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Student Rights and Revival of Immaturity: Can Jurisprudence Account for Coercion?

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Student Rights and Revival of Immaturity: Can Jurisprudence Account for Coercion?♥

Abstract: The problem of this paper is prompted by the claim of Zagreb University students residing in government subsidized dormitories that their duty to act for free as dorm night porters amounts to forced labour. After a preliminary note on the nature and types of legal scholarship, the paper restates jurisprudential arguments against student rights and analyses limitations inherent in legal scholarship in action, or jurisprudence, that make it unresponsive to student rights: a limited normative framework and a limited subject-matter, most notably a limited focus of inquiry when it comes to force or coercion. A glimpse at an analysis of force in international law indicates that the naked force typical of elementary criminal law has dissolved long ago into phenomena remotely related to naked force, such as economic pressure and ideological propaganda. Two legal and social contexts of force are of primary interest to understanding student rights. The first is legal recognition of the vulnerability of children to naked force. The second is the blind eye of jurisprudence for the vulnerability of workers to economic need. The belief in economic necessity and subjugation of the state to capital has resulted in a bizarre reversal of the roles of corporations and students. Jurisprudence cannot change the world but can interpret it more sensibly. What is required is a re-examination of maturity and emancipation within the emerging world law.
Keywords: jurisprudence, immaturity, emancipation, coercion, student rights, world law

Introduction

In 2002 students of Zagreb University residing in government subsidized dormitories, to escape from what they claimed to be forced labour, obliged the Croatian minister of higher education to pay them for serving as dorm night porters. They claimed that forced labour was the duty imposed on them by the dorm management to act as night porters for free. As the student leader explained their cause, the dormitories "are to serve students, not the other way around".[1]

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[1] Juraj Sajfert according to M. Majic, Studenti tvrde da im SC namece prisilni rad<Students Claim that the SC Imposes Forced Labour>, *Vjesnik* (November 16, 2006) URL: http://www.vjesnik.hr/Pdf/2002%5C11%5C16%5C21A21.PDF (25.04.2011); I. Kalogjera-Brkic, Vlada odustaje od testiranja studenata na drogu <The Government Is Giving Up Student Drug Testing>, *Jutarnji list* (Februaury 2, 2003).

The student action against the alleged forced labour in 2002 may be seen as a mere episode of clashes between governments and students, welfare and responsibility, or socialism and neo-liberalism, which is quite common in Europe[2] (but alien to the USA, where even high school kids are treated by their teachers like adults,[3] and where the kids when they mature take loans to study). The problem of this paper is prompted by a debate on the alleged forced labour with a group of students at Zagreb University. The debate was of no practical consequence (the present author's arguments fell short of the target; a later attempt to reach by essentially the same arguments a much larger audience[4] did not provoke a single response – in a sharp contrast to an earlier plea to stop virtual privatization of Croatian universities,[5] which was invoked not only by students demanding the right to free higher education[6] but also by an unintended coalition of alternative media,[7] left-leaning antiglobalists[8] and right-leaning patriots[9]). However, the debate may nonetheless be indicative of a state of affairs which is the problem of this paper. The problem is the unresponsiveness of legal scholarship, especially of jurisprudence, to student rights in the economic environment that fosters new immaturity.

After a preliminary note on the nature and types of legal scholarship (Section 1), the paper restates jurisprudential arguments against student rights (Section 2.) and analyses limitations inherent in legal scholarship in action, or jurisprudence, that make it unresponsive to student rights (Section 3): a limited normative framework (Section 3.1) and a limited subject-matter, most notably a limited focus of inquiry when it comes to force or coercion (Section 3.2). A glimpse at an analysis of force in international law indicates that the naked force typical of elementary criminal law has dissolved long ago into phenomena remotely related to naked force, such as economic pressure and ideological propaganda (Section 3.2.1). Two legal and social contexts of force are of primary interest to understanding student rights. The first is legal

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[2] Comp. J. Marshall, France: Students Protest Against New Law, *University World News* (18.011.2007), URL: http://www.universityworldnews.com/article.php?story=20071115140716110

[3] C. Gillard, The Differences between Us: French and American Classrooms, *The Blog of Harvard Education Publishing* (April 10, 2009), URL: http://hepg.org/blog/14.

[4] I. Padjen, Ima li pilota u studentskom avionu? <Is There a Pilot on the Student Plane?>, *Novi list* (May 2, 2009), 8-9.; repr. as Studiji u Hrvatskoj: mnogo pitanja, malo odgovora <Studies in Croatia: Many Questions, No Answers>, *Universitas*, no. 2 (Split University, June 5, 2009), 13-14.

[5] Id., Privatizacija djece <Privatisation of Children>, *Novi list* (April 7, 2009.), 26-27.

[6] Comp. J. Marshall, France: Students Protest Against New Law, *University World News* (18.011.2007), URL: http://www.universityworldnews.com/article.php?story=20071115140716110

[7] URL: http://www.h-alter.org/vijesti/hrvatska/privatiziranje-djece#news_view

[8] M. Culic, Studenti protiv neoliberalnog koncepta studiranja <Students Against the Neo-Liberal Concept of Study> URL: http://www.index.hr/vijesti/clanak/s...om/431147.aspx ; repr. URL: http://www.revleft.com/vb/studentski-bunt-u-t107025/index.html

[9] URL: http://hakave.org/index.php?option=com_content&id=4387

recognition of the vulnerability of children to naked force (Section 3.2.2). The second is the blind eye of jurisprudence for the vulnerability of workers to economic need (Section 3.2.3). The belief in economic necessity and subjugation of the state to capital has resulted in a bizarre reversal of the roles of corporations and students. Jurisprudence cannot change the world but can interpret it more sensibly (Section 4).

I. Jurisprudence

Legal scholarship is concerned with justice by focusing on its corrective side.[10] There are three types of legal scholarship.[11] The first, which is concerned with the meaning of positive law, is the basic type. It is known as legal dogmatics or legal doctrine. It interprets the law with a view of applying abstract legal standards to concrete social relations, systematic interpretation being the distinctively juristic method of interpretation. The second type, which is concerned with causes and consequences of law, is the social study of law. It consists of more than one species. Legal history explains singular legal phenomena (e.g. why or how a particular constitution was adopted). Sociology of law explains classes of legal phenomena (e.g. why constitutions have been adopted). Psychology of law does the same by analysing the relationship between mental processes and law. Economics studies efficiency of law. The third type of legal scholarship, which is labelled here jurisprudence, is concerned with what was in modernity supposed to be beyond the grasp of the first two types. The third type used to be legal philosophy, which is concerned primarily with conceptual issues of the nature and justification of law. Today it is legal theory, which tends to be more comprehensive. Its task is the identification and interpretation, with a view of application, of the sources of positive law on the basis of the idea of a legal system and, increasingly, of trans-systemic legal relations (i.e. relations between legal systems or between a legal system and a social system, e.g. moral, political or economic). Legal scholarship in action, which is developed in continental Europe primarily by law teachers, and in common law countries primarily by judges, approximates most commonly the first type of legal scholarship but draws heavily on findings of social studies of law and, when dealing with hard cases, expands into inquiries of the third type. For those reasons (and not merely for the sake of brevity) the terms legal scholarship and jurisprudence (and sometimes legal theory) are used here interchangeably.

[10] Aristotle, *Nicomachean Ethics*, Book V.
[11] See esp.H. Kantorowicz, Die Rechtswissenschaft: eine Kurze Zusammenfassung ihrer Methodologie (1928), in: Id., *Rechtswissenschaft und Soziologie*, hrsg. v. Th. Wuertenberger (Karlsruhe: Mueller, 1962).

II. Jurisprudential Arguments against Student Rights

Needless to say, the group of Zagreb students mentioned in Introduction was not impressed by the fact that there was not a constitutional or statutory right to study free of charge within the Croatian legal system, let alone an international human right of the kind, despite article 13, section 2(c) of the International Covenant on Economic and Social Rights, which mentions "progressive introduction of free (higher) education".[12] Nor did any of the following arguments convince the students.

The first, which concerned facts, was that the dormitory management could not, even if it tried to, impose on dorm residents a duty amounting to forced labour since no student was ever required, let alone being forced, to reside in the dormitories. Hence a student who did not accept the duty to act on a rota basis as a night porter of his dorm was free to leave the dormitory.

The second argument, which assumed commutative justice, was that the dormitory was heavily subsidized by the government; moreover, residence in the dormitory was a privilege that was available only to straight A students, students whose parents had low income, students with special needs, and other special categories of students. For that reason it was legitimate to require the residents to contribute to their own well-being by acting as porters two or three times a year.

The third reason appealed to solidarity: University is an autonomous corporation whose students as well as teachers should carry the burden of hard times. An example was the Faculty of Law in Rijeka University, where all the teachers were required by the Faculty Council to act as night porters twice a month when the Faculty accrued losses in the early 1980s, that is, in the days of self-management socialism.

The fourth argument invoked a natural right. Since everyone has an inalienable right to property, they cannot be legitimately deprived of it just to pay servants to students.

The student reply to all the arguments was that the imposed porter's duty amounted to forced labour because it violated the human right of students to study for free. Assumptions behind the reply, which have inspired student protests in Croatia as well as in several European countries, may deserve attention. The reason is that the assumptions reveal limitations inherent in jurisprudence.

[12] UNGA Resolution 2200 A(XXI) of December 16, 1966, entry into force January 3, 1976.

III. Limitations of Jurisprudence

1. .A Limited Normative Framework

A limited normative framework makes jurisprudence unresponsive to normative assumptions entertained by students. Thus invocation of a natural right, or natural law, may be acceptable in jurisprudence or legal theory proper only when it is demonstrated that positive law as a regulatory system has been exhausted so that a departure from positive law is justified. The same applies a fortiori to the references to commutative justice or solidarity that cannot be backed by positive law.

2. A Limited Subject-Matter

A limited subject-matter makes jurisprudence unresponsive to factual assumptions entertained by students. Thus jurisprudence cannot take into account the self-understanding of students as both mature enough to provide for themselves and not mature enough to actually earn their keep without damage to their potential. The assumptions are, in fact, not strictly descriptive. Yugoslav courts started ruling in the early days of socialism that a parent with means was obligated to support his or her mature child to gain a university degree the child was interested in and capable of attaining.[13] An appellate court near Zagreb ruled recently that a 26 year old student was entitled to receive her father's financial support on the ground that she was a full time university student.[14] In view of the tradition, it was only natural for a student representative at the Zagreb University Assembly in June 1970 to state that the Student Union was considering the feasibility of suing the University for damages inflicted on students by university teachers who skipped classes or taught poorly. While the threat was a precocious bluff, it was based on the same factual as well as normative assumptions that are entertained by Croatian students today. The assumptions are too complex to be analysed out. Even if they could be reduced to an economic explanation, it would probably entail that it is a long term collective interest to support students from a public purse to both increase their earning power and maintain their fertility.[15] However,

[13] Ana Prokop, *Porodično pravo: odnosi roditelja i djece <Family Law: Relations between Parents and Children>* (Zagreb: Školska knjiga, 1966), at 200, note 255, referring to the decisions of the supreme courts of Croatia (VSH Gž 999/1947; Gž 950/1948), Serbia (VSS Gzz460/1949; Gž 319/1950; Gž 526/1953), and Montenegro (VSCG Rev 77/1960).

[14] ZSVG 07-326-Gž-R 11.02.2009.

[15] When average education increases 1 year economic growth increases 0,44%, when the number of students of tertiary education increases 1%, the GDP per capita increases 3,7% - according to a summary prepared for the round table on financing higher education, sponsored by the Finance Club, run by students, at the University of Zagreb's Faculty of Economics on April 19, 2011.

by meta-ethical standards valid also in jurisprudence, the explanation is not a justification. And even if it were a justification it is not a valid law either in Croatian law or in international law.

Jurisprudential focus of inquiry is quite narrow when it comes to force despite the fact that force is a key notion of legal scholarship with several almost disparate dimensions, such as a subject matter of law (e.g. inflicting a mortal wound), an exception to liability (e.g. *vis maior*), and a criterion of legal validity (a legal system is valid because it is enforced by the state monopoly of the legitimate use of force.[16] The following sections analyse briefly the first dimension in three steps: force as a subject matter of law; the vulnerability of children to corporal punishment; and the vulnerability of workers to economic need.

a) Force as a Subject –Matter of Law

An illuminating attempt to define force as a subject-matter of law is still Rolf Derpa's study *The Prohibition of Force of the United Nation's Charter and the Use of Non-Military Force*.[17] The study still deserves attention it attracted when it was published.[18] The reason is that the study takes the concept of force from criminal law and develops it in international law. Physical force is defined as "overcoming or hindering resistance to unfolded corporal strength".[19] .Effect of force is defined as infliction of sensitive evil.[20] Force in the latter – and wider – sense is differentiated into the following kinds: a) *vis absoluta*, i.e. the use of force, and *vis compulsiva*, i.e a threat of force; b) direct force, performed by the agent, and indirect force, performed by a proxy; c) active force, performed by commission, and passive force, performed by omission (e.g. a state's territory is used by another state for the use of force against a third state); d) the use of force in

[16] Esp. Max Weber, *Rechtssoziologie*, 2. Aufl., hrsg. v. J. Winckelmann (Neuwied a. Rh.: Luchterhand, 1967), at 71; Hans Kelsen, General Theory of Law and State, tr. (New York: Russell & Russell, 1961), at 18.

[17] Rolf Derpa, *Das Gewaltverbot der Satzung der Vereinigten Nationen und die Anwendung nichtmilitarischer Gewalt* (Bad Homburg: Athenaeum Verlag, 1970), at 17-18.

[18] It has been one of very few books written in a language other than English reviewed –and adorned by accolades - in *American Journal of International Law* (1971). The reviewer was Edgar Bodenheimer, a renowned German born American professor of jurisprudence and international law, who appreciated German legal dogmatics, which was alien to the then dominant academic legal doctrine in North America. When the present writer asked John Willis, at the time a leading Canadian professor of criminal law, for assistance in a search for a comparable conceptual analysis of force in Anglo-American common law, the Canadian derided the very idea that one could formulate a legal concept of force. John Willis believed that he and his colleagues legal realists were dealing with facts rather than concepts. His reaction was, perhaps, biased by empiricist philosophy he was brought up in. But the reaction was not an unfair appraisal of the Kantian heritage.

[19] Derpa (note 17) referring to: Georg Dahm, *Voelkerrecht,* Bd. 2 (Stuttgart: Kohlhammer, 1961), at 357 and Adolf Schonke und Horst Schreoder, *Strafgesetzbuch: Kommentar*, 15. Aufl. (Muenchen: Back, 1970), Par. 234, Rz 6.

[20] Derpa (note 17), at 17, referring to Axel Gerlach, *Die Intervention* (Hamburg: Universitaet, Forschungsstelle fuer Voelkerrecht und auslaendisches oeffentliches Recht, 1967), at 142, 148; Schoenke und Schroeder (note 22), Par.234, Rz 11.

and out of a war; e) military and non-military force.[21] Teleological interpretation of Article 2(4) elucidates the non-military uses of force, which include economic and political pressure, the latter further dividing into propaganda and subversive intervention.

As the glimpse at Derpa's analysis of force demonstrates, the naked force typical of elementary criminal law, such as the physical force produced by the movement of a human limb to break a strongbox or wound a person, had dissolved long ago into phenomena remotely related to naked force, such as economic pressure and ideological propaganda. Moreover, the dissolution has taken place even in international law, which is a primitive legal order concerned chiefly with the maintenance of peace and security, that is, with the prevention and suppression of the use of naked force. If the dissolution has taken place even in international law, the same process, but in subtler ways, should be expected to have taken place in other legal and social contexts.

Two contexts are of primary interest to understanding student rights. The first is legal recognition of the vulnerability of children to naked force. The second is the blind eye of jurisprudence for the vulnerability of workers to economic need.

b) Recognition of Naked Force

School corporal punishment was a common practice in most western countries fifty years ago. Meanwhile the practice has been legally prohibited in almost all the European states. The reason is, obviously, not the change either in physical force used to inflict corporal punishment or in the capacity of children's bodies to sustain the force used in such punishment. The reason is a change of assumptions about children as both natural and social beings. Jurisprudence has assimilated them though, perhaps, without analysing. Some assumptions can be isolated from others. The examples are as follows: children are more sensitive to traumatic experiences than it was assumed fifty years ago; corporal punishment violates the dignity of a child as well as of an adult; violence breeds violence. Other assumptions form an interlocked chain. A part of the chain runs, roughly, as follows: the way a child behaves is natural; it is good for a child to behave naturally; hence it is bad to restrain a child from behaving naturally, as long as the child does not hurt herself or others; it is even worse to restrain a child by force, the only tolerable exceptions being necessity and self-defence. The underlying assumptions are, approximately, as follows: children are immature; they mature by growing naturally, their natural growth takes precedence of their forcible inculturation. Two features of the chain are decisive. First, while children may indeed

[21] Derpa (note 17), 18-27.

behave naturally, the assumptions that their behaviour is natural and good etc. are not natural but social – unless one subscribes to radical determinism, which makes any analysis superfluous anyway. Secondly, a single assumption, e. g. that children are immature or that the way a child behaves is natural, is system-bound in the sense that it cannot be either verified or justified independently of the chain.

c) Blindness to Economic Need

According to Marx, proletarians, which possess nothing but their labour power, are forced by the economic necessity of providing for themselves and their families, to enter - seemingly by their free will - into contracts of employment to make over the temporary disposal of their labouring power to the capitalist.[22] In Marx's own words,

The Roman slave was held by fetters: the age-labourer is bound to his owner by invisible threads. The appearance of independence is kept up by means of a constant change of employers, and by the fictio juris of a contract.

In former times, capital resorted to legislation, whenever necessary, to enforce its proprietary rights over the free labourer. For instance, down to 1815, the emigration of mechanics employed in machine making was in England forbidden, under grievous pains and penalties[23]

Marx's diagnosis that the freedom of contract is an illusion, is formulated to be immune to intra-systemic evidence, that is, to an appraisal of facts within the capitalist mode of production.[24] Marx's diagnosis can be verified only by communism as the radically new socio-economic formation, where contracts are replaced by other modes of social regulation (e.g. by economic planning). The fact that communism has not come into being as yet may be regarded as a falsification of Marx's diagnosis but also as a reason to believe that there is still a chance for communism.

The vulnerability of adults to economic coercion, which has been analysed by Marx and his followers, is no longer legally recognized. Since the disappearance of the really existing socialism there is no legal system set to overcome capitalism by a planned economy. By Marxist

[22] Karl Marx, Wages, Price and Profit, in Id. and Friedrich Engels, tr., *Selected Works*, 2. vol. (Moscow: Progress, 1969), at 55.
[23] Id, *Capital*, 1. vol., tr. (London: Lawrence and Wishart, 1970), at 538.
[24] As attempted by Donna C. Kline, *Dominion and Wealth: A Critical Analysis of Karl Marx's Theory of Commercial Law* (Dordrecht: Reidel, 1987), which tries to dispute Marx's appraisal that freedom of contract is an illlusion by analysing court decisions on contracts entered into under duress.

standards, jurisprudence is by definition blind to economic necessity. Marxist legal theory, which may well be a contradiction in terms, has disappeared together with socialism.

IV. Immaturity and Emancipation in the World Law

Modernity has been a quest for emancipation. The original meaning was the release from paternal power. Legal recognition of the vulnerability of children to coercion is a step in that direction. For a while student rights to study for free seemed to be the highest point of the development. However, the disappearance of Marxism has strengthened the belief in economic necessity but subjugated the states to large corporations.[25] The belief has resulted in a bizarre reversal of roles. Now it is the students who are expected to bear the social burden of making long term investments into the most precious non-renewable economic resource, namely, themselves. Financial corporations, on the contrary, play the market the way minors play ball: the damages are covered by the government.[26] Needless to say, a subjugation of the states to students is not a solution. Suffice it to note what has happened with the student who explained in 2002 that student dormitories "are to serve students, not the other way around": he has been swept away by the brain drain, like thousands before him who have completed fifteen years of education – or more – at the expense of the Republic of Croatia (or Ireland, Portugal, Spain, Italy, Greece, Hungary or Ukraine – to mention just the most debt-laden European states who had supported by free education the development of the economically most developed countries in Europe and America).

Jurisprudence cannot change the world but can interpret it more sensibly.

To begin with jurisprudence may be more concerned directly with distributive and commutative justice by strengthening its ties to the studies of politics and economy.

A relevant jurisprudence will recognize that what counts as unlawful use of force, *vis compulsiva* as well as *vis absoluta*, depends not only on its immediate impact on the physical integrity of individuals but also on the expected damage to the future development of both individual humans and social groups. Inadequacy of the mainstream jurisprudence today in that regard may best be seen in light of a forecast made by Miroslav Radman, a French and Croatian biologist. According to Radman, in a few decades, when the life expectancy will have been

[25] See e.g. Robert Reich, *Supercapitalism: The Battle for Democracy in an Age of Big Business* (New York: Icon Books, 2007).
[26] See e.g. Paul Muolo, *$700 Billion Bailout: the Emergency Economic Stabilization Act and What it Means to You, Your Money* (Hoboken NJ: John Wiley and Sons, 2008).

doubled again, the average person is likely to interrupt his or her education at the age of twenty-five to raise children and return twenty years later to school to qualify for the first job.[27]

Jurisprudence cannot be more sensitive to such developments by merely assimilating scientific knowledge. What is required is a re-examination of maturity and emancipation within the emerging world law, that is, international law which has integrated most other legal systems.[28] Thomas Erskine Holland gained fame by the saying that international law is "(t)he vanishing point of jurisprudence, since it lacks any arbiter of disputed questions, save public opinion".[29] If the foregoing analysis holds, the subject-matter of jurisprudence has become even more complex, encompassing within the former international and now the world law the opposites of reason and immaturity.

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[27] Miroslav Radman, Abraxas Project: Health Longevity via Prevention of Age-Related Diseaseshttp. URL: http://www.miroslavradman.com/en/abraxas-project/80
[28] See Angelika Emmerich-Fritsche, *Vom Voelkerrecht zum Weltrecht* (Berlin: Duncker & Humblot, 2007).
[29] Thomas E. Holland, *The Elements of Jurisprudence*, 13th ed. (Oxford: Clarendong, 1924), at 322.