

Cambridge University Press
978-0-521-13207-7 - An Introduction to Law: Eighth Edition
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Part one

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1

Law and society

One of the many ways in which human societies can be distinguished from animal groups is by reference to social *rules*. We eat and sleep at certain intervals; we work on certain days for certain periods; our behaviour towards others is controlled, directly and indirectly, through moral standards, religious doctrines, social traditions and legal rules. To take one specific example: we may be born with a ‘mating instinct’, but it is through social rules that the attempt is made to channel this ‘instinct’ into the most common socially sanctioned form of relationship – heterosexual marriage.

Marriage is a good example of the way in which social rules govern our lives. Not only is the monogamous (one man/one woman) marriage supported by the predominant religion in British history – Christianity; it is also maintained through *moral* rules (hence the traditional idea of unmarried couples living together being ‘wrong’) and by the operation of rules of *law* which define and control the formalities of the marriage ceremony, lay down who can and who cannot legally marry, specify the circumstances whereby divorce may be obtained, define the rights to matrimonial property upon marital breakdown and so on.

Marriage is only one example of social behaviour being governed through rules. Legal rules are especially significant in the world of business, with matters such as banking, money, credit and employment all regulated to some extent through law. Indeed, in a complex society like our own, it is hard to find any area of activity which is completely free from legal control. Driving, working, being a parent, handling property – all of these are touched in some way by law. Even a basic activity like eating is indirectly affected by law, in that the food we eat is required by legal rules to meet rigorous standards of purity, hygiene and description.

In this introductory chapter, attempts by various writers to analyse and explain law will be examined. We shall also consider some important social, economic and political developments over the past century or so which have profoundly affected the nature and extent of the regulation of social life by means of legal rules and procedures. In addition, some of the important themes running through this book will be introduced, such as the proposition that the law is never static; it is always changing, being reinterpreted or redefined, as

legislators and judges strive, with varying degrees of success, to ensure that the law constantly reflects changes in society itself. This, in turn, leads to a second important theme: that law can be properly understood only by examining the ways in which it actually operates in society, and by studying the often extremely complex relationship between a social group and its legal code.

Analysing law

Most of us, if asked to define law, would probably do so in terms of rules: for instance, we understand criminal law, forbidding certain activities, as a set of rules defining the types of behaviour which, if indulged in, result in some form of official ‘retaliation’ through police intervention, the courts and some form of criminal *sanction* such as imprisonment, or a fine. Criminal law and the notion of legal sanctions will be examined in a later chapter. For the moment, the fundamental notion for us is that of a ‘rule’.

In their work on the subject, Twining and Miers offer a wide definition of a rule as ‘a general norm mandating or guiding conduct or action in a given type of situation’.¹ A rule prescribes what activity may, should or should not be carried out, or refers to activities which should be carried out in a specified way. Rules of law may forbid certain activity – murder and theft are prohibited through rules of criminal law – or they may impose certain conditions under which activity may be carried out (car drivers and television set users must, for example, have valid licences for those items before they can legally drive or use them). Again, the law contains some rules which we might call ‘power-conferring’ rules: rules which enable certain activities to be carried out with some form of legal backing and protection, the best example of which is perhaps the law of contract, which provides rules which, among other things, guide us in the manner in which to act if we wish to make a valid contract.²

Because a rule guides us in what we may, ought or ought not to do, it is said to be *normative*. We can best grasp the meaning of this term if we contrast a normative statement, telling us what *ought* to happen, with a *factual* statement, which tells us what *does* happen. For instance, the statement ‘cars must not be driven except on roads’ is a normative, ‘ought’-type statement, whereas ‘cars are driven on roads’ is a factual, ‘is’-type statement. All rules, whether legal, moral or just customary, are normative, laying down standards of behaviour to which we *ought* to conform if the rule affects us.

Although the notion of a ‘system of rules’ probably corresponds closely to most people’s idea of law, we can soon see that this is not sufficient by itself to be an accurate or adequate account of law, because there are, in any social group, various ‘systems of rules’ apart from law. How do we distinguish, for example,

¹ W. Twining and D. Miers, *How to Do Things with Rules* (5th edn, 2010, Cambridge University Press), p. 80.

² See chapter 11.

between a *legal* rule and a *moral* rule? In our society, though we consider it immoral to tell lies, it is not generally against the law to do so.³ Of course, some moral rules are also embodied in the law, such as the legal rule prohibiting murder. This does not mean, however, as we shall see in chapter 2, that law and morality *always* correspond. It would take a very wide definition of ‘morality’, for instance, for the idea to be accepted that a driver who exceeds the speed limit by only two miles per hour (a criminal offence) would thereby be acting *immorally!*

Again, how do we distinguish between a legal rule and a rule of custom or etiquette? What is the difference between a judge ordering a convicted person to pay a fine for breaking a criminal-law rule and a father ordering his son to forfeit his pocket money for disobeying him? Clearly, there *are* differences between these types of rule, and perhaps the only feature which they all have in common is their normativeness. But where do these differences lie?

The analysis of law, and the specification of the distinctions between law and other rules, have proved surprisingly difficult to articulate. Writers have, over the years, adopted various perspectives on legal analysis, sometimes concentrating on law as a system of rules of an official nature (as in the work of H. L. A. Hart), sometimes focusing upon individual legal rules, their origin and their operation as part of an overall system (as can be seen in works within the sociology of law).⁴ Some writers have analysed law as if it were a ‘closed’ system, operating within its own logical framework, and divorced in important ways from the wider social context. John Austin, writing in the nineteenth century, is an example of such writers.⁵ Others have insisted that law and the legal system can only be analysed by considering them in relation to the other processes and institutions within the society in which they operate – as stated above, such is the perspective within this book.

Still other legal writers have provided accounts of law which take as their central issue the various *functions* which law is supposed to perform in a society. Two examples of this approach are worthy of note. First, the American writer Karl Llewellyn expounded his ‘Law-Jobs Theory’,⁶ which is a general account

³ There are various exceptions to this general statement, of which the best known are perhaps the offence of perjury (lying in the witness box), the making of a false statement in order to induce someone to buy something, which may fall foul of the Trade Descriptions Act 1968 (creating criminal offences for false or misleading trade descriptions, discussed in chapter 11), the law relating to misrepresentation, or lying on an official document (such as an income tax return or claim for income support benefit), which may lead to prosecution.

⁴ For useful discussions of some important contributions in this area, see M. Travers, *Understanding Law and Society* (2010, Routledge); R. Cotterrell, *The Sociology of Law: An Introduction* (2nd edn, 1992, Oxford University Press).

⁵ See the discussions of the work of John Austin in M. Freeman, *Lloyd’s Introduction to Jurisprudence* (9th edn, 2014, Sweet & Maxwell) and R. Cotterrell, *The Politics of Jurisprudence* (2nd edn, 2003, Oxford University Press), ch. 3.

⁶ K. Llewellyn, ‘The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method’ (1940) 49 *Yale LJ*; and see also K. Llewellyn and E. A. Hoebel, *The Cheyenne Way* (1941, University of Oklahoma Press).

of the functions of legal institutions in social groups of all kinds. Llewellyn argued that every social group has certain basic needs, which are catered for by the social institution of law by helping ensure that the group survives as such, and by providing for the prevention of disruptive disputes within the group. Should any disputes arise between members, the law must provide the means of resolving them. The law must also provide the means whereby the authority structure of the group is constituted and recognised (such as a constitution) and, finally, the law must provide for the manner and procedures in which the above ‘law-jobs’ are carried out.

A second example of this approach is that of Robert Summers.⁷ He identified five techniques of law, which may be used to implement social policies. These are, first, the use of law to remedy grievances among members of a society; second, the use of law as a penal instrument, with which to prohibit and prosecute forbidden behaviour; third, law as an instrument with which to promote certain defined activities; fourth, the use of law for managing various governmental public benefits, such as education and welfare policies; and fifth, the use of law to give effect to certain private arrangements between members of a society, such as the provisions of the law of contract in our own legal system.

We can contrast the analyses of Llewellyn and Summers with those of writers such as Austin, in that their accounts relate the law to its social context, whereas Austin treats rules, including legal rules, as though they were amenable to analysis ‘in a vacuum’, so to speak, or, put another way, in a manner divorced from social contexts or settings.⁸ For Austin, the hallmark of a legal rule (which he terms ‘positive’, or man-made, law) lies in the manner of its creation. He defined law as the *command of the sovereign body* in a society (which may be a person, such as a king or queen, or a body of elected officials, such as our own law-making body which we refer to formally as ‘the Queen in Parliament’), and these commands were backed up by threats of sanctions, to be applied in the event of disobedience.

A major problem with Austin’s analysis concerns his use of the idea of the ‘command’. Although the rules of criminal law, mentioned above, may perhaps approximate to the idea of our being ‘commanded’ by the law-makers not to engage in prohibited conduct, on pain of some criminal sanction, there are very many rules of law which do not ‘command’ us to do things at all. The law concerning marriage, for example, never commands us to marry, but merely sets out the conditions under which people may marry, and the procedure which they must follow if their marriage is to be valid in law. Similarly, the law does not command us to make contracts, but rather lays down the conditions under which an agreement will have the force of a legally binding contract. This type of rule may be termed a ‘power-giving’ rule, and may be contrasted with the *duty-imposing* rules which characterise criminal law. As Hart, among

⁷ R. Summers, ‘The Technique Element in Law’ (1971) 59 *Calif. LR*.

⁸ A. Halpin, ‘Austin’s Methodology? His Bequest to Jurisprudence’ (2011) 70 *Camb. LJ* at 175.

others, has pointed out, there are many other instances in law where the legal rule in question cannot sensibly be described as a form of ‘command’: ‘Is it not misleading so to classify laws which confer powers on private individuals to make wills, contracts, or marriages, and laws which give powers to officials, eg to a judge, to try cases, to a minister to make rules, or a county council to make by-laws?’⁹ The law, then, is far too complex, and contains far too great a variety of *kinds* of legal rules, for it to be reduced to the simple proposition that ‘laws are commands’.

What other formulations and classifications of law may be offered by legal writers? One significant attempt in recent years has been Hart’s own theory, contained in his book *The Concept of Law*, in which he sets out, first, the basic legal requirements, as he sees them, of any social group which is to be more than a ‘suicide club’. Every such social group, Hart suggests, must have certain rules which impose duties upon the members of the group concerning standards of behaviour. These ‘primary’ rules, which might contain rules approximating to basic criminal-law rules, but which might also impose what we would call civil-law duties (akin to duties contained in the law of tort – see chapter 9), could conceivably comprise the *only* rules within a social group; but, Hart argues, in a developed and complex society, these ‘primary’ rules will give rise to certain problems which will have to be dealt with by means of additional, ‘secondary’ rules. The first problem with such a simple code is that there will be no settled procedure for resolving doubts as to the nature and authority of an apparently ‘legal’ rule. To remedy this, the introduction of ‘rules of recognition’ is needed: these rules will constitute the hallmark of what is truly a *law*, and may do so by reference to a set of other rules or institutions, such as a constitution, a monarch or a representative body, such as Parliament.

A second problem will be that the primary rules will be static: there will be no means of changing the rules in accordance with changes in the circumstances of the social group. The remedy for this defect, says Hart, is a set of ‘rules of change’, enabling specified bodies to introduce new rules or to alter existing ones. Third, the primary rules will be inefficiently administered, because their enforcement will be through diffuse social pressures within the group. The remedy for this, says Hart, is the introduction of ‘rules of adjudication’, which provide for officials (judges) to decide disputes authoritatively. It will be appreciated that these secondary rules are really ‘rules about rules’, and Hart argues that the characteristic feature of a modern legal system is this *union* of primary and secondary rules.

Interesting though this approach is, it has suffered at the hands of critics. To begin with, some commentators have argued that Hart’s reduction of all duty-imposing rules to a category which he calls ‘primary’ rules is far too great a simplification. Can this category really usefully embrace areas of law, all of

⁹ H. L. A. Hart, *The Concept of Law* (2nd edn, 1994, Oxford University Press), p. 26. For a thorough discussion of Hart’s work, see esp. *Lloyd’s Introduction to Jurisprudence*, op. cit.

which impose duties of various kinds and with various consequences, as diverse in content and objectives as contract law, private property law, family law, criminal law, tort law and labour relations law? It may be argued that a much more complex classificatory scheme is required in order for such differences adequately to be analysed and understood.

Another criticism is that Hart's treatment of a legal system as a 'system of rules' fails to take into account the various other normative prescriptions contained within a legal system which affect the course, development and application of the law, but which are not 'rules'. In particular, Dworkin argues¹⁰ that Hart fails to take account of the role of *principles* in the operation of the law. Principles, he maintains, differ from rules in that while the latter are applicable in an all-or-nothing manner, the former are guidelines, stating 'a reason that argues in one direction, but [does] not necessitate a particular decision'.¹¹ Thus, suppose that a man murders his father in order to benefit from the father's will which, as he knows, provides that all of the father's property will come to him upon the father's death. Irrespective of the liability of the man for murder, the question will fall to be considered whether he will ultimately acquire that property. Normally, the law attempts to give effect to the wishes of the maker of a will, but here the outcome may well be affected by the *principle* that 'no man should profit by his own wrong' and the result may well be that, through the operation of this principle, and *despite the existence of legal rules* which would otherwise have operated in the son's favour, the murderer does not receive the inheritance.¹² Whether or not this type of principle is *part* of the fabric of legal rules, as Dworkin argues, is a difficult question: all parts of the law contain principles as well as 'hard rules' – an example might be principles of public policy which affect judicial deliberations concerning the law of negligence, which we shall consider in chapter 9 – but for the moment, it can be appreciated from the above discussion that there is much more to law than merely legal rules.

A more general point which must be made here is that, although the 'law as rules' approach has, through the work of writers such as Austin and Hart, greatly influenced patterns of legal thought in this country and elsewhere, it is by no means the only approach which may be taken in legal study. Already, we have mentioned the approach which looks at law in terms of its functions within society. Other writers have taken the view that law is best understood by examining the actual *operation* of the legal system in practice, and by comparing the 'letter of the law' with the way in which it actually operates. Such an approach is taken by those writers whose work is usually categorised as 'Legal Realism' – principally, Karl Llewellyn, Jerome Frank and Oliver Wendell Holmes. Other writers, at various times, have analysed law in terms of a society's cultural

¹⁰ R. M. Dworkin, *Taking Rights Seriously* (1977, Duckworth), ch. 2. ¹¹ *Ibid.*, p. 26.

¹² These were the facts in the American case of *Riggs v. Palmer*, 115 NY 506, 22 NE 188 (1889), discussed by Dworkin, *ibid.*, at pp. 23–24. For Hart's response to Dworkin's criticisms, see *The Concept of Law* (op. cit.), esp. pp. 259–268. For a thorough discussion of Dworkin's work, see *Lloyd's Introduction to Jurisprudence*, op. cit.

and/or historical background, while still others, adopting an anthropological approach, have argued that the idea of a legal system may be illuminated by considering and comparing modern legal systems with the systems of small, technologically less developed societies.

Authority and obedience to law

Another important aspect of rules in general, and legal rules in particular, is the phenomenon of obedience to those rules, and the acceptance that those rules are both legitimate and authoritative. Again, there are many analyses of these issues, one or two of which may be briefly considered here.

For example, Austin's idea of why we obey law is found in his notion of the 'habit of obedience' to the sovereign body in a society, which, together with the ever-present threat of sanctions, explains obedience to law. Few, however, would accept this idea as an adequate explanation. It is a questionable assumption that we obey law out of habit or for fear of official reprisals. Do we really go through our daily law-abiding lives with such things kept in mind? Surely not. Rather, as Hart¹³ argues, most of us conform to law because of more complex social and psychological processes. Hart's own explanation of obedience to law lies in the idea of some inner psychological inclination whereby we accept the *legitimacy* or *authority* of the source of the law; we obey because we consider it 'right and proper' to do so. Hart calls this acceptance the 'internal' aspect of obedience to law, and argues that people usually obey because of such acceptance.

Of course, as Hart acknowledges, there are exceptions. Some might obey out of a genuine worry about the consequences of disobedience; others might disagree with the entirety of the legal and social arrangements in our society, but obey the law out of sheer convenience. Everything depends, of course, upon the kind of society and legal system in question, for an extreme and oppressive regime might deliberately obtain obedience to its dictates by instilling terror into the population. In our own society, however, few of us would seriously dispute the idea that most people accept the legitimacy of existing legal, social and political authority, as defined through constitutional doctrines and principles, and our everyday 'common-sense' notions of legal authority.

This question of the idea of authority in society is worthy of closer attention, however. One sociologist who wrote extensively about law, Max Weber, identified three *types of authority* in social groups.¹⁴ First, he argued, the authority of a leader or ruler may be the result of the personal, individual characteristics of that leader – his or her *charisma* – which sets that person apart from the rest. Examples might be Jesus, Napoleon, Hitler in Nazi Germany, Eva Peron in Argentina, or Winston Churchill in Britain, all of whom, it might be said, to some extent

¹³ Hart, *The Concept of Law*, op. cit.

¹⁴ M. Weber, *Law in Economy and Society*, ed. M. Rheinstein (1969, Harvard University Press), esp. ch. 12.

and to varying degrees, rose to their exalted positions and maintained those positions as leaders through their extraordinarily strong personalities.

A second type of authority, according to Weber, is *traditional* authority, where obedience to the leader or regime is sustained because it is traditional: 'It has always been so'. Third, Weber identifies in modern Western societies a form of authority which he calls *rational-legal* or *bureaucratic*, where the authority of the regime is legitimised not through personal charismatic leadership, nor through pure tradition, but through rules and procedures. Although such a type may correspond roughly to authority in our own society, where the system of government and law-making depends upon a constitution providing formal procedures for law-creation and the business of government by Parliament, Weber's three types of authority have rarely, if ever, existed in reality in their *pure* form. Most societies have elements of more than one type. Our own society has elements of all three – the traditional (as seen in the ceremonies surrounding, say, the formal opening of Parliament), the charismatic (such as the leadership of Churchill during the Second World War) and the rational-legal (as in bureaucratic political and legal institutions such as the civil service). The issues raised by notions such as 'obedience to law' and 'sources of authority', then, are clearly much more complex than Austin's simple idea of a 'sovereign' might suggest.

Law and society

We have seen that there is no one way of undertaking legal study: whilst all the various approaches may well have something useful to offer, none has yet managed to produce an analysis of law and legal systems which answers all the many and varied questions which students and researchers might want to ask about this complicated and fascinating subject. The perspective taken in this present book is that an understanding of law cannot be acquired unless the subject matter is examined in close relationship to the social, economic and political contexts in which it is created, maintained and implemented. To equip us for the task of understanding something of the *society* in which the law operates, as well the law itself, we must turn our attention to some analyses which take law as but a part (albeit an important part) of the wider social arrangements.

When a lawyer uses terms such as 'society', the picture often conjured up is of a rather loose collection of people, institutions and other social phenomena in the midst of which law occupies a central place, holding these social arrangements together in an orderly fashion. But if law were suddenly relaxed, would society immediately plunge into chaos and disorder? Most of us doubt that this would happen. One reason why it would not happen is that society is not just a loose group of independent units, but rather exhibits certain regular patterns of behaviour, relationships and beliefs. What gives a particular society its uniqueness is the way in which these patterns interrelate at any given time in