Jurisprudence

2010–2011

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How to use this book

Welcome to this new edition of Routledge Jurisprudence Lawcards. In response to student feedback, we've added some new features to these new editions to give you all the support and preparation you need in order to face your law exams with confidence.

Inside this book you will find:

- NEW tables of cases and statutes for ease of reference

Table of Cases

Table of Statutes

Revision Checklists

We've summarised the key topics you will need to know for your law exams and broken them down into a handy revision checklist. Check them out at the beginning of each chapter, then after you have the chapter down, revisit the checklist and tick each topic off as you gain knowledge and confidence.

1

Sources of law

- [ ] Primary legislation: Acts of Parliament
- [ ] Secondary legislation
- [ ] Case law
- [ ] System of precedent
- [ ] Common law
- [ ] Equity
- [ ] EU law
- [ ] Human Rights Act 1998

Key Cases

We've identified the key cases that are most likely to come up in exams. To help you to ensure that you can cite cases with ease, we've included a brief account of the case and judgment for a quick aide-memoire.

HENDY LENNOX v GRAHAME PUTTICK [1984]

Basic facts

Diesel engines were supplied, subject to a *Romalpa* clause, then fitted to generators. Each engine had a serial number. When the buyer became insolvent the seller sought to recover one engine. The Receiver argued that the process of fitting the engine to the generator passed property to the buyer. The court disagreed and allowed the seller to recover the still identifiable engine despite the fact that some hours of work would be required to disconnect it.

Relevance

If the property remains identifiable and is not irredeemably changed by the manufacturing process a *Romalpa* clause may be viable.

Companion Website

At the end of each chapter you will be prompted to visit the Routledge Lawcards companion website where you can test your understanding online with specially prepared multiple-choice questions, as well as revise the key terms with our online glossary.

You should now be confident that you would be able to tick all of the boxes on the checklist at the beginning of this chapter. To check your knowledge of Sources of law why not visit the companion website and take the Multiple Choice Question test. Check your understanding of the terms and vocabulary used in this chapter with the flashcard glossary.

Exam Practice

Once you've acquired the basic knowledge, you'll want to put it to the test. The Routledge Questions and Answers provides examples of the kinds of questions that you will face in your exams, together with suggested answer plans and a fully-worked model answer. We've included one example free at the end of this book to help you put your technique and understanding into practice.

QUESTION 1

What are the main sources of law today?

Answer plan

This is, apparently, a very straightforward question, but the temptation is to ignore the European Community (EU) as a source of law and to over-emphasise custom as a source. The following structure does not make these mistakes:

- in the contemporary situation, it would not be improper to start with the EU as a source of UK law;
- then attention should be moved on to domestic sources of law: statute and common law;
- the increased use of delegated legislation should be emphasised;
- custom should be referred to, but its extremely limited operation must be emphasised.

ANSWER

European law

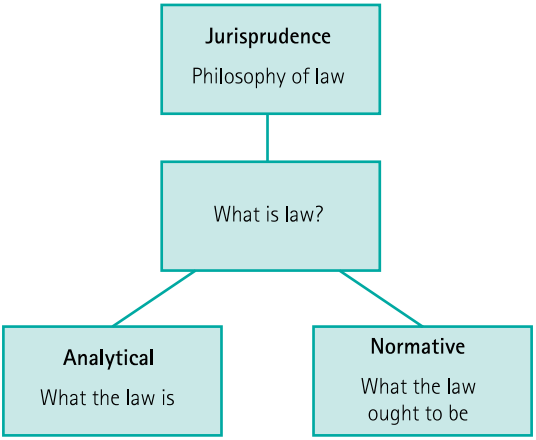
Since the UK joined the European Economic Community (EEC), now the EU, it has progressively but effectively passed the power to create laws which are operative in this country to the wider European institutions. The UK is now subject to Community law, not just as a direct consequence of the various treaties of accession passed by the UK Parliament, but increasingly, it is subject to the secondary legislation generated by the various institutions of the EU.

1

The nature of jurisprudence

- Definitions of jurisprudence
- Key jurisprudential questions: what is the law?/what constitutes good law?
- Austin's division between analytical and normative jurisprudence
- Other subdivisions of jurisprudence
- The terminology of jurisprudence
- Formalist and contents approaches to moral philosophy
- Hart's definitions of positivism
- Differences between branches of utilitarianism
- General questions arising from jurisprudence's two key questions

WHAT IS JURISPRUDENCE?



PROBLEMS OF DEFINITION

The word 'jurisprudence' is derived from two Latin words – *juris*, meaning 'of law', and *prudens*, meaning 'skilled'. The term has been used variously at different times, ranging from its use to describe mere knowledge of the law to its more specific definition as a description of the scientific investigation of fundamental legal phenomena.

A strict definition of jurisprudence is, as is the case with many general terms, difficult to articulate. The main problem with jurisprudence is that its scope of inquiry ranges over many different subjects and touches on many other disciplines, such as economics, politics, sociology and psychology, which would normally be regarded as having little to do with law and legal study.

As such, the best definition is perhaps that supplied by Roger Cotterrell in *The Politics of Jurisprudence*: 'Jurisprudence is probably best defined negatively as encompassing all kinds of general intellectual inquiries about law that are not confined solely to doctrinal exegesis or technical prescription.'

As a subject, jurisprudence may be said to involve the study of a wide range of social phenomena, with the specific aim of understanding the nature, place and

role of law within society. The main question which jurisprudence seeks to answer is general and may be phrased simply as:

What is the nature of law?

This question can be seen as being actually two questions in one, that is:

What is the law?

What constitutes good law?

Answers to these two questions constitute two major divisions in jurisprudential inquiry. These are:

- analytical jurisprudence; and
- normative jurisprudence.

These two divisions were first clearly specified by John Austin in his text *The Province of Jurisprudence Determined* (1832). Other divisions and subdivisions have been identified and argued for as the field of jurisprudence or legal philosophy has expanded.

SOME DISTINCTIONS IN JURISPRUDENCE

The work of jurists can be divided into various distinctive areas, depending mainly on the specific subject matter with which the study deals. What follow are some of the more important divisions and subdivisions, although it is important to remember that there are others.

Analytical jurisprudence

Involves the scientific analysis of legal structures and concepts and the empirical exercise involved in discovering and elucidating the basic elements constituting law in specific legal systems. The question to be answered is: what is the law?

Normative jurisprudence

Refers to the evaluation of legal rules and legal structures on the basis of some

standard of perfection and the specification of criteria for what constitutes 'good' law. This involves questions of what the law ought to be.

General jurisprudence
Refers to an abstracted study of the legal rules to be found generally in the more developed legal systems.

Particular jurisprudence
The specific analysis of the structures and other elements of a single legal system.

Historical jurisprudence
A study of the historical development and growth of legal systems and the changes involved in that growth.

Critical jurisprudence
Studies intended to provide an estimation of the real value of existing legal systems with a view to providing proposals for necessary changes to such systems.

Sociological jurisprudence
Seeks to clarify the link between law and other social phenomena and to determine the extent to which its creation and operation are influenced and affected by social interests.

Economic jurisprudence
Investigates the effects on the creation and application of the law of various economic phenomena, for example, private ownership of property.

THE TERMINOLOGY OF JURISPRUDENCE

Many of the terms used in the study of jurisprudence are relatively unfamiliar and belong more to the realm of philosophy than to that of law. The following are some of the more commonly used terms and brief explanations of what they may mean in specific contexts. It is important always to remember that specific meanings are sometimes ascribed to certain terms by particular jurists, and that these meanings may be different from the ordinary usages.

Cognitivism

This is the position according to which sentences used in a given discourse are cognitive, that is, are meaningful and capable of being *true* or *false* – for example, 'grass is green' is a true proposition. In the area of jurisprudence, it refers to the view that it is possible to know the absolute truth about things – for example, what constitutes truth about justice. Thus in the cognitivist approach the sentence 'it is always wrong to kill another human being' can be true or false.

Contractarian

This applies to assertions or assumptions that human society is based upon a social contract, whether that contract is seen as a genuine historical fact, or whether it is hypothesised as a logical presumption for the establishment and maintenance of the ties of social civility.

Dialectical

Dialectic is a debating method first used by Greek philosophers. It instrumentalises contradiction, or the exchange of arguments and counter-arguments respectively advocating *propositions* (theses) and *counter-propositions* (antitheses). At its most simplistic, the dialectical operation can be set out in this form:

- *Thesis:* an existing or established idea.

This is challenged by an:

- *Antithesis:* an opposite and contradictory idea.

The outcome of the ensuing struggle between the thesis and the antithesis is a union and interpenetration of the two opposites, which constitutes the:

- *Synthesis:* a newer and higher form of idea, which contains qualitatively superior elements pertaining to the two opposites.

The new synthesis, however, will inevitably be challenged by another, newer and opposite idea, and so the synthesis becomes the new thesis, with its antithesis being the new opposite. The continual repetition of this cycle of struggle and resolution constitutes the dialectic, and results in development and change in all things.

Discretion

In judicial decision-making, the supposition that judges, in making decisions in 'hard cases' – that is, cases where there is no clear rule of law which is applicable or where there is an irresolvable conflict of applicable rules – make decisions which are based on their own personal and individual conceptions of right and wrong, or what is best in terms of public policy or social interest, and that in so deciding they are exercising a quasi-legislative function and creating new law.

Many positivists, for example, John Austin and Herbert Hart, would allow for the fact that where there is no clearly applicable rule of law judges do in fact exercise their discretion in deciding cases. Ronald Dworkin, however, strongly denies this and argues that judges have no discretion in 'hard cases' and that in every case there is always a 'right answer' to the question of who has a right to win.

Efficacy

Effectiveness and efficiency, as in the capacity of a certain measure, structure or process to achieve a particular, desired result.

For Hans Kelsen, efficacy is a specific requirement for the existence of a legal system and therefore of law, as in the capacity of officials to apply sanctions regularly and efficiently in certain situations.

Empiricism

In legal philosophy, an approach to legal theory which rejects all judgments of value and regards only those statements which can be objectively verifiable as being true propositions about the nature of law. Legal empiricism is based upon an inductive process of reasoning, requiring the empirical observation of facts and the formulation of a hypothesis which is then applied to the facts, before an explanatory theory of legal phenomena can be postulated.

Formalism

In legal theory, the approach which seeks to minimise the element of choice in the interpretation of terms contained in legal rules and emphasises the necessity of certainty and predictability in the meaning of such rules. Legal formalists would advocate the attribution of specific meanings to certain terms

from which the interpreter of a legal rule could not deviate, and require that such terms should have those same meanings in every case where the rule is applicable.

Functionalism
For functionalism, society is made up of interdependent sections which combine to fulfil the functions necessary for the survival of society as a whole. A functionalist interpretation of the law will therefore focus on the social functions fulfilled by law.

Good
Some value or interest which it is generally considered desirable to attain or provide for in social arrangements, for example, liberty, equality or dignity.

Imperative
With reference to theoretical approaches to the nature of law, the conception which regards law as being constituted generally by the commands, orders or coercive actions of a specific, powerful person or body of persons in society. The main imperative theories are the positivist approaches of:

- *Bentham* and *Austin*: law as a set of general commands of a sovereign backed by the threat of sanctions;
- *Kelsen*: law as a system of conditional directives (primary norms) to officials to apply sanctions.

Intuitionism
Intuition is the immediate apprehension of an object by the mind without the intervention of any reasoning process. Intuitionism refers to the view in moral philosophy according to which humans possess a faculty, conscience, by which they are able directly to discover and determine what is morally right or wrong, good or evil.

Libertarian
Of or concerning approaches to legal and social arrangements which generally give priority to the concept of liberty, or the specification, attainment and protection of particular basic freedoms.

Materialism

In Marxist theory, the notion that changes and developments in human society are based on the material conditions of human existence. The two notions of dialectical materialism and historical materialism in Marxist theory are based on the assumption that there are ongoing associations and contradictions between various social, technical, economic and political phenomena which determine the historical development of society.

Morality

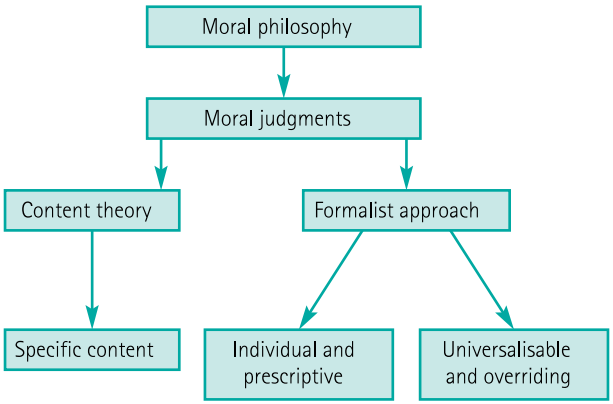
The making, holding or expression of moral judgments, that is, conceptions of what is good and bad, right and wrong or acceptable and unacceptable as judged in accordance with some *a priori* standard which may be a personal or social convention.

Moral philosophy

The formalised attempt to understand the thinking underlying or reinforcing moral judgments.

TWO APPROACHES TO MORAL PHILOSOPHY

There are two main approaches to moral philosophy which comprise distinct theoretical schools of thought.



(1) FORMALIST APPROACHES

These argue generally that what constitutes morality is entirely a question of personal value judgments – morality is a question of the attitude which a person has to a particular issue or problem, rather than an intrinsic quality of the issue or problem itself. Morality cannot therefore be made the subject of empirical and objective observation and analysis, and thus there is no theoretically defensible answer as to what morality is. Moral philosophy should, therefore, be concerned with purely formal questions. In this regard, a moral judgment may be identified by having regard to four formal characteristics.

(i) Prescriptive

It must constitute a specific recommendation, directed at oneself and others as to how to act in certain circumstances.

(ii) Overriding

It must be intended that where there is a conflict between the moral judgment in question and any other recommendations, then the former must take precedence.

(iii) Universalisable

The recommendation that a moral judgment must be capable of applying, and intended to apply, not only to the issue or problem in hand but also to all similar cases.

(iv) Categorical

It is not hostage to the personal ends of the subject who carries out the judgment.

Note: the formalist approach is best expressed in Immanuel Kant's moral philosophy. Kant formulated the categorical imperative as follows in *Groundwork of the Metaphysics of Morals*: 'Act only according to that maxim whereby you can at the same time will that it should become a universal law.' Thus, for example, according to the categorical imperative, lying is always immoral, even if one lies to save the life of a friend.

(2) CONTENT THEORIES

These regard morality as something which has or can have a specific content and which, therefore, can be objectively identified and empirically analysed. Morality constitutes a definite social phenomenon which has developed to

assist mankind in dealing with recurring problems of the human condition. It comprises principles for establishing the proper balance in the interrelationships between persons in society and for protecting interests and values which are regarded as being vital in various societies. Law can, therefore, be considered invalid if it substantially deviates from the requirements of such principles. An example of this approach to morality is Thomas Aquinas' view that '*lex injusta non est lex sed corruptio legis*' (an unjust law is not law).

Natural law

The philosophy of law which proceeds from an assumption that law is a social necessity based on the moral perceptions of rational persons and that any law which violates certain moral codes is not valid at all. Human law is thus based on certain universal principles, discoverable through reason or revelation, which are seen as being eternal, immutable, and ultimately based on the nature of human beings.

Norm

A generally accepted standard of social behaviour. Note that Hans Kelsen uses the term in his definition of law as 'the primary norm that stipulates the sanction' to refer specifically to 'a conditional directive given to officials to apply sanctions under certain circumstances'.

Obligation

For Herbert Hart, a distinction must be made between 'being obliged' to act or forbear, and being 'under an obligation' to act or forbear, the former being motivated by fear of some sanction which occurs as an external stimulus, and the latter being comprised of both the external element and an internal element whereby the subject feels a sense of duty to act or forbear.

Policy

A statement of a social or community goal aimed at some improvement of the social, economic or political welfare of the members of the group in general. As such, a policy may be pursued sometimes even though this would lead to a restriction of the rights of individuals. Dworkin makes a specific distinction between matters of policy as defined and matters of principle, which he regards as setting out the rights of individuals, and he points out the need for justice and fairness in creating a balance between the two.

Positivism

The approach to the study of law which considers the only valid laws to be those laws that have been 'posited', that is, created and put forward by human beings in positions of power in society. Generally, positivism rejects the attempt of Natural Law theory to link law to morality. Herbert Hart has identified at least six different ways in which the term 'positivism' may be employed:

1. Positivism in the definition of law: that law in the wider sense is defined as the expression of human will and that law as the command of the 'sovereign' is the most prominent example of this form of positivism.
2. Positivism as a theory of a form of legal study: the object of which is the analysis or clarification of the meanings of legal concepts, that is, analytical jurisprudence, which is purely a conceptual – as distinct from a sociological, historical, political or moral – investigation of the law.
3. Positivism as a theory of the judicial process: that a legal system is a closed logical system in which correct decisions can be deduced from a conjunction of a statement of the relevant legal rules and a statement about the facts of the case.
4. Positivism as a theory of law and morals: that there is no necessary connection between law as it is and law as it ought to be, the so called 'separation thesis'.
5. Positivism and non-cognitivism in ethics: that moral judgments cannot be established by rational argument, evidence or proof.
6. Positivism and the obligation to obey the law: that there is an unconditional obligation to obey the law, no matter what the content.

Principle

As opposed to a policy, a statement or proposition which describes the rights which individuals may hold apart from those which are specified in the legal rules of a community.

Rationality

The ability to use one's reason or mental faculties generally to evaluate alternative courses of action, to make choices in terms of one's preferences, to set goals and to formulate efficient plans for the attainment of such goals.

Realism

The philosophical approach which emphasises objectivity over sentiment and idealism in the investigation of phenomena. Realists generally argue that the perception of phenomena is an experience of objective things which are independent of the private sense-data that we may initially hold. A meaningful analysis of the nature of law must therefore concentrate on the objective experience of the actual practice of the courts, rather than on some 'rules' which are supposed to guide the attitudes of judicial officials. Legal realism has expressed itself in two main forms:

1. *Scandinavian realism*: espoused by Hagerstrom (1868–1939), Lundstedt (1882–1955), Olivecrona (1897–1980) and Ross (1899–1979). This movement generally rejects metaphysical speculation on the nature of law, regards the ideas and principles of Natural Law as being unacceptable, and argues that the only meaningful propositions about law are those which can be verified through the experience of the senses.
2. *American realism*: William James (1890–1922), John Dewey (1859–1952) and other jurists of this school emphasised the actual practice of the courts and the decisions of judges as comprising the essential elements of law. The law, they argued, is not to be found in certain rules and concepts which may guide officials to reach decisions. It is rather to be found in the actual decisions of judges and predictions of these; for, until a judge pronounces what he or she is going to do about a particular case, we can never know what the law is going to be and how it is going to be applied. Such things as statutes, for example, are therefore merely sources of the law rather than a part of the law itself.

Rule

A statement formally specifying a required mode or standard of behaviour. Note: Herbert Hart, in *The Concept of Law* (1961), emphasises the nature of a rule as a generally accepted standard of behaviour. Law is then constituted by a systemic interaction between specific types of social rules with particular characteristics: primary rules, which impose duties on citizens to act or forbear in certain situations; and secondary rules which are power-conferring and which determine how the primary rules may be properly created, applied and changed.

Sanction

The formal consequence (usually negative or harmful) which is directed at, and normally follows from a specific act of a particular person or persons, where that act is regarded by society or some specific organ of society, for example, the State, as being a requisite condition for the consequence and a justification for the exertion by society or the State of some of its legitimate power against the person or persons.

Note: John Austin, in *The Province of Jurisprudence Determined* (1832), defines sanctions negatively as constituting some 'harm, pain or evil'. He regards sanctions as being a necessary element of law since, for him, the law is made up of the general commands (that is, the expression of certain wishes) of a sovereign, backed by sanctions – that is, the threat of some negative consequences which may follow from non-compliance with the command by the sovereign's subjects. Hans Kelsen, in *General Theory of Law and the State* (1945), regards sanctions both positively and negatively as constituting either punishments or rewards which officials are directed to mete out to citizens under certain conditions. For Kelsen, sanctions are also an essential element of law, since all law in fact comprises 'primary norms' or conditional directives to officials to apply sanctions under certain circumstances.

Social constructionism

A sociological theory of knowledge which considers how social phenomena develop in particular social contexts. A social construct, even though it may seem self-evident to the participants of a given society, is in fact the invention of that society.

Teleology

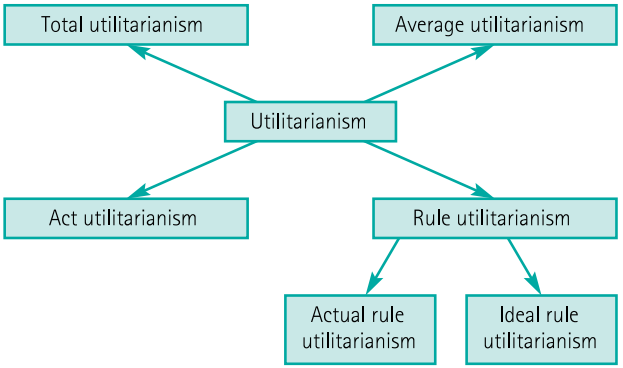
The view that everything has an ultimate end or purpose towards which it will inevitably develop. Classical Natural Law theorists would argue, for example, that humans and their society have as an end some ultimate state of perfection, to which they must naturally approximate and towards which they must necessarily strive, and that law is an essential device for precipitating this end (from the Greek *telos*, meaning end, purpose).

Utilitarianism

The approach of moral philosophy which regards an act, measure or social or legal arrangement as being good or just if its overall effect is to advance the

happiness or general welfare of the majority of persons in society. Utilitarianism is a goal-based approach to the problems of justice in the distribution of the benefits and burdens of society, in that it gives precedence to the advancement of the collective good or welfare, even if this may involve extinguishing or curtailing the rights and political or other liberties of the individual.

BRANCHES OF UTILITARIAN THEORY



- **Total (classical) utilitarianism**: where social and legal measures or institutions are regarded as just if their operation, on the whole, serves to maximise aggregate happiness or welfare.
- **Average utilitarianism**: where social and legal measures or institutions are regarded as just if their operation, on the whole, serves to maximise average happiness or welfare *per capita*.
- **Act utilitarianism**: where a specific act or measure is regarded as right if it will on the whole have the best consequences.
- **Actual rule utilitarianism**: where an act or measure is regarded as right if it is permitted by a rule which, if generally followed, will on the whole have the best consequences.
- **Ideal rule utilitarianism**: where an act or measure is regarded as being right if it is permitted by a rule which, if generally followed, will on the

whole have consequences as good as or better than any other rule governing the same act.

THE SUBJECT MATTER OF JURISPRUDENCE

WHAT IS INVOLVED IN THE STUDY OF JURISPRUDENCE?

The broad divisions of jurisprudential inquiry have been set out above. Those divisions clearly illustrate that jurisprudence covers a wide area of study, dealing with a variety of issues and topics as well as touching on a whole range of other disciplines such as philosophy, political science, sociology, religious studies, economics. What brings unity to jurisprudence as a field of study, however, is that all lines of inquiry revolve around the same two questions:

What is law?

What ought the law to be?

Indeed all jurisprudential currents essentially seek to explain the incidence, existence and consequence of law as a social phenomenon, and to criticise it constructively. Consequently, the questions that tend to be asked have to do with the following matters:

- the origin and sources of law generally and/or in specific societies;
- the historical development of law in general and the emergence and evolution of specific legal systems, traditions and practices;
- the meaning of specific legal concepts and the construction of various legal structures and processes;
- the link between law and other social phenomena such as political ideologies, economic interests, social classes, and moral and religious conventions;
- the operation of the law as a mode of social control, and the effects that it has on the persons to whom it applies in terms of justice as well as social, economic and political developments.

You should now be confident that you would be able to tick all the boxes on the checklist at the beginning of this chapter. To check your knowledge of The nature of jurisprudence why not visit the companion website and take the Multiple Choice Question test. Check your understanding of the terms and vocabulary used in this chapter with the flashcard glossary.

2

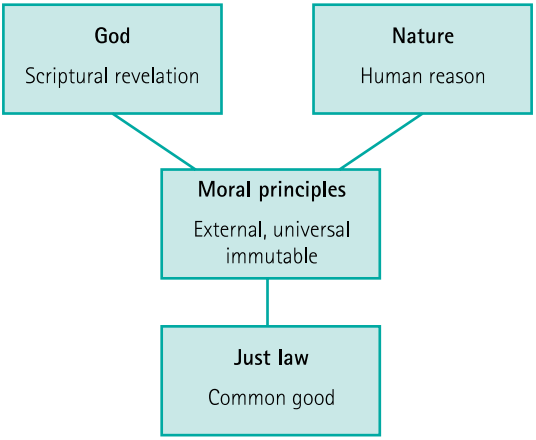
Natural law theory

- What is natural law?
- Sources of the higher principles reflected in law
- Key tenets of natural law theory
- The development of natural law theory throughout the ages
- Aquinas' integration of the rationalist and religious approaches to natural law
- JM Finnis' modern natural law theory
- Practical reasonableness and the objective goods
- How is the 'ought' derived from the 'is' for Finnis?
- The Principle of Generic Consistency
- Main criticisms of natural law theory

THE ESSENCE OF NATURAL LAW THEORY

Natural Law theory seeks to explain law as a phenomenon which is based upon and which ought to approximate to some higher law contained in certain principles of morality. These principles find their source in either religion or reason.

TWO MAIN APPROACHES OF NATURAL LAW THEORY



Theological theories

These regard the universe and human society as being under the governance of some Deity, who has laid down constant principles which must eternally control all of creation. These principles constitute a higher law which is universal, that is, common to all societies, and immutable, that is, it cannot be changed through human agency. This higher law can be grasped through Revelation as in the scriptures or through the use of Reason. All human arrangements, including law, must conform as far as is possible to these principles.

Secular theories

These proceed from regarding human beings as having a certain conception of morality which is intrinsic to them and to their nature. This morality, which

sometimes manifests itself in the form of conscience, is made up of basic principles which form a basis for proper human action. These principles are discoverable through the application of Reason and they ought to form the proper basis for law making. To this extent they constitute a 'higher law' to which all human laws must strive to conform.

FIVE PRESUPPOSITIONS OF NATURAL LAW THEORY

1. Natural Law is based on value judgments which emanate from some absolute source and which are in accordance with Nature and Reason.
2. These value judgments express objectively ascertainable principles which govern the essential nature of persons and of the universe.
3. The principles of Natural Law are immutable, eternally valid and can be grasped by the proper employment of human reason.
4. These principles are universal and when grasped they must overrule all positive law, which will not truly be law unless it conforms to Natural Law.
5. Law is a fundamental requirement of human life in society.

THE GENERAL METHODOLOGY OF NATURAL LAW THEORY

Natural Law theorists have a teleological view of the universe and of human society. This means that they regard the world, especially human society, as having an ultimate purpose which generally refers to some state of perfection towards which society is advancing.

Law, as a device for promoting the desired good, is regarded as being a social necessity in the sense that it provides both a guide for those who are working for the common good, and a control for those who may deviate from what is morally acceptable.

All human laws, if they are to be good and therefore valid, must be created in line with specific moral constraints and must operate in such a way that they provide the optimum conditions, resources and opportunities for the attainment of the common good.

The important question concerning the nature of law is therefore not what the law is at any point in time, since this may not be a true reflection of the principles of Natural Law, but what the law ought to be in order for it to be a true reflection of such principles.

A law which substantially deviates from the principles of Natural Law is not only a bad law, but can be regarded as invalid as well, since it does not truly reflect the model of what law ought to be.

THE HISTORICAL DEVELOPMENT OF NATURAL LAW THEORY

The concept of natural law was very important in the development of the common law. Parliament often made reference to the Fundamental Laws of England which were at times said to embody natural law principles and set limits on the power of the monarchy.

See diagram on facing page.

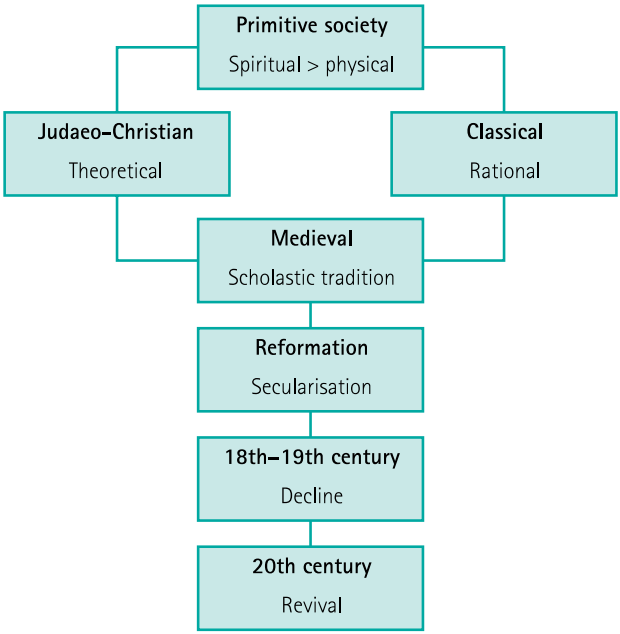
EARLY BEGINNINGS

It is possible to trace Natural Law thinking from the most primitive stages of social development when, for many simple societies, there was at some stage very little distinction made between the religious and the secular, the spiritual and the physical. Many early communities all over the world tended to see a link between the natural world of physical matter and the spiritual world of gods and spirits. The spiritual world was seen as being in control of the physical, including human society, and with a multiplicity of gods and spirits, there was a spiritual entity associated with the workings of almost every aspect of the physical world.

THE HISTORICAL DEVELOPMENT OF NATURAL LAW THEORY

This gave birth to the notion that there was some higher power in control of human existence, and therefore some higher set of rules, principles or laws which humankind could discover and utilise for the proper governance of their lives and thus lead a perfect existence.

This state of perfection was then seen as a goal which the various gods and spirits might have intended for humanity, and it thus became an ultimate purpose for all to work at achieving.



THE CLASSICAL PERIOD AND THE CHRISTIAN ERA

In Europe, the ascendancy of the Judaeo-Christian tradition replaced the polytheism of the ancients with a monotheism which attributed the creation, governance and ultimate judgment of human society to a single Deity. It was then possible to define a singular purpose for human existence, with a divine lawgiver providing basic principles for human morality and law through the scriptures, and requiring that societies govern themselves on the basis of these principles.

Parallel to this spiritual/religious development of Natural Law, early Greek and pre-Socratic philosophers developed the idea of rationalism. They surmised that the universe was governed by intelligible laws capable of being grasped by the human mind. It was therefore possible to derive, from the rationality of the universe, rational principles which could be utilised to govern life in society.

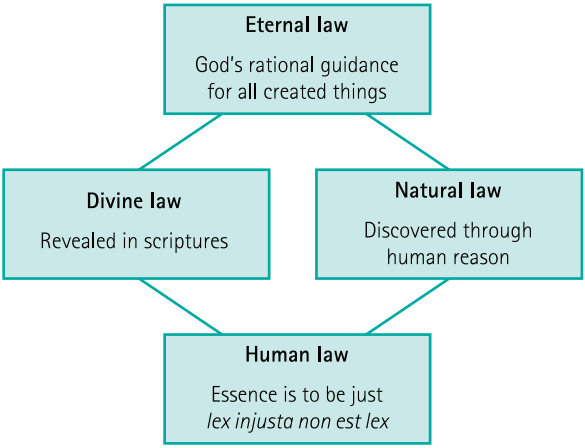
Some examples of classical Natural Law thinking are:

- *Socrates* (470–399 BCE) argued that there were principles of morality which it was possible to discover through the processes of reasoning and insight. Law based on these principles would thus be the product of correct reasoning.
- *Plato* (428–348 BCE) further developed the 'idea' of justice as an absolute 'thing-in-itself' having qualities of truth and reality higher than those of positive law, which could then be seen as a mere shadow of real justice. Law must constantly strive to approximate to the Absolute Idea of justice, and ideal justice could only be achieved or fully realised in an ideal State ruled over by philosopher-kings capable of grasping the Absolute Idea of justice.
- *Aristotle* (384–322 BCE) recognised Nature as the capacity for development inherent in particular things, aimed at a particular end or purpose, in both physical and moral phenomena. He also made a distinction between:
  - *Natural justice*: common to all humankind and based on the fundamental end or purpose of human beings as social and political beings, which he concluded to be the attainment of a 'state of goodness';
  - *Conventional justice*: varies from State to State in accordance with the history and needs of particular human communities.
- The *Stoics* identified Nature with Reason, arguing that Reason governs all parts of the universe, and that humans, as part of the universe and of Nature, are also governed by Reason. People will therefore live 'naturally' if they lived according to their Reason.
- *Cicero* (106–43 BCE) argued that Nature provided rules by which humankind ought to live and that these rules, which could be discovered through Reason, should form the basis of all law. He established the view that an unjust law is not law and argued that a test of good law was whether it accorded with the dictates of Nature.

THE MEDIEVAL PERIOD

This stage in European history saw the final integration of the rationalist and the religious approaches to Natural Law. Mainly this was the work of Thomas Aquinas (1224–74).

AQUINAS' FOUR CATEGORIES OF LAW



Aquinas divided law into four categories (see above):

- *Eternal law*: which constitutes God's rational guidance of all created things, is derived from the divine wisdom and based on a divine plan.
- *Divine law*: that part of eternal law which is manifested through revelations in the Christian scriptures.
- *Natural law*: which describes the participation of rational creatures in the eternal law through the operation of reason.
- *Human law*: which is derived from both Divine law and Natural law and which is, or must be, directed towards the attainment of the common good. This law may be variable in accordance with the time and circumstances in which it is formulated, but its essence is to be just. Thus: *lex injusta non est lex* (an unjust law is not law).

For Aquinas, a human law is unjust where it:

- furthers the interests of the lawgiver only;
- exceeds the powers of the lawgiver;
- imposes burdens unequally on the governed.

Under these circumstances, then, disobedience to an unjust law becomes a duty. However, such disobedience, though justified, should be avoided where its effects would be to lead to social instability, which is a greater evil than the existence of an unjust law.

THE SECULARISATION OF NATURAL LAW

This began with the decline of the Roman Catholic Church, following the Reformation in Europe. Essentially, this secularisation resulted from Protestant theorists seeking to develop a doctrine of Natural Law which would not be dependent on the papacy and papal pronouncements for its coherence.

One of the main secular Natural Law theorists at this stage was Hugo Grotius, a Dutch statesman and jurist who in his writings sought to separate Natural Law from its narrow theological foundations. Instead, Grotius emphasised the classical explanation of Natural Law as being grounded in the authority of Reason based on the Aristotelian system – that is, that Natural Law principles are derived or derivable from the nature of the human intellect which requires and desires society to be peaceful. Thus, these principles are independent of Divine command and it is possible to have Natural Law without appealing to God. Any law contrary to the principles so derived would be invalid from the point of view of rationality, and laws could be seen as having a constructive and practical function – the creation and maintenance of a peaceful society.

THE DECLINE OF NATURAL LAW THEORY

The 18th and 19th centuries saw the decline of Natural Law theory as it came under attack from rationalist and increasingly secularist approaches to the problems of the human condition.

THE 18TH CENTURY

In the 'age of reason', thinkers like Montesquieu (1689–1755), Hume (1711–76) and Adam Smith (1723–90) criticised Natural Law theory for its assertion that there was some ultimate, metaphysical purpose to human existence and human society separate from the moral and physical realities of everyday life.

Hume especially attacked the *a priori* reasoning behind most Natural Law thought, especially what he regarded as being the irrational attempt to derive *ought* propositions from *is* propositions.

THE 19TH CENTURY

This period saw an even more virulent attack on Natural Law theory, as emphasis was placed on the notions of State power and State coercion. For example, the German philosopher Hegel sought to deify the State which he regarded as an end-in-itself, an absolute sovereign whose essence derived from the laws of history and was therefore not subject to some external, higher law.

However, some commentators argue that although Hegel was opposed to classical conceptions of natural law, which for him were merely rationalisations *ex post facto* of the antagonism between what *is* and what *ought* to be, he introduced a much more convincing substitute for natural law with the idea of ethical life. For Hegel, true philosophy was to overcome the antagonism between *is* and *ought* in the process of actualisation of human will under the form of the ethical State. The ethical State is the realisation of *free*, or *ethical*, will. This is because for Hegel, the end of history is to actualise the ideal so there eventually should no longer be a distinction between *is* and *ought*; they would be as one. So even though this is not natural law in the classical sense, Hegel is far from being a positivist. In fact, his conception of morality is much more radical than that of traditional jusnaturalists.

The 19th century also saw the rise of the positivist approaches to law, as expounded by such theorists as Jeremy Bentham and John Austin, which sought to place a strict separation between the two notions of what the law is and what it ought to be. Law and morality could and indeed should be kept separate, and the principles of Natural Law were regarded as belonging more to the realm of morality than to that of law.

THE 20TH-CENTURY REVIVAL OF NATURAL LAW THEORY

The 20th century saw a revival of Natural Law approaches to the study of law, particularly the notion that there must be a higher set of principles, separate from the positive law, which the latter must satisfy if it is to be regarded as valid law. This revival was the result of a number of factors, including:

- the general decline of social and economic stability worldwide;
- Nazi Germany, whose acts were lawful on the basis of Nazi laws;

- the expansion of governmental activity, especially the increasing encroachment of State institutions on the private lives of citizens through the medium of the law;
- the development of weapons of mass destruction and their increasing use in wars on a global scale;
- increasing doubts regarding the use and effectiveness of the empirical sciences in determining and resolving problems of the human condition.

JM FINNIS AND THE RESTATEMENT OF NATURAL LAW

John Finnis, an Oxford philosopher, starts by refuting the criticism, first aired by David Hume, that classical Natural Law theory irrationally sought to derive an 'ought' from an 'is', that is, to derive normative values by reasoning from observed natural facts. He concedes that some Natural Lawyers of the classical school, especially the Stoics and the medieval rationalists, may have done so. However, he grounds his own restatement of Natural Law on the writings of Aristotle and Aquinas, whom he claims were not guilty of this irrationality.

In his reinterpretation of the writings of Aquinas, Finnis argues that the normative conclusions of Natural Law are not based on observation of human or any other nature. Rather they result from a reflective grasp of what is self-evidently good for all human beings and from a practical understanding gained by experiencing one's own nature and personal inclinations. This is Finnis' main contribution to the Natural Law debate: his substitution of intuition for rational speculation as a way to derive the 'ought' from the 'is'.

Finnis argues that objective knowledge of what is right is made possible by the existence of what he calls 'basic forms of human flourishing' which are objective 'goods' distinct from any moral evaluations of goodness. These are generally things which for most people make life worthwhile and they are self evident – that is, they would be 'obvious to anyone acquainted with the range of human opportunities'.

Natural Law, then, is a set of principles of practical reasonableness to be utilised in the ordering of human life and human community – in the process of creating optimum conditions for humans to attain the objective goods. These conditions constitute the 'common good'.

Finnis lists seven objective goods which he regards as being irreducibly basic. These are:

1. life – the first basic value;
2. knowledge – a preference for true over false belief;
3. play – performance for the sake of it;
4. aesthetic experience – the appreciation of beauty;
5. friendship or sociability – acting for the sake of one's friends' purpose or well being;
6. practical reasonableness – the use of one's intelligence to choose actions, lifestyle, character, etc;
7. religion – the ability to reflect on the origins of the cosmic order and human freedom and reason.

These objective goods are attainable only in a community of human beings where there is a legal system which facilitates the common good. Rulers have the authority to work for the common good, and unjust laws which work against the common good may be valid but they do not accord with the ruler's authority. The position of rulers may give the rules which they create a presumptive authority, but those that are unjust, though they may be technically valid, will be no more than the corruption of law.

DERYCK BEYLEVELD AND ROGER BROWNSWORD'S SECULAR NATURAL LAW THEORY

In *Law as a Moral Judgement*, Beyleveld and Brownsword put forward a Natural Law (or idealist, as they would say) theory of law that draws on the work of Immanuel Kant and Alan Gewirth.[1] While Beyleveld and Brownsword

[1] *Immanuel Kant* (1724–1804) is a central figure in the history of modern philosophy. He defends a moral theory centred on the idea of reason and autonomy. In his view, human beings should be conceived primarily as rational beings carrying an intrinsic value. As a result, no act can be considered moral if it denies the autonomy of other human beings because in so doing it contradicts the non-instrumental value of humanity.

Alan Gewirth (1912–2004) was an American philosopher who argued for the view that ethics can be founded on reason and are ultimately shaped by a supreme principle, i.e. the Principle of Generic Consistency according to which all agents have inalienable rights to the capacities and facilities they need in order to be able to act. In this way, he also provided a rational justification for human rights by connecting the notion of human right to the very possibility of human agency.

defend a Natural Law view their approach differs radically from the ones put forward by Finnis, among others, as the former, but not the latter, is secular, i.e. it stands even though we do not assume the existence of God. Further, Beyleveld and Brownsword do not endorse the idea, which has underlined the traditional forms of Natural Law theory, that there exists a higher law, namely a law independent of human acts and prescribing the basic principles that any human law ought to conform with in order to be valid law.

From the outset, Beyleveld and Brownsword make it clear that the very notion of Natural Law theory should be redefined. On their view, the defining and fundamental tenet of any Natural Law theory, as opposed to a positivist theory, is the claim that law is a moral concept: law necessarily depends on social facts as well as moral values. They thus support the 'connection thesis', meaning the view that morality impinges on law in that there obtains a (conceptually) necessary connection between law and morality. Accordingly, for Beyleveld and Brownsword legal rules ought to be consistent with some moral requirement.

To argue for this view, Beyleveld and Brownsword put forward a sophisticated argument showing that the sphere of action is ultimately governed by a supreme moral principle. This principle, which is called 'Principle of Generic Consistency' (hereafter PGC), states that necessary agents, i.e. those beings who can act for a purpose and so perform voluntary and intentional acts, must act in accord with the right of freedom of other agents as well as their own one. The PGC is the basic principle governing human behaviour and has to be accounted for by any institution that purports to order human relationships. As a result, no institution purporting to govern human conduct is entitled to incorporate norms inconsistent with the PGC. This entails that so long as law can be defined as a body of norms aiming at ordering and governing human relationships, it cannot incorporate norms contrary to the PGC, i.e. norms inconsistent with a particular moral principle. Then, it is argued, there is a necessary, or conceptual, connection between law and morality in that law cannot disregard, at the very least, a moral principle, namely the PGC.

To sum up, Beyleveld and Brownsword claim that:

1 there is a basic moral principle governing human purposive actions, the PGC;

2 law is an institution that aims at governing human purposive actions;
3 law cannot contradict the PGC or the basic principles of a morality grounded on the PGC;
4 then, it is demonstrated that there is a necessary connection between law and morals.

The implications of this argument are developed in detail by Beyleveld and Brownsword who in so doing defend an original Natural Law theory addressing important issues such as the nature of legal systems, the status of international law, the problem of political obligation, the features of legal reasoning, the legitimacy of political authority, and the role of a Constitution within a legal framework, etc. In this way, Beyleveld and Brownsword advance a comprehensive alternative to legal positivism.

THE MAIN CRITICISMS OF NATURAL LAW THEORY

Many of these have been articulated by the followers of the positivist school of thought and can be summarised as follows:

- The attempt by Natural Law theorists to derive *ought* propositions from *is* propositions is neither logically possible nor defensible.
- Natural lawyers are wrong to place a strong connection between law and morality. Although law may sometimes reflect morality, the two are distinct phenomena and should be recognised as such. An analysis of the one should therefore not impinge upon our conception of the other. A law can be valid because it has been created validly, even though it may offend our moral sensibilities.
- Morality is a matter of personal value judgments, which may change erratically for a variety of reasons. It is therefore undesirable to base the development of law, with its necessary requirement for certainty and predictability, on moral considerations as the Natural lawyers would have us do.
- The appeal by some Natural Law theorists to the existence of a 'higher law' which should be a measure of moral and legal propriety is an appeal to irrationality, since it is not possible objectively to demonstrate the existence of such principles.

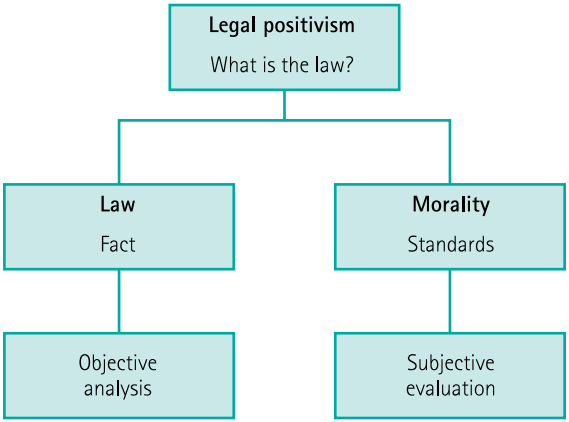
You should now be confident that you would be able to tick all the boxes on the checklist at the beginning of this chapter. To check your knowledge of Natural law theory why not visit the companion website and take the Multiple Choice Question test. Check your understanding of the terms and vocabulary used in this chapter with the flashcard glossary.

3

Positivist theories of law

- What is the positivist approach to law?
- The 'is' and 'ought' questions in legal positivism
- Devices used to identify law
- Imperative theories of law
- Bentham's approach to law
- The distinction between expositional and censorial jurisprudence
- What is good law for Bentham?
- Austin's command theory of law
- Elements of the statement 'law is the command of a sovereign backed by sanctions'
- Hart's criticism of Austin
- Kelsen's pure theory of law
- Kelsen's distinction between primary and secondary norms
- Kelsen's distinction between subjective/objective meanings of actions
- The hierarchy of norms/concept of the basic norm
- Criticisms applicable to imperative theories

WHAT IS THE POSITIVIST APPROACH TO LAW?



Legal positivism draws a sharp distinction between the law that 'is' and the law that 'ought' to be, which does not mean that the 'ought' question is not being addressed by legal positivists, but that it is addressed separately from the 'is' question.

According to Margaret Davies in *Asking the Law Question*: 'the idea behind "positivism" as a legal philosophy is that legal systems are "posited", that is, *created*, by people, rather than having a natural or metaphysical existence.'

Consequently, legal positivism regards the law's most important feature as being the fact that it is 'posited' by certain persons in society who are in positions of power and who provide the sole source of the validity and authority of such law. The point of legal positivism is to come to an understanding about the nature of legal systems rather than speculate about the morality of a given system. As such, the issue raised by the question: *what is law?* is essentially a question of fact, to be answered by empirical reference to, and an analysis of, objective social phenomena. Law is law if it has been created in the correct way.

In making such an analysis, only such material as can be factually identified as being legally relevant should be taken into account, because the law is a distinct phenomenon which can originate, exist and be explicable only within

its own terms, even though it may have some similarities or connections with other social phenomena such as morality, religion, ethics and so on. Positivism artificially isolates the study of law from all other considerations.

An investigation into the nature of law can be seen as an attempt to answer two questions, which may in themselves be seen as elements of the general question: *what is law?* These two sub-questions can be phrased as follows.

- **What is the law?** This is a question of fact involving an attempt to explain the actual incidence of law in various societies and to identify and analyse its basic characteristics, structures, procedures and underlying concepts and principles. In legal theory, this is normally referred to as the 'is' question, since it requires mainly the factual identification of law.
- **What is good law?** This is a normative question requiring an evaluation of the existing law and its assessment as either good or bad by reference to some standard which specifies a goal that is regarded as being desirable and towards which good law must aspire. This, in legal theory, is generally referred to as the '*ought*' question, since it involves an assessment of the existing law in terms of whether or not it is what it ought to be by reference to the desired goal and the accepted standard of good law.

Generally, legal positivists argue that although these two questions may be equally important and deal with the same phenomenon – law – they are essentially different, deal with different issues and require different answers. They should therefore be answered separately and the issues which they involve should not be confused. Legal theorists should avoid the logical confusion which may lead them to try and derive an *ought* from an *is*. This, most legal positivists believe, has always been the problem plaguing the theories of Natural Law.

- Being a positivist, however, does not mean that a theorist necessarily rejects the importance of certain value judgments which may be made about the law. The basic argument of positivists is that the issues of fact concerning the existence, validity and authority of law, and the issues of evaluation of such law in terms of its adequacy and propriety on the basis of some standard must be kept separate and questions relating to them must be answered separately.

- Legal positivists normally seek to provide a formula which can be used to identify law either generally or in specific societies and systems. Most positivists believe that it is possible to provide a neutral and universally acceptable device by which investigation into the nature of law may be carried out.

THE IMPERATIVE THEORIES OF LAW

The term 'imperative' is used here to describe a particular approach of certain positivist theorists who, in their conceptions of law, emphasise the coercive element of the law and argue that law is essentially a matter of force and the imposition of sanctions by the State.

JEREMY BENTHAM (1748–1832)

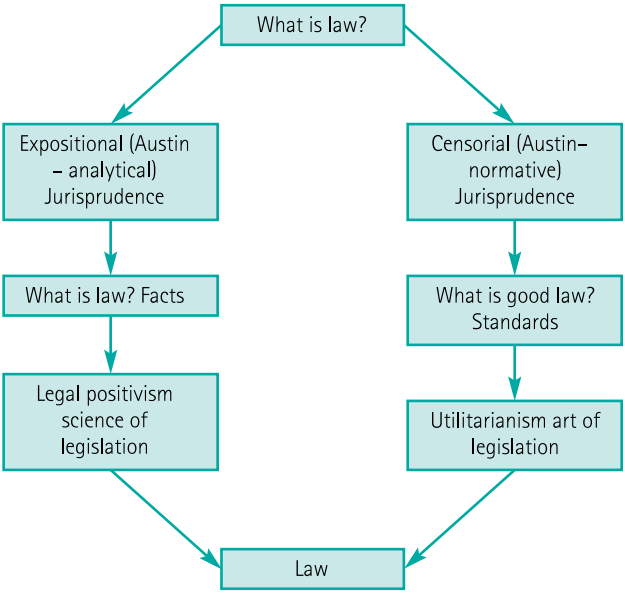
See figure on facing page

THE ORIGINS OF THE COMMAND THEORY OF LAW

Jeremy Bentham is generally credited with being the founder of the systematic imperative approach to law, although most of what he wrote in this regard was not in fact published until almost a century after his death. Bentham rejected the Natural Law approach which contended that laws were either valid or invalid depending on their goodness or badness as judged on the basis of some higher law. He did not believe in the notion of natural rights, which he described as 'nonsense on stilts'. For Bentham, only happiness was the greatest good. The 'art of legislation' consisted in the ability best to tell or predict that which would maximise happiness and minimise misery in society. The 'science of legislation', on the other hand, comprised the adequate and effective creation of laws which would advance or promote social happiness or pleasure, whilst at the same time reducing social pain and misery.

THE NATURE OF LAW

Bentham made a distinction between what he called 'expositional jurisprudence', which is the attempt to answer the factual question, *what is the law?*, and 'censorial jurisprudence', which involves the normative question of what the law ought to be, that is, *what is good law?* Bentham's answer to the



first question was a positivist one, for he believed that law could only be identified and described in terms of legally relevant facts. The second question could be answered from the point of view of utility – the maximisation of pleasure and the minimisation of pain – but this answer would only be provided separately and after the requirements of the first question had been thoroughly investigated and specified.

Bentham advocated a definition of law which hinged upon the concepts of sovereignty, power and sanctions in a political society. This definition required that regard must be had to the law's:

(a) *source*: the person or persons who had created the law and whose will it is that the law expresses;

(b) *subjects*: the person or things to which the law does or may apply;

(c) *objects*: the acts, as characterised by the circumstances, to which it may apply;

(d) *extent*: the range of its application, in terms of the persons whose conduct it is intended to regulate;

(e) *aspects*: the various ways in which the will of the sovereign as expressed in the law may apply to the objects [as in (c) above] of that law;

(f) *force*: the punishments and sanctions which the law relies upon for compliance with its requirements, including such other laws and devices – what Bentham calls 'corroborative appendages' – as may be used to bring such sanctions to bear on the law's subjects;

(g) *expression*: the manner in which the law is published, and the various ways in which the wishes of the sovereign are made known;

(h) *remedial appendages*: any such other laws as may be created and published in order to clarify the requirements of the principal law.

JOHN AUSTIN (1790–1859)

ANALYTICAL POSITIVISM AND THE COMMAND THEORY OF LAW

John Austin is generally regarded as being Jeremy Bentham's disciple, being, like the older man, both a positivist and a utilitarian. Austin was ultimately responsible for the popularisation of the command theory of law. He argued for a distinction to be made between 'analytical jurisprudence', looking at the basic facts of the law, its origin, existence and underlying concepts, and 'normative jurisprudence', which involved the question of the goodness or badness of the existing law. Austin, like Bentham, argued that the factual questions relating to the existence of the law should be answered before questions of what the law ought to be could be considered. He believed that the more important question for the study of jurists was the question of the factual existence of law, and this he regarded as being the basic subject of jurisprudence.

For Austin, as for Bentham, the existence of law had to do with the same issues of sovereignty, power and sanctions. People with power in a politically independent society would set down rules governing certain acts for those who were in the habit of obeying them. Austin's notion of sovereignty was similar to Jeremy Bentham's.

Austin's definition of law proceeded from the general to the particular, starting with a general characterisation of law as 'a rule laid down for the guidance of

an intelligent being by an intelligent being having power over him'. Within this general conception, Austin identified two major divisions:

- *the laws of God*: laws set by God for his human creatures, which Austin regarded as being 'laws properly so called';
- *laws set by men to men:* these comprise two distinct categories:
  - positive law: laws set by men as political superiors or in the exercise of rights conferred by such superiors;
  - positive morality: laws set by men, but not as political superiors or in the exercise or rights conferred by such superiors – these include what Austin calls 'laws by analogy' – for example, rules referring to the membership of private clubs.