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JURISPRUDENCE

Suri Ratnapala

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Jurisprudence

Jurisprudence is about the nature of law and justice. It embraces studies and theories from a range of disciplines such as history, sociology, political science, philosophy, psychology and even economics. Why do people obey the law? How does law serve society? What is law's relation to morality? What is the nature of rights?

This book introduces and critically discusses the major traditions of jurisprudence. Writing in a lucid and accessible style, Suri Ratnapala considers a wide range of views, bringing conceptual clarity to the debates at hand.

From Plato and Aristotle to the medieval Scholastics, from Enlightenment thinkers to postmodernists and economic analysts of law, this important volume examines the great philosophical debates and gives insight into the central questions concerning law and justice.

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To Vidura Ravindranatha, Rusri and Adrian Surindra

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Work of this nature consumes precious years of an author's life and is not possible without the sympathy and support of family. I owe them the greatest debt.

Suri Ratnapala
2009

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Introduction

This book is about the social phenomenon that is known as law and its relation to justice. This is not a treatise on some branch of law such as contract law, tort law or the law of crime. It is about past and present theories concerning the nature of law and justice in general. However, it is not possible to conduct an inquiry of this nature, let alone make sense of the more important questions, without reference to actual legal systems and actual laws. Hence, specific rules of law figure in discussions throughout this book.

Jurisprudence in the sense used in this book has been around since at least the time of the philosopher Socrates (470–399 BC). Great minds have sought answers to questions about the nature of law, right and justice, but questions persist. This says as much about the complexity of these ideas as it does about the limits of our language and reason. Theories that have proposed answers to questions have themselves become subjects of ongoing debate. This book does not pretend to have the last word on any of these questions, but neither does it seek to avoid controversy. Its primary object, though, is to state in comprehensible terms the major questions in jurisprudence, assess critically the contributions on these questions made by various schools of thought, introduce the reader to some new insights about legal systems and make its own contribution to this conversation about law and justice. It does not matter that there is no consensus about the meaning of concepts such as law and justice. There may never be. We can make up our own minds after getting to know relevant theory, and in so doing learn a great deal about the legal system and the society we find ourselves in.

Rewards of jurisprudence

The study of jurisprudence brings immediate rewards to the lawyer. It hardly matters to a physicist or a chemist how anyone defines physics or chemistry. The physicist and the chemist are not constrained in what they do by definitions of their disciplines. They simply get on with being physicists or chemists. In contrast, it is critically important to a legal practitioner to be recognised as doing law, particularly by judges and clients. A practising lawyer is restricted, if not by a definition of law, at least by the way law is understood by judges and other officials who enforce the law. A good lawyer is one who knows when to argue strictly from statutes and precedents, when to re-interpret laws or distinguish precedents and when to appeal to policy, justice or the good sense of the judge. This is the stuff of jurisprudence. Make no mistake: jurisprudence sharpens legal professional skills.

There are rewards too for the social scientist and the philosopher. Law is part of the structure of society, whether modern or primitive. Law both shapes and is shaped by society. Law impacts on every human activity undertaken within society. Imagine going to work this morning. Decide whether you wish to drive or take the train. If you drive, the road rules will help you get to your office safely. If you take the train, the contract you make by buying a ticket will oblige the rail company to take you there. When you get to your office your employment contract (or some statute) will determine what you do and how much you get paid. Imagine just about any activity and you will find law in attendance – sometimes helping, sometimes hindering. For the sociologist, anthropologist, economist and just about any social scientist, it pays richly to consider the nature of law and the legal system.

Law raises critical issues in moral philosophy. The question of why a person should observe the laws of a society is a moral question. The statement 'The law should be obeyed because the law says so' does not take us anywhere. We must look outside the law to find the duty to obey the law. Law is normative in the sense that it lays down rules of conduct – what ought to be done and what ought not to be done. Basic laws of society, such as the rules against harming person and property and the rule that promises must be performed, are also moral rules. Particular laws, though, may offend the moral of sense of individuals. Some enactments – such as those that authorise war crimes and genocide – will shock the human conscience and draw universal condemnation. Are they laws, and, if so, are there moral obligations to obey them?

The remaining contents of this chapter are arranged as follows. First, the compass of jurisprudence is explained. Second, I discuss certain threshold issues that arise in any quest to understand the concept of law. Third, I provide a synopsis of each chapter's scope and content. Finally, I mention some salient issues in jurisprudence that are not addressed in this book but that represent future challenges for jurists and other students of law.

Jurisprudence

Jurisprudence is an imprecise term. Sometimes it refers to a body of substantive legal rules, doctrines, interpretations and explanations that make up the law of a country: thus, English, French or German jurisprudence refers to the laws of England, France and Germany. Jurisprudence may also refer to the interpretations of the law given by a court. We speak in this sense of the constitutional jurisprudence of the US Supreme Court and the High Court of Australia, and the jurisprudence of the European Court of Human Rights. Jurisprudence in this sense is not synonymous with law, but signifies the juristic approaches and doctrines associated with particular courts.

The subject of this book is jurisprudence in a different sense. This jurisprudence consists of scientific and philosophical investigations of the social phenomenon of law and of justice generally. It embraces studies, theories and speculations about law and justice undertaken with the knowledge and theoretical tools of different disciplines – such as law, history, sociology, economics, political science, philosophy, logic, psychology, economics, and even physics and mathematics. No discipline is unwelcome that sheds light on the nature of law and its relation to society.

The range of questions about law and justice asked within this jurisprudence is indefinite. What is law, and can it be defined? What are the historical origins of law? How do rules of behaviour emerge in a society even before they are recognised or enforced by the state? Is there a basic set of rules that make social life possible? How does law shape society? How does society shape law? What qualities must law possess to be effective? How do judges decide hard cases? Whence comes their authority? Is there superhuman natural law? If so, how do we find its principles? Why do people obey some laws even when they face no sanction for disobedience? Is there a duty to obey an unjust law? Can we make moral (or economic) judgments about particular laws or legal systems? What do we mean by justice? Is there a special brand of legal justice? Are there universal standards of justice? What is natural justice and what are its minimum demands? What do we mean by social justice? These questions are not just interesting in themselves, but are critical for understanding the phenomenon of law and its relation to justice. They are legitimate questions within jurisprudence as the discipline is understood in this work. Of course, it is impossible in a book of this scale to discuss all of the contributions from different disciplines or to consider all the important questions that have been raised, and can be raised, in relation to law and justice. The book's discussions are therefore selective. I explain the basis of the selection in the course of this chapter.

Legal theory

The term 'legal theory' is associated with theories seeking to answer the question: what is law? It is a specific project within jurisprudence. John Austin, the

19th century legal positivist (discussed in more detail in Chapter 2), thought that this was the only project in jurisprudence (Austin 1995 (1832), 18). Most British legal positivists since Austin have tended to limit their inquiries to the task of finding a universally valid definition of law or a set of criteria to distinguish law from other kinds of rules. The best known of the modern British legal positivists, Herbert Hart, devoted his book *The Concept of Law* to the challenge of showing how rules of law are different from: (a) commands such as those of a gunman who relieves you of your wallet; (b) moral rules that fall short of law; and (c) mere coincidences of behaviour that represent social habits or practices (Hart 1997, 8–9). Legal positivists prefer the term 'legal theory' to describe what they do.

It is worth mentioning that legal theory does not stop with the range of questions posed by the positivists. A theory is a testable hypothesis or proposition about the world. It is possible to theorise about many other aspects of the phenomenon of law, such as the law's origins, its emergent quality, its role as a factor of production, its psychological force, and so on. Hence, legal theory, when used in relation to the central themes of legal positivism, should be understood as limited to theories about the idea of law and its basic concepts.

Analytical and normative jurisprudence

Some writers have identified two species of jurisprudence – analytical and normative. Questions concerning the meaning of law in general and of the major concepts of the law are grouped within analytical jurisprudence, and questions focused on the moral dimensions of the law are left to normative jurisprudence (Davies & Holdcroft 1991, v). Analytical jurisprudence is roughly co-extensive with legal theory, as identified with legal positivism. Some scholars have further classified analytical jurisprudence into general and particular branches (Harris 1980, 4). General analytical jurisprudence is focused on the concept of law generally, and particular jurisprudence on the basic concepts of law that are common to most, if not all, legal systems. (See Figure 1.1.) These are the building blocks of legal rules and include concepts such as right, duty, liberty, liability, property, possession and legal personality.

It is important to keep in mind that these are labels of convenience. They are valuable if taken as navigational aids, but may mislead if treated as true categories. There is much analysis in normative jurisprudence and, as we will discover in our inquiries, there is much that is normative in various analyses of the concept of law.

Law

In every language there is a word for law, in the sense of rules of conduct that are considered obligatory by members of a community. The term 'law' is also used in science to state a theory about the physical world. In saying that every action has

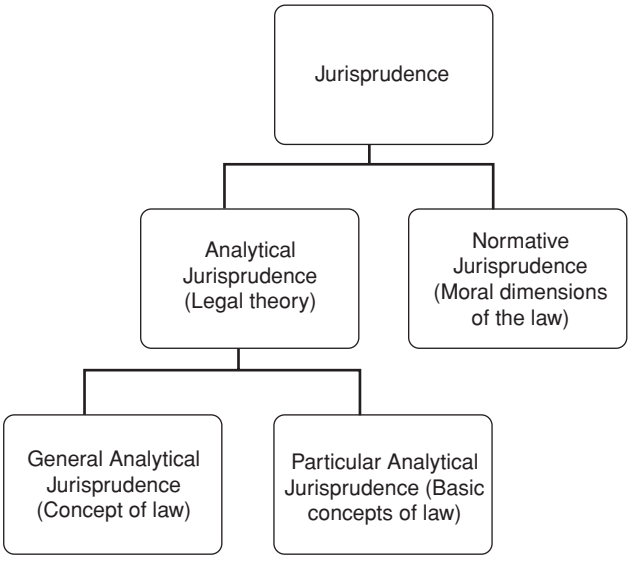

Figure 1.1 Types of jurisprudence

an equal and opposite reaction, Isaac Newton stated a law of nature. However, our immediate concern is not with this type of law, but with laws that prescribe rules of conduct in society. Law in this sense is common to all societies. There is no society that does not have rule breakers, and no society without discord. Yet it is hard to imagine a society where there are no common rules. Cohabitation and cooperation are not possible except on the basis of some common understanding of what behaviour is acceptable and what is not. The rules that indicate the right and wrong ways of behaving are generally identified by the term 'law' or a word of equivalent meaning. There are many kinds of law, such as moral law, religious law, laws of etiquette, customary law, common law, royal law, statute law, and so forth.

The modern state does not concern itself with all of these laws, but only with those that for reasons of policy it chooses to enforce. Thus, in the United Kingdom the coercive power of the state is not applied when a person fails to observe the widely accepted social rule of joining the queue to be served at a shop or restaurant. However, the state will enforce the rule against theft if a customer walks away with goods without paying for them. Lawyers will account for this difference by saying that only the latter case involves a breach of the law, properly so called. The law that they refer to is state law – the law that the state makes or chooses to recognise and enforce. An efficient and fair legal system enables citizens to identify with some confidence those rules that the courts or other state officials will recognise and enforce, and those that they will not. It makes sense in jurisprudence to pay special attention to the question of

the formal criteria that legal systems use to identify state law. Nothing that I say in this book is intended to devalue this enterprise.

Excluding moral considerations from the concept of law (the possibility of which I leave as an open question at this point) is a very different exercise from excluding them from jurisprudence. The question of whether law has a necessary connection to morality is important, but it is only one among the many worthwhile questions we may ask about law.

The quest for a definition of law

Some influential thinkers in the tradition of legal positivism have attempted to define law. Thomas Hobbes, Jeremy Bentham and John Austin defined law as the commands of a political sovereign backed by sanctions (Hobbes 1946 (1651), 112; Bentham 1970 (1782), 1; Austin 1995 (1832), 24). Hans Kelsen defined law as norms validated by other valid norms within a system of norms that ultimately derives from a common basic norm (1967, 201). Joseph Raz held that 'law consists of authoritative positivist considerations enforceable by courts' (1995, 208). Such definitions do not work without supplementary definitions. Austin had to define 'sovereign', 'command' and 'sanction'; Kelsen explained what he meant by 'norm', 'basic norm' and 'validity'; and Raz explained what is meant by 'positivist considerations'.

The leading positivist, HLA Hart, however, found that nothing concise enough to be recognised as a definition can provide an answer to the question 'What is law?' (Hart 1997, 16). Hart identified the typical case of law as the result of the union of primary and secondary rules. Specifically, he argued that law comprises primary rules of obligation that are recognised as law according to the secondary rules of recognition accepted within that system. This was, to Hart, only the central case of law, and he acknowledged that 'as we move from the centre we shall have to accommodate . . . elements of a different character' (1997, 99).

Legal positivists, despite their differences, unite in the claim that they have a general theory that accounts for all occurrences of law in all cultures and times, and that also distinguishes law from all other types of norms and social practices. They claim, as part of this general thesis, that a law is a law irrespective of its moral standing. In other words, law has no necessary connection with morality. A law that authorises genocide does not cease to be law only by reason of universal moral condemnation. Hence, positivists in one way or another seek to establish the necessary and sufficient conditions for something to be called law. In this sense they are all defining law.

It is of paramount importance in a modern state to have a reliable set of indicators that identify the rules likely to be enforced through the power of the state. Identifying indicators of law and providing definitions of law are two very different undertakings. I will be supporting the view that the former is feasible, but the latter is not. Some of the most persistent debates in legal theory arise from the neglect of the nature of definitions. Some thinkers define the law without

realising that they are doing it. Some others define the law without making clear what kind of definition they are giving.

There are different kinds of definition and it is important to know in what sense a theorist is seeking to define law. It is possible to give a *lexical definition* of the term 'law'. A lexical definition simply reports the sense in which the term is understood within a language community. The definition of a 'bachelor' as an unmarried man is a lexical definition. This is what English speakers understand by that word. A lexical definition of the concept of 'law' (more accurately, its vernacular equivalent such as *lex*, *loi, Gesetz*, *lag* or *legge*) will indicate the sense in which the term is understood within a given community. A lexical definition of law in a remote Australian Aboriginal community or in an Inuit tribe may be different from the lexical definition of law among English speakers in England or Australia. A lexical definition may be right or wrong, and can be empirically tested by asking members of a community what they mean by law. Sociologists and anthropologists are particularly interested in lexical meanings of law.

It is also possible to give the term 'law' a *stipulative definition*. A stipulative definition assigns a meaning to a term. Such a definition is neither right nor wrong. A law may variously define an 'adult' to mean any person who has reached the age of 16, 18, 20 or 25. The definition may be fair or unfair, practical or impractical, but it is neither right nor wrong as it does not pretend to report a fact. Stipulative definitions are common in legislation. Section 23 of the *Acts Interpretation Act 1903* (Cth) stipulates that a reference in an Act to a man includes a woman and a word in the singular includes the plural unless a contrary intention appears in the Act. Jeremy Bentham, the first and greatest of the British legal positivists and a founder of modern utilitarianism, defined the law as the command of the sovereign. As I show in Chapter 2, he was conscious that this was a stipulative definition and that law was understood very differently in his own community. He proposed this definition for the utilitarian reason that it promotes clarity and certainty, which is to the public advantage.

A jurist may also give the concept of law a *theoretical definition*. A theoretical definition is a special case of a stipulative definition. Whereas a stipulative definition can be completely arbitrary, a theoretical definition assigns a meaning to a term and justifies it by a scientific theory. Unlike a non-theoretical stipulative definition, which is neither right nor wrong, a theoretical definition can be shown to be wrong by disproving the theory. The statement 'Earth is the planet third closest to the Sun in a system of planets that orbit the Sun' is a theoretical definition of the Earth. The definition will be falsified if another planet is found closer to the Sun. A theoretical definition that cannot be falsified is purely stipulative. Many of the theories of law consciously or unconsciously construct theoretical definitions.

A definition – whether lexical, stipulative, theoretical or any other – is not of much use unless it enables us to identify with some precision the things that are included within the term. One way to do this is to give the 'extension' of the

term. Extension is the naming of all items that belong within the term. It makes perfect sense for a father writing a will to define his family as 'my wife A and my children B, C and D'. On the contrary, it is impractical, if not impossible, to give the extension of a term such as 'Englishman' because there are just too many English men to name. Hence, it is necessary to state the 'intension' of the term.

The intension of a term specifies all the properties that are not only necessary but also sufficient to place something within the term. The intension of the term 'Englishmen' may be stipulated as 'all men born in England or who have a parent born in England'. The definition of a triangle as the figure formed by straight lines connecting three points (and only three points) on one plane is an intensional definition. Anything more or anything less will make some other kind of figure. Hart gave the example of a definition of an elephant as a 'quadruped distinguished from others by its possession of a thick skin, tusks and trunk'. This is an intensional definition, and so is the definition of Earth given previously.

Definitions are important in law as they are in mathematics, logic and empirical science. Geometry defines the notions of point, line, circle, triangle, square, and so forth. Without these we will not know that on a conceptual plane, a straight line drawn through the centre of a circle will divide it in half, or that the sum of every triangle adds up to 180 degrees, or that the diagonals of a square will bisect each other at right angles. The definition of the units of measurement is critical in empirical sciences. The kilogram, the basic unit of measuring mass, is determined by a piece of platinum-iridium kept in a vault in Sèvres, France. The metre is defined as the distance travelled by light in an absolute vacuum in 1/299 792 458 of a second. Likewise, definitions matter in law. Law makes little sense unless we have a clear understanding of the fundamental legal concepts such as right, duty, liberty, power, liability, and immunity. In fact, we cannot make any legal statement without deploying one or more of these concepts. The law also requires more concrete definitions. A law that imposes income tax must define what 'income' is. A law that protects minors must define a 'minor'. A law that excludes heavy vehicles from a city street must define a 'heavy vehicle'. Criminal offences must be defined with a high level of precision to make the criminal law workable and fair.

Legal positivists are not content with defining legal categories, and seek a universal concept of law. Anthropologists ask: what do the Barotse or the Trobrianders or the Koori people or the English understand by law? Legal positivists, in contrast, search for a definition of law that is both theoretical and intensional. In other words, they seek a definition that specifies the necessary and sufficient ingredients of law and that holds true for all societies at all times. Have they succeeded? We will find out in the chapters to follow. For the moment, it is worth mentioning one aspect of the challenge that awaits them.

Law is an inseparable part of society and society is a complex, dynamic and emergent order. Society comes about when individuals observe certain common

rules of conduct that allow them to cohabit and cooperate with one another. These rules may exist in the form of state laws, customs, morals, religious precepts and various informal norms that people observe as matters of etiquette and civil behaviour. Thus, law in its broadest sense gives structure to society. There are different kinds of complexity. Law and society are examples of what scientists call emergent complexity. Take a look at an intricate work of art such as a filigree. The design may be extraordinarily complex, but the object is static. No part of it moves. Thus, it is complex but not emergent. Now consider a clock. It is a highly complex machine with many interacting parts that are in perpetual motion. It is not static like the filigree, but its behaviour does not change over time. Again, the clock does not have the property of emergence. Society, in contrast, changes over time as the individuals who compose it adapt to the changing world. It is therefore complex and emergent. The law, therefore, also has the property of emergent complexity. Defining such systems is not easy.

The arrangement of the contents of this book

I summarise the contents of this book in the following pages. The summaries are unavoidably oversimplified. The book is arranged in four parts:

Part 1 – Law as it is (Chapters 2, 3 and 4)
Part 2 – Law and morality (Chapters 5 and 6)
Part 3 – Social dimensions of law (Chapters 7, 8, 9 and 10)
Part 4 – Rights and justice (Chapters 11 and 12)

There is danger in placing philosophical ideas and theories in compartments. Many thinkers have written on both law and justice. Some, like Hobbes, Bentham, and the modern British positivists, have taken care to separate their views on law from their thoughts on justice and what the law ought to be. Some, particularly in the natural law tradition, regard law and morality as inseparable. Yet the division I have proposed is not completely arbitrary.

Part 1 contains chapters on legal positivism and legal realism. Legal positivists and legal realists entertain different conceptions of law, but they share the aim of explaining the law *as it is* as opposed to what the law *ought to be*. The two schools are also united by their insistence that the law has no necessary connection with morality. I begin this survey in Chapter 2 by discussing the most influential school of jurisprudence within the British Commonwealth – legal positivism. It is associated with a distinguished line of British thinkers, commencing with Thomas Hobbes and his followers Jeremy Bentham and John Austin. In more recent times scholars such as Herbert Hart, Neil MacCormick and Joseph Raz have refined the positivist message. That message can be summarised here only at risk of gross oversimplification. However, it may be said that at a minimum positivists share and defend the position that rules of law may be logically and factually separated from other rules of conduct such as moral and social rules, and that a universal test or set of tests can be stated for identifying law that

transcends cultural differences. Positivists do not deny that law may enforce a community's morals, or even that in a particular legal system some moral test may determine whether a rule is recognised as law. Their contention is that a law that satisfies the formal criteria of validity is a law even if it is immoral. This chapter traces the evolution of British positivism to date, examines the central ideas of this school of thought and evaluates its influence on political and social life.

The greatest contribution to legal positivism outside the British tradition is that of Hans Kelsen, whose remarkable theory demands our closest attention, not the least because it is easily misunderstood. Kelsen set out to establish a science of legal norms that is independent and separate from the political and cultural forces that produce specific legal norms. Kelsen wrote: 'It is the task of the science of law to represent the law of a community, i.e. the material produced by the legal authority in the law making procedure, in the form of statements to the effect that "if such and such conditions are fulfilled, then such and such a sanction shall follow"' (1945, 45). Kelsen described laws as norms that are validated by other norms within a given system of norms. The whole system is sustained by political realities that, analytically speaking, lie outside the legal system. Kelsen's theory has intuitive appeal to legal practitioners and has played a major role in the resolution of legal disputes arising in the context of revolutionary overthrow of established legal order. Chapter 3 explains Kelsen's theory and, in the light of criticisms it has drawn, evaluates its intellectual and practical contributions to our understanding of the nature of law.

Legal positivism has been challenged by thinkers in the two realist traditions of jurisprudence: the American and the Scandinavian. While the two branches have much in common, their approaches and concerns differ. I discuss these schools of thought in Chapter 4, beginning with the Americans. American realism, as Karl Llewellyn pointed out, represents an intellectual movement rather than a school of thought or set of theories about law. American realists mount a serious challenge to the positivist conceptions of law by their deep scepticism of law as rules enacted by constitutionally authorised law makers. Realists share with legal positivists one premise: it is important to distinguish the law as it exists from the law as it ought to be. The realists study what the courts are doing, disregarding what the courts ought to be doing. The realist, though, soon discovers that what the courts do in fact is engage in value laden legal creativity.

While positivists and realists agree that it is important to separate the 'is' from the 'ought', they differ on how to ascertain the 'is'. The realists' most serious departure from legal positivism occurs at this point. The positivists look to the established law giving authorities (tyrants, parliaments, etc) to discover the law. The American realists liken this thinking to putting the cart before the horse. They look instead to judgments of courts, especially the appellate courts, to discover the law as it actually is. Legislative enactments and previous judicial precedents influence what courts do, but they are not the only influences that shape judicial decisions. In his famous article 'The path of the law', Oliver Wendell Holmes

declared that 'the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law' (Holmes 1897, 461). Most realists question the very possibility of rules. Law is represented by the actual behaviour of the legal system, not by how it ought to behave according to rules laid down by legislatures. In layman's language, the proposition is that it is idle to regard law as rules written in a law book when the law is what the higher courts say it is.

The Scandinavian realists mount a different sort of attack on legal positivism. Scandinavians point out that rules are not real things: they have no physical existence. No one has touched or felt a rule, or even seen one in the way we see a chair or an elephant. What we see are writings in a statute book. Parliament has declared that a person who takes property without the consent of the owner must be convicted of theft and punished. This is not a rule but a fact. The law consists of facts. Any talk of rules belongs in metaphysics. A collection of politicians gather in a house called parliament and decree this or that. This fact creates certain changes in the behaviour of people and of courts. American realists describe the law in terms of the decisions of officials, particularly those of the appellate courts. The Scandinavians look at law from the viewpoint of the person who obeys the law. They ask why the person obeys the law. Law is law, from the Scandinavian viewpoint, because of its psychological force in altering the way people behave.

In Part 2, I consider the theories that, directly or indirectly, assert the inseparability of law and morals. Chapter 5 is focused on the classical tradition of natural law theory, which asserts the presence of a higher form of law that deprives immoral human law of its obligatory force. The strongest version of natural law theory is expressed in the maxim *Lex injusta non est lex*, or 'unjust law is not law'. More accurately, this line of argument claims that at some point on the moral scale an enactment may be seen as so immoral or unjust that it loses its authority as law. The most famous modern formulation of this argument was provided by Gustav Radbruch, the German philosopher and one time minister of justice. In an article that is said to have inspired post-war courts to reject the defence of lawful orders raised by Nazi war criminals, Radbruch contended that 'where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the law is not merely "flawed law", it lacks completely the very nature of law' (Radbruch 2006 (1946), 7). He maintained that large parts of Nazi law, measured by this standard, never attained the dignity of law. I trace this tradition from the early Greek philosophers through Roman legal doctrine, the theological teachings of St Augustine, St Thomas Aquinas and the schoolmen, natural rights theories, Hobbes, Locke and others, to its modern exposition by John Finnis.

The question of the possibility of separating law and morals is discussed further in Chapter 6. The chapter considers the work of two modern legal theorists, Lon Fuller and Ronald Dworkin, who maintained that the concept of law is

imbued with morality of a certain kind. Fuller identified it as the inner morality of the law. Dworkin called it the law's integrity. Fuller regarded law as a purposeful enterprise whose aim is to subject human conduct to the guidance and control of general rules. The law's capacity to guide human actions depends on certain properties in its enactments. These properties are: generality, prospective operation, accessibility, clarity, consistency, reasonable constancy, possibility of observance, and congruence with official action. Rulers fail to make law to the extent that they fail to endow their enactments with these qualities. Fuller argued that these qualities are not just requirements of efficiency but constitute the inner morality of the law.

Dworkin examined the concept of law as it is understood in the Anglo-American culture. People expect integrity in their legal system. People's duty to obey the law, which is a moral duty, and the state's monopoly of power to enforce the law rest on the law's integrity. Integrity requires internal coherence and consistency based on the principle of treating like cases alike. Dworkin used the allegory of the chain novel (or a soap opera) to explain the role of the courts, who are the final arbiters of the law in the Anglo-American system. A chain novel may be written by successive authors developing the story as time goes by, yet readers expect some consistency and coherence in the unfolding story. A character must not be the hero in one episode and the villain in the next unless there is a credible explanation in the narrative. A story set in the countryside must not become overnight a story of inner city life. A disjointed chain novel leaves readers dissatisfied. Similarly, incoherent and inconsistent judicial action will destroy the faith that people have in the legal system. We can always pick up another novel to read, but few of us can choose another legal system to live under.

Part 3 moves the focus of the book to the law's social dimensions. I begin with a discussion of the sociology of law and sociological jurisprudence in Chapter 7. Law is a social phenomenon. It is the product of society, but at the same time it affects the way society is structured and functions. The sociology of law is the study of the connections between law and society. There are two kinds of sociology: positivist sociology and interpretive sociology. Positivist sociology applies the methods of empirical science to the study of social phenomena. Just as a natural scientist seeks to explain the causes of physical events such as ocean currents, earthquakes, weather patterns and pollution, a sociological positivist looks for the causes of social occurrences such as juvenile crime, family breakdown and drug addiction. Interpretive sociologists think that the social world is very different from the physical world and, hence, it cannot be understood purely by the methods of natural science. There are psychological, ideological and spiritual dimensions of human behaviour that cannot be measured like physical objects. Hence, interpretive sociologists take a more holistic approach and enlist other kinds of knowledge such as history, philosophy and psychology. I explain and discuss the sociological theories concerning law advanced by the pioneers in the field: Karl Marx, Max Weber, Émile Durkheim, Eugen Ehrlich

and Roscoe Pound. The interpretive sociologist understands the law in a much broader sense than lawyers do. The lawyer's law is made of the formal rules of state law expressed in statutes, orders, judgments and so forth. Sociologists treat the law of the state as only one specialised form of regulation among a much larger range of social control devices. Law includes, from the sociological viewpoint, customs, social practices, moral codes, and the internal rules of associations such as clubs, churches, cults, and even criminal syndicates.

I consider Karl Marx's view of the law as part of the superstructure of society. The foundation of society consists of the economic relations that determine how the goods that satisfy human wants are produced and distributed. The superstructure made of the state and its laws not only reflects this economic system but also reinforces it. As human communities progressed from tribal living to feudal society and the capitalist economy, the form of the law also changed to reflect and consolidate the features of each system. Marx predicted the inevitable self-destruction of capitalist society and its transformation by a transitional dictatorship into a stateless socialist society. The common ownership of the means of production and the abolition of class divisions would bring an end to the need for law and the state. History did not unfold the way Marx predicted, but his thinking continues to be influential as an ideology.

Max Weber, like Marx, was a student of economic and social history. Weber developed a theory about the progression of law from its ancient roots in tradition and magic to its current rational form. He identified the causes of the rationalisation of law with the needs of a capitalist economy and of the bureaucratic state. However, unlike Marx, Weber did not identify the law exclusively with the maintenance of the capitalist exchange economy and saw other purposes that the law fulfilled.

I follow the discussion of Weber's legal sociology with the work of Émile Durkheim, for whom law was the basis of social solidarity. Durkheim, like Marx, thought that law represented the contours of society, but unlike him did not see the law in oppressive terms. The division of labour plays a critical part in Durkheim's sociology. It determines the kind of law that a society has. In older societies, where there was little division of labour, law is found mainly in its repressive form. Criminal law is the main form of repressive law. In modern society, the more extensive division of labour calls for restitutive law. Every society has both kinds of law, but the restitutive kind predominates as society becomes economically sophisticated.

The chapter continues with a discussion of the sociological jurisprudence of Eugen Ehrlich, who was most famous for his idea of the living law. The centre of gravity of the law is not in parliaments or the courts but in the life of the people. Society emerges from the ground up as an association of associations. Its origins are in the genetic associations known as the family. Other associations are formed as people collaborate for mutual advantage. The process eventually leads to nationhood and government, and thence to international associations of the kind that we observe today. Ehrlich argued that legal norms exist in

society before they are enacted as legal propositions by the state. Most people obey the rules of social life without compulsion. However, when on occasion the norms are violated, and resulting disputes cannot be resolved informally, the courts have to apply what Ehrlich called norms of decision, which consist of lawyer's law combined with moral and policy reasons that inevitably enter judicial calculation.

The chapter closes with an account of the sociological jurisprudence of Roscoe Pound. Pound recognised that there are narrow and broad meanings of law, but he was a jurist first. Whereas the previous thinkers came to the law from sociology, Pound went from law to sociology. The first task of the jurist is to know the law in the lawyer's sense. Pound considered the changing role of law in society, concluding that the law's role is the adjustment of competing interests with a minimum of friction and waste. The importance of his theory lies in his demonstration of the way interests are born outside the legal system and are transformed into legal relations, and in his message that legal institutions are shaped by the needs of the social and economic order, and not the reverse.

The discussion of the social dimensions of law is continued in Chapter 8, where I consider three major strands of radical jurisprudence that challenge the premises of both legal positivism and natural law theory. The chapter examines the body of theory produced by scholars of the movements popularly known as critical legal studies (CLS), feminist jurisprudence and postmodern legal theory. They are the views of thinkers who question the traditional understandings of the nature of law and its role in social regulation. Radical jurisprudence represents a brand of sociology of law that combines empirical observations of the law with normative critiques. The chapter commences with the central claims of liberal legal ideology that are challenged by radical theory. The common theme of the radical schools is that liberal law is fundamentally oppressive. The key reason is that law transforms abstract ideas ('man', 'woman', 'husband', 'wife', 'child', 'consumer', and so on) into legal categories in a way that 'reifies' by making them appear as real categories. A woman, for example, is cast into a stereotype that limits her role in the eyes of the law. CLS scholars argue, further, that this brand of legality papers over a serious contradiction in society as constructed by liberal law. A person desires individuality as well as togetherness with others. A society organised on liberal principles denies this dilemma by its celebration of individual rights and autonomy. According to CLS, liberal law systematically weakens the social bond and creates in persons a deep sense of alienation.

Feminist legal theory views this reification as the outcome of a male dominated culture. There are different interpretations of the female predicament under liberal law. Some feminist legal theorists argue that women, by nature, are different from men. Whereas men have a sense of separation from others, women view life in relational terms. They see themselves as carers, not competitors. The impersonal, abstract nature of law fails to accommodate the feminine and

thereby disenfranchises women. Other feminist theorists take the opposite view: that the law draws illegitimate distinctions between the genders, keeping women out of positions either expressly (as in the case of combat ranks of the military) or by male oriented eligibility standards – for example, those that favour physical attributes as against intellectual abilities. Feminists such as Catharine MacKinnon present a straightforward uncompromising argument against male domination, and call on women to give up the equality quest and fight for ending oppression in the form of rape, sexual assault of children, endemic family violence, prostitution and pornography, and other modes of female subjection.

This chapter also investigates the postmodernist movement in legal theory, concentrating particularly on deconstruction and language game theory. The postmodernists, who have displaced critical legal studies as the major force in radical jurisprudence, question the liberal claim to objectivity of the law on epistemological grounds. The recent origins of postmodernist theory are found in the thinking of Friedrich Nietzsche and Martin Heidegger, but in fact postmodernists reopen an ancient debate that started in the quarrels between the Sophists and Plato about the possibility of objective knowledge and universal values. In its most radical form deconstructionist theory holds that there is no reality outside texts. Words gain their meaning from their difference from other words, which themselves gain their meanings from their difference from yet other words, and so on. This process, Jacques Derrida argued, is one of infinite regression and hence words are 'undecidable' (1981, 280). Therefore, texts themselves lack objective meaning. Less radical language theorists regard language not as a wholly arbitrary system of subjective meanings but as something legitimated by the conventions of a speech community. These theorists argue that the standards of truth and justice are products of specific 'language games', conventions, and shared normative understandings or community practices. Knowledge is not entirely subjective, but contingent. I consider the compatibility of this approach with the liberal notions of law and legality.

Chapter 9 discusses theories of law that explain the law's growth and function from the economic point of view. Until the pioneering work of Ronald Coase, Guido Calabresi, Henry Manne and others, economists paid little attention to law and lawyers tended to disregard the economics of law. Since then, the study of the development and efficiency of common law rules by transaction cost analyses has become widespread. The Coase theorem – that in conditions of zero transaction costs the allocation of rights would not matter, as parties would bargain towards the efficient solution – means, conversely, that in conditions of significant transaction costs the allocation of rights by law is critical from the point of view of social cost and wealth maximisation. These insights led Richard Posner to the theory that the common law, through the process of litigation, trends towards efficient rules. Even if this is the case, the law is often not the result of common law progression, but is the consequence of legislation emerging from the interplay of social and electoral pressures. I follow the discussion of transaction costs theory with explanations of the key ideas and achievements of

the public choice theory, produced by economists who engage in micro-economic analyses of democratic decision making processes.

Chapter 10 is a discussion of the neglected but rich tradition of evolutionary theory in jurisprudence, from the 18th century evolutionist thinkers to contemporary institutional theorists. These theories explain the emergence of law in society and the way law is fashioned by the accumulation of social experience. The process of spontaneous order (of which the common law is a prime example) – also known as emergent complexity – has in recent times generated enormous excitement in the disciplines of economics, psychology, artificial intelligence, computer science and mathematics. Scientific insights into emergent complexity are shedding light on the ways in which order (hence, rules) arise out of seemingly chaotic interactions of elements (read 'persons' in the context of law) without the help of a designer (read 'legislator' in the case of law). According to this theory law predates rulers, governments, parliaments and courts, and law continues to be generated by the emerging coincidences of behaviour on the part of individuals pursuing different life aims. This chapter identifies the moments of evolutionary thinking in the classical and medieval periods and traces the systematic development of evolutionary jurisprudence by Matthew Hale, Bernard Mandeville and the 18th century Scottish moral philosophers. The chapter proceeds to examine the later development of this tradition by the Austrian school of economics and the new institutional economists. It concludes by assessing the relevance to jurisprudence of current scientific research into emergent complexity.

Part 4 consists of two chapters on rights and justice. A claim of justice is made not as a plea for compassion or charity but as a matter of right. It may be presented as a legal entitlement or a moral claim, but always as a right. A person who lacks legal rights under a contract because of some technical defect may have a moral claim to performance under it. Labour unions seeking higher wages do so in the name of moral rights. Hence, it is important to consider the concept of a right before discussing justice. In Chapter 11, I discuss the nature of rights and duties using WN Hohfeld's analysis of fundamental legal conceptions and their inter-relations. Hohfeld's system identifies the basic concepts or building blocks without which one cannot construct a sensible legal statement. The system is focused on law but is transferable to moral codes of conduct. I explain the Hohfeldian system of jural relations, and address its subtleties and some refinements proposed by other writers. The system is found to withstand the standard criticisms made against it.

Chapter 12 is on justice. Justice signifies a universally treasured value. No one wishes to be treated unjustly. Hence, a claim made on grounds of justice is a psychologically powerful claim. Yet 'justice' is a spectacularly imprecise term that serves many, often conflicting, causes. Justice may mean justice as virtue, legal justice in the procedural or substantive sense, distributive justice, or political justice. The term is used much too loosely, leading to serious confusion of our normative choices by obscuring the tensions between different conceptions of

justice. This chapter is dedicated to explanation of the different conceptions of justice, with a view to providing readers with the theoretical knowledge necessary to engage fruitfully in the great debates about justice. A discussion of Aristotle's system of justice as virtue is followed by sections on legal and distributive justice. The second half of the chapter investigates two distinct theoretical traditions concerning political justice. One is the social contract approach. I discuss the contending theories presented by John Rawls and Robert Nozick within the social contract framework. The other approach is that of the evolutionary tradition in social theory, which originated in the work of the 18th century English and Scottish philosophers. These ideas are explored mainly through the thinking of David Hume and Adam Smith, and I conclude with a discussion of the central normative implications of the evolutionary view.

Old debates and new frontiers

The province of jurisprudence is vast. If jurisprudence is understood as the study of law and justice in all their dimensions, it is not solely the preserve of jurists. Historians, sociologists, anthropologists, economists, philosophers, psychologists and scientists have a great deal to offer to the discipline, as seen from their increasing interest and exciting contributions. Like other branches of intellectual inquiry, jurisprudence represents a process of discovery through observation, careful theorising and vigorous challenge. The phenomenal transformation of the world through the information revolution revives old debates in jurisprudence and opens new frontiers.

The convergence of legal systems and the emergence of new legal orderings as a consequence of globalised markets, the rise of international institutions, the proliferation of new technologies, the discovery of cyberspace and the emergence of new forms of property and of communication are generating new challenges for scholars seeking to explain the nature of law and the processes of legal change. Legal theories need to be reconsidered, and where necessary restated, in the light of these changes. Although the nation state remains strong and its coercive powers to regulate economic and social activity are mostly intact, a large part of the global trade is regulated by norms that originate in usage or in the quasi-legislative activities of international trade associations such as the International Chamber of Commerce. The World Trade Organisation (WTO) is a legislative body with enormous powers, not only over international trade but also indirectly over the structure of domestic economies and political institutions. Some countries need to make structural adjustments having significant social, cultural and political ramifications in order to meet WTO conditions. Numerous free trade agreements also have similar effects on partner nations. International commercial arbitration continues to expand as the principal mechanism for dispute resolution in world trade, with major centres of arbitration now spread

across the globe. These factors suggest that the centre of gravity of legal systems is no longer so clearly located in national legislatures.

On the political side, the international human rights regime has been strengthened immeasurably, partly by being linked to global trade and partly by the construction of institutions such as the International Criminal Court. The international community has greater capacity to punish crimes against humanity after they are committed, but appears powerless to halt or pre-empt large scale politically perpetrated human tragedies such as those unfolding in Dafur in Sudan and in Zimbabwe. The so-called responsibility to protect (R2P) has not moved beyond theory.

Some of the most exciting prospects for jurisprudence lie in two new branches of science. One is in evolutionary psychology and cognitive science. These disciplines are shedding light on the psychology of rule following. A fundamental question in jurisprudence remains: why do people observe rules? The simplistic explanation that people obey the law for fear of punishment is long abandoned. Mutual convenience is a better explanation, but it is insufficient because people usually do not stop and calculate convenience before acting. These psychological disciplines hold out prospects of deeper understanding of legal systems. The other branch consists of the work of researchers in many disciplines working collaboratively or intra-disciplinarily to study the phenomenon of emergent complexity. The research in this field is adding to knowledge of complex systems, including the law, by revealing how self-ordering systems emerge and change over time. I outline the prospects that this emerging science holds for jurisprudence, but note that challenging work lies ahead.

PART 1
LAW AS IT IS

2

British Legal Positivism

Legal positivism is the most influential school of thought in jurisprudence. This is hardly surprising, as the idea of law as the creation of a human law giver that lies at its heart is a common intuition. Ask the person on the street whence comes the law, and expect to hear that law is the work of parliaments, monarchs or other rulers. Ask a lawyer what the law is, and anticipate an answer drawn from legislation and judicial precedents. The ancients may have regarded the law as received from divine sources but in the modern world, where most laws have a known human author, people think of law as the product of designing human minds.

British legal positivists regard the law as 'social fact', by which they mean that law is found in the actual practices or the institutions of society. Legal positivists have their significant disagreements but they share the common aim of helping people understand the law *as it actually is*. A survey of positivist writings on the nature of law reveals the following main themes:

1. Law is the creation of human agents. Even custom is not law unless it is recognised and enforced by a human authority.
2. The law *as it is* can be distinguished from notions of what the law *ought to be*. Law is social fact. It is found as rules declared by authorities such as legislatures and courts, or in the actual practices of those who enforce the law.
3. There are good practical reasons for distinguishing the law as it is from what the law ought to be. It will make the law more clear and certain, so that people have a better idea of their rights and duties and the community is better able to assess the worth of laws.

4. It is possible to identify a set of formal criteria by which we may determine whether or not a rule is a law.
5. There is no *necessary* connection between law and morality, though many laws are based on moral precepts. A law does not cease to be a law if it fails some moral test which is not in itself a law. The US Bill of Rights imposes several moral tests, but they are binding as law, not morals. A legal system may leave room for judges to introduce their moral standards in deciding controversies. According to legal positivists, that makes no difference to the positive character of the law. The court's judgments will produce law even if they fail our own moral tests. Thus, an immoral law may yet be a law in theory as well as in fact.

I propose to examine the history and theory of British legal positivism through the work of its principal proponents, considered in historical order. But first, it is worth saying something about the philosophical tradition of positivism to which legal positivism is related.

Positivism and logical positivism

Positivism

Positivism, as a philosophical method, is also known as empiricism. Auguste Comte (1798–1857) is regarded by many as the first true positivist. He sought to expel metaphysics (unverified belief systems) from the study of society. Comte argued that we can truly understand the nature and functioning of society only by the scientific method of empirical observation, theory construction and verification. Comte believed that our ways of thinking about the world have evolved through three stages: the theological, metaphysical and scientific (1975 (1830–42), 1, 21). In the beginning, people conceived of the world as divinely ordained. The authority of rulers in such a world is subordinate to divine will. In the metaphysical age that commenced after the French Revolution, the will of God was replaced by notions of natural rights. According to this worldview, people have rights by virtue of being born human, and these rights must not be abrogated by human rulers. Thus, the French philosopher Jean-Jacques Rousseau began his famous book *The Social Contract* with the words 'Man is born free but everywhere is in chains' (1968 (1762), 165). The existence of natural rights, though, is a moral claim that cannot be proved or disproved. In the modern era, many people turn away from metaphysics to find answers to questions by scientific study of the observable world. This is positivism. If you want to know the law concerning murder you try to find the law as it is authoritatively stated, or as it is actually enforced, as opposed to what the law ought to be.

Logical positivism

Logical positivism, also known as logical empiricism, is the philosophical program associated with the Vienna Circle[1] of the 1920s, and later with the British empiricists such as Bertrand Russell and AJ Ayer. Yet the roots of this intellectual tradition may be traced to the thought of the 18th century Scottish philosopher David Hume. Like positivists, logical positivists seek to eliminate metaphysics from knowledge statements. Any statement that cannot be 'verified' is metaphysical, and hence has no cognitive significance.

Nature of scientific knowledge

In his *Enquiries Concerning Human Understanding*, Hume explained the principle of verification thus:

> If we take in our hand any volume; of divinity or school metaphysics, for instance; let us ask, *does it contain any abstract reasoning concerning quantity or number?* No. *Does it contain any experimental reasoning concerning matter of fact and existence?* No. Commit it then to the flames: for it can contain nothing but sophistry and illusion. (1975 (1748), 165)

According to Hume, a statement makes sense only if: (a) it is true in the purely formal or abstract sense; or (b) it reports a fact or scientific law that can be verified by experience or experiment. Hume in this passage was referring to the two forms of scientific knowledge that philosophers today call *analytic* and *synthetic* (as illustrated in Figure 2.1). Analytic knowledge is abstract or formal. Mathematics

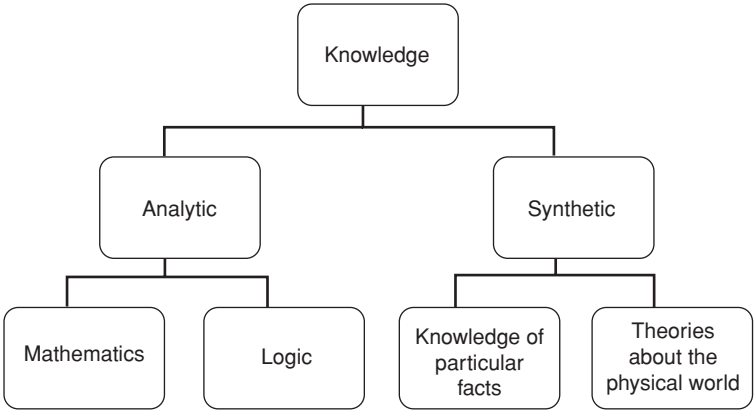

Figure 2.1 Forms of knowledge

1 The Vienna Circle was a group of physicists, mathematicians and philosophers who met regularly in Vienna and are considered the principal instigators of this school of thought. They were Moritz Schlick, Rudolf Carnap, Herbert Feigl, Phillip Frank, Kurt Gödel, Hans Hahn, Otto Neurath and Friedrich Waismann.

and logic are its two branches. A statement is true in the analytic sense if it is mathematically or logically correct within a given set of axioms. Take the case of mathematics. The statement $2 + 2 = 4$ is mathematically true whether we are talking of apples or oranges or elephants. The famous Pythagorean theorem that in a right angled triangle the square of the hypotenuse equals the sum of the squares of the remaining sides is mathematically correct according to the axioms of Euclidean geometry. Now consider simple logic. If we assume that all persons seek happiness it is logically correct to say that whoever is a person will seek happiness. The above statements do not convey knowledge of particular facts, but state the logical consequences that flow if certain facts are present.

Synthetic knowledge is of two kinds. It may be knowledge about a particular physical fact, or it may be a theory about cause and effect in the physical world. The statement that I have $10 in my wallet is a statement of particular fact. So is the statement that the Empire State Building is 1250 feet tall. These claims can be proved or disproved. You can count the dollars in my wallet and, with the right instruments, measure the height of the Empire State Building. In contrast, a theory about causation in the physical world cannot be proved but may only be falsified. Hume was the first to notice the problem of verifying statements about cause and effect. Where there is fire there is heat. We come to expect this not by direct proof but by experience. We expect the future to resemble the past not because of prescience but because of experience. We accept certain social practices and rules, not because we can 'verify' them but because experience has shown the value of observing them. Karl Popper in the 20th century made a sustained attack on the verification doctrine of the logical positivists. He said that we cannot prove our scientific theories but can only present them as conjectures or hypotheses. These conjectures we hold to be true until falsified by experience or experiment. The theory that the Sun circled the Earth was considered true from the dawn of the human race until Nicolaus Copernicus published his astronomical observations in 1543. The statement that 'all ravens are black' holds true only until a raven of a different colour is found. Logical positivism, despite these controversies, was a powerful intellectual force that touched all fields of inquiry, including legal theory.

Logical positivists argue that statements such as 'God is omnipotent' cannot be verified. As Rudolf Carnap observed, neither can Heidegger's claim that 'nothing nihilates'. According to the logical positivists, we are free to believe these things, but their inclusion in philosophy and science leads to confusion. Let us consider logical positivism in relation to law. The statement 'The law of England prohibits the smoking of cannabis' is a synthetic statement. It may be verified or refuted by consulting the relevant law books and legal practice. The statement 'If John smokes cannabis, he will break the law' is an analytic statement. Both statements may be verified. In contrast, the proposition 'Cannabis smoking ought to be lawful' cannot be shown to be true or false in a logical or empirical sense. It is simply a person's moral preference.

Legal positivism

Legal positivism bears resemblances to logical positivism, but differs in some ways. Legal positivism aims to identify the law *as it is*. This may seem easy, but is not. First, there is the question: what do we mean by law? The word 'law' (or its vernacular equivalent) has many meanings. We can dismiss immediately the sense in which natural scientists use the term 'law' – as in 'the second law of thermodynamics' or 'Newton's three laws of motion'. Scientific laws are theories about the natural world – why things happen the way they do. The law that concerns us is of a very different kind: namely, law that tells people what they may do, must do or must not do. We may call this 'normative law'.

There are many types of normative law. They include religious laws, moral laws, customary laws and laws of etiquette. Legal positivists offer theories on how we may distinguish law 'in the legal sense' from laws in the non-legal sense. These theories generally attribute the property of law only to those rules that are derived from a law making authority existing as a political or social fact. A rule may be universally observed in a society but will not be a law in the legal positivist's book unless it is made or recognised by established authority. Hart is an exception among legal positivists. He saw no reason to deny the name 'law' to the customary rules observed by primitive societies that had no legislatures or courts or other authority. He called these rules primary rules of obligation. Likewise, Hart regarded international law as law, even though the international community lacks the kind of law making bodies and law enforcement capacities that we expect of national legal systems (1997, Ch. X). He made the obvious observation that developed national legal systems generally display a set of secondary rules that regulate the recognition of primary obligation rules, their modification and their application (1997, 91). These secondary rules authorise certain bodies to make, declare or modify laws, and define their powers and procedures. In common law systems, the secondary rules define the law making powers of the legislatures and confer on the courts the authority to interpret and declare relevant law in particular cases that come before them. The secondary rules may be found in a written constitution or may exist, as in the case of the UK, in the form of custom.

The other major theme in legal positivism is the claim that law has no necessary connection to morality, although often enough the law will express the morality of the people it regulates. As Hart wrote, 'Here we shall take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so' (1997, 185–6). The Austrian jurist Hans Kelsen (1881–1973) went further in making his case for a science of law. In his *Pure Theory of Law*, Kelsen argued that a legal rule and a moral rule are distinct, though they may often coincide in content. The norm 'Do not kill' is both a moral rule and a legal rule. The moral rule is moral because of its content. It is derived from a higher or more general moral principle. In contrast, the legal rule is legal not owing

to its content but 'only because it has been constituted in a particular fashion, born of a definite procedure and a definite rule of law' (Kelsen 1935, 517–18). Conversely, a morally repugnant rule will be a law if it has been made according to the established procedures and criteria of validity.

The morality of a community may enter the law in several ways, but legal positivists insist that in each such case morality has legal force only because a competent authority such as a parliament or a court has converted the moral rule into a legal rule. A legal system may include a moral test of legality. This may be done in several ways. First, the moral principle against which laws must be tested may itself be enacted as a superior constitutional rule. The equal protection clause of the Fourteenth Amendment to the US Constitution commands that 'No State shall . . . deny to any person within its jurisdiction the equal protection of the laws'. Laws that violate this clause are unconstitutional and void. Equal treatment is a moral principle generally accepted in American society. Yet legal positivists treat the equal protection clause as setting a legal (not moral) test, because it is part of the positive law of the United States.

Second, a legal system may authorise a court to dispense justice according to some general notion of morality, without actually laying down specific moral rules that the court must apply. The Roman *praetor* had such power. In the 13th century, the English monarch authorised his principal spiritual advisor, the Chancellor, to grant equitable relief to plaintiffs who petitioned the monarch when justice was denied by courts because of the rigidities of common law forms of action. The Chancellor's sense of equity trumped law. The Chancellor's Court, like the Roman *praetor*, eventually narrowed its wide discretion to a set of self-imposed predictable rules. The legal positivists have no difficulty in regarding equitable rules as law, as they are made by authorised law makers.

Third, the open texture of language leaves judges with a measure of discretion in deciding cases. Many laws are clear and leave little room for judicial interpretation. A law that fixes the age of voting at 18 years or sets the maximum term of parliament as five years is hardly contestable. Most laws, though, are not of this type, but concern rules of conduct. It is not possible to devise a legal rule concerning conduct that resolves all future questions without going into endless detail. Such an infinitely complex law, if it can be written down, will be incomprehensible. This means that legal rules often leave grey areas (penumbras of uncertainty) where judicial discretion plays a decisive role. Legal positivists such as Hart think that in such cases the court acts as a legislator with the authority of parliament.

Legal positivists argue that in each of the above situations, moral standards attain legal status only through some form of official promulgation. This is the famed 'separation thesis' of legal positivism that is ceaselessly debated. In general, legal positivists separate the law from the materials from which the law is built, including morals, customs, folkways and policy (see Figure 2.2).

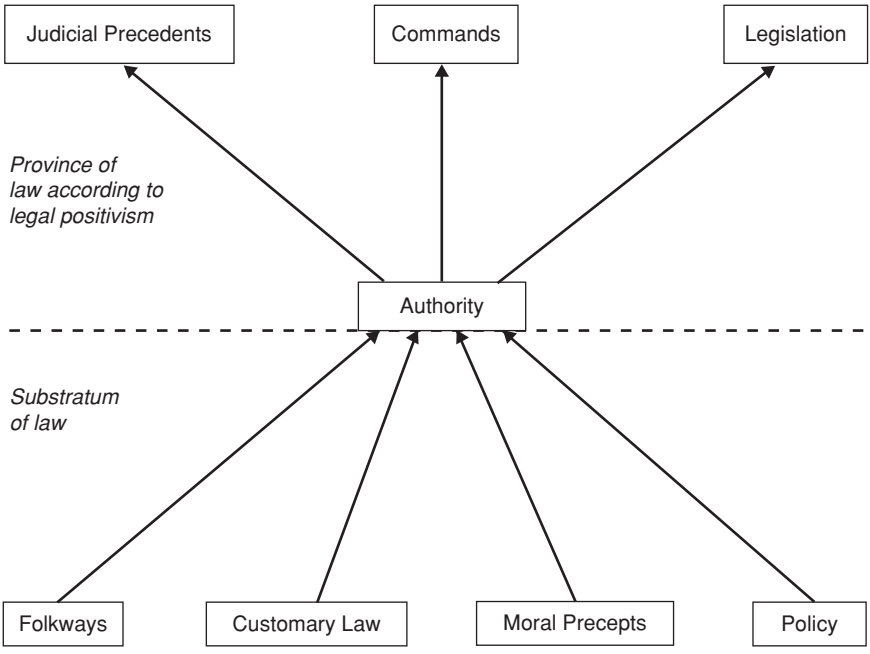

Figure 2.2 Province of law according to legal positivism

Scientific, normative and hybrid theories of legal positivism

A scientific theory offers an explanation of some aspect of the physical or cultural world within which we live. It seeks to explain the world as it exists. A scientific theory may be general, in the sense that it is said to be true for all times, places and cultures, or it may be special, in the sense that it holds true in specific conditions. A normative theory, in contrast, is about what ought to be done. Thus, scientific theory is about 'is' and normative theory is about 'ought'. Hobbes, Bentham, Austin and Hart, in my view, represent a hybrid strand of legal positivism. Their work at times suggested that the concept of law has an objective and universal (therefore scientific) meaning that allows law to be separated from other norms, such as social and moral rules that shape human behaviour. They seemed also to propose that, irrespective of scientific validity, societies should, for their own good, embrace the positivist concept of law. They argued that the public interest is served better if society does not confuse law with morality, and accepts as law only those rules and commands that satisfy formal requirements of validity irrespective of moral content. This version does not deny that a particular society may recognise as law only those rules that conform to certain moral standards. Instead, it makes the utilitarian argument that moral tests of legality cause more harm than good because they lead to the uncertainty of the law.

Legal positivism and legal realism

Legal positivism is not the only school of thought within jurisprudence that seeks to separate the law *as it is* from the law *as it ought to be*. Legal realists (whose theories we discuss in Chapter 4) have the same ambition. There is a critical difference, though, between the positivist and realist traditions in legal theory. Positivists define law with reference to formal criteria of legal validity, whereas realists conceive the law as it is actually experienced by people. A positivist will treat the ban on littering the town square as law because it has been enacted by a law making authority designated by the legal system. It does not matter that everybody ignores it and no one is prosecuted. A realist will say that the ban is not law because law enforcers ignore it and it has no practical effect. Hence, the two schools differ radically in the way they identify the law as it is. What they genuinely share is the conviction that there is no necessary connection between law and morality and that a morally repugnant rule can have the force of law.

Modern legal positivists are not intellectual clones of the 17th and 18th century proponents. They have healthy quarrels but agree on three basic premises: (1) law exists as social fact; (2) law is the product of human authority; and (3) there is no necessary connection between law and morality.

In what follows I discuss the history and philosophy of British legal positivism, its modern refinements and the principal criticisms that its central ideas attract.

Thomas Hobbes and *Leviathan*

The idea that the ruler's will is law (*voluntas principis*) recurs throughout the history of Western political thought. It was particularly influential in the 16th and 17th centuries, during which the feudal kingships of western Europe were transformed into absolute monarchies. Monarchs claimed the right to absolute political power by divine right. France's Louis XIV famously declared *'L'état, c'est moi'* (I am the state). The absolutist theories were not about law but about political power. They claimed that the monarch might make law at will. They did not say that customary law and natural law were fictitious, only that the monarch's judgment was final on all questions of law. *Voluntas principis* was more a political claim than an objective description of the phenomenon of law.

We find in the work of Thomas Hobbes (1588–1679) the first clear theory of law based on the notion of sovereign power. Hobbes was a royalist who was dismayed by the destruction wrought by the English Civil War (1642–49) and the arbitrary rule of the Rump Parliament that followed the defeat and execution of Charles I in 1649. The turmoil and chaos of those times convinced Hobbes that only strong central government could secure the safety and wellbeing of the people. Hobbes spent most of the turbulent decade in self-exile in Paris, during

which he wrote his greatest work – *Leviathan*, published in 1651. The book remains one of the most powerful justifications of absolute power. Whereas other contemporary defenders of royal absolutism appealed to the divine right to rule, Hobbes made a utilitarian case for recognising an 'uncommanded commander' whose will is law.

Hobbes concluded from his observation of human nature that people will be in perpetual conflict unless they are subject to a supreme political authority. Individuals on the whole have equal strength. ('For as to the strength of body, the weakest has strength enough to kill the strongest, either by secret machination or by confederacy with others that are in the same danger with himself' (Hobbes 1946 (1651), 80). Hence every person will lay claim to everything, including the control of other persons. The result will be war among individuals and hopeless misery. Hobbes, memorably, put it this way:

> Whatsoever therefore is consequent to a time of war, where every man is enemy to every man, the same [is] consequent to the time wherein men live without other security than what their own strength and their own invention shall furnish them withal. In such condition there is no place for industry, because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short. (1946, 82)

We know that the history of humankind was not remotely like this. Many past and present societies have prospered without the protection of absolute rulers. Equally, many societies have been impoverished and destroyed by absolute rule. However, we should mention in Hobbes' defence the following points.

First, Hobbes was right in saying that civilisation is impossible in conditions of perpetual conflict. It is difficult to conceive of humanity flourishing without security of life, liberty and property. This is commonsense that history repeatedly confirms. Second, Hobbes advocated *absolute* power but not *arbitrary* power. He considered absolute power to be the remedy for the arbitrariness of a self-help system. According to Hobbes, 'the end of obedience is protection' and the 'obligation of subjects to the sovereign ... is understood to last as long, and no longer, than the power lasteth by which he [the sovereign] is able to protect them' (1946, 144). Hobbes maintained that the natural right of individuals to protect themselves can never be relinquished by covenant. Although sovereignty is intended to be immortal, 'yet is it in its own nature, not only subject to violent death by foreign war, but also through the ignorance and passions of men it hath in it' (1946, 144). Hobbes here was saying that sovereignty can be destroyed not only by the subjugation of the nation by a foreign power but also by the sovereign's own corruption. Hobbes' sovereign is not necessarily an individual. It could be a group or even an elected parliament. A sovereign (whether one or many),

when ruled by passion or ignorance, may govern in its own interests or prove too incompetent to protect the interests of its subjects. Such a sovereign loses its right to obedience. Unfortunately, history shows that Hobbes' confidence that absolute power will deliver safety of life, liberty and property of the individual subjects was seriously misplaced.

Hobbes' theory is conspicuously missing in most discussions of legal positivism. Even Hart's *The Concept of Law* has little to say about Hobbes. Perhaps it is because Hobbes defined the law with a moral purpose in mind. As James Boyle put it, 'Hobbes was shoring up the power of a centralised state by appearing to deduce, from the very definition of law, the need to subordinate all forms of normative authority to the power of the sovereign' (1987, 385). Hobbes argued strenuously that the only effective way for people to escape the misery of their natural condition was by conceding all political power, including a monopoly of law making power, to a supreme commander. Hobbes, unlike later positivists, was not preoccupied with the demonstration of law as scientific fact. For Hobbes, the greater good demanded that people equate the law to the command of the sovereign. Subjects have a moral duty to obey the law so made, except in extreme conditions when a weakened or corrupt sovereign can no longer offer them protection.

Jeremy Bentham: law and the principle of utility

The English jurist and philosopher Jeremy Bentham (1748–1832) is the greatest historical figure in British legal positivism. In *An Introduction to the Principles of Morals and Legislation* Bentham laid the groundwork for a theory of law as the expressed will of a sovereign. (This book first appeared in a private printing in 1780, but was published only in 1789.) Bentham developed this theory in great detail in a sequel entitled *Of Laws in General* (1970a (1782)). This work, though completed in 1782, was only discovered lying among his papers at the University College, London, in 1939, and an authoritative edition of it appeared only in 1970. As Bentham's book collected dust, a work titled *The Province of Jurisprudence Determined* by one of his disciples, John Austin, rose to prominence and became the most influential treatise on legal positivism. The debt that Austin owed to Bentham was enormous, patent and acknowledged. Yet Austin's work in some respects pales in the company of Bentham's two books.

Principles and *Laws* together reveal Bentham's thinking about the law. Bentham, like Hobbes, did not think that law everywhere was regarded as the legislative will of a sovereign. Bentham regarded the term 'law' as a socially constructed fictitious entity. He knew that even in his own country the law, as commonly understood, was found mainly in the form of common law that was not the creation of a political sovereign. He wrote:

> Common law, as it styles itself in England, judiciary law as it might aptly be styled every where, that fictitious composition which has no known person for its author, no known assemblage of words for its substance, forms every where the main body of the legal fabric: like that fancied ether, which, in default of sensible matter, fills up the measure of the universe. Shreds and scraps of real law, stuck on upon that imaginary ground, compose the furniture of every national code. What follows? – that he who, for the purpose just mentioned or for any other, wants an example of a complete body of law to refer to, must begin with making one. (Bentham 1970b, 8)

Bentham regarded this authorless, unpromulgated and uncodified body of rules that made up English law as being unworthy of the name 'law'. He dismissed similarly the idea of a higher natural law. He called such law 'an obscure phantom, which, in the imaginations of those who go in chase of it, points sometimes to *manners*, sometimes to *laws*; sometime to what the law *is*, sometimes to what the law *ought* to be' (Bentham 1970b, 298).

Bentham reasoned that a system of law that derives its rules exclusively from the clearly expressed legislative will of a sovereign will produce clearer and more certain laws than the rules generated by the common law system. His preference for legislation was grounded in utilitarian moral philosophy, of which he was a principal instigator. There is no better short statement of this philosophy than Bentham's own memorable words at the beginning of *An Introduction to the Principles of Morals and Legislation*:

> Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of cause and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it. In words a man may pretend to abjure their empire: but in reality he will remain subject to it all the time. The *principle of utility* recognises this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law. Systems which attempt to question it, deal in sounds instead of sense, in caprice instead of reason, in darkness instead of light. (1970b, 1–2)

Bentham's notion of pleasure included not only carnal pleasures but also the more sublime forms of satisfaction gained from intellectual and spiritual pursuits, noble deeds and self-sacrifice. He drew from this his famous principle of utility, which states that an action ought to be approved or disapproved according to its tendency to increase or diminish the happiness of the party whose interest is in question. Bentham was convinced that a system of law that derives its rules exclusively from the commands of a sovereign authority, when measured by the yardstick of public utility, is superior to the common law system. Whereas the former produces clear, authoritative and certain laws, the latter generates a cumbersome and illogical mass of precedents that serve the interests of lawyers but not of the public. Bentham proposed the codification of all laws.

Bentham's assault on the common law overlooked its virtue as a dynamic, adaptive and natural outgrowth of a people living in relative freedom. He overestimated the capacity of a comprehensive code to supply clear answers to novel controversies that are a permanent feature of our ever changing world. It is possible to argue that comprehensive codification fails Bentham's own test of utility. I will return to these issues in later chapters, but first let us understand Bentham's theory of law and its importance in jurisprudence.

Bentham's definition of law

Bentham offered a detailed definition of a law in Chapter 1 of *Of laws*. It was not a lexical definition in the sense that it described how 'law' was understood by people (especially lawyers) in his time. It was a stipulative definition, stating what he thought ought to be the accepted meaning of 'law'. The definition, though convoluted, was meticulously crafted and avoids some of the defects that taint Austin's later effort. It also anticipated many of the refinements that modern legal positivists introduced. Bentham wrote:

> A law may be defined as an assemblage of signs declarative of a volition conceived or adopted by the *sovereign* in a state, concerning the conduct to be observed in a certain *case* by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power: such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should upon occasion be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon those whose conduct is in question. (1970a, 1)

Bentham made his own incredibly laboured elaboration of this definition in *Of laws*. The work is breathtakingly lucid and elegant in some parts and frustratingly dense and complex in other parts. There is much to quarrel with philosophically about Bentham's thesis, but as a technical exposition of the structure, manifestations and operation of the law in the legislative form it has no parallel. We do not have the luxury of engaging with the detail of his analysis, hence must focus on its main features.

Source of law – the sovereign within a state

A law is an expression (assemblage of signs) of the will (volition) of a sovereign within a state. Law in this sense requires a state (political order) that establishes sovereign authority. A society that lacks the superstructure of a state and has no sovereign hence has no law in the sense of Bentham's definition, though it may have law in a different sense. Bentham meant, by 'sovereign', 'any person or assemblage of persons to whose will a whole political community are (no matter what account) supposed to be in a disposition to pay obedience: and that in preference to any other person' (1970a, 18). Thus, the sovereign may be

an elected parliament, an oligarchy, or even a tyrant who secures the people's obedience by naked force.

Bentham, unlike Austin later, suggested that the sovereign's power may be limited by 'transcendent laws', by which he meant constitutional rules (1970a, 64). Austin was forthright on this question. The constitutional rules that constrain the sovereign are merely rules of positive morality. Bentham struggled to explain the idea of legally limited sovereignty. He discussed the issue in relation to a sovereign who is an individual. The sovereign prince may set limits on his own power by a royal covenant (*pacta regalia*). A covenant that seeks to bind his successor will only be a 'recommendatory mandate' that becomes covenantal only when adopted by the successor (1970a, 64–5). Bentham recognised the absurdity of a person giving themselves a binding order. I cannot enforce my New Year resolutions except by the power of my own will and good sense. Similarly, the effectiveness of a sovereign's self-command depends on the sovereign's will and good sense. It will be effective as law only if the sovereign is subject to an outside force, such as a superior court with power to invalidate laws – in which event the sovereign is not sovereign. Bentham says that a sovereign's self-imposed limitations are enforced only by force of religious or moral sanctions. These forces are no match for the political will of the sovereign (1970a, 70).

The will of the sovereign

The content of the law may be established by the sovereign by *conception* or by *adoption* (Bentham 1970a, 21). Conception is where the substance of the law is conceived by the sovereign itself, as when the Queen in Parliament enacts a statute that lays down a new rule of conduct. Adoption is where the sovereign confers validity on a rule made by another person. This may happen in one of two ways. First, the sovereign may adopt laws already in existence and made by other persons. Bentham called this 'susception'. Thus, sovereigns may adopt the laws created by their predecessors, thereby providing for the continuity of the legal system. Second, sovereigns may declare that they will adopt laws made in the future by another person. This is 'pre-adoption'. What we call delegated legislation today falls within this category. This is the case where an Act of Parliament authorises an official to make laws and bestows validity upon them. Such an official, in Bentham's language, has the power of 'imperation' (1970a, 22).

Not every expression of sovereign will generates law as it is commonly understood. Sovereign will becomes law only when it takes the legislative form. Thus, administrative orders, military commands and judicial decisions, in Bentham's view, are not laws. Bentham thought that in the case of Britain the will of the sovereign always takes the legislative form. The British sovereign is a corporate body comprising the Crown, the Lords and the Commons. He observed: 'it would be hardly possible for that complex body to issue any order the issuing of which would not be looked upon as an act of legislation' (1970a, 5). Thus, the Crown in

Parliament was making law even when it enacted the bill of attainder that condemned the Earl of Stafford to death and when it exiled the Earl of Clarendon. In contrast, Bentham regarded a royal decree of the absolute monarch of France, to banish a citizen or to send him to the Bastille, not as an act of legislation but as a judicial act or a preventive order of the executive. Why did Bentham think that the former were legislation but not the latter, even though the two sovereigns had the same extent of power and the orders were indistinguishable in content? He stated that such *lettres de cachet* were not regarded in France as legislation but as *ordres souverains* (sovereign orders) (1970a, 6). If so, what counts as legislation (and hence as law by Bentham's definition) depends not on the nature of the act but on local usage and understanding as to what constitutes a legislative act. Here again, Bentham conceded that his definition of law was not universally valid but was stipulative.

Subjects and objects of a law

A law is about conduct – what a person or class of persons may do, must do or must not do in given circumstances. A statement that does not impose a duty on a person or confer a liberty is not a law. According to Bentham, generality is not a necessary quality of a law. Subjects of the law are the persons to whom the law is directed. A law may be directed at a single person, commanding that person to do or not do a specified act (1970a, 34, 77–80). A law has effect only on persons who are subject to the sovereign's power. Thus, the law of England will not control the French sovereign or his subjects.

The objects of a law are the acts or forbearances that the sovereign aims to secure by enacting the law. If a law states 'No trader shall export wheat in a foreign owned vessel', the subjects of this law are traders and its object is to ensure that exported wheat is only carried by vessels owned by nationals.

Forms of law

Bentham, unlike John Austin much later, did not commit the error of identifying law exclusively with the commands to do or not do something. Hence, he identified law with *mandates*. He was aware that many enactments do no more than declare or clarify the law and that some laws actually grant persons freedom to do as they please. Law, in its most commonly known sense, is made up of mandates. Mandates include commands and prohibitions as well as non-commands and permissions (Bentham 1970a, 16, 97–98). Bentham made a painstaking classification of the different kinds of mandates that may issue from the sovereign. I explore this taxonomy in Chapter 11.

Parts of a law

Bentham observed that a law is different from the statutory instruments such as Acts of Parliament that create law. Take, for example, the law prohibiting murder