traditional Melanesian thinking in regard to the underlying concepts?

PRESCRIBED BOOKS

For basic elementary reading

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