From this, Austin proceeded to make further distinctions which effectively narrowed down his conception of the positive law which he believed should be the proper subject of jurisprudence.

Ultimately, Austin's conception of law can be reduced to the simple statement:

> Law is the command of a sovereign backed by sanctions.

THREE ELEMENTS OF AUSTIN'S DEFINITION OF LAW

The three main elements of that conception were explained by Austin as follows:

- Sovereign
  - habitually followed
  - politically superior
  - factually determinable
  - illegally limitable
- Command
  - expression of desire
  - general order
  - threat of sanctions
- Sanction
  - harm, pain or evil
  - minimal possibility
  - possibility of application

Sovereign

The sovereign is the essential source of all law in society and where there is no sovereign there can be no law. The sovereign must be a determinate and common political superior, that is, it must be possible clearly to identify and determine a person (or group of persons) who is habitually obeyed by the bulk of the members of society and who does not habitually obey anybody else. The sovereign must be legally illimitable and indivisible and be the sole source of legal authority.

Command

The sovereign's will is expressed in the form of a command. A command is an imperative form of a statement of the sovereign's wishes, and it is different from an order in that it is general in its application. It is also different from other expressions of will in that it carries with it the threat of a sanction which may be imposed in the event of the subject of the command not complying with it.

Sanction

A sanction is some harm, pain or evil which is attached to a command issued by a sovereign and which is intended as a motivation for the subjects of the sovereign to comply with his or her commands. The sanction is a necessary element of a command and there must be a realistic possibility that it will be imposed in the event of a breach. It is sufficient that there be the threat of the possibility of a minimum harm, pain or evil.

CRITICISMS OF AUSTIN'S COMMAND THEORY

Many of the criticisms of John Austin's command theory of law have concentrated on its inadequacy in explaining the incidence of law and the salient features of present day legal systems. Some of these criticisms, as articulated by Herbert Hart in *The Concept of Law* (1961), can be summarised briefly as follows.

The problem of the continuity of legislative authority

Austin's characterisation of a sovereign requires that the sovereign be identifiable as a matter of fact as the person who is habitually obeyed by the bulk of the members of a society. Such a characterisation poses the problem of the continuity of legislative authority: where a ruling sovereign passes away and a new one is installed, there cannot be in the first instance a habit of obedience to that new sovereign which may give him the authority to make laws. Does this then mean that the new sovereign is no sovereign at all and therefore cannot make valid laws? If this is the case then how can a new habit of obedience be established where the new sovereign's wishes do not have the authority of law, since only a sovereign can be the source of commands which have the pedigree to be laws? It would appear that the new incumbent can never become sovereign in Austin's terms and so can never have the authority

to make law. Hart argues that the problem with Austin's model of sovereignty is that he lacks the concept of a legal rule which would simply denote who can or cannot make law in a particular society.

The problem of the persistence of laws

Austin's model characterises all laws as the commands of a sovereign. All laws therefore owe their existence, validity and authority to a particular and determinate sovereign, and practically there can be no law without a sovereign expressing wishes in the form of commands. The problem that this raises is one of the continuing validity of laws when the sovereign who is their author is no longer in existence. How can certain laws continue to exist validly and to be applied authoritatively when those who created them have long passed into oblivion? Austin's answer to this problem was that such laws retain their validity through the 'tacit consent' of the new sovereign. However, the problem with the notion of tacit consent is that it requires that the new sovereign should positively apply his or her mind to the existence of these laws and then consciously make a decision authorising their continuing validity, even if this decision is not expressly communicated or published. The fact of the matter is that in most cases new legislators do not go through this deliberate process of validation of laws preexisting their own assumption of legislative authority. They simply accept the validity of such laws because there normally is a 'rule' in most mature legal systems validating these laws. Austin's problem, again, is that his command theory lacked the notion of such a rule.

The problem of the variety of laws

For Austin, every law must have a sanction for it to have validity, since the imperative conception of law contends that all laws are in the form of commands expressing the will of a sovereign, and a command is distinguished from other expressions of will by the fact that commands invariably carry with them the threat of some harm, pain or evil which may realistically be applied in the event of non-compliance by the subject. One problem which this notion raises is that not all laws carry with them the threat of a sanction. Some laws are merely regulatory, and prescribe how people must act without necessarily threatening punishment. Other laws confer power on people to validly create legal relationships, for example, the laws of contract. An attempt by Austin to treat the nullity of a contract as a sanction for non-compliance with proper contractual procedure appears far fetched, since not all the parties to a

contract will suffer from such nullity. Even in the case of laws which carry sanctions, for example, criminal law, sanctions are only appealed to in the event of a breach, and are not necessarily in the forefront of the consideration of either the legislators or their subjects at every stage of the creation and existence of the laws to which they attach.

Other criticisms of Austin's doctrine

Other criticisms of Austin's doctrine include the following:

- The requirement that the sovereign be legally illimitable, which leads Austin to conclude that constitutional law is not law properly so called, fails to explain the fact that the rules comprising most constitutions are regarded by those subject to them as binding law and are deferred to as such. In any case, it is not necessary for legislators themselves to be above the law in order for their legislative activity to produce valid legal instruments.
- Austin's conclusion that international law is not law but 'positive morality merely' because no specific sovereign can be identified as being the author of its rules, and since obedience to these is a matter of choice for the various states, results from a confusion between the lack of the systematic structures normally identified with municipal legal systems and questions of validity of laws. Laws may validly exist even in situations where some of these structures are non-existent or merely embryonic in their development.
- The requirement that the sovereign in a politically independent society be indivisible fails adequately to explain the existence of multiple law-making bodies in some jurisdictions, for example, federalist societies such as the US, as well as in parliamentary democracies where the law-making structures are decentralised. Austin's attempt to equate the entire electorate in such systems with the sovereign would lead to the untenable situation where the electorate would be seen as being in the process of issuing commands to themselves and being in the habit of obeying themselves.

HANS KELSEN (1881–1973)

THE PURE THEORY OF LAW

The rationale and methodology of the pure theory

Hans Kelsen sought to define and identify the essence of law by providing a formula which excluded any factors which might obscure our perception of such law. As a positivist, Kelsen believed that the existence, validity and authority of law had nothing at all to do with such non-legal factors as politics, morality, religion, ethics and so on. He therefore sought to provide a 'pure theory' of law, one that would be scientific and accurate in answering the question: what is the law? In this context, 'pure' means two things: that the analysis of the law is limited to the law itself, and that the analysis of the law is purely conceptual (rather than contextual).

The nature of law as a system of norms

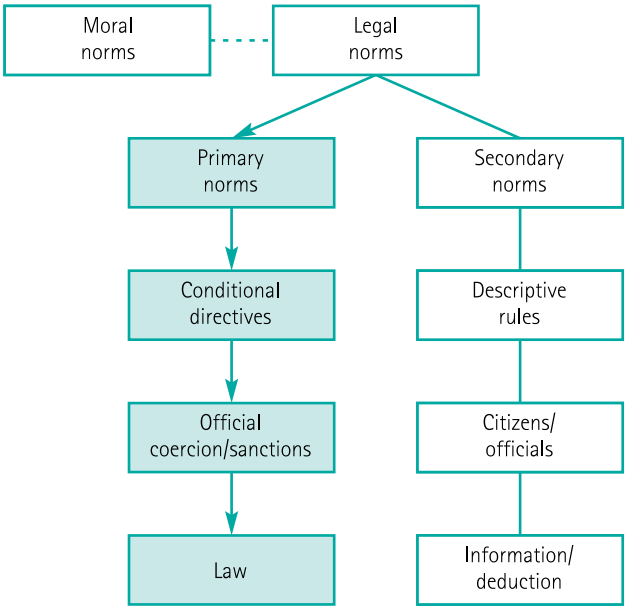
Kelsen regards the law as a coercive system, concerned primarily with the application of sanctions to persons who have acted in certain specific ways. The law is constituted by norms (statements of what ought to be) which inform officials of a State as to the instances when they may apply sanctions to persons whose actions have fulfilled the conditions under which such sanctions must be applied.

These norms express the reality of the law to the people who are tasked with enforcing it, even though the actual rules of the system may be phrased differently.

The distinction between moral norms, legal norms and legal rules

Kelsen distinguishes between a moral norm, which is a required standard of behaviour in relation to some individual or social conception of the good, and a legal norm, which merely describes what the law specifies ought to be under certain circumstances. The legal norm does not in itself prescribe action, it merely describes what the law essentially requires, even though the law itself may not be in the form of an 'ought' proposition. A further distinction is therefore to be made between legal rules, that is, the law as contained in the publications of legislators, and legal norms, that is, the law as it is expressed in the norms which specify what officials ought to do. The content of legal norms is, for Kelsen, the essence of all law and is what all legal science should strive to explicate in respect to different societies.

Pure theory of law



Primary norms and secondary norms

Another way in which Kelsen describes the distinction between legal rules and legal norms is in terms of primary and secondary norms. The primary norm may be seen as that statement which stipulates the sanctions which may be applied under certain conditions. It is the primary norm which constitutes a conditional directive to officials to apply sanctions in certain circumstances. The legal rule, that is, the actual rule created by the law-making authority, and which specifies the proscription or prescription of certain conduct is then only a secondary norm and is not itself the essence of the law. The secondary norm can be derived from the primary norm by a process of deduction.

The subjective and objective meanings of actions

For Kelsen, all actions have a subjective meaning and an objective meaning. An act may have no more significance than that which can be derived from

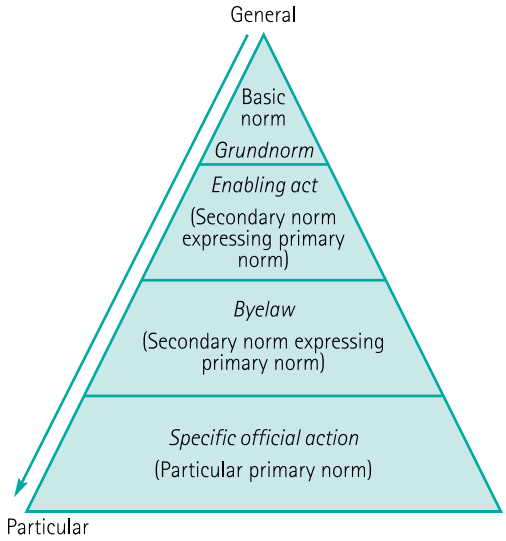
its mere occurrence, for example, the act of picking up a stone and throwing it at a wall may mean only that – the simple physical act of employing one's musculature in the physical elevation of a solid piece of matter and forcefully propelling it in a certain direction with the intention that it collide with another, larger piece of solid matter. This is the subjective meaning of the act, and if there were no law against this sort of activity, then no more would be thought of it and the matter would lie where it fell. However, if there were a law against throwing stones at certain buildings, say, people's homes, then there would be a primary norm which directs officials to apply sanctions in the event of some person acting in a way which fulfils the conditions under which sanctions may be applied under that law. In this case, the act of picking up a stone and throwing it at a wall would automatically acquire legal significance, in that if the wall forms part of some person's abode, then the stone thrower's act will have fulfilled the conditions under which an official would properly be required to apply a sanction by the relevant legal norm. This then becomes the objective meaning of the act. And, in a legal system which is on the whole efficacious, the appropriate sanction would be duly applied.

The hierarchy of norms

Kelsen's legal norms are arranged in a dynamic hierarchy, with each norm deriving its validity from another norm which occupies a position higher up in the hierarchy. These norms range from the general, which are higher norms, to the particular, which are lower norms. The ultimate validity of all legal norms is predicated upon an hypothetical basic norm or *Grundnorm* which occupies the highest position in the hierarchy, and beyond which no other norm may exist. The basic norm can sometimes be identified with, although it is not, the historical first constitution of a society.

The basic norm and the validity of norms

The basic norm is presupposed because the mere contention that a certain norm exists presupposes its validity, and that validity can only be derived from a higher norm, which in turn acquires its validity from an even higher norm, culminating in a valid *Grundnorm*. Thus, the question regarding legal norms, including the basic norm, is not whether or not they are valid, since the mere fact of their existence presupposes their validity, rather it is one of whether or not, in their existence, they belong to a particular hierarchy and hence to a certain legal order.



The basic norm and legal efficacy

Every society has a basic norm peculiar to it, and this *Grundnorm* can be identified by reference to the legal norms which are actually referred to by officials in each society when they apply sanctions. It follows that it is only in a society where officials regularly and effectively apply sanctions in accordance with certain primary norms that we can identify a system of norms and hence a basic norm. Kelsen's formula for identifying law as a matter of norms, therefore, hinges upon the efficacy of legal systems in the application of sanctions. It follows, then, that there cannot be a hierarchical system of norms in a society where officials do not efficaciously apply sanctions. If we cannot identify such a system, nor its basic norm, then we cannot be able to identify law in that society. For Kelsen, then, we can properly declare that such a society does not have law nor a legal system. The basic norm is presupposed on account of the actual activity of officials applying sanctions in accordance with primary norms which constitute a system which is on the whole efficacious. It follows that the basic norm can change in situations where officials cease to apply sanctions in accordance with one set of norms and start applying sanctions efficaciously in accordance with another set of norms.

Implications and criticisms of Kelsen's pure theory

Kelsen's theory has been criticised for its extreme emphasis on the formal identification of the elements of law, excluding, as it does, such factors as politics, morality and questions of justice. Indeed he has been accused of engaging in 'an exercise in logic, not in life', and his theory has been seen as useless as a device for understanding the complexities of laws and legal systems. It is to be said, however, that Kelsen's doctrine has a certain value in that it helps us focus on the actual dynamics of law enforcement, and the fact that ultimately it is officials who decide how and to what extent the law may affect ordinary people's lives.

Kelsen's approach, and his emphasis on the role of officials in the occurrence and existence of the law, meant that he ultimately saw little distinction between the State and its law. Indeed, Kelsen saw the State as the personification of all law, and his view thus disregards, to quite a large extent, the perspective of the ordinary citizens in a society and their interest in the development of the law. In fact, for Kelsen, it would appear that the common citizenry have no more to do with the law than merely acting in ways which justify the application of sanctions by officials, and in doing so, their role is merely the passive one of fulfilling conditions under which sanctions may be applied. Ultimately for Kelsen, only officials can disobey the law, when they fail to apply a required sanction. This view appears to be very one sided, emphasising as it does the external, coercive element of the law, and disregarding the reality that laws are in fact directed at both officials and ordinary citizens, and that many private persons are keenly aware of what the law requires of them in certain circumstances and, in most cases, strive to act in accordance with those requirements out of a sense of duty, or obligation. For most people, therefore, their activity has both a subjective and an objective meaning.

Kelsen's theory equates the existence of the law with its validity, since legal norms can exist only in a system which is on the whole efficacious, and such a system is comprised of a hierarchy of valid legal norms predicated upon a valid basic norm. Efficacy in this case means merely the regular and effective application of sanctions by 'officials'. What this means is that the validity of laws in Kelsen's scheme has nothing to do with the legitimacy of the law-making authority, and indeed, any usurper can create valid laws once they establish themselves and start to apply sanctions efficaciously, causing the basic norm to change. In this regard, Kelsen's theory has been criticised for providing

legitimacy to political regimes which do not have a mandate from the citizens to rule and to make law. Certainly, this theory was utilised to try and justify the unilateral assumption of power by an illegal regime in the former Rhodesia in 1965, and to establish the validity of the laws which it subsequently created, in the case of *Madzimbamuto v Lardner-Burke* [1968]. Further, Kelsen's theory does not allow for the criticism of any such valid laws, however iniquitous.

Finally, it must be noted that the identification of the basic norm in any society is an extremely problematic exercise. Since that norm does not have a specific content, and since it is primarily presupposed, its role in the validation of the other norms in the hierarchy can be fraught with obscurities. Since the *Grundnorm* plays such a pivotal role in the validation of the other norms of a system, it follows that any problems which might arise with its identification and explication may affect the entire coherence and consistency of the hierarchy which it supports, and thus deprive the concept of a legal system of its very foundations.

GENERAL CRITICISMS OF THE IMPERATIVE THEORIES

General criticisms of the imperative positivist approaches to law include the following:

- Contrary to the imperative positivist view, legal systems and law do not just rest on sovereignty, power and force. They are based more on legitimacy, authority and obligation.
- For imperative positivists, sanctions are a necessary part of all valid law. However, the fact is that there are many laws which do not have sanctions attached to them. Many laws confer powers on people, or regulate people's conduct in a relatively neutral fashion without threatening punishment.
- Whereas it is true in some cases that, as the imperative positivists argue, people obey laws out of fear of sanctions, this is not the sole motivation in all cases. Sometimes people comply with laws because they feel a sense of obligation arising from their recognition of the legitimacy of the law-making authorities.
- Imperative positivists place a strict distinction between law and morality. In reality, however, many people perceive a link between law and morality.

Especially where questions of justice arise, the stability of the entire legal system and the validity of its laws may depend on the extent to which the majority view a society's laws as conforming to some moral standard.

- Ultimately, the imperative positivists are criticised for providing an arid and excessively formalistic approach to law. It is argued that there is no value in a theory which cannot explain all the salient features of extant legal systems and/or offer room for improvement. Further, an approach to law which simply legitimises existing structures and institutions even if these are a corruption of law is ultimately inadequate.

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 Positivist theories 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.

4

Alternatives to the imperative models of law

- Legal realism: American/Scandinavian movements
- Why do realists insist on interdisciplinary studies for lawyers?
- Hart on coercion, rules and morality
- Distinction between obedience and compliance
- Hart's definition of a 'rule'
- Primary and secondary rules
- The systemic quality of law
- Rule of recognition/rules of change/rules of adjudication
- The "internal morality of law" according to Fuller
- Fuller's eight rules of proper law-making
- The Hart–Fuller debate
- Hart's criticisms of Fuller's "inner morality of law"
- Dworkin's criticisms of natural law and legal positivism
- Dworkin's criticism of Hart
- The difference between rules and principles for Dworkin
- Dworkin and judicial discretion

The key alternatives to command models of law are those set out by Hart, Fuller and Dworkin, though it is Hart's work which is the most innovative: it has been said to provide the foundations of contemporary legal philosophy in the English-speaking world and beyond. Hart's work was a reaction against Austin's jurisprudence, which he once referred to as 'the record of a failure' (1961).

Early alternatives to imperative models also include legal realism.

Legal Realism

This movement rejects the notion of natural law because it does not believe in immutable principles of justice, but it also rejects imperative models of the law because for them the meaning of legal terms does not come from the legislator but from an observation of law in action. Legal realism is an empirical reaction to legal formalism, to the idea of a science of law. There are two main movements: American and Scandinavian Legal Realism. The American Critical Legal Studies movement, which emerged in the 1970s, can be said to have arisen out of American Realism (see Chapter 9).

American Realism

American realists see law as an instrument of government designed to achieve, and justify, specific social aims. For them, the meaning of legal terminology, legal values, is acquired through experience and observation as they are 'real'. This movement is often said to have first emerged in the US with Supreme Court Justice Oliver Wendell Holmes. It was prevalent essentially between the 1920s and the 1940s.

Legal realists believe that:

- Legal rules do not determine the outcome of legal disputes, judges do.
- The law is a tool to achieve social goals and balance conflicting interests.
- The study of law should be interdisciplinary because legal outcomes depend on factors which are extrinsic to legal rules.

This movement is characterised by two core premises:

- The study of law involves more than rules and doctrine; it includes the study of how law works in practice, or 'law in action'.

- Law is an instrument of government. It is a means to achieve social goals, these are not abstract and immutable, but concrete and contingent upon their context.

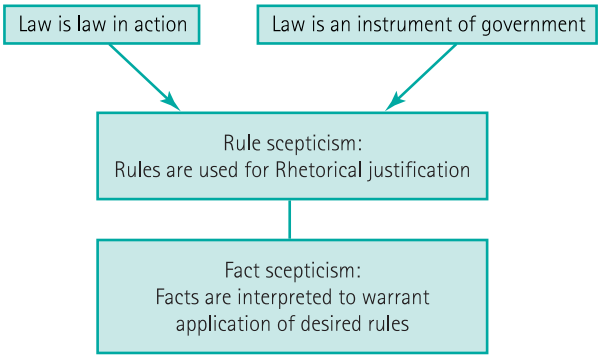
These premises produce two types of scepticism:

Rule scepticism

For realists, judges do not reach their decisions on the basis of a formalist application of legal rules and principles to the facts of a given case, but reach a decision based on the desirability of a given outcome and only subsequently resort to the rules in order to rationalise their decision in terms that seem to be legally grounded.

Fact scepticism

In the same way that judges use legal rules essentially in order to ground their decision in law rather than applying rules to cases, they also interpret the facts of cases under their consideration in such a way as to fit the outcome that they wish to reach. Events are thus construed in such a way as to warrant the application of the legal rules which will rhetorically ground the judicial argumentation.



Law should therefore be considered as a policy science. A lasting effect of realism on American legal reasoning is that the legitimacy of a judicial decision stems from both its conformity to rules and precedents but also its social implications.

Scandinavian Legal Realism

The founding father of this movement is the Swede Axel Hägerström (1868–1939). Scandinavian realism is more philosophically grounded than American realism. Its starting point is that what cannot be known through experience does not exist and so should not be taken into consideration in the production of legal knowledge. It follows that natural law does not exist, but also that rights and duties do not exist either. In Hart's words, both schools of realism agree that a right is not an objective entity, 'existing apart from the behaviour of men', but whereas for American realists a right 'is a term by which we describe the prophecies we make of the probable behaviour of courts or officials; the Scandinavian jurists [. . .] say that a right is nothing real at all but an ideal or fictitious or imaginary power'. This is because the concepts of rights and duties have no empirical content; they do not belong to sensible, material reality: 'these concepts are metaphysical sham-concepts: it is impossible to identify that which we call a right or a duty with any fact.' (Olivecrona)

So for Hägerström:

- There are no such things as natural law or natural rights because sensible reality is devoid of values (i.e. it is absurd to ask 'what *ought* to happen in nature', all one can do is ask 'what *does* happen in nature').
- Imperative models of law are invalid because it does not make sense to hold that the meaning of legal terminology is determined by the will of the legislator.
- Laws are found in the reality of social facts.
- Positive law is a system of rules that can be identified empirically as behavioural regularities in human societies
- Legal knowledge is an empirical inquiry into the causal relations between legal rules and human behaviour.

In this perspective, known as 'rational naturalism', the normativity of law is not accepted. This is why, as soon as the late 1930s, many people saw realism as potentially dangerous because it did away with the necessity to ground legal systems in morality. Fuller's work goes against this perceived error.

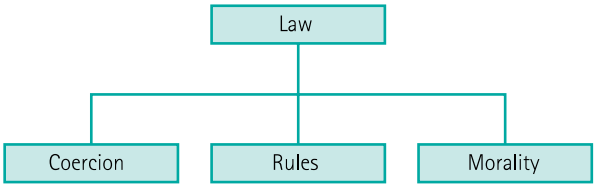
HERBERT HART, *THE CONCEPT OF LAW* (1961)

THE THEORETICAL BACKGROUND TO HART'S CONCEPT OF LAW

Hart presents his approach to law as a superior alternative to previous attempts at explaining the nature of law – especially the imperative positivism of Bentham, Austin and Kelsen – which he believes have provided us only with narrow, singular, and therefore inadequate definitions of the law. Hart argues that it is not possible to answer effectively the question: *what is law?* by appealing to a definition which merely emphasises some particular feature of the law, such as its coercive element or its moral dimension. Such an approach will only serve to obscure other, equally important elements of the law which we cannot afford to ignore if we are to present an adequate picture and explanation of the nature of law.

Hart asserts that the main reason why the question: *what is law?* has not been successfully answered over the years has been because of the continued recurrence of three main issues relating to the nature of law which he believes have never been properly dealt with and explained by previous thinkers on the subject.

THREE RECURRING ISSUES IN JURISPRUDENCE



- The question of the relationship between law and coercion: 'How does law differ from, and how is it related to, orders backed by threats?'
- The question of the relationship between law and morality: 'How does legal obligation differ from, and how is it related to, moral obligation?'
- The nature of rules: 'What are rules and to what extent is law an affair of rules?'

For Hart, the efforts to provide a clear-cut definition in answer to the question: *what is law?* have ended with many previous writers on the subject limiting

their consideration to only one or other of the above issues. For example, he attempts to show that the imperative theories of law have entirely lacked the concept of a rule, and that this has caused them to regard law only as an external system of coercion, thus ignoring the internal element of legal obligation which leads people to obey laws even when there is no threat of force compelling them to comply.

A related problem is that which arises from what Hart calls the 'open texture' of words and therefore of the law. Law is basically a matter of language – an attempt to communicate required standards of behaviour by the use of words which are supposed to signify some notion of reality. However, words by their very nature are problematic as instruments for such communication, since their meanings may be obscure or their implications may differ depending on the context of the intended recipient of the message. In this regard, definitions may be required of the words used initially, and it is the crux of the problem that any such definitions have themselves to be constructed out of other words, which latter may also be obscure and so require further clarification. According to Hart, this problem has led some thinkers, such as the legal realists, mistakenly to deny that law is a matter of rules and to assert instead that only what the courts say is what constitutes law. For the same reason, Formalists have argued for an approach to rules of law which seeks to limit the choices which might be available in instances when such rules have to be interpreted.

Linked to the above is a problem which results from the fact that the creators of any laws in society are, in Hart's words, 'men not gods'. This means that they have certain limitations which include:

- *Relative ignorance of fact*: it is never possible, when creating a law to deal with a particular situation, to be absolutely certain that one has included and covered all material issues and the various possible combinations of such issues which may confront anyone seeking to use the law to resolve problems and disputes at a subsequent stage.
- *Relative indeterminacy of aim*: it is not possible for a legislator accurately to anticipate future developments in society and, therefore, it is difficult to be able to ascertain the best way to deal with new situations which may arise and to which existing laws may need to be applied.

A further problem which Hart identifies is the existence of areas of uncertainty as to what constitutes law and what does not. In this regard, international law

and so called 'customary law' are cases in point, as both appear to lack some of the features which are normally associated with law, such as a legislature or a system of courts. Simplistic and singular definitions of law would then tend to exclude these categories of legal phenomena without providing an explanation as to why they should not be treated as law.

THE NEED FOR A FRESH START

Hart believes that generally the above-mentioned problems are a result of the fact that law is a complex social phenomenon which is linked to other social phenomena in various ways.

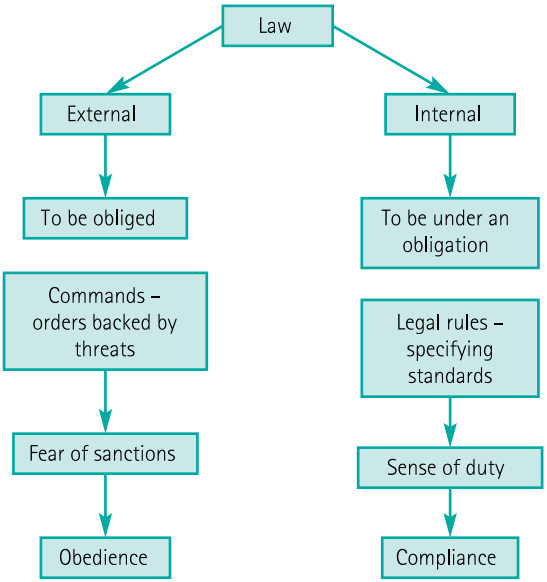
This makes it difficult to answer the question: *what is law?* effectively through sweeping singular definitions. He notes several previous and contemporary attempts and then concentrates on the command theory of law in order to demonstrate the problems that these have created.

The approach adopted by Jeremy Bentham, John Austin and Hans Kelsen, which treats the law as mainly a matter of power, coercion and sanctions, contains the essential truth that law, to a large extent, makes certain conduct obligatory. This means that laws limit the range of options and choices which people in society may have in the organisation of their activity. It is also true that much of the law, especially the criminal law, is backed by sanctions and that in many mature legal systems, officials work effectively to impose those sanctions wherever they become aware of a breach of the law. However, this approach misses one very important point. This is the fact that the laws of many societies are generally obeyed by their citizens, not through the fear of sanctions, but because of a certain sense of obligation arising from the citizen's respect for the legitimacy and authority of the law giver. This is the case even where the individual may not agree with the requirements of a particular law.

Hart argues that the command theorists, in emphasising force as the core component of all law, have looked only on one side of the coin – the external element of law which compels people to act out of fear. This may be the 'bad man's view' of the law and Hart argues that it does not present a balanced picture. In focusing only on the commands of a sovereign and the actions of officials in imposing sanctions, the command theorists have ignored the internal element which characterises all law. This is what Hart calls the 'internal

point of view' which makes people feel a sense of obligation to obey the law. Hart makes a distinction between the two notions (see figure below).

THE TWO ASPECTS OF LAW

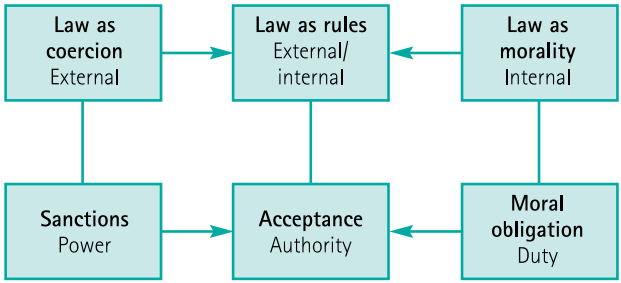


- 'To be obliged' – that is, to be forced to act in a certain way because of some threat, such as when an armed man orders a person to hand over money.
- 'To be under an obligation' – that is, to feel within oneself a sense of duty to act in a certain way without some external stimulus compelling such action.

He argues that the command theories explain law only in terms of the former notion, and that to this extent they are inadequate, because the law operates both in an external and an internal fashion to induce compliance. Indeed, Hart contends that the law functions less as an external and more as an internal inducement to action and that the external element comes into play only in the occasional event of a breach, when officials act to apply sanctions.

Hart believes that the main problem with the command theories of law is that they lack the concept of a rule, which he describes as a statement of an 'accepted standard of behaviour'. Where there is a rule – in this case, a rule of law – which most people are aware of, then there is no need to have officials constantly watching over citizens to see that they comply with the law, because most of these citizens would comply anyway since they accept the rule as standard. They use the rule to judge their own as well as other people's behaviour. They use the standard as a basis for criticism of any behaviour, their own and others', which does not comply with the rule, and they use the rule as a justification for such criticism.

RULES AND THE EXTERNAL/INTERNAL ELEMENTS OF LAW



Some of the more specific criticisms which Hart makes of the command theories of law have been noted in the previous chapter. The conclusion which Hart reaches through his examination of the flaws in the imperative approach is that he has effectively established the need for a fresh start. This, he argues, must be a theory of law which avoids singular definitions of the subject. He therefore presents *The Concept of Law* (1961) as an attempt, not to define law, but to provide an understanding of law, coercion and morality as interrelated but distinct social phenomena. In this regard, his approach is an 'exercise in analytical jurisprudence', for it is intended to analyse especially the nature of rules in order to determine how legal rules make the law a distinctive form of social control. However, Hart recognises that the law is a social phenomenon which can only be adequately understood and explained in terms of social facts. These facts include the attitudes which people have and the language which they use in expressing their conceptions of the law as well as other social

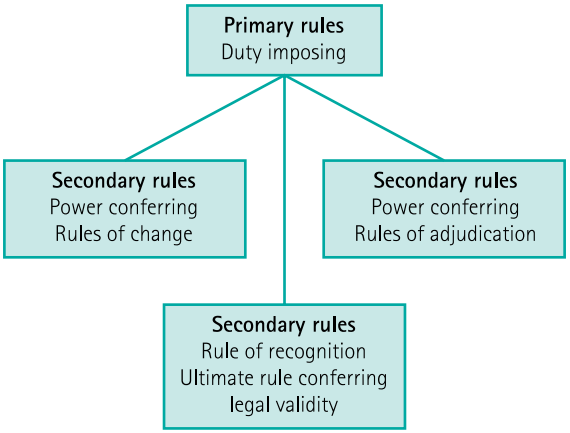
phenomena, such as morality and coercion. For Hart, therefore, his approach must also be seen as an 'exercise in descriptive sociology', for it seeks to explain the law in terms of its social context.

Hart is, however, a committed positivist and his intention is to provide an improved positivist account of the law. He believes that only that which has been created and posited by the proper law-making authorities in a particular society can properly be called law. There is no necessary link between law and morality, and although there may be similarities between them and in their requirements, the two must still be kept strictly separate. Laws are valid if they have been created in accordance with the requirements of proper law making in a certain society, and their goodness or badness has no bearing on their validity.

THE UNION OF PRIMARY AND SECONDARY RULES

For Hart, law is a matter of rules. Rules are statements of accepted standards of behaviour. Law is a system of social rules and to this extent it is similar to morality, which is also constituted of social rules. Both types of rules are 'social' because they arise within a social context, apply to social activity, and have social consequences. However, the rules of law are different from those of morality in a number of fundamental ways.

THE UNION OF PRIMARY AND SECONDARY RULES



THE SYSTEMATIC QUALITY OF LEGAL RULES

The main distinctive element of law is that its rules have what Hart calls 'a systematic quality'. What this means is that rules of law are of different types, and that each of these categories interacts with the others in a manner which enables them to be called a system rather than say, a 'body', of rules. Rules of morality generally lack this systemic quality. The rules of law can be classified into two main groups, and it is the interaction between these groups which justifies the description of legal arrangements in certain societies as being a legal system.

CATEGORIES OF LEGAL RULES

Primary rules

These are the basic duty-imposing rules of law. They specify what people ought and ought not to do, and in this way they create obligations with which members of a society are required to comply. Examples are rules of the criminal law, tort and so on. In the more mature legal systems, these rules are normally created, validated, enforced and changed by officials.

However, it is possible to envisage a 'pre-legal' society, that is, a society where there may not exist structures such as a legislature, courts and so on. In such a society, there may still be rules of law, because there would be certain rules which are accepted by the majority of the citizens as specifying accepted standards of behaviour, and to which weight and authority are given by consensus. The validity of these rules as law would then depend on what Hart calls the 'internal point of view' of the citizens in the community, which describes a critical reflective attitude enabling the citizens to feel a sense of obligation to obey such laws. This type of arrangement would not, however, be a legal system as such and it would raise a number of problems for the citizens.

- The problem of uncertainty – it would always be difficult to determine whether a certain rule was a rule of law or whether it was some other type of rule, such as a rule of morality, custom or religion.
- The problem of the static nature of laws – even where rules of law were known, new situations might arise which would need the immediate modification of an existing rule to cover that situation or, failing that, the creation of an entirely new rule to resolve a problem. It would not be easy

to create, with sufficient expedition, a new rule through the process of establishing consensus amongst all the citizens.

- The problem of inefficiency – where rules of law were broken, there would always be a difficulty in ascertaining the reality and extent of the breach, as well as in determining the extent of compensation or the severity of punishment. Self-help schemes in this respect would result in a wastage of resources.

In order to resolve these difficulties, there would be a need for a different set of rules, which would determine the processes of creation, validation, transformation and adjudication in respect of the primary rules of law.

Secondary rules

These are rules about rules, that is, they are rules of law which are brought into existence for the purpose of governing the creation and operation of the primary rules and in order to resolve the problems which have been identified above in regard to a legal arrangement in which only primary rules exist. Generally, secondary rules are power-conferring rules, in the sense that they give the ability to some person or body of persons to do something with regard especially to primary rules, although such power may be exercised in respect to other secondary rules as well.

Secondary rules are of three types, corresponding to the problems which may arise in a pre-legal society.

1 *The rule of recognition.* This is the ultimate rule which determines the existence and validity of all other rules in a legal system. Although it is classified as a secondary rule, it lies at the heart of a legal system because it is by reference to it that any other rule can be classified as a rule of law. The rule of recognition therefore resolves the problem of uncertainty as to the legality and validity of rules. It is itself identified by determining the formal criteria by which officials in a particular legal system decide what rules are valid rules of law. So, the rule of recognition may not be written down or even clearly set out as a singular rule. Indeed it may be a conglomeration of rules setting out the accepted formal sources of law in a society. Thus, for example, in England and Wales the main part of the rule of recognition may be in the form:

> Whatever the Queen-in-Parliament enacts is law.

This would mean that the legality and validity of most rules in this legal system would depend on whether they have been properly enacted by the Queen-in-Parliament. However, since there are other, accepted, formal sources of law in this country, this would mean that various other elements would have to be added on to the main part of the rule. Thus we could have a more comprehensive rule of recognition which would include these others as sources of valid law, and the full version of the rule of recognition would be, if properly set out, something as follows:

> Whatever the Queen-in-Parliament enacts, and whatever byelaws and regulations are enacted in pursuance of the requirements of and in accordance with the powers set out in the enabling statutes, and whatever rules originating from custom are properly judged to be law by the courts, and whatever precedents are at present accepted by the higher courts of the land as accurately specifying the proper interpretation and application of the laws of this country, shall be the valid laws of England and Wales.

The rule of recognition resolves the problems of uncertainty in the law by establishing a formal distinction between those rules which are law and those which are not. In doing so it provides certain rules, both primary and secondary, with both legality and validity. Thus, the rule of recognition will help to determine the separation between legal rules and other social rules such as those of morality, and other factors determining how people should act, such as certain forms of coercion.

2 *The rules of change*. Rules of change are necessary to enable changes to be made in the legal obligations which people may have under the duty-imposing primary rules of a legal system. Such changes may be in the public sphere, where the State imposes certain duties on citizens, or they may be in the private sphere, where citizens create certain legally binding obligations amongst themselves. Thus, rules of change will be of two types:

(i) *Private rules of change*: these enable changes to be made in the legal relationships which private persons have with one another, for example, the rules of contract law. Such rules confer power, rather than impose duties on citizens in their private capacity.

(ii) *Public rules of change*: these rules give power to officials in their public legislative capacity to change the primary and other rules of a legal system in order to meet new developments in the legal needs of society.

Rules of change, then, exist in a legal system to resolve the problem which may arise in a 'pre-legal' situation in respect to the various laws being static and not being capable of expeditious change to cover new and unprecedented situations.

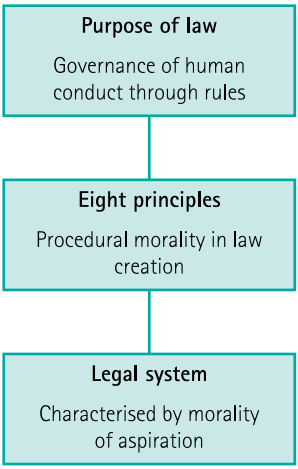
3 *The rules of adjudication*. These rules confer power on judicial officials to carry out the process of adjudication where a dispute has arisen or a law has been breached. They also set out standards for the proper determination by the courts of the instances, the extent and the commensurate punishment or compensation for any breach of the law. These rules exist to resolve the problems of inefficiency which might arise in a 'pre-legal' society where there would be no courts to adjudicate and no way of knowing for certain when a rule of law has been broken and how the situation should be dealt with.

In the 'union of primary and secondary rules', Hart believes that he has found 'not only the heart of a legal system, but a most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist'. He believes that this approach is superior to previous attempts to explain the nature of law. This is because it allows us to see legal phenomena, not in terms of isolated precepts with no meaningful link to social reality, not in the form of disparate chunks of legislative or other obstacles to certain activity, but as a unified system of social control which is predicated upon the concept of the rule of recognition. This, then, requires and enables us to explain the related notions of 'legislation, jurisdiction, validity and, generally, of legal powers, private and public'.

LON FULLER AND THE 'INNER MORALITY OF LAW'

Fuller wrote *The Morality of Law* in 1964, discussing the connection between law and morality. His challenge to the positivist approach to law rejects Hart's conception of the law essentially as a matter of rules with no necessary moral content. The two jurists' disagreement on the nature of law led to the Hart–Fuller Debate in 1958, which was very significant in framing the modern conflict between positivism and natural law.

MORALITY OF LAW



FULLER'S ARGUMENT FOR PROCEDURAL MORALITY IN LEGAL SYSTEMS

The purpose of legal systems

Generally, Fuller takes the opposite stance to the positivist view which argues for a strict separation between law and morals. Fuller saw a necessary connection between law and morality through what he regarded as 'reason' in legal ordering. His main argument is that the basic idea underlying and justifying the creation of a legal system is the purposive enterprise of subjecting human conduct to the governance of rules. In order for a system of social control to be a system of law – as opposed to, say, a system of coercion – it must acknowledge certain procedural purposes, described by a certain set of principles, as its goals.

The morality of legal systems

Fuller argues that legal systems must be set up so that they operate in a manner which will effectively satisfy the ultimate purpose of all legal systems: that is, the governance of human conduct through rules of law. The principles which constitute the basic requirements for a legal system to satisfy this goal constitute what Fuller described as 'the inner morality of law'. These principles

are 'internal' because the goals which they describe are themselves intrinsic to the whole idea of law and contribute to its purpose and therefore to the justification for its creation. They are moral because they provide standards for the evaluation of official action in the creation and application of law.

The principles of procedural morality in legislation

Fuller argued for eight principles of proper law making. These were as follows:

1. *There must be rules:* law must be constituted by rules specifying the conduct which is their object and how that conduct is to be controlled. Rules have an ongoing existence after their creation. Law cannot be constituted by *ad hoc* stipulations in the form of capricious orders and commands.
2. *The rules must be prospective and not retrospective*: if human conduct is to be governed by rules, then those whose conduct is to be the object of such governance must be informed in advance of the fact, so that they can plan and organise their activities accordingly. Retrospective laws have the effect of penalising people for actions which were not unlawful at the time when they were perpetrated. The result is to deprive the legal arrangement of any semblance of a system which it could possibly have.
3. *The rules must be published*: as with the above stipulation, people need to know the categories of their conduct which are to be governed by rules of law and the manner in which that governance is to be achieved. Proper publication of the rules of law provides such information and therefore is essential for the operation of law as a system.
4. *The rules must be intelligible*: people cannot be expected to comply with the requirements of the law in the organisation of their activity if they are ignorant of those requirements. Publication of the rules must, therefore, be in a manner which is clear, precise and accurate.
5. *The rules must not be contradictory*: where rules of law contradict each other, the citizen will be confused as to which rule to give precedence to. In this regard, then, it would be improper and indeed self-defeating to require compliance with rules in instances where the citizen does not know whether certain conduct will be deemed unlawful or not.
6. *Compliance with the rules must be possible*: rules requiring the impossible will, of necessity, not be complied with and so it is pointless for us to produce such rules, unless the intention is to penalise citizens unnecessarily.

7 *The rules must not be constantly changing*: certainty is an essential element of the law as a system of rules, for it is only when citizens can predict the consequences of their actions with a fair degree of accuracy, that they can meaningfully plan their actions.

8 *There must be a congruency between the rules as declared and published and the actions of officials responsible for the application and enforcement of such rules*: this enables citizens to be reasonably certain that their actions will attract certain reactions from the system. In this way, citizens can apply the rules of law to themselves with relative confidence and be assured of the results of their actions.

THE LEGALITY OF LEGAL SYSTEMS

Fuller argues that it is only when a system satisfies all the eight principles of proper law making to some degree, that it can be called a legal system. Where there is a complete failure to comply with any of the principles, then whatever the system in question produces is not law but something else, since only a legal system can produce law, and only compliance with all of the eight principles can qualify a system as legal.

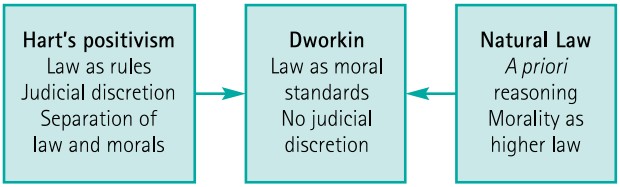
The morality of legal systems is a 'morality of aspiration', in that legal systems aspire to comply satisfactorily with the eight principles. It is possible for a system to be more or less of a legal system, depending on the extent to which it satisfies all the eight principles.

Hart takes exception to Fuller for his description of the eight principles as 'moral', arguing that it is possible for a system to comply with all the principles and still succeed in making bad law. Fuller, however, believes that where a system complies with all the principles, then the cumulative effect of such compliance is more likely to be the creation of morally good laws rather than bad ones.

RONALD DWORKIN'S CONCEPTION OF LAW AND MORALITY

Dworkin is best known for his critique of Hart's legal positivism in *Law's Empire*.

DWORKIN'S THEORETICAL STANCE



Ronald Dworkin occupies a theoretical position which rejects some of the basic tenets of Natural Law theory and yet which is at the same time extremely critical of the positivist approach to law. It has been said that his ideas constitute a third theory of law, since he appears to occupy a middle ground between positivism and Natural Law without identifying meaningfully with either of them.

Dworkin disagrees with the approach of Natural Law thinking to the question of the nature of law in three respects:

1. He rejects the *a priori* reasoning of Natural Law thinkers which assumes the existence of predetermined moral principles, which, in turn, are supposed to determine the validity of all made laws and to which the latter must approximate.
2. For Dworkin, the close link which Natural Law thinking places between the notion of justice and the fact of law and which makes it impossible to distinguish between the validity of a law and its injustice is implausible.
3. Dworkin also rejects the claim of Natural Law that the truth of propositions of law must be determined on the basis of some moral standard and that the more accurate interpretation of a statute is the one which accords most closely with some moral perspective.

Dworkin disagrees strongly with the three most basic tenets of positivism:

1. The notion that law is made up of only one, factually identifiable and objectively verifiable type of standard. Dworkin specifically singles out the contention advanced by Herbert Hart, that law is composed only of rules.
2. The contention that questions of law and issues of morality must be kept strictly separate when the nature of law is being investigated.

3 The attribution by legal positivists of extensive discretion, amounting almost to legislative power, to judges when they are involved in the adjudication of 'hard cases'.

DWORKIN'S CRITICISM OF HART'S POSITIVISM

The positivist identification of law

Dworkin's main criticism of the positivist approach to law has to do with its general conception of the law as being constituted by only one of a number of different types of standards. The classical positivists, Bentham and Austin, saw law as a set of commands issued by a sovereign who had the power to impose sanctions. Kelsen regarded law as a set of primary norms, that is, conditional directives to officials to apply sanctions under certain circumstances. Hart saw law as a system of primary and secondary rules validated by a rule of recognition. For all these theorists, as positivists, a single type of general standard constituted law, and everything else which did not fit in with the criteria set out for identifying such law was not legally relevant.

Positivism, hard cases and judicial discretion

Dworkin saw the inability of the positivists to recognise any other standards as being law as a weakness which ultimately led them erroneously to propose that in situations where there was no specific law applying to a particular situation – so called 'hard cases' – then judges were liable to use their discretion in order to reach a decision. In this respect, Dworkin specifically criticised Hart's concept of law as a system of rules.

According to Hart's scheme, only those rules which satisfy the criteria of legal validity set out in a legal system's rule of recognition may be classified as law. Anything else, including rules of morality and other social standards, cannot be law and will therefore not be directly relevant in the processes of adjudication carried out by the courts. Normally, judges will not have any problems identifying the rules of law which apply to a particular dispute and using them to resolve the dispute.

However, in 'hard cases', judges sometimes do run out of law. Such 'hard cases' occur in instances where there is no rule of law which specifically applies to the case before the court. Alternatively, what rules exist may be in irreconcilable conflict with each other and thus cannot be meaningfully

utilised. For Hart, as for the other positivists, judges in this situation will use their discretion to decide the matter. This means that they will appeal to their own personal conceptions of what is just and unjust along with, maybe, a consideration of certain matters of policy before they make a decision based on their conception of what is fair. The process of adjudication in these situations then amounts almost to legislation, giving judges the ability either to make new law or fundamentally to alter the meaning and range of application of existing laws. Dworkin argues that this positivist approach does not accurately reflect and explain what in fact happens when courts make decisions in 'hard cases'.

DWORKIN'S 'ONE RIGHT ANSWER' THESIS

Moral standards and the law

Dworkin believes that the law is made up not just of rules, but also of other standards such as policies and principles. These are equal to rules in terms of importance and effect in the processes of legislation and adjudication respectively, although they are different in their character and mode of operation from rules. All these standards together make up what Dworkin calls the 'moral fabric' of a society and are intended to protect certain interests which are regarded by the members of such a society as being valuable. These interests are normally specified in terms of abstract rights, such as the right to life, liberty and human dignity. Each society may have certain abstract rights peculiar to itself, since people in different societies may regard different interests as being valuable and therefore deserving of protection. Thus, a certain 'morality' in this sense may be particular to a certain society, and it will be possible for us to empirically discover that morality by objectively determining what interests are protected by abstract rights in that society. This is what leads Dworkin to reject the Natural Law contention that we can, through reason alone, discover moral principles which are higher than the human will and which are universal, eternal and immutable. The idea of rights, however, still allows him to argue that morality is or should be a part of law, and that considerations of justice do, and must, carry weight in the determination of disputes by the courts.

The differences between rules and principles

Dworkin distinguishes between rules and principles in the following manner. In the process of adjudication, principles apply or operate differently from rules.

Where a rule applies, it does so in an 'all or nothing' fashion, requiring that the case be decided or the dispute resolved in accordance with it. Where a principle applies, however, it does not do so in a conclusive fashion. It provides a reason for the case to be decided in a certain way, but does not require that the decision be necessarily in accordance with it. This is because it is possible for principles to conflict, and in such situations they have to be weighed and balanced against each other before the decision is made to apply one or the other.

Because of their propensity to conflict, principles have weight, a quality or dimension which allows them to be compared, balanced, and for choices to be made between them. Rules do not have weight in this sense. The validity or invalidity of rules is not debatable. Either a rule is valid or it is not. Either a rule applies to a particular case or it does not. There is no question of balancing rules one against the other.

Because they do not have the dimension of weight, rules cannot conflict and remain both valid. Principles can, however, both be valid and legally binding even if they conflict.

Hercules and the limits of judicial discretion

Where a case comes before a court of law, the judge is not just limited to applying one set of standards, such as rules, to resolve the dispute. There are available to him other standards, such as principles, to make a decision even in cases where no specific rule of law applies. These principles will constrain the judge to make a certain and specific decision and therefore limit his or her discretion in adjudication.

For Dworkin, judges do not have quasi-legislative discretion. They do not have discretion in the 'strong sense' of being actually able to make decisions which have the effect of producing new law or fundamentally altering existing laws. They may have discretion in the 'weak sense' in the manner in which they apply the law as found in rules and principles. This is because, although judges are not provided with specific procedures for applying each law, they still must not act in a mechanical fashion and must exercise a degree of judgment in the interests of justice and fairness.

Ultimately, because of the existence and operation of legal principles, there is in relation to every dispute always a right answer to the question: *who has a right*

to win? All a judge needs to do is to find that answer, and in doing so he or she must search through the 'moral fabric' of society.

To illustrate his argument, Dworkin appeals to actual decided cases where he says the use of legal principles is evident. One such case is the American case of *Riggs v Palmer* [1899], where the question arose as to whether a murderer could be allowed to inherit from his victim, even though the will deposing the estate in his favour was valid. Under the applicable rules of testamentary succession, the murderer was entitled to inherit, since there was no provision for an exception in relation to this particular situation. The court, however, relying on the legal principle which says that no person may profit from his or her wrong, decided to deny the murderer the inheritance. For Dworkin, this principle justifies a decision which at that time could not have properly been made under any existing rule of law. At the same time, however, the application of the principle resulted in a decision which had as much legal authority as if it had been made under a legal rule. This shows that there are always legal standards underpinning judicial decisions in 'hard cases', even where the existence and application of such standards is not always articulated by the respective judges.

To further reinforce his argument, Dworkin postulates a hypothetical judge, appropriately named Hercules, whom he endows with superhuman powers of analysis, deduction and adjudication. Hercules has the capacity, often lacking in ordinary judges, to provide exhaustive justifications for decisions in 'hard cases' on the grounds of principle. In order to do this, Hercules would initially have to construct the most sound theory of law possible which will provide moral and political justification for the legal rules and institutions comprising 'law' in his particular jurisdiction. This theory, if properly worked out, would represent the law as a seamless web of legal rules, legal principles and other legal standards capable of providing a single right answer in every instance where the question arises: *who has a right to win?* Hercules would thus be able to justify every correct decision in respect to 'hard cases' by appealing to the soundest theory and to the standards of adjudication which it specifies.

Unfortunately, most ordinary judges do not possess Hercules' 'superhuman skill, learning, patience and acumen', and thus are not capable of providing these exhaustive justifications for their decisions in 'hard cases' in every instance. However, the point which Dworkin is making by positing the ideal

judge is basically, that the process of adjudication in 'hard cases' is not as haphazard and capricious an affair as the positivist reliance on the notion of judicial discretion would imply. Judges do seek to find justification for decisions which they make in such cases, and in many of them, such justification exists, even though it may not be specifically articulated by the judge in question.

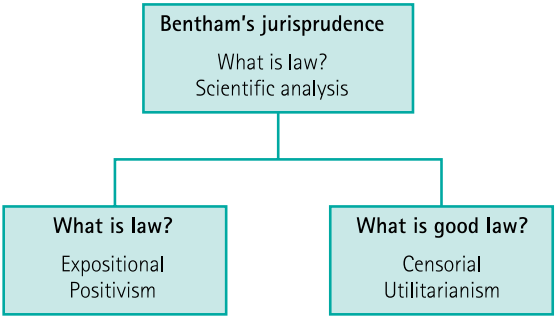
Of course, sometimes, judges make mistakes in deciding 'hard cases' and, sometimes, they do not properly apply the correct principles in a manner which would provide them with a right answer. But this is only a result of the fallibility of judges as human beings and does not invalidate the correctness of other decisions made on the same basis. The fact that most judges do not provide proper explanations and justifications for their decisions in 'hard cases' does not mean that those explanations and justifications do not exist.

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 Alternatives to the imperative models 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.

5

Utilitarianism

JEREMY BENTHAM AND CLASSICAL UTILITARIANISM AS QUANTITATIVE HEDONISM



BENTHAM AS BOTH POSITIVIST AND UTILITARIAN

As a legal theorist, Jeremy Bentham was a positivist who regarded an overwhelmingly important field of jurisprudential inquiry to be that of answering the question: *what is law?* in terms of the empirically demonstrable facts of power, sovereignty and sanctions. He was also a renowned reformer, who believed that the process of legislation should be geared towards the realisation of 'the good', which in turn meant that all legislation must be aimed at providing abundance and security, and at the reduction of inequalities between citizens in society. Bentham, however, rejected the approach of Natural Law thinkers which sought to identify the 'good' in law with some higher set of moral principles derivable by reason from some metaphysical source such as nature or God.

Bentham also expressed a profound hostility for the methods of English common law in general, and for judicial law making in particular. As such, he was a strong advocate of codification, which by definition implies the need of going beyond the question of what law is and towards the question of what law should be. Bentham invented a number of devices designed to create good law.

THE PRINCIPLE OF UTILITY

Bentham believed that the most important quality of human beings was their sentience – that is, their ability to feel pleasure (which he regarded as good and

therefore to be pursued and maximised) and pain (which was bad and had to be reduced). Bentham argued that these were self-evidently the two masters of humankind. He identified what he called 'pleasures of the sense', such as riches, power, friendship, good reputation and knowledge, among other things. There were also pains of the sense, including privation, enmity, bad reputation, malevolence, fear, etc.

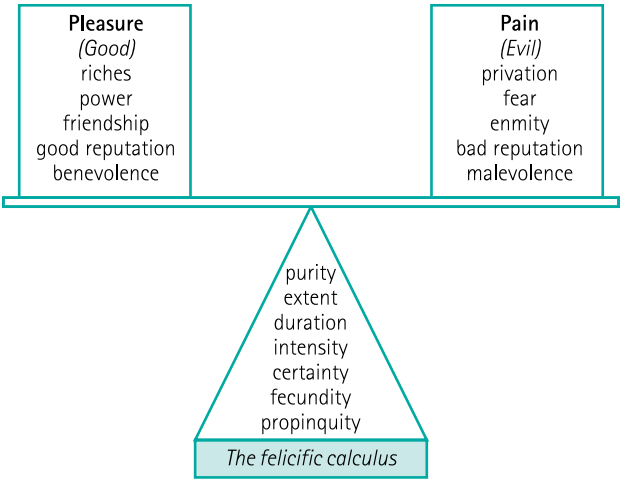
For Bentham, the principle of utility had to be the guiding standard and the basis for evaluation of all action. Utility in this case was to be understood as that quality of an object or action which gave it a propensity to produce some good, satisfaction/happiness or benefit on the one hand, and to prevent or reduce pain, evil or mischief on the other. The principle of utility was, as such, an objective standard for deciding on what was good law and what was not.

THE *FELICIFIC CALCULUS* AND THE MAXIMISATION OF HAPPINESS

Bentham believed that it was possible to predict accurately the consequences of an act and to calculate the extent to which it would promote pleasure and prevent pain. He believed that we could actually measure the intensity, duration, purity and fecundity of these sensations, and he developed a 'felicific/hedonistic calculus' for achieving this. Taking into account the certainty, propinquity and the extent of such sensations, we could calculate the social totals of the amount of pleasure and pain which an action would have. By making a quantitative comparison between these, we could then choose to perpetrate only those actions, or enact only those laws, which would have the overall effect of providing for the *greatest happiness of the greatest number*.

For Bentham, the 'science of legislation' comprised the ability, on the part of the law-making authorities in a State, meaningfully to tell or predict the sort of actions and measures which would maximise pleasure or happiness and minimise pain or misery. The 'art of legislation' was then the ability of the legislators to create laws which would effectively promote the good and reduce the bad in this sense.

THE *FELICIFIC CALCULUS*

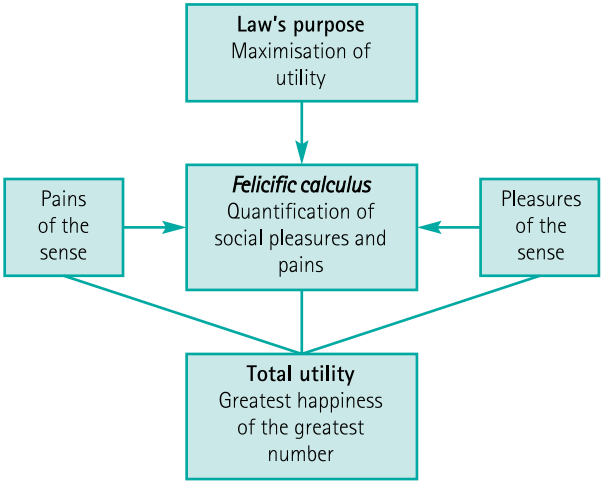


THREE BASIC ASSUMPTIONS OF UTILITARIANISM

The logic of Jeremy Bentham's utilitarianism was grounded on three basic assumptions:

1. The happiness of an individual person is augmented in circumstances where the addition made to the sum total of their pleasures is greater than any addition made to the sum total of their pains.
2. The general interest of a community consists of all the interests of the individuals which it comprises.
3. The collective happiness of a community is increased in circumstances where the total of all pleasures of the individual members of that community is augmented to a greater extent than their pains.

UTILITARIANISM AND SOCIAL HAPPINESS



THE PANOPTICON

Lastly, there is a less 'benevolent' aspect to Bentham's quantitative hedonism, which is that it rests on absolute surveillance. For Bentham the principle of utility needs an institutional device to be implemented efficiently. Indeed it is clearly the case that the extension of the *felicific calculus* to all inhabitants of a given territory – this *calculus* being cast as the sole legitimising device for law by Bentham – has to be mediated by the constant surveillance of all by all. Infinitesimal calculation of pain and pleasure requires absolute knowledge and so absolute visibility.

Thus Bentham, with the help of his architect brother, took his utilitarian theory in the practical direction by coming up with the design of an institution which he called the Panopticon. In the Panopticon there would be a central tower in which a watcher would be (or not) situated, keeping everyone in check through the (real or imagined) operation of his gaze. The key practical application of the Panopticon was clearly the prison, but Bentham thought the Panopticon could be used for all manner of purposes:

> No matter how different, or even opposite, the purpose: whether it be that of punishing the incorrigible, guarding the insane, reforming the

> vicious, confining the suspected, employing the idle, maintaining the helpless, curing the sick, instructing the willing in any branch of industry, or training the rising race in the path of education: in a word, whether it be applied to the purposes of perpetual prisons in the room of death, or prisons for confinement before trial, or penitentiary-houses, or houses of correction, or work-houses, or manufactories, or mad-houses, or hospitals, or schools.
>
> (*Panopticon or the Inspection House, etc.*: 1962, vol. IV, 40)

Note: The panoptic mechanism invented by Bentham has been convincingly interpreted by Michel Foucault in his remarkable *Discipline and Punish* (1977) as characteristic of a transition between a form of political power enforced by the sovereign and one that operates through networks of surveillance.

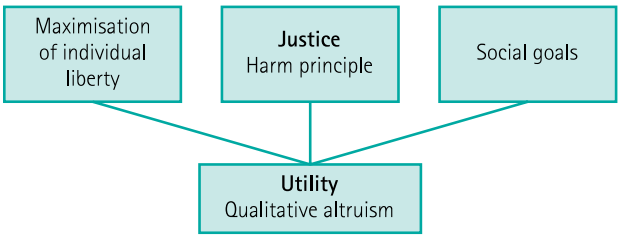
SOME CRITICISMS OF BENTHAM'S UTILITARIANISM (see also Chapter 6)
Some of the more specific criticisms of the Benthamite utilitarian creed have to do with its coherence and the consistency of its requirements. These criticisms include the following:

- Generally, utilitarian theory is based upon the assumption that it is possible to predict the consequences of a particular action or law, thus enabling prior evaluation to be made of an act in terms of the extent to which it will maximise pleasure and minimise pain. The contrary view is that, in practice, it is not possible to look into the future with such clarity of vision as to be able to determine how a certain arrangement will turn out. The assertion that it is somehow feasible to evaluate the goodness or badness of actions and laws in terms of consequences, prior to the event, is therefore essentially fallacious.
- The idea of the *felicific calculus* by which we are supposed to be able to measure the sum total of pains and pleasures flowing from a contemplated act is impracticable. Pain and pleasure are simply too subjective to be measured accurately, let alone for them to be compared one to the other in quantitative terms. The whole idea of being able to calculate the extent to which the happiness of a community generally has been augmented and the extent to which the sum total of its misery has been reduced is based upon an empirically indefensible proposition. To this extent, the principle of

utility, as a standard for evaluating actions and laws, is not altogether objective and is no better than the moral principles proposed by Natural Law thinkers.

- Utilitarian theory provides what is essentially a consumer model of law, representing a scenario in which the law makers in a society practically go shopping around, picking out those measures which, in their opinions, best satisfy certain perceived desires amongst the members of their community. In the first place, the truth of the matter is that legislators do not pick and choose legislative measures in this way. In creating certain legal arrangements, their actions are determined and influenced by a whole range of other factors such as efficiency and convenience, as well as other values apart from the mere pursuit of happiness. In any case, it is accepted that the desires of people in society are capable of being manipulated in various ways. This means that what the legislators treat as the desires of their subjects may not necessarily be the genuine article, and, therefore, the consequences of any action may not be accurately predictable.
- Finally, it is argued, the linchpin of Bentham's utilitarianism – the pursuit of happiness and the satisfaction of basic sensual desires – is a rather gross and perverse aim for morality. Utilitarianism is a moral philosophy which seeks to provide a theory of justice. Surely the noble ideal of justice demands a more refined conception of good and bad and a more rigorous standard for evaluating law than this basic pandering to unbridled hedonism?

JOHN STUART MILL AND THE REFINEMENT OF UTILITARIANISM THEORY: UTILITARIANISM AS A QUALITATIVE ALTRUISM



UTILITARIANISM AND THE NATURE OF HAPPINESS: QUALITY V QUANTITY

John Stuart Mill (1806–73) sought to refine the Benthamite version of utilitarian theory by adopting a qualitative approach to the main requirements of that theory.

THE SOURCES OF SATISFACTION/HAPPINESS

Bentham argued for the maximisation of happiness and the minimisation of misery purely in the physical sense, that of sensual pleasure and pain. Mill argued that there were other sources of happiness which were of a different nature, but which provided as much satisfaction and were as valuable as pleasures of the sense.

THE FORMS OF SATISFACTION/HAPPINESS

Bentham believed that it was possible to measure the quantity of happiness and misery using the *felicific calculus*. The difference in quantity is the only real difference between pleasures and pains. The proper test of the 'goodness' or 'badness' of an act is the amount of happiness or misery which it produces. Mill argued that there are qualitative as well as quantitative differences between sources of happiness and misery. A proper test of the goodness or badness of an act needs to make reference to the quality, as well as to the quantity, of the pleasures and pains produced.

THE VALUE OF SATISFACTION/HAPPINESS

For Bentham, the value of pleasures depends merely on the differences in quantity between them. Mill, however, argued that the quality of satisfaction or pleasure produced by an act is as important, if not even more important than the quantity produced. He believed that the differences in quality between pleasures may mean that small amounts of some pleasures are regarded by those experiencing them as being of much greater value than large amounts of other, less refined, pleasures.

THE NATURE OF HUMAN BEINGS

Bentham placed emphasis on the sentience of human beings – that is, their ability to feel pleasure or pain – in working out the requirements of utilitarian theory. This led him to consider only the physical sensations of pain and

pleasure, as elements of misery and happiness. Mill believed that intelligence, rather than sentience, was a more important characteristic of human beings. The full use of one's higher faculties, therefore, could lead to a greater, truer and qualitatively more valuable happiness than the mere satisfaction of base physical pleasures.

UTILITARIANISM AND THE NEED FOR HAPPINESS: HEDONISM V ALTRUISM

Mill's consideration of the justification and the process of the utilitarian search for collective social happiness led him to different conclusions from those reached by Bentham:

- Bentham argued that, in the pursuit of happiness, people are or should be motivated to secure the happiness of others, because by doing so they ensure their own happiness. To this extent, the motivation for any actions which assist others to achieve happiness would be based upon an individualistic pursuit of personal satisfaction, even though the cumulative effect would be a general increase in the happiness of the group.
- Mill, on the other hand, argued for an altruistic approach, emphasising that the search for happiness should be primarily based upon a consideration of the interests and welfare of others, rather than the interests of the individual. Those engaged in the creation and evaluation of the institutions and processes aimed at promoting happiness in society must ensure, as far as this is possible, that the interests of the individual are aligned with those of the group.

UTILITARIANISM AND THE SEARCH FOR HAPPINESS: JUSTICE V UTILITY

The place of justice in utilitarian theory

Bentham dismissed the notion of justice as a fantasy which was created for the purposes of convenience in the discussion of issues and situations which were the practical products of the application of the principle of utility. Mill believed that the idea of justice occupied a central place in the creation of a balance between social considerations of utility and individual concerns of liberty and equality. The notion of justice made it possible to create a balance which would have the effect of increasing happiness in society.

The relationship between justice and other social values

The notion of justice, for Mill, was closely tied in with his ideas on morality, equality and liberty. Justice implied the identification of interests which came together to form 'something which is not only right to do, and wrong not to do, but which some individual can claim from us as his moral right'. Equality of treatment is an essential element in the organisation of social life, and its contribution to the maximisation of happiness or satisfaction cannot be denied. Liberty helps to clarify the distinction and balance between the interests of the individual and the goals of society.

The scope of justice

According to Mill, the concept of justice has developed to cover many areas of activity which are not necessarily controlled through the agency of the law. In his view, justice must be seen as covering both constituted rights, which are regulated by the law, and other actions and claims which are not subject to law.

UTILITARIANISM AND THE POSITION OF THE INDIVIDUAL: LIBERTY V SOCIAL GOALS

The identification of liberty

In his essay, *On Liberty* (1859), Mill set himself the task of maximising the liberty of the individual. Within this general category, Mill included such specific freedoms as:

- liberty of expression and publication;
- liberty of thought and feeling;
- freedom of opinion;
- liberty of conscience;
- liberty of tastes and pursuits;
- liberty to unite for purposes which did not harm others.

The role of liberty in utilitarian theory

For Mill, liberty was an essential element in the pursuit of happiness, since it is only in a society where the specified freedoms are guaranteed that people will be content in the satisfaction that their individual interests are secured and

that they need not fear that they may be arbitrarily sacrificed in one way or another for the purpose of the attainment of some social goal. According to Mill, the granting and the protection of these freedoms provided people with the ability of pursuing their own good in their own different ways, with the only limitation being that such pursuits should not interfere with the interests of others.

The idea of rights

In a way, for Mill, the idea of rights provides the distinction between the concept of liberty and the notion of justice. In his famous harm principle Mill states that:

> The only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others . . .

For Mill, the individual should have liberty in regard to actions which do not affect the rights of others. Such rights are determined by reference to justice. Justice defines that sphere of conduct where society has an overriding interest and the individual takes second place.

THE SECURITY OF LIBERTY IN UTILITARIAN THEORY

It is important to realise that, despite his argument in defence of liberty, Mill is still a committed utilitarian. To this extent, his ultimate aim is to provide for a standard or mechanism which will have the overall effect of maximising happiness or satisfaction in society. In this context, the pursuit of liberty can only be a means to an end. We guarantee certain liberties for the individual in order to make him/her relatively content in the knowledge that he/she is secure in respect to certain of his/her interests. Such contentment can only contribute to the sum total of social satisfactions. However, these liberties are not an end in themselves, and their provision takes second place to the overall purpose of attaining the social goal of happiness. In this case, therefore, where there is a danger that the individual exercise of the said liberties may lead to some unhappiness, as may occur when such exercise infringes on the interests of other persons, then it is perfectly acceptable to limit or extinguish those liberties. Freedom is therefore not absolutely secure in Mill's scheme of things, since it is ultimately only a means to an end.

Illustration: should criminal law uphold morality?

The conflict between utilitarianism and the harm principle is illustrated by ongoing debates on the question of the criminalisation of what some consider to be immoral behaviour, especially sexually deviant behaviour.

The Hart–Devlin debate

The relation between law and morality was raised in practical terms by the *Committee on Homosexual Offences and Prostitution in Great Britain*. This committee, headed by Sir John Wolfenden, investigated the legalisation of homosexuality and prostitution for three years. It issued its report in 1957, recommending the decriminalisation of homosexuality on the basis of freedom of choice and the privacy of morality. The Report took the view that immorality should not be law's concern. Hart and Law Lord-to-be Patrick Devlin contributed to the debate, engaging in a polemic now universally referred to as the Hart-Devlin debate.

Devlin: the majority rule

Devlin argued that the moral views of the majority, and the good of society, should prevail over the rights of the individual:

- Law without morality '. . . destroys freedom of conscience and is the paved road to tyranny'.
- Criminal law must preserve society's 'moral fabric' and so enforce moral norms to keep society from falling apart.
- Laws governing private morality guard against the disintegrating effects of actions that undermine the morality of society and so are justified.
- A shared morality is necessary for the survival of society.
- Immorality is what every right-minded person considered immoral. No acts are 'none of the law's business'.

Hart: individual rights

- Why should the conventional morality of some members of the population, be they the majority, be a justification for preventing people from doing what they want?
- J.S. Mill's harm principle.

- Societies survive changes in basic moral views all the time; they do not disintegrate.

The Hart-Devlin debate was again relevant to the House of Lords decision in *R v Brown* [1993]. In this case the appellants belonged to a group of sado-masochistic homosexuals who over a 10-year period willingly participated in the commission of acts of violence against each other, including genital torture, for the sexual pleasure which it engendered in the giving and receiving of pain. It was held that consensual sado-masochistic homosexual encounters which occasioned actual bodily harm to the victim were offences against the person, notwithstanding the victim's consent, because public policy required that society be protected by criminal sanctions against a cult of violence which contained the danger of the proselytisation and corruption of young men and the potential for the infliction of serious injury.

UTILITARIANISM AND THE ECONOMIC ANALYSIS OF LAW: THE ECONOMIC CONCEPTION OF JUSTICE

The approach which is generally known as the Economic Analysis of Law (EAL) has been put forward, particularly by American thinkers, as a viable alternative to classical utilitarianism. It generally seeks to avoid the problems that have confronted the latter theory by substituting different definitions and assumptions in the argument for the maximisation of happiness or satisfaction. It does this especially by emphasising the *rationality* of persons and their desire for *efficiency* in the processes which lead to the achievement of individual and social goals.

In essence, this approach to questions of law and justice regards society as primarily an economic entity and people as being basically *homo economicus* – that is, humans are regarded as primarily economic agents, who act and react essentially for economic reasons, seeking as much as possible to maximise wealth and the satisfaction of their preferences. To this extent, the law becomes an economic tool, to be utilised efficiently for the maximisation of happiness. Its creation and application is governed by economic considerations. Justice then becomes an economic standard, based on the two elements of rationality and efficiency.

THE CONTRIBUTION OF THE ECONOMIC ANALYSIS OF LAW TO THE UTILITARIAN DEBATE

The case of the *felicific calculus*

One problem which has confronted classical utilitarian theory is the criticism that the *felicific calculus* developed by Jeremy Bentham for the prediction and measurement of human pains and pleasures is impracticable, since we cannot be certain whether people will be happy or not with any proposed act or measure. To answer this, EAL argues that human beings are rational animals. Being rational means that, where they are given a choice, people will choose and accept actions which they see as having the effect of maximising their satisfactions by giving them more of what they desire rather than less. Thus, we can easily predict what reactions people may have to a proposed act by simply measuring, in economic terms, how much people will get of what they desire from the proposed act.

The problem of predicting pleasures

Another problem for classical utilitarianism is the question of how to determine accurately exactly what people desire under a given situation. It is therefore difficult to decide upon what measures to take in order to maximise the happiness/satisfaction of the greatest number of people in society. EAL proposes an approach to the problem which reduces people's desires to economic units. A person's desire for a particular thing may be measured in terms of how much that person is prepared to pay for the thing, either in money or in the form of some other resource which they have available to them, such as time or effort. In this case, therefore, what a person wants is what they are willing to pay for, and the extent to which they want it is determined from the amount which they are willing to pay for it.

The question of balancing desires

Classical utilitarianism is criticised for seeking to balance the happiness of certain persons with the misery of other persons in society, and the argument is that this is not possible. EAL proposes a formula which, by determining people's desires and dislikes in economic terms, allows us to calculate the happiness or misery which a certain situation or action may cause by simply finding out how much certain persons will be willing to pay to have the action occur and how much other persons are willing to pay to have the situation or action not occur. In this way, the balance of pleasures and pains can accurately be discovered.

Contribution to legal thinking

EAL has proved very useful in legal thinking insofar as it offers pragmatic justifications or criticisms of legislation or legal decisions where doctrinal argumentation can prove unconvincing. For example, in the area of criminal law, if crime is considered to be a rational choice providing certain advantages, EAL can identify disincentives through a cost/benefit analysis.

RICHARD POSNER AND THE ECONOMICS OF JUSTICE

In his writings in two texts, *The Economic Analysis of Law* (1977) and *The Economics of Justice* (1981), Richard Posner articulates a theory of justice which generally equates justice with economic efficiency. His assumption is that the justice of social, political and legal arrangements can be determined in terms of the concept of wealth maximisation. In this regard, the operation of legal systems, in terms of the creation, application and enforcement of the law, and particularly the common law, can be understood and assessed in terms of economic efficiency. In *The Economic Analysis of Law*, Posner defines 'efficiency' as:

> . . . exploiting economic resources in such a way that human satisfaction as measured by aggregate willingness to pay for goods and services is maximized.

Efficiency requires that society provide conditions in which the operation of the free market will ensure that goods, including certain rights and privileges, will be at the disposal of those who value them most highly and therefore those who are most willing to pay for them. To this extent, Posner, like the utilitarians, rejects the moral dimension of rights, and presents what is essentially an individualistic economic conception of justice.

Posner analyses the operation of the common law and, along with other proponents of EAL, concludes that law is basically a set of rules and sanctions which are intended for the regulation of the behaviour of persons whose primary instinct is to maximise the extent of their satisfactions, as measured in economic terms. The law is also administered by people, that is, lawyers and judges, whose main consideration is economic efficiency. Law is, therefore, created and applied primarily for the purpose of maximising overall social utility.