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Introduction

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

Jurisprudence in the sense used in this book has been around since at least the time of the philosopher Socrates (469–399 BC). Great minds have sought answers to questions about the nature of law, right and justice, but questions persist. This says as much about the complexity of these ideas as it does about the limits of our language and reason. Theories that have proposed answers to questions have themselves become subjects of ongoing debate. This book does not pretend to have the last word on any of these questions, but neither does it avoid controversy. Its primary object, though, is to state in comprehensible terms the major questions in jurisprudence, assess critically the contributions on these questions made by various schools of thought, introduce the reader to some new insights about legal systems and make its own contribution to this conversation about law and justice. It does not matter that there is no consensus about the meaning of concepts such as law and justice. There may never be. We can make up our own minds after getting to know relevant theory, and in so doing learn a great deal about the legal system and the society we find ourselves in.

Rewards of jurisprudence

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

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

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

The remaining contents of this chapter are arranged as follows. First, the compass of jurisprudence is explained. Second, I discuss certain threshold issues that arise in any quest to understand the concept of law. Third, I provide a synopsis of each chapter's scope and content. Finally, I mention some salient

issues in jurisprudence that are not addressed in this book but that represent future challenges for jurists and other students of law.

Jurisprudence

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

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

The range of questions about law and justice asked within this jurisprudence is indefinite. What is law, and can it be defined? What are the historical origins of law? How do rules of behaviour emerge in a society even before they are recognised or enforced by the state? Is there a basic set of rules that make social life possible? How does law shape society? How does society shape law? What qualities must law possess to be effective? How do judges decide hard cases? Whence comes their authority? Is there superhuman natural law? If so, how do we find its principles? Why do people obey some laws even when they face no sanction for disobedience? Is there a duty to obey an unjust law? Can we make moral (or economic) judgments about particular laws or legal systems? What do we mean by justice? Is there a special brand of legal justice? Are there universal standards of justice? What is natural justice and what are its minimum demands? What do we mean by social justice?

These questions are not just interesting in themselves, but are critical for understanding the phenomenon of law and its relation to justice. They are legitimate questions within jurisprudence as the discipline is understood in this work. Of course, it is impossible in a book of this scale to discuss all of the contributions from different disciplines or to consider all the important questions that have been raised, and can be raised, in relation to law and justice. The

book's discussions are therefore selective. I explain the basis of the selection in the course of this chapter.

Legal theory

The term 'legal theory' is associated with theories seeking to answer the question: what is law? It is a specific project within jurisprudence. John Austin, the 19th-century legal positivist (discussed in more detail in Chapter 2), thought that this was the only project in jurisprudence (Austin 1995 (1832), 18). Most British legal positivists since Austin have made it their central task to find a universally valid definition of law or a set of criteria to distinguish law from other kinds of rules. The best known of the modern British legal positivists, Herbert Hart, devoted his book *The Concept of Law* to the challenge of showing how rules of law are different from: (1) commands such as those of a gunman who relieves you of your wallet; (2) moral rules that fall short of law; and (3) mere coincidences of behaviour that represent social habits or practices (Hart 1997, 8–9).[1] Legal positivists prefer the term 'legal theory' to describe what they do.

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

Analytical and normative jurisprudence

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

1 The third edition of *The Concept of Law* was published in late 2012. All references here are to the second edition (1997), as it was the last edition in Hart's lifetime.

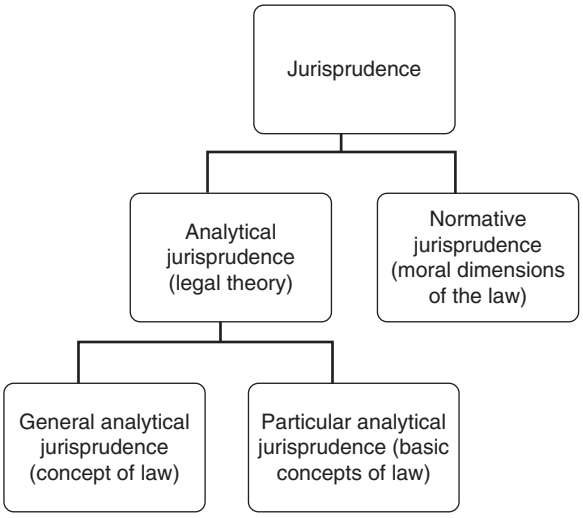

Figure 1.1 Types of jurisprudence

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

Law

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

The modern state does not concern itself with all of these laws, but only with those that for reasons of policy it chooses to enforce. Thus, in the United Kingdom the coercive power of the state is not applied when a person fails to

observe the widely accepted social rule of joining the queue to be served at a shop or restaurant. However, the state will enforce the rule against theft if a customer walks away with goods without paying for them. Lawyers will account for this difference by saying that only the latter case involves a breach of the law, properly so called. The law that they refer to is state law – the law that the state makes or chooses to recognise and enforce. An efficient and fair legal system enables citizens to identify with some confidence those rules that the courts or other state officials will recognise and enforce, and those that they will not. It makes sense in jurisprudence to pay special attention to the question of the formal criteria that legal systems use to identify state law. Nothing that I say in this book is intended to devalue this enterprise.

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

The quest for a definition of law

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

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

Legal positivists, despite their differences, unite in the claim that they have a general theory that accounts for all occurrences of law in all cultures and times, and that also distinguishes law from all other types of norms and social practices. They claim, as part of this general thesis, that a law is a law irrespective of its moral standing. In other words, law has no necessary connection with morality. A law that authorises genocide does not cease to be law only by

reason of universal moral condemnation. Hence, positivists in one way or another seek to establish the necessary and sufficient conditions for something to be called law. In this sense they are all defining law.

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

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

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

A jurist may also give the concept of law a *theoretical definition*. A theoretical definition is a special case of a stipulative definition. Whereas a stipulative definition can be completely arbitrary, a theoretical definition assigns a meaning to a term and justifies it by a scientific theory. Unlike a non-theoretical

stipulative definition, which is neither right nor wrong, a theoretical definition can be shown to be wrong by disproving the theory. The statement 'Earth is the planet third closest to the Sun in a system of planets that orbit the Sun' is a theoretical definition of the Earth. The definition will be falsified if another planet is found closer to the Sun than the Earth. A definition that cannot be falsified is purely stipulative. Many of the theories of law consciously or unconsciously construct stipulative definitions.

A definition – whether lexical, stipulative, theoretical or any other – is not of much use unless it enables us to identify with some precision the things that are included within the term. One way to do this is to give the 'extension' of the term. Extension is the naming of all items that belong within the term. It makes perfect sense for a father writing a will to define his family as 'my wife A and my children B, C and D'. On the contrary, it is impractical, if not impossible, to give the extension of a term such as 'Englishman' because there are just too many English men to name. Hence, it is necessary to state the 'intension' of the term. The intension of a term specifies all the properties that are not only necessary but also sufficient to place something within the term. The intension of the term 'Englishmen' may be stipulated as 'all men born in England or who have a parent born in England'. The definition of a triangle as the figure formed by straight lines connecting three points (and only three points) on one plane is an intensional definition. Anything more or anything less will make some other kind of figure. Hart gave the example of a definition of an elephant as a 'quadruped distinguished from others by its possession of a thick skin, tusks and trunk' (1997, 14). This is an intensional definition, and so is the definition of Earth given previously.

Definitions are as important in law as they are in mathematics, logic and empirical science. Geometry defines the notions of point, line, circle, triangle, square and so forth. Without these we will not know that on a conceptual plane, a straight line drawn through the centre of a circle will divide the circle in half, or that the sum of angles in every triangle adds up to 180 degrees, or that the diagonals of a square will bisect each other at right angles. The definition of the units of measurement is critical in empirical sciences. The kilogram, the basic unit of measuring mass, is determined by a piece of platinum-iridium kept in a vault in Sévres, France. The metre is defined as the distance travelled by light in an absolute vacuum in 1/299 792 458 of a second. Likewise, definitions matter in law. Law makes little sense unless we have a clear understanding of the fundamental legal concepts such as right, duty, liberty, power, liability and immunity. In fact, we cannot make any legal statement without deploying one or more of these concepts. This is the reason that I devote Chapter 13 to this subject. The law also requires more concrete definitions. A law that imposes income tax must define what 'income' is. A law that protects minors must define a 'minor'. A law that excludes heavy vehicles from a city street must define a 'heavy vehicle'. Criminal offences must be defined with a high level of precision to make the criminal law workable and fair.

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

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

The arrangement of the contents of this book

I summarise the contents of this book below and in the following pages. The summaries are unavoidably oversimplified. The book is arranged in four parts:
Part 1 – Law as it is (Chapters 2, 3, 4 and 5)
Part 2 – Law and morality (Chapters 6, 7 and 8)
Part 3 – Social dimensions of law (Chapters 9, 10, 11 and 12)
Part 4 – Rights and justice (Chapters 13 and 14)

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

Part 1 contains chapters on legal positivism and legal realism. Legal positivists and legal realists entertain different conceptions of law, but they share the aim of explaining the law *as it is* as opposed to what the law *ought to be*. The two schools are also united by their insistence that the law has no necessary connection with morality. I begin this survey in Chapter 2 by discussing the origins and development of the most influential school of jurisprudence within the British Commonwealth – legal positivism. It is associated with a distinguished line of British thinkers, commencing with Thomas Hobbes and his followers Jeremy Bentham and John Austin. In more recent times scholars such as Herbert Hart, Neil MacCormick and Joseph Raz have refined the positivist message. That message can be summarised here only at risk of gross oversimplification. However, it may be said that at a minimum, positivists share and defend the position that rules of law may be logically and factually separated from other rules of conduct such as moral and social rules, and that a universal test or set of tests can be stated for identifying law that transcends cultural differences. Positivists do not deny that law may enforce a community's morals, or even that in a particular legal system some moral test may determine whether a rule is recognised as law. Their contention is that a law that satisfies the formal criteria of validity is a law even if it is immoral. Chapter 3 discusses the developments of British legal positivism in the 20th century, examines the central ideas of this school of thought and evaluates its influence on political and social life.

The greatest contribution to legal positivism outside the British tradition is that of Hans Kelsen, whose remarkable theory demands our closest attention, not the least because it is easily misunderstood. Kelsen set out to establish a science of legal norms that is independent and separate from the political and cultural forces that produce specific legal norms. Kelsen wrote:

> It is the task of the science of law to represent the law of a community, i.e. the material produced by the legal authority in the law making procedure, in the form of statements to the effect that 'if such and such conditions are fulfilled, then such and such a sanction shall follow'.
>
> (1945, 45)

Kelsen described laws as norms that are validated by other norms within a given system of norms. The whole system is sustained by political realities that, analytically speaking, lie outside the legal system. Kelsen's theory has intuitive appeal to legal practitioners and has played a major role in the resolution of legal disputes arising in the context of revolutionary overthrow of established legal order. Chapter 4 explains Kelsen's theory and, in the light of criticisms it has drawn, evaluates its intellectual and practical contributions to our understanding of the nature of law.

Legal positivism has been challenged by thinkers in the two realist traditions of jurisprudence: the American and the Scandinavian. While the two branches have much in common, their approaches and concerns differ. I discuss these