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Sociological Jurisprudence and Sociology of Law

Sociological jurisprudence and its related field sociology of law together constitute an immense field of study, embracing all aspects of the relations and interactions between law and society. Legal positivism and natural law theory are focused on a central question in legal theory. In the case of legal positivism it concerns the formal tests for identifying a law. Natural law theory is mainly about the relation between law and morality. The methodology of legal positivism is empiricism and logical reasoning and, in the case of Kelsen, transcendental idealism and logical reasoning. The methodology of natural law is mainly practical reason. Thus, legal positivism and natural law theory are limited by both their aims and their methodology.

American legal realism threw open the door of jurisprudence to admit facts about the way the legal system actually operates in society. The rule sceptics focused on the differences between the law as written down and the law as applied in particular cases by the appellate courts. The fact sceptics studied the uncertainties that attend the trial process. The rule sceptics argued that if judges are the real law makers, they might as well take that role seriously and do it more openly and competently by taking explicit account of the social consequences of their decisions. Legal realism of the American kind broadened the scope of jurisprudence by connecting what lawyers and judges actually do with the society that they are asked to serve through the processes of the law. Even so, the American realists were preoccupied with official law – the law of the courts and of the legislatures as interpreted by the courts.

Sociological jurisprudence, with the help of sociology of law, expanded the boundaries of jurisprudence much further – so much so that the field is difficult to demarcate. There are innumerable connections between law and society: every branch of human learning, from physics, chemistry and medicine to philosophy,

religion and psychology, produces knowledge about law and society. Sociology borrows from all these fields, and sociological jurisprudence borrows from sociology. It would take a sizeable volume to give even a reasonable account of this field. This chapter offers an explanation of the tradition of sociology of law and sociological jurisprudence through the work of its founders.

The ideas of the thinkers considered in this chapter, apart from those of Karl Marx, fall within the liberal legal tradition. The later part of the 20th century saw a new wave of theories about the role of law and its impact on society from angles that questioned the liberal interpretations of this relationship. They include the theories of the critical legal studies movement, postmodernist jurisprudence and feminist jurisprudence. Although much of this later work is properly classified as sociological jurisprudence or sociology of law, it is also unified by another common element – the rejection of some of the central assumptions of liberal legal ideology. Hence, there is good reason to consider these three approaches separately, as I do in the next chapter.

Sociology, sociology of law and sociological jurisprudence

Roscoe Pound (1870–1964) was the first jurist to make the social dimensions of law a central concern of Anglo-American jurisprudence. He was by no means the originator of the sociological tradition in law, which in fact commenced in Germany and France. Pound's achievement was to combine thoroughgoing technical study of the law in all its aspects with the insights and methods developed by sociologists of law. He called this branch of study sociological jurisprudence, to distinguish it from sociology of law. However, sociological jurisprudence – as the name suggests – draws inspiration, ideas and methods from sociology of law.

Sociology

The study of society is as old as philosophy. Political theory, moral philosophy, and even religion are concerned with society in one way or another. Sociology as a distinct discipline has a more recent origin, in the work of the French philosopher Auguste Comte (1798–1857). Sociology seeks to understand the workings of society in a scientific way. There are two main sociological schools: positivist sociology and interpretive (antipositivist) sociology.

Positivist sociology

Positivist sociology is based on empiricism and scientific method. Empiricism is the belief that the only true knowledge is knowledge gathered from observed facts. It is the philosophical foundation of science. Physical science consists of theories about the behaviour of non-living things, ranging from celestial bodies

to sub-atomic particles. Biological science studies living organisms, from the largest animals and plants to the smallest micro-organisms. Social science tries to do something similar with societies. Positivist sociology is a branch of social science that applies the objective methods of empirical science to the study of society. Its method typically involves the collection and analysis of empirical data and the construction and testing of theories. If crime rates are consistently higher in poorer neighbourhoods than in prosperous ones, a positivist sociologist may construct the hypothesis that poverty is a cause of crime and then test this against further evidence. Positivist sociologists have produced specific theories on subjects such as crime, family breakdown and race relations, as well as general theories about society and social change. The object of positivist sociology is to make knowledge about society less speculative and more evidence based.

Interpretive sociology

Interpretive sociologists maintain that the social world is very different from the natural world; hence, it cannot be studied by the methods of natural science. Society is not governed solely by the laws of nature. Society consists not of robots but of thinking individuals, who are guided by norms, symbols, values, beliefs, ideals, ideologies and many other cultural factors. There are psychological and spiritual dimensions of society that cannot be understood or measured by external observation alone.

Georges Gurvitch explained that social reality consists of different layers. There is an outer layer that we can perceive by our senses, such as the demography, geography and technology of the society. What is the population of the society? What languages do people speak and what are their faiths? Does the society live in the Stone Age, Bronze Age, feudal age, industrial age, or in the post-industrial age? What do people eat and drink? Beneath this lie the organisational layer (governments, laws, courts etc), the layer of unorganised social patterns (traditions, fashions etc) and several more. Gurvitch identified eight such layers, with the lowermost representing the spiritual values of people (1947, 25–37). The scientific method is only capable of penetrating the outer, perceptible layers. Hence, the sociologist must take a more holistic approach and enlist other kinds of knowledge, such as history, philosophy and psychology.

Leading sociologists of law, including Émile Durkheim, Max Weber and Eugen Ehrlich, adopted the interpretive approach. The interpretive method has been more influential in the sociology of law, although the positivist method is alive and well in the modern socio-legal research programs in universities, particularly in the United States. I propose to focus on interpretive sociology in this chapter.

Sociology of law

The law, being a fundamental feature of society, has always been a fertile field of inquiry for sociologists. Sociology of law is that part of sociology that seeks to

understand the 'social reality' of law in all its dimensions (Gurvitch 1947, 48). Sociologists, though, have a different concept of law from that commonly held by lawyers. Lawyers limit the term 'law' to the formal law of the state, comprising statutes, official commands, judicial precedents and such like. Sociologists have a much broader view of the law. Law in this wider sense encompasses all forms of social controls, including customs, moral codes and internal rules of groups and associations such as tribes, clubs, churches and corporations. In this context, lawyers' law is only a highly specialised form of social control involving specialised agencies like legislatures and courts.

Intelligent lawyers know that social order is maintained not only by the formal law, but also by many social rules, standards and practices not found in law books. The academic and social life in my university is governed by a large number of statutory provisions, including the *University of Queensland Act* and the statutes and rules made by the university senate. However, the civility and order among students and staff and the success of the university enterprise owe a great deal to many other informal norms that prevail within the community. People invariably stand in a queue to be served at the campus bookstores and restaurants. Students largely respect each other's privacy. Foreign students from diverse cultures are made welcome. There is a high degree of self-discipline within the classroom. Students form private associations for scholarly or recreational pursuits. There is a general culture of mutual respect and cooperation that helps the university to carry out its functions. What is true of my university campus is true of all harmonious and successful societies. However, the lawyer sharply distinguishes these informal norms from the formal rules that a court will enforce. The distinction is not so clear to the sociologist. As Pound put it, 'what seems to the jurist as a deep cleavage seems to the sociologist as no more than a scratch' (1943, 4).

The laws of an association, according to lawyers, exist because of the validity that state law confers upon them. Customary laws are law because a state organ such as a court or parliament has recognised them as law. Moral rules and rules of social etiquette are not laws in the lawyer's sense. The sociologist of law, in contrast, treats all these rules as part of the 'social reality' that is law.

Sociological jurisprudence

Sociological jurisprudence is a method of studying law that combines the lawyer's view of the law, technical knowledge of the law and insights produced by the sociology of law. The term 'sociological jurisprudence' was coined by its most famous proponent, Roscoe Pound, who is also known as Dean Pound because of his extraordinarily long tenure as the Dean of the Harvard Law School. The sociologist of law approaches law from the viewpoint of society and its diverse forms of social control. These inquiries lead to the discovery of the specialised and organised form of social control which is the lawyer's law. The sociological jurist starts from the opposite end, the organised form of control that is the lawyer's

law, and moves towards sociology in search of ways to improve the capacity of law to serve the ends of society. The meeting point according to the sociologist is the sociology of law, but according to Pound it is sociological jurisprudence. Pound explains the role of the sociological jurist:

> He holds that legal institutions and doctrines are instruments of a specialised form of social control, capable of being improved with reference to their ends by conscious, intelligent effort. He thinks of a process of social engineering, which in one way or another is a problem of all the social sciences. In sociological jurisprudence it is a special problem of achieving this engineering task by means of the legal order . . . It is treated as a problem of jurisprudence, and yet in its larger aspects as not merely a problem of that science. Law in all its senses is studied as a specialized phase of what in a larger view is a science of society. (1943, 20)

The distinction that Pound draws between the sociology of law and sociological jurisprudence is not so clear in historical and contemporary scholarship. In fact, among some of the most prominent early sociologists of law, such as Leon Duguit, Emmanuel Levy, Eugen Ehrlich and Maurice Hauriou, were jurists who went to sociology from law. Sociology itself emerged in the late 19th and early 20th centuries through a burst of intellectual activity in Europe, at the centre of which were Émile Durkheim, Max Weber and Eugen Ehrlich. However, Karl Marx and Herbert Spencer had previously published their work, interpreting the history of human society as a process of evolutionary progression. I will begin the story of the sociology of law with Marx's influential thinking.

Society and class struggle: the sociology of Karl Marx

Karl Heinrich Marx (1818–83) was born to a Jewish family in Trier, Prussia. His revolutionary views led him into exile – first in Paris, thence to Brussels and finally to the most tolerant European nation of the day, England, where he worked until his death. Marx's theory of society has been regarded as a forerunner of sociology, but it is now considered as sociology in the strict sense. Many of Marx's writings were undertaken in collaboration with his friend and fellow German philosopher, Friedrich Engels (1820–95). Marx's philosophy of human beings and society was first formulated in his work *The German Ideology*, written in 1845 but not published until 1932.

Marx rejected religion and metaphysics and produced a materialistic interpretation of human existence and history. Human beings are a species of animal. What distinguishes human beings from other animals is the fact that they are able to produce their means of existence. Other animals simply consume what nature offers. Lions and tigers do not breed their prey; they simply hunt them down and eat them. In other words, non-human animals do not engage in agriculture or industry. At some stage of their history human beings began to produce their

own means of livelihood by growing things and making objects such as hunting weapons. This is when human beings began to distinguish themselves from other animals (Marx & Engels 1973 (1845), 42). Marx said that this form of production is possible only with the increase of the human population and intercourse among individuals (1973, 42). (More likely, increases in human populations followed agriculture, but this is only a minor oversight when compared to other failings of Marxism.)

Marx produced an elaborate theory of how society progresses, from its ancient tribal roots to feudal society and then to industrial and commercial society. The means of producing livelihood determines the nature of society. In the ancient tribal group people live by hunting and gathering on tribal lands. There is no concept of private property and the laws are determined by the conditions of primitive existence. A feudal form of society emerges as the means of production becomes agricultural. Land is held by feudal landlords and worked by tenants, who are attached to the land. In the towns, where the population is cosmopolitan, the lands are held by the state, with townsfolk having the right of possession. True private property, according to Marx, arises only in the industrial age, with the rise of the capitalist class. The changes in the means of production are accompanied by increasing division of labour. As society gets larger and more complex different people specialise in doing different things – an observation that Adam Smith made before Marx. Consider the loaf of bread on your table. The wheat is grown by a farmer, converted to flour by a miller, transported by a trucker, baked by a baker and sold by a supermarket. Marx wrote:

> The division of labour inside a nation leads at first to the separation of industrial and commercial from agricultural labour, and hence to the separation of town and country and to the conflict of their interests. Its further development leads to the separation of commercial from industrial labour. At the same time through the division of labour inside these various branches there develop various divisions among the individuals co-operating in definite kinds of labour. The relative position of these individual groups is determined by the methods employed in agriculture, industry and commerce (patriarchalism, slavery, estates, classes). These same conditions are to be seen (given a more developed intercourse) in the relations of different nations to one another.
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> The various stages of development in the division of labour are just so many different forms of ownership, i.e. the existing stage in the division of labour determines also the relations of individuals to one another with reference to the material, instrument, and product of labour. (Marx & Engels 1973, 43)

In market theory, specialisation and division of labour is an unambiguous good as it leads to greater efficiency, and hence to the production of more goods that are better and cheaper. Marx acknowledged this advantage, but argued that the division of labour inevitably leads to the exploitation of some groups by others. He thought that the process would lead to the concentration of property and capital in an ever smaller group, at the expense of an ever larger population of propertyless and exploited workers whom Marx called the proletariat.

This would lead to 'alienation' of the latter group and to class conflict (Marx & Engels 1973, 56).

The law of a society, Marx rightly observed, changes to reflect the ways in which people produce the means of their livelihood. Every social system has a base and a superstructure. The economic relations constitute the base of the society. Law, state and the popular consciousness (understanding) of the base constitute the superstructure. The base and superstructure are inter-dependent. The base gives rise to the superstructure and the superstructure protects and reinforces the base. The superstructure changes to reflect the changes in the base. The organisation, law and beliefs of ancient tribes (their superstructure) reflected the ways of the hunter gatherer existence (the base). Agriculture brought about a form of feudal kingship and feudal law. The main features of feudal law were the division of society into estates consisting of the monarchy, landholding aristocracy and tenants, who owed reciprocal rights and duties. The emergence of industrial and commercial modes of production brings about further dramatic changes in the law, state and beliefs. The whole system of law, including contract and property law and labour law, is adapted to facilitate commerce and industry (Marx & Engels 1973, 81). The estates are abolished, and instead society becomes divided into classes – owners of capital, industrial workers, commercial workers, and so forth. The superstructure consists not only of the law but also of the state and its ideology. The state and law, as superstructure, guarantee the conditions under which capital is accumulated and commerce and industry are conducted. In short, the state becomes the protector of the capitalist class and the instrument of oppression of the working classes.

Marx was not only an interpreter of the past but also a prognosticator of the future. The emergence of industrial society and capitalism is inevitable in Marx's theory of history. Equally, the end of capitalist society is also inevitable if Marx was right. Marx predicted that the concentration of capital in an ever diminishing class would worsen the condition of the proletariat to the point at which they would naturally rise in revolt, overthrow the capitalist state and establish a dictatorship of the workers (1973, 94–5). The dictatorship would be only a transitory phase, a means to an end. It would abolish capitalism and class divisions, and bring about a communist society in which the means of production and distribution would be commonly owned. Since there would be no classes or class conflict, and no private property to protect, the state would lose its relevance and wither away.

Findings in social anthropology contradict Marx's linear view of human history at many points. Studies of tribal societies reveal forms of private property, contract and trade. (See, for example, Gluckman 1967; Malinowski 1922; Pospisil 1958.) Marx's top-down 'law as domination' view hardly fits modern democracy, where law making is a messy process with outcomes determined by the interplay of interest group politics, often against the interests of ruling elites. In conceiving the role of law purely in terms of the enforcement of capitalist economic relations, Marx overlooked the law's value in facilitating cooperation within and

across classes. Sociologist Paul Rock's observation on deviancy theory in Marxist criminology applies with equal force here:

> The perspective offers no understanding of law as a complex and variegated rule-system whose origins are frequently as mysterious to elites as to the governed. It offers no vision of a legal system as a series of constraints upon law-giver and ruled alike. It does not refer to legitimacy and authority other than in the context of manipulation and mystification. It does not provide for the elaborate patterns of accommodation that characterise many social situations of social control. (1974, 144)

The histories of societies did not follow the path that Marx mapped. The first Marx-inspired workers' revolution occurred in a feudal empire (Russia) and not in an industrial capitalist society. The alienation of the proletariat did not occur in the industrialised democracies, since workers became property owners and shareholders and the welfare state taxed capital and profits and distributed wealth. The state intervened in the markets in times of serious instability. Changes in technology created new forms of work and working conditions generally improved. Class divisions, to the extent that they existed, dissipated. Most tellingly, the dictatorships established in the name of workers' revolutions proved not to be transitory. Many of these states were overthrown by counter-revolutions that established market economies and democratic governments. The collective mode of production was abandoned by one country after another that had embraced it.

Max Weber and the rationalisation of the law

Maximilian Weber (1864–1920), the German economist and sociologist, was one of the most influential writers in the fields of sociology, political economy and public administration. He taught at the universities of Berlin, Freiburg, Heidelberg, Munich and Vienna, and held a number of official positions. Max Weber was a man of enormous learning whose knowledge encompassed the cultures, philosophies and juristic thought of European, Sinic, Indian and African civilisations.

Weber, like Marx, was a student of society from its ancient tribal roots to its modern capitalist-industrial form. Like Marx, he was keenly aware that a society's legal system reflects its prevalent social relations. However, Weber differed from Marx in several ways. Unlike Marx, he did not identify social relations exclusively with the means of production. He also did not prophesy the end of capitalism and the birth of a stateless society. As a sociologist, his approach was more detached. 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 the capitalist economy and of the bureaucratic state. Weber's sociology of law appears in different parts of the three volumes that comprise his monumental work, *Economy and Society*. His sustained

analysis of the history of law is found in the book-length chapter VIII of the second volume, entitled 'Economy and the law (sociology of law)'. Weber's main focus is the process of legal change in different stages of human history.

Spontaneous emergence of norms

Weber started with the question of how law emerges in primitive societies before there are law makers. Law formation begins with individual actions and plain habits. When these habits become diffused among a group of individuals, they become 'incorporated as "consensus" into people's semi-conscious or wholly conscious "expectations" as to the meaningful corresponding conduct of others' (Weber 1968, 754). In simpler terms, when people begin to behave similarly in similar conditions, social habits are formed as if by unconscious agreement and individuals count on these habits in going about their lives. If people in a society usually keep their promises they will begin to rely on the practice and, for example, engage in trade. These consensual understandings eventually acquire the guarantee of coercive enforcement, distinguishing them from mere 'conventions'. Weber made the critical observation that this kind of unconscious law emergence happens at all times, even in our own age of formal law making (1968, 754). If this seems improbable, think of how the rules of the internet came about before any regulator or national parliament thought of them.

How does legal change happen in a primitive society that lacks formal machinery for law making? The way laws emerge is also the way laws change. Changes in external conditions bring about changes in the conduct of individuals, leading to new patterns of behaviour and new consensual understandings (unconsciously or sub-consciously) about correct conduct (Weber 1968, 755). This is a process of adaptation to the changing environment – a kind of natural selection of rules. New content may also enter the law 'as a result of individual invention and its subsequent spread through imitation and selection' (Weber 1968, 755). Weber's hypothesis about the spontaneous emergence of legal norms is reminiscent of the evolutionary jurisprudence of the 18th century Scottish philosophers David Hume, Adam Smith and Adam Ferguson that I discuss in Chapter 10.

From irrational adjudication to judge-made law

The existence of legal norms does not automatically mean that there is rational adjudication according to the norms. Norms guide the behaviour of individuals in daily life, but when disputes arise there is no reliable way to determine the prevalent norm and the relevant facts. The primitive judge is usually a charismatic figure who will draw on magical inspiration to decide the case. Norm and fact are not distinguished but the case is heard as a whole. There is no understanding that the judge represents the law and must decide according to law. The judge makes an inspired decision about which party is right. However, judges cannot retain the confidence of their community without achieving some consistency in

the way they decide cases. There is pressure to decide like cases alike. This leads to the formation of precedents and judge-made law (Weber 1968, 759).

Legal change in primitive society occurs mainly through the case law method. Legislation is unknown and the idea that a human agent can make or change the law does not occur to the primitive mind. The law had to be correctly known and interpreted, but not created. 'Their interpretation was the task of those who had known them the longest, i.e. the physically oldest persons or the elders of the kinship group, quite frequently the magicians and priests, who, as a result of their specialised knowledge of the magical forces, knew the techniques of intercourse with the supernatural powers' (Weber 1968, 760). When in doubt, the elders turned to charismatic revelation. When a new rule was needed to cope with the changing needs of the community, the elders looked to revelation to obtain a rule using magical devices. In practice, it was the opinion of the magic men that became the law. This was the origin of legislative power.

One of the important side effects of the appeal to magic was the formalism that attended the judicial process. The question (whether it was about disputed facts or about a norm generally) had to be precisely formulated, and presented according to the right ritual, in order to get the correct answer from the supernatural entity. This is the reason that all ancient legal processes were laden with rigid formalities. Traces of these magical elements are found in the Roman law and the English law. Even a simple contract for delivery of goods in Rome required the ceremony of *mancipatio* involving five witnesses, a person holding a pair of scales and a ritual utterance. A claim before a *praetor* (magistrate) failed in Roman law if it was not made and proved according to a strict formula. A similar formulary system was introduced to England by Henry II in the 12th century to replace the supernatural modes of trial such as ordeal and oath counting. It was fully abolished only in 1852 by the *Common Law Procedure Act*. Under the formulary system, a litigant had to make a claim in one of the court-approved written forms called a *writ*. If I wished to institute an action against a person who had assaulted me or physically restrained me, I had to present a *writ of trespass*. Against a person who invaded my land, I had to seek a *writ of trespass on the case*. Against a person who dishonoured a contract, I had to ask for the *writ of assumpsit*. The language of each writ was fixed and only the details of the relevant transaction had to be supplied – much like electronic form filling today. The litigant had to choose a particular writ and stand or fall by that choice. This rigidity caused injustice in particular cases. The equitable jurisdiction of the Roman praetor and the English Court of Chancery grew out of demands for the correction of the injustices that excessive formalism had created.

Emergence of legislation

Conscious law making first appeared in the form of compacts among heads of kinship groups or chieftains gathered as assemblies. Apart from attending to administrative matters, they assumed the role of providing authoritative interpretations of magically sanctioned norms. What began as interpretation

led to the making of new norms (Weber 1968, 766). Germanic assemblies (and, indeed, the English Parliament) at first did not distinguish between statutory enactment and judicial decision. They switched from one form to the other depending on the case at hand (Weber 1968, 766).

Arrival of lawyers

The formation of a class of professional legal experts is an important development in the rationalisation of the law. It also signals the arrival of the capitalist era, with its demand for legal certainty and the guarantee of property and contractual rights. An established legal profession is practically necessary to consummate the rationalisation of law. In the charismatic stage law prophets advised courts. They were replaced over time by legal *honoratiores*, who were not quite professional legal experts but were persons acknowledged as repositories of legal knowledge because of their prestige and influence in society. The growth of commerce and increasing complexity of society created a demand for systematically trained legal professionals (Weber 1968, 775). In England, the training of barristers was provided through a guild system (the Inns of Court), where lawyers trained would-be lawyers. Solicitors were trained on the job by other solicitors. In Germany and France legal education was provided by universities, with admission to the profession controlled by government.

Legal training within the guild system produced 'craftlike specialisation' in law (Weber 1968, 787). Lawyers learnt not only to litigate but also to avoid litigation by drawing up appropriate contracts and other instruments. Weber thought, wrongly, that this kind of 'cautelary' jurisprudence could not produce a rational legal system (1968, 787). On the contrary, by ordering the affairs of people according to previously established law, lawyers brought greater rationality to the law.

Tension between formal rationalisation and substantive rationalisation

Weber identified two kinds of rationalisation – formal and substantive. Formal rationalisation eliminates the magical or charismatic element from the processes of law finding and adjudication. The law becomes the subject of professional study, with the result that it becomes a body of reasonably ascertainable and predictable rules. Formal rationalisation of the law demands that cases are decided according to established law, thus reducing the capacity of judges to adjudicate according to their subjective sense of justice or even to the popular view of what is just. Substantive rationalisation seeks to make the law more pliant, to produce what is thought to be expedient or just outcomes. Formal rationalisation promotes formal justice and substantive rationalisation seeks substantive justice.

One of Weber's most important insights about the law concerns the eternal tension between the demands of formal rationalisation and substantive

rationalisation, and between formal justice and substantive justice. Formal rationalisation enables people to know in advance the 'rules of the game'. This is a necessary condition of individual freedom. It is much easier for me to stay out of trouble and to do what is right for me and my family if I know beforehand what I am allowed and not allowed to do. However, from time immemorial there has been a different view: that the general rule should not obstruct the achievement of moral or political goals.

Take the case of a trader who delivers certain goods to a buyer, expecting the buyer to pay the agreed price. The trader enters this transaction because he expects that the agreed price will be paid and that in the last resort a court will compel the buyer to pay the price. Suppose that the buyer pays only half the price because the quality of the goods did not match what she expected, or she finds that she could have obtained the goods cheaper from a different trader. In a formally rational system of law this would make no difference, and the court will hold the buyer to the agreement and order that she pay the remainder. Formal justice will be done, even at the expense of substantive justice. Hence, some legal systems subordinate the general rule to judicial or administrative discretion, which can be used to do what is thought to be right in the particular case. Laws on price and wage fixing and fair trading typically allow tribunals to disregard contracts. Weber wrote:

> Formal justice guarantees the maximum freedom for the interested parties to represent their formal legal interests. But because of the unequal distribution of economic power, which the system of formal justice legalises, this very freedom must time and again produce consequences which are contrary to the substantive postulates of religious ethics or of political expediency. Formal justice is repugnant to all authoritarian powers, theocratic as well as patriarchic, because it diminishes the dependency of the individual upon the grace and power of authorities. (1968, 12)

It is not only theocratic and autocratic rulers who dislike the freedom that formal rationalisation of the law offers. As Weber observed, even democratic majorities may resent the limits that formal justice places on their powers (1968, 813). Democratically elected governments often find that they cannot deliver what they have promised to various voting groups, or pursue their ideological objectives, within the confines of formal justice. The demands for gender equality, fair wages, consumer protection, for example, can be met only by legislation that grants officials wide discretion to alter legal relations, in derogation of the freedoms that exist under general and abstract laws. In other words, the pursuit of substantive justice usually entails departures from the formal rationality of the law. The opponents of substantive or social justice believe that such departures lead to arbitrariness and authoritarian control.

Law and economics

Weber, unlike Marx, did not reduce all social relations to economic relations. Law protects not only economic interests, but also personal security and purely

ideal goods such as personal honour or the honour of divine entities. Law also guarantees political, ecclesiastical and family structures, and as well as 'positions of social pre-eminence' that are 'neither economic in themselves nor sought for preponderantly economic ends' (Weber 1968, 333). However, economic interests are the predominant concern of the law and they are among the strongest factors that influence the creation of law (Weber 1968, 334).

Weber observed that, in theory, an economy may operate without state guaranteed enforcement of the law. Rights may be protected by mutual aid systems such as kinship groups (or, we might add, private security agencies). Money in all its forms has existed independently of the state. Debtors in the past may have feared excommunication more than state coercion (Weber 1968, 336). In modern times, credit rating by creditors' associations has proved to be an effective way of enforcing loan repayments. However, Weber argued that a modern economic system cannot exist in practice without a public legal order. This requires a state with monopoly power to coercively enforce the law. With the disintegration of tradition and the divergence of class interests, customary and conventional means of law enforcement have broken down. Weber explained:

> The tempo of modern business communication requires a promptly and predictably functioning legal system, i.e. one which is guaranteed by the strongest coercive power. Finally, modern economic life by its very nature has destroyed those other associations which used to be the bearers of law and thus of legal guarantees. This has been the result of the development of the market. The universal predominance of the market consociation requires on the one hand a legal system the functioning of which is calculable in accordance with rational rules. On the other hand, the constant expansion of the market . . . has favoured the monopolisation of all 'legitimate' coercive power by one universalist coercive institution through the disintegration of all particularist status-determined and other coercive structures which have been resting mainly on economic monopolies. (1968, 337)

Marx argued that the modern state and its laws exist to protect capitalist interests and modes of production. Weber did not say that the only purpose of the state is to serve the market, but he saw the expanding market as a driving force for the creation of a state monopoly of coercive powers.

Law and social solidarity: Émile Durkheim's legal sociology

Émile Durkheim (1858–1917) is considered to be one of the founders of sociology, together with Weber. He established the first sociology department in France, at the University of Bordeaux. Durkheim set out his sociology of law in the book *The Division of Labour in Society*, which was first published in 1893.

Division of labour as the cause of social solidarity

Durkheim regarded society not as an aggregate of individuals but as a system that has an independent existence. The whole that is society is greater than the sum of its parts. This is true even from a commonsense viewpoint, and was well known to earlier thinkers. A collection of individuals is not a society simply because they happen to be in close proximity to each other. They may have gathered to fight on a battlefield, or to watch a football match, or to catch planes to different destinations around the world. A society exists because of interdependence and bonding among a group of individuals. Durkheim called this 'solidarity'.

How does social solidarity come about? Durkheim argued that the principal cause of solidarity is the division of labour. Marx viewed the division of labour in industrial capitalist society as a cause of class division and class conflict. Some people were owners and managers, while others were industrial and agricultural workers. Specialisation within sectors, Marx argued, produces further divisions. The result is class conflict. In sharp contrast, Durkheim viewed specialisation and the division of labour as a powerful force for social solidarity. The division of labour is usually associated with economic efficiency. A system under which the blacksmith makes the plough and the farmer uses it to till the land is far more efficient than a system under which farmers have to make their own tools. The computer on which I write these words is the product of the efforts of many groups of specialists. Some have made the microchips, others have made its mechanical devices and yet others have written the programs that make it carry out my commands. People in all parts of the world benefit from the economic efficiency that the division of labour produces.

Durkheim acknowledged the economic advantage of the division of labour. However, he argued that the division of labour has a more important (moral) function – that of bringing people together in a diverse society. The division of labour not only creates a technologically advanced society but also maintains its social cohesion by making people depend on each other's functions. What can I gain by robbing my butcher or my greengrocer? I will have to grow my own food. I want the butcher and greengrocer to prosper so that I can get a convenient supply of food. Traders want their customers to prosper so that they can remain in business. This, then, is the bond or solidarity between producers and consumers. Durkheim wrote:

> We are thus led to consider the division of labour in a new light. In this instance, the economic services that it can render are picayune compared to the moral effect that it produces, and its true function is to create in two or more persons a feeling of solidarity. In whatever manner the result is obtained, its aim is to cause coherence among friends and to stamp them with its seal. (1964, 56)

The division of labour tends to be less pronounced in primitive societies, in which individuals are very similar to each other. They hunt and gather food in the same manner, jointly defend their territories and live their lives in the same way. Durkheim claimed, somewhat dubiously, that even the roles of men and women

are not strongly differentiated in primitive society. Hence, the division of labour in marriage is negligible and marital solidarity tenuous (Durkheim 1964, 58–9). However, modernity brings dissimilarity through specialisation, and specialisation brings about the division of labour and a new form of solidarity based on mutual need.

Durkheim observed that solidarity, as a moral (mental) phenomenon, cannot be accurately measured. Hence, we need to observe and measure the facts that represent or symbolise solidarity. Consider the relationship between two friends. We cannot measure their mental feelings towards each other as we cannot get into their minds. Yet we can gain some measure of their friendship by observing the patterns of their actions. They always help each other and never harm each other. (They may even remember each other's birthdays and wedding anniversaries!) Likewise, we cannot directly measure social solidarity, but we can measure the evidence or the visible symbols of it. Durkheim thought that the visible evidence of social solidarity is found in the law of the society (1964, 64). He acknowledged that the law will not provide full evidence of social solidarity. There are customs that people observe which are not recognised by authorities as law, or in fact are contrary to law. Normally custom is not opposed to law but is the basis of law. A custom arises in opposition to law only in exceptional circumstance. This is when the law no longer corresponds to the state of existing society (Durkheim 1964, 65). It is not altogether clear why he did not simply regard custom as law in the sociological sense, as opposed to the lawyer's sense. Durkheim's key sociological insight was that the contours of society are reflected in its laws. We can find the nature of the social life of a society by findings its laws. Law, in other words, mirrors society. Durkheim asserted that 'Since the law reproduces the principal forms of solidarity, we have only to classify the different types of law to find therefrom the different types of social solidarity which correspond to it' (1964, 68).

Durkheim's view of law as the symbol of social relations is different from Marx's view of law as the superstructure of society. First, in Marx's theory law as superstructure interacts with the economic relations that represent the base of society. The law not only reflects the base but also consolidates the economic relations and class divisions that form the base. According to Durkheim, law as symbol is evidence of the social accommodations that bring about solidarity. Second, for Marx law is an instrument of oppression, in the sense that it maintains the exploitative means of production that characterises capitalist industrial society. Durkheim regarded law not as oppression but as facilitation of social cooperation.

Law in the sociological sense

If we have to find the law in order to find the form of solidarity prevailing in a society, we must know what law means. Durkheim started with the broad view of law as a 'rule of sanctioned conduct' (1964, 68–9). Sanctions change according

to the importance of the rule within the community – the place the rule holds in the public consciousness. Laws can be classified according to the nature of the sanctions. There are two types of sanctions: repressive and restitutive (Durkheim 1964, 69). Repressive sanctions take the form of punishments. They relate typically to crimes. Restitutive sanctions are meant not to inflict suffering but to restore the parties to the position that they were in before the unlawful act was committed. Restitutive sanctions are characteristic of civil law, including commercial law, procedural law, administrative law and constitutional law (Durkheim 1964, 69). The *Criminal Code* prohibits theft and imposes the punishment of imprisonment on a convicted thief. This is a repressive sanction. A motorist drives a car negligently and causes damage to another car. The law requires the motorist to compensate the victim to the extent of the cost of repairing the car. This is a restitutive sanction.

The position, then, is this. The type of law in a society is the indicator of the type of social solidarity. The type of sanction is the indicator of the type of law.

Mechanical and organic solidarity

Durkheim thought that the two kinds of law represent two kinds of solidarity. Repressive law indicates a mechanical form of solidarity and restitutive law is the reflection of an organic form of solidarity. Every society today has both forms of law. Hence, it must follow that every society has both mechanical and organic solidarity. Durkheim argued, though, that restitutive law – and hence organic solidarity – is predominant in societies that have a high degree of specialisation and division of labour. Conversely, societies made up of like individuals and little division of labour will have mainly repressive law, indicative of mechanical solidarity.

Mechanical solidarity

Criminal law is the classic repressive law, in Durkheim's definition. According to Durkheim, 'an act is criminal when it offends strong and defined states of the collective conscience' (1964, 80). An act is not a crime, in the sociological sense, because it is highly immoral. Many people consider incest even between adults and adultery to be highly immoral, but they are not etched in the collective conscience as crimes worthy of punishment. So what is collective conscience? Durkheim wrote:

> The collective sentiments to which crime corresponds must, therefore, singularise themselves from others by some distinctive property; they must have a certain average intensity. Not only are they engraven in all consciences, but they are strongly engraven. (1964, 77)

Durkheim observed, correctly, that of all the branches of the law, criminal law changes the least. This is because it is so strongly ingrained in the collective conscience. Durkheim, of course, was not using the term 'crime' to include all the

acts that the modern law punishes. The statute laws of the modern state impose punishments on all sorts of acts that are hardly etched in popular conscience. Consider the offence of driving after drinking even moderate amounts of alcohol, or of driving above ultra-cautious speed limits on country roads, or of failing to lodge a tax return on time. These are the sorts of crimes that are known in classical terminology as *mala prohibita* (wrongs by prohibition). The criminalisation of these acts has little to do with popular conscience. Durkheim was referring to the well-known categories of universally condemned acts known as *mala in se (*wrongs by their nature). These are the crimes that are found in the standard criminal code of a country. Durkheim attempted a rough tabulation of these acts (1964, 155–6).

Organic solidarity

Restitutive law corresponds to organic solidarity. Whereas repressive law arises from the core of the collective conscience, restitutive law lies at its periphery or outside it (Durkheim 1964, 112–13). Restitutive law governs relations between persons and things, as in real property, and between person and person, as in contract. Restitutive law does not impose punishments but repairs relations to where they stood before a breach of the law occurred. Thus, the plaintiff is given compensation for damages caused by the negligent defendant, and in contract the buyer is compelled to pay the seller the purchase price.

Restitutive law arises from the division of labour. I have certain competencies that enable me to perform services to others. I also depend on the services of many others. I buy my food from the supermarket and the grocer, my clothes from clothes shops and gasoline from the gas station, and get my hair cut by the barber. These people themselves depend on others for functions that they either cannot perform or perform inefficiently. Civilised life, therefore, is based on countless dealings among thousands and millions of persons, most of whom are strangers. Restitutive law grows out of the nature of these relationships. Durkheim explained:

> The relations which are formed among these functions cannot fail to partake of the same degree of fixity and regularity. There are certain ways of mutual reaction which, finding themselves very comfortable to the nature of things, are repeated very often and become habits. Then these habits, becoming forceful, are transformed into rules of conduct. The past determines the future. In other words, there is a certain sorting of rights and duties which is established by usage and becomes obligatory. The rule does not, then, create the state of mutual dependence in which the solidary organs find themselves, but only expresses in a clear cut fashion the result of a given situation. (1964, 366)

This is essentially the evolutionary theory of the insensible growth of law through mutual convenience, first formulated by 18th century evolutionist thinkers such as Bernard Mandeville, David Hume, and Adam Smith. I discuss this theory in Chapter 10.

Although restitutive law concerns relations between individuals, society is not completely out of the picture. When the law needs to be enforced, the individual must seek the collective power of the society. The society, according to Durkheim, is not just a third party arbitrator in such instances: 'The law is, above all, a social thing and has a totally different object than the interest of the pleaders' (1964, 113). The society has an independent interest in upholding the law.

Anomic division of labour

The division of labour sometimes leads to conflict and defeats solidarity. Durkheim called this kind of dysfunctionality 'anomic' division of labour. Industrial and market collapses, recessions and labour disputes are some of the dislocations that can happen when the division of labour intensifies. Information asymmetry can cause too much or too little to be produced, leading to economic disruptions and conflict. Marx and his followers believed that the division of labour inevitably leads to conflict among classes. Durkheim thought otherwise.

He argued that 'if in certain cases organic solidarity is not all it should be it is . . . because all the conditions for the existence of organic solidarity have not been realised' (1964, 365). The state of anomie, Durkheim thought, is theoretically impossible 'wherever solidary organs are sufficiently in contact or sufficiently prolonged' (1964, 368). The reason is that such close contact will reveal mutual dependence, and breakdowns in relations can be quickly identified and repaired. It is the breakdown of communication that disrupts the mutually adjusting process of social order. Durkheim anticipated, and feared, that globalisation of markets would lead to more conflict because of the disconnection between different producers and consumers. He, of course, had no way of foreseeing the astonishing means of instant communications that have become a hallmark of global trade.

An evaluation of Durkheim's sociology of law

Durkheim's views of the evolution of restitutive law through mutual convenience and the division of labour closely follow the insights established by Adam Smith and other evolutionary thinkers of the 18th century. The value of his work lies in his explicit application of these insights to the law in a more technical way. Durkheim's treatment of repressive law, though, is deeply flawed.

Durkheim identified repressive law with penal law. Repressive law punishes acts that shock the collective conscience. He contrasted repressive law with restitutive law, which is at the periphery of collective conscience or outside it. It is historically indisputable that many of the wrongs against person, property and honour that are now considered crimes were initially simply private wrongs settled between wrongdoers and victims or their families. The remedy was initially personal vengeance, and later compensation. Even today these crimes give rise to both penal sanctions and civil remedies. The attachment of penal sanctions

to these acts was a later development. (For an illuminating economic history of criminal law, see Benson 1990.) The point I make is that many of the repressive laws that Durkheim identified were restitutive in nature, and became repressive only because the state at a certain stage of history decided to make the acts in question punishable by the state. If these acts are repulsive to the collective conscience, they would have been repulsive even before their criminalisation by statute.

There are crimes against the state (treason, sedition etc) and against religion (blasphemy etc) and public order (rioting etc) that are not private in nature. These fit better into Durkheim's category of repressive laws. Even in such cases, their recognition as crimes has more to do with the threat they pose to public safety and the legal process than to some notion of collective conscience.

The living law: the legal sociology of Eugen Ehrlich

The predominant view of law today is that it consists of the norms that a court would use to decide a case. Legislation enacted by parliaments and precedents set by past judicial decisions are considered now to be the primary sources of the norms used by courts. However, most people go about their lives in complete ignorance of the technical law that the courts apply in the cases that come before them. If I ask 1000 people on the street for the definition of the crime of theft or the requirements of a valid contract, most of them will give me a wrong answer. Yet most of them would be law abiding citizens who in all probability will never see the inside of a court. What does this tell us? It tells us that social order rests on rules that most people observe without knowing their legal meanings. Average citizens do not commit theft or any other crime, not because of the risk of punishment by a court but because they think that it is the law that they live by.

Eugen Ehrlich, the Austrian jurist and sociologist, tried to summarise his book *Fundamental Principles of the Sociology of Law* in one sentence. In the preface he wrote: 'At the present as well as at any other time, the centre of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself'. Ehrlich (1862–1922) was born in Chernivtsi in Ukraine, which at the time was part of the Bukovina province of the Austro-Hungarian Empire. He studied and practised law in Vienna before returning to Chernivtsi to teach law. Ehrlich is most famous for developing the idea of living law.

Society as an association of associations

Ehrlich took an evolutionary view of the emergence and growth of society and its laws. The human race became social beings through the process of natural selection. Those who learned to associate with others gained a survival advantage

over those who did not. The earliest associations were 'genetic' in nature – by which Ehrlich meant family groups and clans. As society advanced there came into being many other associations, such as the commune, the state, guilds, social clubs and agricultural and industrial associations. A person usually belonged to several of these associations. Overall society was made up of the interaction of these associations (Ehrlich 1936, 27–8). Each association had its internal order, and at first there was no general law of the land but only the rules of the internal orders of associations, which were their legal norms. Eventually European societies reached the feudal age. Then too, what passed for law were the agreements between king, the lords and different classes of serfs. To know the law, one must know the terms of these agreements (Ehrlich 1936, 32–3). The first true laws were found within city walls, where a number of different associations (of merchants, craftsmen etc) interacted, forming broader associations. The laws of real property, of pledge, of contract and inheritance were first established in these cities.

Ehrlich identified the main associations of human society as the following: 'the state with its courts and magistracies; the family, and other bodies, associations, and communities with or without juristic personality; associations created by means of contract and inheritance, and, in particular, national and world-wide economic systems' (1936, 54). Thus he foresaw the convergence of national economies and the formation of international associations of various sorts that we see today.

Legal norm and legal proposition

Ehrlich distinguished a legal norm from what he called a legal proposition. A legal norm is a rule found in the form of actual practice. It is the rule of the inner order of an association. A legal proposition is 'is the precise, universally binding formulation of a precept in a book of statutes or in a law book' (Ehrlich 1936, 38). The actual practices of making and observing contracts for the sale of goods among persons constitute legal norms. The *Sale of Goods Act*, which formally states the law relating to the sale of goods, contains legal propositions. This distinction is critical in Ehrlich's theory. The crucial point is this: the legal norms of the sale of goods contracting and the legal propositions are not the same. The legal norms in the form of social practice exist even without the legal propositions. The state existed before the constitution, there were contracts before the law of contracts and there were testaments before the *Wills Act* (Ehrlich 1936, 35–6). The legal norms, the rules of inner order, represent the living law, and legal propositions comprise the law in the books. The living law gives content to the law in the books. Ehrlich wrote:

> The inner order of the associations of human beings is not only the original, but also, down to the present time, the basic form of law. The legal proposition not only comes into being at a much later time, but is largely derived from the inner order of associations. (1936, 37)

Legal norm and norm for decision

There are times when the inner order of an association is disrupted by a breach of its legal norms. A used car dealer may claim that the car sold was a serviceable vehicle. The buyer may claim that it was unserviceable without costly repairs. The inner order is disrupted. Most of these disruptions are resolved without the aid of a court. Negotiation, private arbitration and even market pressure may solve the problem. Even in the modern age, the proportion of legal disputes that end in court cases is minuscule. However, some disputes will need judicial resolution. When this happens, the legal norms of association will not be a sufficient guide to decision.

A legal norm, in Ehrlich's definition, is a rule that members of an association observe without compulsion. It is the rule that prevails in times of peace but not in times of war. If the living law is broken, the judge cannot restore it to life but must offer a remedy. The judge deals with a new situation. The inner order of the family works well when the couple have harmonious relations. They do not need the assistance of a court or of remedial law. If the relations break down, the association is at an end and so is its inner order. If the dispute goes to the court, the judge will have to make orders for the division of property, custody of children, maintenance, and so forth. The judge will apply legal propositions (law in the books) as well as moral and policy considerations in the exercise of judicial discretion. Ehrlich called these the norms for decision (1936, 126–7). These include the law of damages and restitution, standards and burden of proof, injunctions and so forth (Ehrlich 1936, 127).

Judicial discretion is not unbounded. A norm for decision used in a particular type of case ought to be applied in similar cases. Ehrlich calls this the law of the stability of norms. This not only saves intellectual labour but also serves the social need for stable norms for decision, which provides a measure of predictability of judicial action that allows people to arrange their lives accordingly.

State and state law

State law is law created by the state. State law is possible only where there is a state and the state possesses sufficient military and police power. Although state law is pervasive today, it was rare in the past except in city states and the more powerful kingdoms and empires. Unlike today, state law was mainly concerned with the organisation of the state organs and the declaration of existing law. The original courts were not state courts but private bodies created by associations.

Ehrlich considered the state to be one of the associations (in fact the largest) that make up society. It is a product of social need, of the growing complexity of relations among the intertwined and interdependent associations. Ehrlich wrote:

> We must think of it as an organ of society. The cause of it is the steadily progressing unification of society; the quickened consciousness that the lesser associations in society,

> which in part include one another, in part intersect one another, in part are interlaced with one another, are merely the building stones of a greater association of which it is composed. (1936, 150)

The interdependence of the associations creates the overall order of society. It is still possible in modern society to have associations with their own rules of behaviour. Members of the Old Amish community of Lancaster County, Pennsylvania, live by their own special rules. There are various communes of religious sects and counter-cultural groups living by special rules in most free societies. These are exceptions that confirm the general rule that associations through interactions form larger associations, leading eventually to national and global associations.

Society (the grand association of associations) uses the state as its organ to impose its order upon the associations that belong to it. This means that 'state law in all its essentials merely follows the social development' (Ehrlich 1936, 154). The earliest statutes were in the form of agreements among those affected by the instrument. The Roman *leges sacratae* and the German *Landfreiden* were agreements. The enacting recital of British Acts of Parliament commences with the words: 'Be it enacted by The Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled and by the authority of the same'. In theory, British statutes are agreements between the people, the lords and the Crown. The reality, of course, is different in today's world. Rulers, elected and unelected, make law by unilateral will.

Ehrlich argued that there is a limit to the kind of unilateral law that the rulers can impose upon society (1936, 373). In other words, rulers, even those whose powers are not constitutionally limited, cannot make law as they please – not in the longer term, anyway. Legislation does not operate in a social vacuum. It must overcome social forces that operate independently of the state. Military power is not a match for these social forces in the long term. It may defeat foreign enemies but is ill-equipped to impose permanent ways of life on the population. There is no better example of this than the efforts of the dictatorship in the old Soviet Union to recreate society according to the socialist ideal. The state laws enacted by the regime attempted to abolish private ownership of the means of production, outlaw institutionalised religion, control the freedom of communication, movement and association, eliminate political opposition and equalise incomes. The regime failed to achieve any of this, and the whole system collapsed within 70 years. The principle is evident even in modern democratic societies. Price controls are notoriously ineffective, and so is excessive censorship. There is widespread tax evasion. People in business and industry migrate from the official legal system to their own, through contractual arrangements that establish rules of conduct, and private forums for resolving disputes through associations such as the International Chamber of Commerce (ICC).

Ehrlich's contribution to the sociology of law

Ehrlich demonstrated, better than any other sociologist of law, the difference between the law in the books and the living law. However, he underestimated the effect of the norms for decision and state law in shaping the living law. This is not entirely surprising, because Ehrlich was writing before the era of extensive legislation and government intervention in the economic and social life of communities. The force that the state applies through its laws is a factor that individuals and associations of individuals take into account in ordering their lives. State law has social consequences and some of these are unintended. State laws of any significance will create a series of behavioural adjustments in social relations, much like ripples in a pond. As individuals adapt to a new law, they cause changes in the inner order of the various associations in which they participate.

Ehrlich also underestimated the capacity of the state to develop interests that are hostile to the interests of the associations that it is meant to serve. The modern state, with its immense bureaucracy and multiple power centres, has acquired a life of its own. He also did not pay enough attention to the competition among associations, particularly in democracies, to bend the state law in their favour at the expense of other associations. I am here referring to the intense interest group politics that are a feature of majoritarian democracies. State law is often born out of these distributional struggles. Ehrlich was historically correct when he pointed out that in the longer term rulers cannot sustain systems of laws far removed from the living law of the people. In the shorter term, though, people put up with much that they dislike.

Roscoe Pound and law as social engineering

Nathan Roscoe Pound (1870–1964) was the most prominent American sociological jurist. He differed from the previously considered theorists in an important way. Whereas the others were concerned with the law in the broader social sense, Pound was mainly focused on the lawyer's law – the law that legislators, judges and other authorised officials make. He was not unmindful that the term 'law' has wider connotations, but the task he set himself was the discovery of the ways in which the formal legal order serves its social purpose. The legal order is not simply the set of legal rules but the whole legal system, comprising its institutions, doctrines, rules and techniques.

Task of the legal order

What is the task of the formal legal order? According to Pound, it has changed over time. In primitive societies, 'the law aimed at nothing more than keeping the

peace . . . putting an end to revenge and private war as the means of redressing injuries' (Pound 1940, 68). The law was not an instrument for social change. The role of the legal system in the Greek city states was the orderly maintenance of the status quo. As the reader will recall from the discussion in Chapter 5, the Greek teleological view assigned individuals to specific roles according to a cosmic plan. The law served to keep society in harmony with this universal scheme of things. This theory persisted through the Roman law and the Middle Ages, until after the Reformation. The Reformation introduced the idea of individual freedom, and the law's primary role was seen in the 17th and 18th centuries as the provision of maximum individual liberty consistent with the similar liberty of others. This idea of the law's task later merged with the aim of 'bringing about and maintaining a maximum strength and efficiency in organised society, identifying the political organisation of society with civilisation' (Pound 1940, 69). It is fair to say that the notion of the law's role has been further transformed since Pound wrote these words.

Pound's view of the law's role is practical and modest: law's task is to recognise and adjust competing interests with a minimum of friction and waste (1940, 80–1). He identified legal and judicial activity as a form of social engineering. Pound did not use the term 'social engineering' in the modern sense of deliberate attempts to restructure society or rearrange social relations. Rather, it was a comparison of the legal task to that of a problem-solving design engineer who tries to make the machine run more efficiently and smoothly. Pound thought that the adjustment of competing interests with minimum friction and waste had a philosophical value, but did not elaborate on the question (1940, 80).

What are interests?

Interests are claims that persons make of the legal system. Some of these claims are already recognised by law, but there are others that are not so recognised. My claim not to be subject to physical violence is recognised by the criminal law. A terminally ill and long suffering person's claim to be assisted in terminating their life (euthanasia) is not recognised by Australian law. Trade unions make many claims on behalf of workers. Some are granted by the legal system and others are not. Pound identified three kinds of interests: individual interests, public interests and social interests. Individual interests relate to person, property and personal relations such as marriage. Public interests relate to the dignity of the state as a juristic entity. In the past the government claimed immunity from actions in tort; even now there are surviving Crown prerogatives. This is a dwindling category. Social interests include the interest in public safety, peace and order, and public health. These interests overlap with individual interests. There are also social interests in the security of social, domestic, religious and economic affairs (Pound 1940, 66). These interests are frequently in conflict. Labour claims for minimum wages conflict with claims for contractual freedom. A factory owner's claim to operate machinery may conflict with a neighbour's claim against noise. Claim of

parliamentary privilege may conflict with a claim of damages for defamation in parliament. Pound's simple point is that there are incessant efforts by individuals and groups to gain recognition of new rights and to defend established rights. The resulting conflicts have to be resolved by the legislature and, in the absence of legislation, by the courts.

The principle or measure of valuing and adjusting competing interests

How should the different competing interests be valued? Pound saw no grand theory to deal with this question. Legislatures resolve them according to political convenience, but how should courts go about it? Pound offered only the most practical commonsense advice: namely, that courts should secure as much as possible of the scheme of interests as a whole with the least friction and waste. Pound claimed that this is what the courts, lawyers and judges have been doing since the Roman jurisconsults of the first century: 'No matter what theories of the end of law have prevailed, this is what the legal order has been doing, and as we look back we see has been doing remarkably well' (1940, 76). In short, there is no theory available to judges other than the judicial pragmatism that has served society well. Thus, in Pound's view the aim of the legal order is also its principal method.

Pound's worth

Pound's main point was that, whatever theory of adjudication we use, we cannot get away from the problem of reconciling and balancing competing interests. He wrote: 'For the purpose of understanding the law of today I am content with a picture of satisfying as much of the whole body of human wants as we may with least sacrifice' (1954, 47). However, we can derive certain principles imbedded in his proposition.

The first is that the courts should try to satisfy as many interests as possible *with the least sacrifice*. This means that certain claims may not be admissible because they call for too much sacrifice. The law bans narcotics, child pornography, underage alcohol consumption, because of their social costs and danger to vulnerable groups. There is another kind of cost that excludes certain types of claims being entertained by the courts, though they may be granted by a legislature. Take the hypothetical claim of a trader to sell a product above the price set by an Act of Parliament. The court may uphold the claim only at the sacrifice of a weightier claim, the supremacy of Parliament's law. The second is that a court cannot be arbitrary in adjusting competing claims. This means that similar conflicts should be similarly resolved. This cannot be a hard and fast rule, but without a reasonable degree of decisional consistency the court will lose its reputation as an impartial adjudicator and eventually its power to command. That is a price

too high to pay. Third, a court must have a rational basis to recognise a new right or to diminish an existing right, and must explain the reasons for its decision. A departure from the existing law is usually rationalised on the ground that the new case is materially different from the past decided cases, or the past decisions were clearly mistaken or, more rarely, that there are compelling policy reasons for not following a precedent. The court's decision may not stand the test of logic, but that is less important than the public perception that the court is not acting capriciously. In other words, a court cannot be seen to make new law openly without losing public confidence. The element of logical pretence, to the extent that it is present in judgments, is critical to the functioning of the courts. A court that reveals to society that it is open to any sort of claim and all kinds of arguments will be short lived. What all this means is that judicial discretion, in practice, is confined to what are known as hard cases – or, as Hart called them, cases of the penumbra.

A major problem with Pound's theory concerns his failure to separate the aim of the legal order as a whole from the methods available to the courts. Even if we accept his formulation of the end of the legal order, there is much left to be said about the judicial role in serving that end.

Pound's major sociological contribution is his explanation (incomplete as it is) of the way interests that form outside the legal order are transformed into enforceable rights within the legal order. His sociological message was most clearly stated in the following observation from his essay 'The next feudal system':

> We shall achieve nothing by an obstinate rearguard action against the adapting of legal institutions and legal doctrine to the society they govern. In the end they will conform to the needs of the economic and social order, not the economic or social order to their logical or dogmatic demands. (Pound 1930, 397)

The achievements of the sociological tradition

The sociologists of law and sociological jurists enriched jurisprudence and expanded its frontiers in a number of ways. First, they demonstrated the inseparability of the legal order from the order of society. There is no society without law and no law without social order. Second, they showed that the lawyer's law or the law in the books is not the only law by which people live, and not the only law that determines the structure of society. This is the case for two reasons. One is that there are many more social rules that people observe than are recognised or enforced by the official legal system, and yet without them social order is unsustainable. A second reason is that many of the rules in the law books would be ineffectual but for the fact that they are already observed as social rules. The law of contract would be meaningless if people routinely broke their promises. Criminal law is effective not because of super-efficient crime prevention and crime punishment but because most people live by its rules most of the time anyway. Third, the sociologists and sociological jurists demonstrated the dynamic

and adaptive nature of the legal order. The legal order, being part of the social order, changes with it. Tribal law, feudal law and the liberal law of industrial societies each reflect a stage of social development. Fourth, they demonstrated that the law as a social phenomenon has a life of its own and that the path of the law is not entirely, or even mainly, determined by legislators. Fifth, by all this they demonstrated the poverty of jurisprudence that limits itself to the study of the law in the books.

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Radical Jurisprudence: Challenges to Liberal Legal Theory

The jurisprudential theories discussed in previous chapters, with the notable exception of the theory of Karl Marx, are cast within the intellectual tradition of political liberalism. There are significant differences among these theories, but they are ultimately grounded in liberal views of law and society. This chapter discusses the challenges to the fundamental assumptions of liberal legal theory that came to prominence during the later decades of the 20th century. It will focus in particular on the ideas of the critical legal studies (CLS) movement, postmodernist legal theory and feminist theory. It is not possible to understand criticism without knowing what is being criticised. Hence, I start with a brief discussion of liberalism and liberal legal theory.

Liberalism and liberal legal theory

Liberalism is a tradition in political and legal theory that gives primacy to individual liberty in the political and legal arrangements of a society. 'Liberalism' is a term of recent origin. Originators of the liberal philosophy such as Hobbes, Locke, Hume, Smith and Montesquieu did not use the word. In fact, 'liberal' in early English usage was a term of ridicule meaning a libertine. The term gained respect and influence during the 19th and 20th centuries and (in its various forms) has become the dominant political ideology of the Western world. There are many kinds of liberal theory, and important differences among them. The following questions draw different responses from liberal thinkers.

1. Why is individual liberty the pre-eminent political value?
2. What does individual liberty mean and what are its bounds and requirements?
3. How can individual liberty be achieved and protected; what kinds of institutional arrangements serve individual liberty?

Kinds of liberalism

There are two main liberal schools of thought about the pre-eminence of individual freedom. The natural rights theorists such as Hobbes, Locke, Grotius and Rousseau argued that liberty was inherent in personhood. Self-ownership, property acquired by one's labour and capacity to pursue one's chosen life ends were considered essential to existence *as a person*, as opposed to being another's property. Utilitarian thinkers such as Bentham and Mill, and evolutionary theorists such as Hume and Smith, believed in the intrinsic worth of individual liberty but made further arguments on grounds of efficiency. Societies that allow greater freedom for individuals have achieved greater prosperity than those that suppress liberty. This is also the message of modern economics based on methodological individualism.

Modern liberals divide into two broad categories on the question of what liberty means. Classical liberals regard liberty as freedom from legal or illegal restraint. They generally adopt John Stuart Mill's 'harm principle' as their guide on this question. In his essay *On liberty*, Mill argued:

> . . . the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant. (2002 (1869), 8)

Welfare-state liberals have a different view of liberty. (Welfare-state liberals are known simply as liberals in North America, and elsewhere they are better known as social democrats.) They believe that in addition to legal freedom, people must be freed from want so they can better enjoy their legal liberty. What good is the freedom of movement, they might ask, to a person who has no money to travel? Many welfare liberals believe that poverty has social causes. They argue that markets that result from individual liberty do not ensure fair distribution of wealth. Classical liberals reply that the market process is the most efficient way of increasing everyone's wealth. They argue that the quest for just distribution is doomed because it is impossible to find the just distribution, and it can be pursued only by limiting individual liberty and causing greater poverty. Usually some sort of compromise between these two views prevails in the real politics of present-day liberal democratic societies. The important point here is that classical

liberals and welfare liberals in their different ways regard individual liberty as the pre-eminent political value.

Liberal legal theory

The jurisprudential theories so far considered, with the exception of the Marxist doctrine, share a broadly liberal view of the relation between law and society. This is the case despite their widely differing views about the scope and means of attaining liberty. Liberal legal theorists generally agree on four propositions about law and society.

1. Law is a public good

Law serves the public interest by providing a framework of rules that allows individuals to coordinate and harmonise their actions. The idea of a lawless society is a self-contradiction. Liberal legal theorists admit that law is used by rulers in their own interests, but they reject the notion that law by nature is an instrument of oppression. Law emerged in response to the coordination needs of the community and is not *in itself* a source of conflict. This is the message of the pioneers in the sociology of law: Weber, Durkheim, Ehrlich and Pound.

2. The rule of law is necessary for liberty

Liberalism in all its forms is formally committed to the ideal of the rule of law as the means of securing liberty. The rule of law has many meanings, but in this context it means subjection of both public and private actions to the governance of knowable and reasonably certain law. The rule of law serves individual liberty by curbing arbitrary actions of officials and making the law more certain and predictable. As Fuller vividly illustrated, if the law is whatever the ruler commands at any given moment, if the law lacks the semblance of generality and if the law is not consistently observed by officials, the citizen will find it hard to know what is right and wrong according to the law. Life becomes less predictable and an essential condition of liberty is lost (Fuller 1969, 39).

Legal positivism, it is said, is consistent with the most arbitrary forms of law, and this is true. Hart refused to deny the name ‘law’ to the utterly capricious and inhumane dictates of the Nazi regime during its final years. Kelsen’s theory led to the same conclusion. However, the ideological reasoning behind legal positivism is quite the opposite. Hobbes, Bentham and Austin identified the law with the commands of a sovereign, chiefly for the utilitarian reason that it makes the law more certain and more knowable. Hart thought that nothing was gained by denying the legal effect of Nazi laws. The positivist position is that if we admit the formal validity of evil enactments, in other words that they are laws, we can do something about them. If we deny that they are law, we commence a needless and endless philosophical debate that only makes the law harder to know and reform.

3. The rule of law is possible

There are three essential conditions for the rule of law: (a) the law must be knowable and reasonably stable; (b) facts must be ascertainable to a generally acceptable standard; and (c) the making of the law and the application of the law must be distinguishable to an appreciable degree.

(a) Law must be knowable

The law is not effective unless most people to whom it is directed understand it in the same way. Take the rule 'Parties to a contract must observe the terms of the contract'. Most people understand this simple rule even if they cannot give technical definitions of the words 'contract', 'parties', 'observe' and 'terms'. If people have wildly differing notions about these words, the law will be ineffectual. There is, of course, much law that a lay person will not understand because of its complexity and technicality. (The Australian income tax legislation is known to defeat even able legal minds.) The point is that the law will be meaningless if people have no shared sense of what it requires or permits. Liberal legal theorists believe that law in the normal case is comprehensible, often without, but sometimes with, the help of trained lawyers. It is true that the American realists question the belief that the law can be reliably gathered from law books. They are not saying that the law is unascertainable, but that the law can be found only by close study of judicial decisions of appellate courts. Legal positivists such as Hart conceded that the open texture of language left uncertainty at the margins. A law that prohibits vehicles from a public park clearly forbids cars, trucks and motorcycles, but a penumbra of uncertainty exists as regards bicycles, roller blades and skateboards. The uncertainty will be progressively reduced through judicial interpretation, but not eliminated.

(b) Facts must be ascertainable

The law has no meaning except in relation to persons, things and events – in other words, facts. Therefore, the rule of law is not possible unless relevant facts can be ascertained. Take the case of a man who shoots another man in a public place in full view of many bystanders. The fact of the shooting can be easily established in a court of law by witness testimony. This is because people usually trust the evidence of their senses and usually perceive facts the same way. They all see the object that the man points at the victim and recognise it as a gun. Not every case will be as simple as this. Sometimes the judge (or jury) will come to the wrong decision for a variety of reasons, including false testimony, impaired observation or faded memory of witnesses and the sheer lack of reliable evidence. The 'fact sceptics' within the American realist tradition (discussed in Chapter 4) are preoccupied with the factual dimension of the law. However, they do not question the possibility of finding facts, but only the way that courts go about finding facts. Thus, liberal legal theorists generally agree that both law and facts can be determined – not perfectly, but to the degree that enables the law to serve

its social function of securing liberty and facilitating peaceful and productive social intercourse.

(c) The making of law must be separated from the application of law

The orthodox legal view is that courts decide cases according to pre-existing law, at least in the vast majority of cases. Liberal legal theorists know that courts, particularly the appellate courts, play a creative role in the course of deciding novel cases (Hart's cases of the penumbra). However, they believe that the courts have very limited legislative scope overall. Dworkin argued that the courts in the Anglo-American common law system generally maintain the law's integrity in administering justice.

If judges and other officials responsible for law enforcement are not guided by law but are free to make law for the individual case, the rule of law is displaced by the rule of particular men and women. This would be the case if judges enforced contracts or awarded damages in negligence cases, not according to established rules but on their own views of what is just. Liberal legal theorists believe that the discretions involved in judicial decisions do not, on the whole, destabilise the rule of law.

4. The political institutions of liberalism protect liberty and the rule of law

Liberals count on constitutional devices such as the separation of powers (with independent courts), due process, representative democracy and the constitutional guarantees of basic rights to promote the rule of law and secure individual liberty. Representative democracy plays a central role in these systems by electing and removing governments and by electing and removing legislators, who in theory represent people's views.

There is a school of anarcho-liberals who reject the idea of the state altogether as an inherently oppressive organisation. They call themselves libertarians, to distinguish themselves from classical liberals. The anarcho-liberals argue that all the services that the state provides, including defence and the security of person and property, can be arranged by contractual arrangements among free individuals. Murray Rothbard was the most influential theorist of this movement (Rothbard 1985).

Classical liberals, on the contrary, believe that the state is inevitable but should be retrained. They generally embrace the concept of the minimal or 'night-watchman state' that Robert Nozick illustrated in his *Anarchy, State and Utopia* (Nozick 1974). Classical liberals argue that laws must be general and abstract, and discretionary powers of government should be strictly limited, to secure liberty. Hence, they oppose over-regulation of economic and social life, particularly through arbitrary methods such as licensing schemes, price and wage fixing, tax-subsidy schemes, and affirmative action. Welfare liberals grant the state a more interventionist role, consistent with their commitment to provide material assistance to those whose enjoyment of legal liberty is diminished by poverty or disadvantage. In practice, the modern liberal democracies tend to

oscillate between the classical liberal and welfare liberal conceptions of the state. Liberals accept this as an inevitable consequence of political liberty.

Liberals of all types believe that the institutions of the liberal-democratic state offer the best means of preventing oppression of individuals and groups. They admit that much injustice occurs under liberal legal regimes, but argue that there is no better political system available to us. Liberal legal theorists believe that liberal political systems are self-correcting. Abolition of slavery and the enfranchisement of women are two early examples of the corrective power of liberal democracy.

Challenge of the critical legal studies (CLS) movement

'Like a meteor the Crits appeared, shone brightly for a short time and have gone' (Freeman 2001, 1055). The CLS movement had its roots in the anti-capitalist and anti-liberal intellectual revolt that swept the Western world in the late 1960s and early 1970s. It flourished in the late 1970s to mid-1980s, mainly in the United States, but was a spent force in jurisprudence by the end of the 20th century. It failed to dent the edifice of orthodox legal doctrine and culture, and within the intellectual left it was eclipsed by the more radical postmodernist movement. So why discuss CLS? Like the Marxists and American realists before them, CLS scholars challenged prevailing comfortable assumptions about the law and compelled liberal legal theorists to re-examine, revise and refine their views. Although CLS has declined as a movement, its ideas continue to energise left critiques of liberal law and CLS scholars continue to produce some of the most challenging literature on legal theory.

The central charge that CLS levels is that law as developed in liberal societies is oppressive. Law papers over contradictions and conflicts within society that the law itself has created. Law formalises oppression, makes it respectable and indoctrinates people to accept it. CLS, like Marxism, argues that law, at least in the way it has historically developed, is a system of domination. However, unlike Marxism, CLS does not break down society into the simple division between capitalist and working classes. The law, according to CLS, splinters society in all sorts of ways – between traders and consumers, employers and employees, landlords and tenants, men and women, straight and gay, white and black, locals and foreigners, skilled and unskilled, and so forth. Unlike Marxism, CLS does not offer a clear political program to address the problems that afflict society, though thinkers such as RM Unger have proposed new kinds of social cooperation. CLS allegations against liberal notions of law are too serious to ignore, and must be explained and examined.

CLS spawned a large volume of critical literature that cannot be fully surveyed in this chapter. I will discuss four main aspects of this body of theory:

1. fundamental contradiction within society
2. alienation by categorisation and reification
3. denial of the value neutrality of law
4. alternative legal world of CLS.

Fundamental contradiction

CLS scholars share the view that society has a fundamental contradiction, or paradox. The contradiction is that individuals cannot do without others, but also need to be free of others. In other words, we want society as well as autonomy. We depend in life on the support of our family, friends, community and state – what CLS calls 'the collective'. At the same time, we need to be free from the violence of others. We need our own space to live freely and well, but we cannot find this security except with the help of others. This is not a new insight. As John Donne memorably wrote, 'no man is an island, entire of itself' (*Meditations*, XVII). Our personhood is defined not only by our individual characteristics but also by our relations with others. Everybody knows it, and liberal legal theorists worked on this premise. CLS sees a further problem. Duncan Kennedy stated it this way:

> But at the same time that it forms and protects us, the universe of others (family, friendship, bureaucracy, culture, the state) threatens us with annihilation and urges upon us forms of fusion that are quite plainly bad rather than good. Numberless conformities, large and small abandonments of self to others, are the price of what freedom we experience in society. And the price is a high one. (1978, 212)

Kennedy argued that until recently (that is until CLS revealed it), Western legal thinkers have not acknowledged this contradiction (1978, 213). This is simply untrue. Republicans and liberals have always feared the power of the collective to do more bad than good. They are acutely aware that the governments people erect for their own protection and advancement tend to gain lives of their own and threaten individual freedom unless they are contained by checks and balances. Kennedy, though, insisted that liberal legal thinking has produced elaborate mechanisms of denying the contradiction. He said that one form of denial is to present this contradiction as a case of 'tension between conflicting values that we must balance rationally' (1978, 214). This, to him, is so clearly false that the person who asserts it is probably trying to 'minimise or conceal the element of paradox, stalemate and desperation that we experience when we try to decide what kind of collective coercion is legitimate and what illegitimate' (1978, 214).

'Contradiction', 'paradox' and 'conflict' are distinct concepts. A contradiction, in the logical sense, cannot be resolved. Socrates lives or he does not live. He cannot do both. Unicorns exist or they don't. A paradox occurs when one makes a statement that leads logically to its converse. A famous paradox is that of the Cretan 'C' saying that all Cretans are liars. The statement is false if 'C' is saying the

truth, because 'C' is a Cretan. Another is Heraclitus' assertion that 'Knowledge is impossible'. How does Heraclitus know this except with knowledge? Kennedy did not use 'contradiction' and 'paradox' in these senses. So what exactly did he mean, and how is it different from the liberal view of the eternal tension between the need for collective action and the need for protection from collective power? Kennedy did not provide a clear answer. The fact that the state (or collective) is both useful and dangerous is not a contradiction or paradox in the logical sense. It is not logically or pragmatically impossible to contain power and channel it to useful social ends. Hence, liberal legal scholars are right in treating it as a case of conflicting needs that have to be practically reconciled. Life is full of these conflicts and living involves ceaseless pragmatic compromises at all levels. I love chocolate ice cream, but eating too much of it is not healthy and so I must strike a balance. We make compromises within family about spending. At the social level the police must be given power to protect us, but we have to protect ourselves from the police. None of this involves denial. It is simply a matter of managing conflict as best as we can.

Liberals identify what they consider to be the proper, and hence legitimate, functions of the state – such as defence, responsibility for major infrastructure, supporting the judicature and, in modern times, the provision of social security to varying degrees. This, according to Kennedy, is a denial of the contradiction. His reasoning, again, is not clear. The fact that in a democracy the proper role of the 'collective' is continually debated, and the state's boundaries are constantly redrawn, is evidence not of denial but of recognition of the need to reach practical compromises.

Other CLS writers have seen different contradictions in liberal theory. M Kelman claimed that the positivist method of the liberals leads to the identification of the social good with the aggregate of personal preferences ascertained through markets and voting systems. Values, he said, are not merely matters of preference or taste but universal maxims (Kelman 1987, 68). This is another instance of CLS attacking the straw man of liberalism. There are many natural law theorists within the liberal ranks who explicitly embrace universal values. It is also grossly incorrect to say that positivists regard values solely as a matter of preference. Their position is that mixing legality and morality of law does not help clear thinking, and if we mix the two we diminish our chances of making the law better reflect values. Liberal economists are also aware that markets cannot operate in a valueless environment. The moral rules that secure person and property, sanctity of contract and trust are the foundations of trading systems. Neither do democratic systems function without supporting values such as the toleration of opposing views and fair conduct in seeking office.

Alienation by categorisation and reification

Life consists of a series of moments lived. However, to make sense of the world – and indeed to survive in the world – we have to think and talk in categories.

Take the case of the category 'human being'. One way of speaking of human beings is to describe each and every human being. Since no two persons are identical we end up having to refer by description to billions of individuals. This is impossible. In any case, a description of a single human is not possible without the use of other categories such as 'tall', 'short', 'fat', 'slim', 'heart', 'lung' and so forth. Therefore we have an abstract category called 'human being'. When a person refers to a 'human being' other people get the same rough idea. In short, we can only communicate by resort to categories such as 'human being', 'man', 'woman', 'child', 'sister', 'brother', 'dog', 'cat', 'parliament', 'aeroplane', 'football match', 'red wine' and so on.

These categories are abstractions. They are not real things but ideas that group things and events for convenient reference. Legal language is made up of categories. CLS scholars regard the law as 'reifying' these abstractions – treating them as real things. The categories stereotype or pigeonhole individuals into particular roles and destroy their sense of personhood and interconnectedness. CLS calls this alienation. P Gable wrote: 'One is never, or almost never, a person; instead one is successively a "husband", "bus passenger", "small businessman", "consumer", and so on' (1980, 28).

This kind of argument cannot be denied. Citizen X might say that, despite all the different roles he plays in daily life, he feels like a person and feels connected to his fellow beings in many ways. CLS would reply: 'Ah, but your view doesn't count because you have been indoctrinated and conditioned to think that way – you are an alienated being '. X might protest that he is not conditioned and that he is quite capable of forming an independent judgment. CLS would answer: 'That only proves that you have been thoroughly conditioned to think so'. It is very much like saying you don't believe in fairies. The believer in fairies will say, 'You can't possibly know. You have been conditioned to deny that fairies exist because in your community anyone who believes in fairies is regarded as a lunatic'.

The alienation is blamed on liberalism and capitalism. Gable wrote:

> The source of this absence of interconnectedness is the passivity, impotence, and isolation generated by the structure of groups, as those groups are themselves organized by the movement of capital. Within these groups no one is normally aware of his or her sense of unconnectedness, passivity, impotence, and isolation, because this felt reality is *denied* by the socially communicated reality. Each person denies to the other that he or she is suffering, because this collective denial has been made a condition of what social connection there is. (1980, 28)

This means that either we do not feel our suffering, or we cannot admit it because of social conditioning. If we do not *feel* suffering we are not suffering. If the suffering was real and widespread, one has to doubt whether social pressure could prevent its expression. As Marx said, alienation will eventually lead to revolt. Social pressures are formed by the convergence of individual feelings. If most people shared this sense of alienation it should create new social pressures in reaction.

Denial of the value neutrality of law

CLS is on much firmer ground in denying that law in liberal legal systems is value neutral. What is meant by the law's value neutrality? The reference here is not to particular laws, but to the abstract concept of law. No one claims that particular laws are value neutral. The criminal laws concerning murder, theft, robbery and rape are far from value neutral – they enforce moral standards. The law of contract that asks people to perform their contracts and the law of tort that holds people responsible for their negligent acts are value laden. So are the laws that redistribute wealth from some groups to others.

CLS says that liberals believe in the neutrality of law in a deeper and more abstract sense. Law is neutral in nature because it can serve different social values and aims. The *form* of the law retains its neutrality while its *content* is politically changed. In Australia, the law once criminalised adultery and adult homosexuality, but no longer does so. Slavery is prohibited today, though the law permitted it in the past. The law, as generally understood, is neutral as regards the uses to which it is put.

CLS scholars disagree. There are two kinds of law: one consisting of rules, and the other of standards. At one end of the spectrum there are rules that can be mechanically applied – rules that Kennedy called 'formally realisable' rules (1976, 1687–8). A good example is the legal rule that a person must be at least 18 years old to be eligible to vote at parliamentary elections. At the other end of the spectrum there are what Kennedy called 'standards', such as the notions of 'good faith, due care, unconscionability, unjust enrichment and reasonableness' (1976, 1687–8). Kennedy argued, correctly, that rules are more compatible with individualism. They may appear superficially neutral, but at the deeper level they are consistent with the liberal conception of law. A rule informs the individual in advance of the permitted range of actions. Traders know that they cannot sell liquor to minors. Pharmacists know that they cannot sell a drug without a prescription. Motorists know that they cannot drive faster than 100 kph on the freeway. Landowners know that they cannot cut down protected trees. Each has prior knowledge because of rules. The rules limit their freedom, but at least they know what the limits are so that the freedom they have is secure. Rules, however, can work unjustly in the individual case. A patient may need a drug before she can get to a doctor. A minor may be mature enough to drink responsibly. A motorist may have to exceed speed limits to pick up his child from school. Rules, in short, do not cater to each individual situation. Rules, in this sense, are impersonal.

In contrast, standards allow decision makers to tailor the law to what they think is the right outcome considering the situations of the parties and of society generally. Kennedy argued that impersonal rules favour individualism, whereas standards are more conducive to 'altruism' (1976, 1712). An employer, under the impersonal rules of contract law, has only to pay the employee the wage fixed by contract, regardless of the employee's needs. Such law is individualistic. In

contrast, Australian labour law for most of its history has authorised tribunals to fix wages according to an employee's need, regardless of contract. In Kennedy's lexicon, this is altruistic law. Standards, Kennedy argued, are also not value neutral. What is 'reasonable' or 'unconscionable' or 'good faith' is a matter of moral or political judgment. What seems reasonable to a man may be unreasonable from a woman's standpoint. The law may impose the standard of the reasonable *man* to the exclusion of the reasonable *woman*. What is a reasonable wage, or a reasonable standard of diligence, is by its nature a political question.

CLS scholars are right to question the value neutrality of law. The very idea of predictable law and the rule of law is value laden. It privileges individual autonomy over collectivism. However, the laws of liberal societies are not ideologically clear cut. There is a continuous political tug-of-war between the ideals of impersonal abstract rules and discretionary power to determine rights and duties. It is, nevertheless, a battle of political values.

Alternative legal world of CLS

Assuming that people suffer oppression and alienation under liberal legal systems and they are in denial about their condition, what remedy do CLS scholars offer? CLS rejects Marxist-type revolution and dictatorship as an oppressive alternative. Kennedy had a modest and honest view of what could be done. He believed that the contradiction within society cannot be eliminated because it is society that has created and sustains it. 'The enterprise thus appears twice defeated before it is begun: we cannot resolve the contradiction within legal theory, and even if we could, the accomplishment would be of limited practical importance' (Kennedy 1978, 221). However, he argued that it is a worthy undertaking, because in its absence we intensify the contradiction by regarding it as part of the nature of things.

Gable proposed the radical solution of getting rid of law, which he regarded as 'an imaginary form of social cohesion'. He recommended the 'delegitimation of the law altogether, which is to say the delegitimation of the notion that social life is created and enforced by imaginary ideas' (Gable 1980, 46). How this can be done is left unexplained. Unger, one of the iconic figures in the CLS movement, had a more ambitious plan of social construction. It involved multiplying the branches of government and subjecting them to popular sovereignty in different ways (Unger 1983, 31–2). The scheme called for the overhaul of the market based economy as we know it. Unger stated that 'the central economic principle would be the establishment of a rotating capital fund', from which capital would be 'made temporarily available to teams of workers and technicians under certain general conditions fixed by central agencies of government' (1983, 35). These conditions would be designed to limit income disparities and 'imperial expansion' of the organisations (Unger 1983, 35). The citizen would have four types of rights: *immunity rights* (security against others); *destabilisation rights* (right to challenge established institutions and social practices); *market rights* (provisional claims to

portions of social capital); and *solidarity rights* (legal entitlements of community life representing standards of good faith, loyalty and responsibility). Unger called this political theory 'superliberalism'.

What CLS achieved

Unger claimed that the result of the CLS attacks on formalism and objectivism (characteristics he attributed to the law) 'is to discredit, once and for all, the conception of a system of social types with a built in institutional structure' (1983, 8). Despite such self-laudatory statements CLS has not had great traction in jurisprudence or social theory. A key problem for the CLS scholars has been the fact that few outside their own circle perceive the world the way they do. The same sets of facts and circumstances are felt and interpreted differently by different people. What is seen as alienation by some may be seen as liberation by others. CLS tries to make people conscious of the alienation and oppression claimed to be imposed by the categories and modes of reasoning of liberal law and institutions. This consciousness raising is required because of the power of the law to condition people's thinking. Perhaps CLS has over-estimated the law's power over people and undervalued the people's power over law in liberal societies.

Unger's superliberal society at a glance seems unfeasible. Its economy needs a government to manage the allocation of resources for producing the means of existence. This is a return to socialist command and control that has been tried unsuccessfully. Unger's society also needs a government, however decentralised and fragmented, to define and enforce the four types of rights that he commended. How are these bodies constituted? If they are elected, how can we be sure that noble critical legal scholars are elected? How can elections be kept free of pressure group politics? How stable would such a political system be? Designing utopian systems is easy, but achieving them in the world of real people is hard.

Postmodernist challenge

The term 'postmodern' has its origins in the architectural movement that started in the 1950s as a breakaway from modern architecture. Whereas modern architecture sought perfection of form and detail, postmodern architecture shed the restrictions of form to embrace adventurous and unconventional design ideas.[1] The postmodern attitude of irreverence to tradition, freedom from form and creativity spread to art, music and literature and thence to philosophy and jurisprudence.

1 The modernist Seagram Building in New York and the postmodernist San Antonio Public Library in Texas, found easily on the internet, are excellent examples of the two styles.

Roots of postmodernist philosophy

Postmodernism did not start a new movement in philosophy but re-ignited an ancient debate under a new name – a debate that stretches back to the quarrels between Plato and the Sophists in the 5th century BC (see discussion in Chapter 5). The debate, at its core, is about the possibility of objective knowledge of the world and about right and wrong. The postmodernist attack aims at the heart of all science, including legal science, that is based on empirical observation and logical reasoning. If knowledge of the law and of facts is subjective, the rule of law is impossible. The Sophists rejected Plato's view that everything had an ideal form, and generally denied the possibility of objective knowledge. Our knowledge of the Sophist arguments comes mainly from the reports of their opponents, Plato and Aristotle. In the first book of Plato's *The Republic* Thrasymachus argues that there is no objective standard of justice, stating that 'right is the same thing in all states, namely the interest of the established government' (Plato 1974 (360 BC), 78). Gorgias of Leontini maintained that whatever exists cannot be known, and if it is known to one man he cannot communicate it to another (Russell 1962, 95).

The more recent inspiration for postmodernism in philosophy is found in the thinking of the German philosophers Friedrich Nietzsche (1844–1900) and Martin Heidegger (1889–1976). The way ordinary people observe the world around them has two aspects. One is the observer, the individual who observes. The other is the thing that is observed. The thing observed is assumed to have an existence that is real and independent of the observer. Thus, when I say that 'I see that table', I assume that I see a true table existing apart from myself. Nietzsche argued that the notion of a true world outside our perception of it is a useless and superfluous idea (1954, 485–6). In fact, the self too has no real existence. What I call 'I' is simply a social construct arising from the moral imperative of society to attribute responsibility for my actions (1954, 482–3). Heidegger's importance to postmodernism lies in the question that he posed in his famous book *Being and Time* (*Sein und Zeit*), published in 1927. Heidegger's language is unnecessarily convoluted, but the central question is easily understood. Knowledge is knowledge about what exists: things, persons, animals, events, the world, the universe, technology, science, and so on. Heidegger used the name 'beings' to cover all these. Knowledge is about 'beings'. Heidegger pointed out that although philosophers from Plato onwards have discussed the nature of 'beings', no one has inquired about what it really means for something to 'be' or exist. Rocks, motor cars and bacteria are beings, but they cannot think and hence cannot ask questions about the meaning of their existence (being). Human beings are different because they can ask such questions. Heidegger gave such an inquiring being the special name '*Dasein*', which in German means 'the Being'. Heidegger did not answer the question of what being means, except to say that being is in time (temporality). He did not use time in the ordinary sense of years, months and days, but in the sense that we are constituted partly by what we have been

(Heidegger 1993, 62–4). We are creatures of our past. Our birth, upbringing, education, environment, and all our life experiences make us what we are. Although Heidegger provided no answer, the question he posed inspired postmodernist theorists to challenge the very idea of an individual that is at the core of liberal theory.

The most radical of postmodernist scholarship is deconstruction theory. Deconstructionism, out of all postmodern views, is the most subversive of the liberal concept of law and of liberal political institutions. Hence, the following discussion will have a special focus on that school of thinking.

The nature of the problem

Lawyers are not alone in thinking that there is a real world out there. Most people go about their lives without questioning the realness of the world that they perceive with the help of their senses and their minds. When I see my neighbour's dog I think that there is a real dog. However, scientists know only too well that the way we see a dog is not the way the dog really is. To begin with, what we sense is mediated by the nature of our sense organs. We live in a world of perception. Although we may have reason to think that the perceptual world is affected by, and hence bears some correspondence to, the physical world, the two are very different. In microbiological terms the dog is a collection of cells with lives of their own. In the world of the particle physicist, it is a collection of interacting quanta. The world of our daily life is very different from the world of the scientist.

As already mentioned, philosophers at least from the time of the Sophists have identified an even deeper problem concerning our belief in a real world. The world of the scientist, though different from the world of mere lawyers, is nonetheless built on perceptions or mental pictures of things that are assumed to exist outside the mind. Hence, science presupposes the presence of a physical world. However, no scientist or philosopher has shown conclusively that the perceptions of our mind have anything to do with an external reality, although no one has established the contrary either. There are, in fact, two problems here. First, we cannot show that a world outside the mind exists without using our minds. Every perception of a thing is mediated by the mind. If we get rid of our minds we cannot perceive anything, and hence cannot demonstrate anything. Second, even if there are things out there, we cannot be sure that our perceptions represent things as they are. In other words, no one has seen the bridges that connect things to our minds. As Hume wrote, 'nothing is ever present to the mind but its perceptions, impressions and ideas' (1978 (1739–40), 67).

Philosophers have responded differently to these problems. Some maintain that there is a real world outside the mind. They are called 'realists'. Some realists think that the mind itself is a physical phenomenon, the result of the operations of our neurons. Then there are 'idealists' who maintain that all we

know are products of the mind. The idealists Berkeley and Mach denied the existence of a material world. 'Transcendental idealists', notably Immanuel Kant, theorised that there are two worlds: (1) the world of *phenomena*, which consists of perceptions; and (2) the world of *noumena*, or things in themselves, which exist outside our minds. According to Kant, we can only know the phenomenal world. The *noumena* of the outer world cause sensations in us, but these sensations are ordered by our own mental apparatus into the things that we perceive. Believers in this theory are also called phenomenologists. (See discussion in Chapter 3.)

Idealism raises a fundamental question concerning human knowledge: if all that we know are products of our own minds, is it possible that the objects we perceive are our own creations? It suggests that consciousness is not simply a passive receptacle or, as Locke envisaged, a white paper upon which the external world inscribes itself, but in fact is constitutive. If so, it may be argued, as some postmodernists do, that truth is a matter of the coherence of one's subjective beliefs or, at best, a question of conformity with the conventions of the epistemic community to which one belongs. It is not hard to see that such a conclusion is completely at odds with the way knowledge is regarded in society. It is generally thought that on most questions there is a right view, or at least an objectively preferable view. There are frequent disagreements among reasonable persons as to the truth, but there is a general consensus concerning the criteria by which the better view can be determined.

Postmodernism, on the contrary, represents a revolt against rationality and a rejection of objective reality. The adage 'knowledge is power' takes on a new meaning in postmodern thinking. In the past, this meant that knowledge was helpful in an instrumental sense. Knowing something that your opponents did not know (e.g. knowledge of the battlefield or of the state of the coffee crop in Brazil) gave you an advantage over them. According to postmodernists, knowledge is power in a deeper and more oppressive way. Since there is no objective knowledge, what passes for knowledge is simply claims of truth legitimated by convention or by some 'epistemic authority' that determines the criteria by which truth is established. What is scientifically true is determined by the norms set by the scientific community, and what is legally correct is determined by the modes of reasoning of the legal fraternity. Thus, knowledge is seen as a form of power. What are presented as examples of rational and objective knowledge in the Western intellectual tradition are subjective views. The rational subject, while holding essentially subjective views, 'constitutes itself as an authorised knower of that world while excluding other forms of subjectivity from having a similar, representational voice [and] these other forms of subjectivity, for example certain feminist and non-Western types, are invalidated or marginalised to greater or lesser degrees' (Poster 1989, 159). Rationality is seen as an indeterminate process involving standards that are 'historically contingent matters of convention, interpretation, or the imposition of power' (Smith 1988, 149).

The challenge to liberal legality

The certainty of the law depends to a large measure on people being able to agree on its meaning. This is impossible if all knowledge is subjective. The commonsense view is that law, whether it consists of custom, judicial precedent or express enactment, is objectively knowable, as are the facts to which the law is applied. The postmodern thesis that all knowledge is subjective, conventional or dictated by authority radically undermines this notion. We have to make two very important distinctions here between conventional theory and postmodernism.

First, according to mainstream theory, there is a difference between the statement that the law is conventional or authoritarian and the statement that *knowledge* is conventional or authoritarian. Traditional jurisprudence readily accepts that law is often a matter of convention (custom) or the result of authoritarian rule (as in the case of the commands of a sovereign). However, lawyers believe that the law, once established, is a matter of objective knowledge. If the postmodernist thesis is true, nothing is objectively knowable and hence there can be no correct or privileged interpretation of the law. Every statement of knowledge, whether it concerns law or science, is an act of legislation in the most fundamental sense (Lyotard 1984, 8). Second, traditional legal theory admits that there can be equally persuasive alternative interpretations of the law. Indeed, disagreements concerning the law and its application to particular facts are the very stuff of legal practice. However, lawyers generally agree on the modes of reasoning that are relevant to the understanding and application of statutes and precedents. There are always hard cases, but that is because of the inadequacy of existing rules or the lack of decisive factual evidence either way. In contrast, the postmodern denial of the possibility of a right answer is radical. No amount of information can help us overcome this problem, for information itself is subjective. Hence, a claim of the right view can be justified only by convention or authority.

Deconstruction and the law

Jacques Derrida (1930–2004), the Algerian-born French thinker, is one of the most influential figures in modern European philosophy. His theory of deconstruction poses the most profound challenge to liberal theories of law and hence deserves close attention. Derrida was not a jurist but a philosopher of language. The quality of his writing is appalling and some of his work is near impenetrable. Yet he is important enough for us to make the effort to understand his work.

It is not easy to understand post-structuralism without understanding structuralism. Ferdinand Saussure (1857–1913), the Swiss linguist, is widely regarded as the founder of the structuralist tradition. Structuralists were a group of thinkers who were interested in the deep structure of the different systems that make up our world. Saussure understood language in the broadest possible sense. Language includes writing, speech, signs, and even mental images

of sounds and signs (Saussure 1989, 15). He explained that language can be meaningfully studied only by giving the linguistic structure pride of place (1989, 10). There are several problems in understanding language.

In speech there are 'signifiers' and the 'signified'. The word 'cat' is a signifier. The object it signifies is the cat. However, there is no real or logical connection between the word 'cat' and the animal. If we simply utter the word 'cat' it is just a meaningless sound. There are two lessons from this observation. One is that a word has meaning only when it is delimited or separated from other words in a sequence. If I say that 'the cat is on the roof', the sound 'cat' begins to have some meaning.

> To summarise, a language does not present itself to us as a set of signs already delimited, requiring us merely to study their meanings and organisation. It is an indistinct mass, in which attention and habit alone enable us to distinguish particular elements. The unit has no special character, and the only definition it can be given is the following: *a segment of sound which is, as distinct from what precedes and what follows in the spoken sequence, the signal of a certain concept.* (Saussure 1989, 102)

A second lesson is that we cannot just string together words. The sequence 'roof the on is cat the' has no meaning. Hence, one can communicate in language only by making up sequences of words according to certain conventions or rules established in the community within which the language has grown (Saussure 1989, 11). These conventions represent the structure of the language.

Western philosophy is founded on the belief in the possibility of knowledge of the world around us. Although we may not be able to know directly and accurately the things that are outside our minds, we have perceptions about them and reliable knowledge can be gained from perceptions. Saussure argued that thought is possible only through language, hence there is nothing, even perceptions, before language (1989, 110). This means that a deaf and blind person such as the famous author and intellectual Helen Keller had some form of mental language before her teacher Annie Sullivan taught her to speak. (Presently, I argue the contrary, that language is a form of perception.)

Derrida, following Saussure, argued that there is no such thing as a perception that is independent of language:

> Perception is precisely a concept, a concept of an intuition or of a given originating from the thing itself, present itself in its meaning, independently from language, from the system of reference. And I believe that perception is interdependent with the concept of origin and of center and consequently whatever strikes at the metaphysics of which I have spoken strikes also at the very concept of perception. I don't believe that there is any perception. (1972, 272)

Derrida's point was that the idea of perception suggests that there is something that exists independent of language and prior to language. This is impossible, in Derrida's view, because there is nothing outside texts (*il n'y a pas de hors-texte*) (Derrida 1976, 163). People use words thinking that they represent real categories such as 'man', 'woman', 'child' and 'dog'. Derrida called this kind of false

category 'logos' and the belief in such categories 'logocentrism'. In Derrida's own difficult language: 'The system of language associated with phonetic-alphabetic writing is that within which logocentric metaphysics, determining the sense of being as presence, has been produced' (1976, 53).

Derrida was convinced that there is nothing outside texts, not even perceptions. This belief is fundamental to the deconstruction project. If there are no real objects to which words can refer, words can only refer to other words. Saussure said this before Derrida. However, in Saussure's view words have relatively stable meanings derived from their differences from other words. The aim of deconstruction is to show that words have no stable meanings at all. Hence, Derrida needed to destroy Saussure's structural theory to make deconstruction possible. In Saussure's theory of differences, words have a centre or core meaning that allows them to be differentiated from other words. Derrida argued that a centre imports the idea of a transcendental signified or a real thing outside language. Such a centre, he said, is impossible because there are only differences in a state of infinite play. He stated:

> [I]n the absence of a centre or origin, everything became discourse . . . that is to say, a system in which the central signified, the original or transcendental signified, is never absolutely present outside a system of differences. The absence of the transcendental signified extends the domain and the play of signification infinitely. (Derrida 1981, 280)

Why infinitely? It is common sense that you cannot know what a dog is without also knowing something of what a dog is not. Included in the notion of a dog are traces of the non-dog. However, Derrida's point is: all that a dog is not cannot be determined, now or ever. There is a spatial as well as a temporal aspect to this problem. Spatially, we cannot determine what 'non-dog' is because words representing instances of 'non-dog', such as 'octopus' or 'elephant', themselves derive their meanings from differences from other words, and so on forever. The temporal dimension arises from the fact that 'all that is not dog' depends not only on what is 'not dog' now, but what will be 'not dog' in the future. Since the future is infinite, the possibilities of 'not dog' are also infinite Hence, the meaning of 'dog' is never present, but is ever deferred. To indicate this temporal dimension, and to distinguish his idea from that of Saussure, Derrida employed a new word of his own making: *différance.* This infinite dissemination of meaning, and the fact that a word contains within itself its 'Other', makes language 'undecidable'. It is impossible to separate what is inside from what is outside. Every inquiry concerning meaning ends in an abyss, or '*aporia*'.

What are the consequences of deconstruction for law and justice? Derrida explained his view of justice at a symposium on 'Deconstruction and the possibility of justice' held in New York in 1989. His speech is published in a book bearing that name, in a chapter titled 'Force of law: the "mystical foundation of authority"' (Derrida 1992). The gist of Derrida's argument is as follows. Derrida said that no judicial decision can be just unless it is a 'fresh judgment'. To be

just, a decision must 'be both regulated and without regulation: it must conserve the law and also destroy it or suspend it long enough to have to reinvent it in each case, rejustify it, at least reinvent it in the affirmation and the new and free confirmation of its principle' (Derrida 1992, 23). The need for this reinvention or reaffirmation arises from the fact that every case is unique, and hence calls for an 'absolutely unique interpretation, which no existing, coded rule can or ought to guarantee absolutely' (Derrida 1992, 23). Most common law judges would agree with this view, notwithstanding the radical terms in which it is presented. Every case is undoubtedly unique, though many of them may look very similar. In applying a rule to a case, the judge is actually saying that the rule is such that it extends to the case at hand. Where a case is clearly within a rule or precedent, it may appear that the judge is making a mechanical decision. This is not so, as the judge must contemplate the meaning of the rule and the nature of the case, however simple the exercise may seem. Now, you may call this process the application of the law to each new case, or you may call it reaffirming the law in each case. Either way, you are describing the same process. Thus far, then, Derrida did not subvert the traditional notion of justice.

However, Derrida was committed to the notion of the undecidability of language. He said that the judge must take account of rules but in the end is confronted by the 'always heterogeneous and unique singularity of the unsubsumable example' (1992, 24). In simple words, Derrida was saying that, in the ultimate analysis, it is impossible to do justice by applying rules because each case is unique. It is critical to understand this point in order to realise the extent to which Derrida departed from the liberal notions of law and justice. We mortals think that sometimes a collection of individual things may differ from each other in various respects but may nevertheless have certain common characteristics that enable all of them to be grouped within one class or rule. A child who opens a bag of marbles may find that each item of this treasure is different from the others in colour and size. Yet, after examining them, the child may conclude that they are all marbles. Every act of killing a human being is unique in innumerable ways. Yet we think that the presence of certain qualities – such as the causing of death, the causal connection to the accused, and a defined state of mind – together with the absence of exculpatory circumstances, enables us to classify some of these acts as murder. No one has ever said that murder can be conclusively proved, only that it may be sometimes proved beyond the reasonable doubts of 12 jurors. We are able to make these classifications because we act as if there are real things out there and we believe that words can refer to these things. We can distinguish a marble from a dice because we think that both exist and that the word 'marble' refers to the spherical item and the word 'dice' to the cube-shaped item. In Derrida's world there are no objects, but only words without centres whose meanings are in constant flux as they interplay with other words. The trace of the dice is found in the marble and neither word has a core meaning that enables it to be differentiated from the other in a permanent way. Hence classifications and rules are impossible. What is outside is inseparable

from what is inside. So, in the end, the judge must be guided and also not be guided by a rule. This is the 'ordeal of the undecidable', which alone can produce justice. According to Derrida, as the just decision is made beyond rules, it is an act of madness:

> The instant of decision is a madness, says Kierkegaard. This is particularly true of the instant of the just decision that must rend time and defy dialectics. It is madness. Even if time and prudence, the patience of knowledge and the mastery of conditions were hypothetically unlimited, the decision would be structurally finite, however late it came, a decision of urgency and precipitation, acting in the night of non-knowledge and non-rule. Not of the absence of rules and knowledge but of a reinstitution of rules which by definition is not preceded by any knowledge or by any guarantee as such. (1992, 26)

If language is inherently undecidable, it is difficult to see how there can be any rules at all. In any case, Derrida was maintaining that the ultimate decision is uninformed by any rule. At the moment of judgment, judges are unfettered by law. What guides them at the moment of reckoning? According to Derrida, it is 'another sort of mystique' (1992, 25). Fortunately for those who cherish the rule of law, judges decide cases in a reasonably predictable way.

Could Derrida be wrong?

Derrida denied the existence of physical objects to which words could refer. If there are things outside texts, then words could refer to them and have relatively stable meanings. Derrida also denied that there is anything like perceptions. He equated perceptions to concepts. A mental world of concepts that exist outside language also makes deconstruction impossible. In such a world, concepts take the place of things and words could have determinate meanings by reference to the concepts. It does not matter whether a 'dog' is a physical entity or a mental entity. If such an entity exists outside language the word 'dog' can have a meaning anchored in that entity, so that the word will not 'disseminate' into Derridean indeterminacy. In other words, if there is such a mental dog, the claim that the word 'dog' has only momentary meanings resulting from interplay with other words loses its force.

Let us first look at Hume's idea of perception, as a convenient way to assess Derrida's thesis. Hume believed that only perceptions are immediately present to the mind. He distinguished two types of perceptions: (1) impressions, and (2) thoughts or ideas. Impressions are the more lively perceptions, such as those that we gain when we hear, see, feel, love, hate, desire or will (Hume 1978 (1739–40), 67). These are single mental experiences associated with sense data and emotions. Ideas are less forceful, as they are inferences formed out of impressions that are remembered. Single impressions are recalled as simple ideas and then linked together as compound ideas. I see an orange colour, feel a shape and texture, and smell a fragrance and I conclude that there is an orange in my hand. We link impressions and ideas according to the principle of cause and effect. We observe that certain objects are 'constantly conjoined with each another'. Where

there is fire, heat is felt, from which fact people conclude that fire causes heat. We expect cause and effect, not because of some 'inseparable and inviolable connection' between impressions but because of past experience (Hume 1978, 157). In the final analysis, human knowledge is experience or customary knowledge. Hume wrote: 'Without the influence of custom we should be entirely ignorant of every matter of fact beyond what is immediately present to the memory and senses . . . There would be an end at once of all action as well as of the chief part of speculation' (1975 (1748), 465).

Unlike Hume, Derrida denied that any kind of perception exists, and insisted that all we have are texts. Here, Derrida walked into his own trap. How do we know that there are texts? We know this only because we have perceptions or impressions of them. We see them, feel them, and hear them (Derrida's texts included speech). Saussure and Derrida thought that text even included mental images of words, but how do we have mental images of sounds or signs without perceiving them? Without perceptions or impressions there are no texts, however we define text. Without perception there are no texts, no authors, no Derrida – in short, nothing to deconstruct. If we admit that we perceive texts, we have no grounds to deny other perceptions. Derrida ignored this problem. His pronouncement '*Il n'y a pas de hors-texte*' is an *ex cathedra* pronouncement made without argument. As MH Abrahams stated, 'it functions as an announcement of where Derrida takes his stand – namely within the workings of language itself' (Abrahams 1989, 35). It is the metaphysical foundation of Derrida's philosophy. Take it away, and the edifice of deconstruction theory collapses.

Law and language game theory

All postmodernists share Derrida's disbelief in the possibility of objective knowledge, but not all of them treat knowledge purely as a matter of momentary personal taste. Language game theorists treat knowledge as something that is legitimated by the conventions of the relevant speech community. According to them, knowledge questions are not 'undecidable'. On this question Richard Rorty, a postmodern champion of rhetoric against philosophy, accused Derrida of succumbing 'to nostalgia, to the lure of philosophical system building, and specifically that of constructing yet another transcendental idealism' (1982, 89). According to language game theorists, knowledge, though lacking a transcendent foundation, is not a matter of unbridled subjectivism. These theorists:

> . . . try to show that the standards we develop for such matters as justice and truth are the products of specific language games, conventions, shared normative understandings or community practices, due to change when new contingencies arise from whatever source, including pure happenstance (Wolfe 1992, 361; compare Fish 1989, 23).

According to language game theory, knowledge is anchored in a contingent 'reality'. However, this 'reality' consists not of unsubsumable singularities, as Derrida

alleged, but of understandings that are in harmony with the conventions of the relevant community. As François Lyotard saw it, truth is that which conforms to the 'relevant criteria . . . accepted in the social circle of the "knower's" interlocutors' (1984, 19). According to Stanley Fish, this makes the individual a 'situated subject . . . who is always constrained by the local or community standards and criteria of which his judgment is an extension' (1989, 323). Language game theory's concession to a relatively stable, though contingent, form of communal knowledge appears to accommodate the rule of law to a much greater extent than does deconstruction. It means that rules can have stable meanings such that they are capable of guiding human action in the context of a given community.

Feminist jurisprudence

Feminist jurisprudence posed the third major challenge to liberal legal theory in the late 20th century. It owes much to the previously discussed CLS and postmodernist attacks on liberal legal theory, but has developed its own independent lines of reasoning. Unlike the CLS and postmodernist movements, feminism is grounded in a powerful moral case acknowledged by most liberal thinkers. It is the case for equal treatment of women and the elimination of all forms of oppression, whether direct or systemic.

Feminist jurisprudence must be distinguished from the much older political movement for equal rights and justice for women. The latter struggle began, and continues to be conducted, within the framework of the rules of liberal democracy. Feminist jurisprudence, on the contrary, finds liberal legal theory and methods of reasoning to be largely responsible for the oppressed condition of women. In particular, feminist jurists think that the liberal notion of objective legality is founded on abstract categories that do not recognise the circumstances and experience of women. Hence, this brand of feminist jurisprudence belongs to the genre of radical anti-liberalism.

Women are subjected to unspeakable oppression and cruelty in different parts of the world. In some Islamic societies women are punished for not covering their faces in public or even for being seen in public in the company of a male who is not a relative. Women in many societies are forced to marry against their wishes. Some are genitally mutilated. Women who cohabit without paternal approval are murdered in the name of family honour. The litany is endless. This kind of treatment is unlawful in liberal societies and feminists also condemn it. However, the main focus of feminist jurisprudence is not on the atrocities that women endure in illiberal societies but on the condition of women in liberal societies, under liberal law.

Feminist jurisprudence has generated a vast volume of literature and there are numerous overlapping strands of feminist legal theory. In an important essay, Patricia Cain identified four schools of feminist legal theory: (1) liberal

feminism, (2) radical feminism, (3) cultural feminism, and (4) postmodern feminism (1990, 829–47). I propose to consider these in turn, but first will say something of the status of women in liberal theory.

Liberalism and women

Liberalism, by definition, rejects discrimination and oppression of individuals or groups. Its commitment to the liberty of individuals from unjustified governmental or private interference is unqualified. The first political philosopher to state the case for the equality of men and women was John Stuart Mill, an iconic thinker of the liberal tradition. His essay *The Subjection of Women* remains to date the definitive liberal statement of the equality of men and women.

> The object of this Essay is to explain as clearly as I am able grounds of an opinion which I have held from the very earliest period when I had formed any opinions at all on social political matters, and which, instead of being weakened or modified, has been constantly growing stronger by the progress of reflection and the experience of life. That the principle which regulates the existing social relations between the two sexes – the legal subordination of one sex to the other – is wrong itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other. (Mill 1997 (1869), 1)

Mill regarded discrimination on grounds of gender as offensive to the most fundamental value of liberalism, which is the liberty of the individual. Mill's political theory was utilitarian. Like Bentham, he thought that the only irrefutable criterion of moral judgment was utility or advantage, not just for the individual but for society as a whole. All of humanity gains by eliminating discrimination and oppression of women, who constitute half its number. Mill feared that his message of women's liberation would not prevail against the popular opinions and feelings of his time. Yet in the century and a half since he wrote the essay, women in liberal democracies have made impressive gains through political action. They have won equal voting rights, marital rights, property rights and access to education, professions and most occupations. They have increased their representation in the branches of government and corporate boardrooms. Liberalism in theory rejects all formal and informal barriers to entry into professions, occupations and public offices.

Most liberal democracies have constitutional or statutory prohibitions against discrimination on grounds of gender. Liberal views on gender equality were the prime movers for the preparation and adoption in 1981 of the United Nations *Convention on the Elimination of All Forms of Discrimination*. It has been ratified by all liberal democratic nations. The treaty has been operationalised in these countries in a variety of ways, including constitutional entrenchment, special legislation and judicial application.