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The nature of legal theory: from laws to law

1.1 Introduction

This chapter begins with a discussion of the relationship between *law* and *legal theory*, and continues by clarifying some basic problems of terminology and methodology. It then considers the importance of context in legal theory, the dangers inherent in classifying legal theories and the extent (if any) to which we can have knowledge of moral matters, before concluding with an explanation of why it is useful to study legal theory, both from the perspective of legal practice and within the wider context of the academic study of law.

1.2 Law and legal theory

Most courses of study within the field of law involve an analysis of the content of a specific part of the whole legal system. Provided you know the basic terminology of the legal system you are studying, the title of a typical course gives a reasonably accurate indication of the scope of the subject matter involved. Thus English lawyers will know what aspects of legal doctrine they can expect from a course on *tort*, while Scots lawyers will know what they can expect from a course on *delict*; and comparative lawyers will know that, broadly speaking, the two subjects are the same.

It is not surprising, therefore, that law students develop an expectation that the scope of both the courses they study, and the textbooks which support those courses, will be defined by reference to specific areas of law. Of course, the treatment of the legal content may vary. Some courses will be taught and studied contextually, with the legal doctrines being examined within the social and economic context of the real world; others will proceed on the so-called *black letter* basis, which means that the cases and statutes containing the legal doctrines will be subjected to purely textual analysis, with little or no reference to the practical context within which those doctrines function.

Other variations are possible. For example, the packaging and labelling of courses may change from time to time. What was once commonly known as *constitutional and administrative law* may become known as

public law. Similarly, the established textbook unities of *contract* and *tort* may be merged and expanded by the addition of *restitution* to form the new subject of *obligations*, while at the same time being enlivened and made more realistic by the addition of a dash of *equity*. Nevertheless, irrespective of the ways in which courses are labelled, taught and studied, the general proposition remains that practically the whole of the law curriculum is presented in terms of areas of law which are, or are at least perceived to be, doctrinally coherent.

Legal theory is different. One immediately apparent difference is that legal theory is painted on a larger canvas; or, to change the metaphor into a more appropriately verbal one, it asks bigger questions. So, for example, criminal lawyers will ask questions such as *what is the definition of theft?* Legal theorists, on the other hand, will ask questions such as *what is it that makes the prohibition on theft (along with a great many other prohibitions) into a matter of law, whereas many other forms of dishonesty are left solely in the realm of morality?*

In a nutshell, therefore, legal theory involves a progression from the study of *laws* to the study of *law*.

1.3 A question of terminology: *jurisprudence*, *legal philosophy*, or *legal theory*?

Although this book is called *Legal Theory*, you will find that some other books (and the courses for which they are used) bear other titles, such as *Jurisprudence*, *Legal Philosophy* or *the Philosophy of Law*. Closer examination of the contents of both books and courses, however, will generally show that the choice of title often reflects nothing more substantial than the personal preference of the person making the choice. All that need be said here is that this book uses the expression *legal theory* in a relatively broad sense to include discussion of not only the nature of *law*, but also the nature of *rights* and *justice*, and the use of *law* to *enforce morality*.

If justification for this use of *legal theory* is required, it may be provided on two bases.

First, all these topics discussed are clearly theoretical in nature, and those which do not directly address the nature of law itself are so closely involved with the nature of law that it would be both unrealistic and unhelpful to consign them to separate consideration elsewhere.

Secondly, it is a peculiarly Anglo-American idea to treat *legal theory* as being more or less synonymous with *jurisprudence*. In French, for example, the word *jurisprudence* means the body of law developed through the decisions of the courts. This explains the use of the phrase

Strasbourg jurisprudence to identify the *law* contained in the European Convention on Human Rights as developed by the European Court of Human Rights at Strasbourg. The phrase *théorie générale du droit*, on the other hand, reflects the theoretical nature of that kind of material which, in Anglo-American usage, is called *jurisprudence*.

1.4 The sources of legal theory

It is, of course, trite to say that the primary sources of English law are cases and statutes, together with any relevant sources of European Community law. Admittedly, as we shall see more or less throughout this book, one of the central concerns of legal theory is whether *law* may properly be limited to formal texts of any kind, or whether it also incorporates elements drawn from other sources. However, for the present purposes, the essential point is that judicial and legislative texts are, in practical terms, the primary sources of legal doctrine, with scholarly works being no more than aids to understanding those sources.

For the student of legal theory, on the other hand, the primary sources are frequently not cases and legislative enactments, but the works of legal theorists. Furthermore, legal theorists are not necessarily lawyers, because the subject matter is inextricably linked with both philosophy and political theory. As Friedmann puts it:

'all legal theory must contain elements of philosophy – man's reflections on his position in the universe – and gain its colour and specific content from political theory – the ideas entertained on the best form of society.' (*Legal Theory*, 5th edn, 1967, p. 4.)

More particularly:

'Before the nineteenth century... the great legal theorists were primarily philosophers, churchmen and politicians'

and

'the new era of legal philosophy arises mainly from the confrontation of the professional lawyer, in his legal work, with problems of social justice.

'It is, therefore, inevitable that an analysis of earlier legal theories must lean more heavily on general philosophical and political theory, while modern legal theories can be more adequately discussed in the lawyer's own idiom and system of thought. The difference is, however, one of method and emphasis. The modern jurist's legal theory, no less than the scholastic philosopher's, is based on *ultimate beliefs whose inspiration comes from outside the law itself*.' (Emphasis added. *Ibid.*)

Some support for the part of this analysis which relates to the pre-20th century period can be found in Oliver Wendell Holmes' pointed comment on the leading English legal theorist of the 19th century, that

‘the trouble with Austin was that he did not know enough English law’. (*The Path of the Law* (1897) 8 Harv LR 457, at p. 475. Austin’s *command theory* of law is discussed in Chapter 4.)

The most practical consequence of the fact that many legal theorists are not lawyers is that some of the skills required to read and evaluate texts drawn from non-legal disciplines may not come easily to law students, whose habits of conceptualizing, and whose expectations of language and those who use it, have been conditioned by the protracted study of legal texts. One of the characteristics which the other academic disciplines may possess, when contrasted with law, is a greater dependence on *soft concepts*, in the sense that the concepts are, in their very nature, incapable of the degree of precise verbal formulation which would enable their exact content and limits to be easily identified. It follows that some law students, who are often used to working with harder (using the term *harder* in the sense of *more precise*) concepts, may well find that it takes time to adapt to some aspects of the academic discipline involved in legal theory. However, this adaptation is part of the mind-broadening process of education, and must be accepted as a valuable part of the academic challenge which the subject presents.

1.5 The importance of context in legal theory

1.5.1 Introduction

Having established the nature and sources of legal theory, we must move on to consider one of the most basic points of all, namely that all legal theories must be seen within their own context or contexts.

1.5.2 Theories in context

Introduction

There are many contexts within which legal theories may be viewed. While acknowledging that there is significant overlap between them, it will nevertheless be useful to identify, and comment briefly upon, three of the most basic contexts.

First, we will consider the importance of the historical context within which a theory is formulated. Secondly, we will turn to the cultural context of which a theory forms part. Finally, we will consider the context of the particular question to which a theory is offered as an answer.

The historical context

At the risk of stating the obvious, all legal theorists work within the intellectual climate of their age; and this is equally true whether they

belong to, or react against, the mainstream of contemporary ideas. While this fact necessarily governs the scope of each theorist's worldview, on a more positive note it also gives succeeding generations the opportunity to benefit from the work of their predecessors. As Isaac Newton recognized of his own position within the field of physical science, if he had been able to 'see further than other men' it was because he had been able to 'stand on the shoulders of giants'.

The cultural context

Although the existence of a legal system is one of the characteristics of all human societies, and therefore legal theory is, to this extent, cross-cultural, it will nevertheless be apparent that what is meant by words such as *rights*, *freedom* and *justice* will vary substantially from one culture to another. The factors which govern these differences will themselves vary, but will typically include the economic basis of each society (for example, capitalist and socialist societies will obviously take different approaches to the question of property rights) and the status of religion within each society.

By way of overlap with the historical context, it will be obvious that, even within a single culture, attitudes may undergo fundamental changes with the passage of time. For example, in *Bird v Holbrook* (1828) 4 Bing 628, which involved a claim in respect of an injury caused by a spring-gun, Best CJ said '... Christianity... has always been held to be... part of the law of England'.

Similarly, as recently as the second half of the 19th century, the Court of Exchequer Chamber held that a person who had agreed to let a room was entitled to refuse to proceed with the letting when he discovered that the room was to be used by the Liverpool Secular Society for a lecture which would question Christian doctrine. The basis of the court's decision was that since Christianity was part of English law, it followed that the intention had been to use the room for an unlawful purpose. (*Cowan v Milburn* (1867) LR 2 Exch 230.)

However, by the early part of the 20th century judicial attitudes had changed. In *Bowman v Secular Society Ltd* [1917] AC 406, the House of Lords upheld the legality of a legacy to a company whose objects were 'to promote... the principle that human conduct should be based upon natural knowledge and not upon super-natural belief, and that human welfare in this world is the proper end of all thought and action'. More particularly, Lord Sumner, having discussed *Bird v Holbrook* (above), and having pointed out that 'spring-guns, indeed, were got rid of, not by Christianity, but by Act of Parliament', observed that 'the phrase

“Christianity is part of the law of England” is really not law; it is rhetoric’. He explained the change of legal principle thus:

‘The words, as well as the acts, which tend to endanger society differ from time to time in proportion as society is stable or insecure in fact, or is believed by its reasonable members to be open to assault. In the present day, meetings or processions are held lawful which a hundred and fifty years ago would have been deemed seditious, and this is not because the law is weaker or has changed, but because the times have changed, society is stronger than before. In the present day reasonable men do not apprehend the dissolution or the downfall of society because [the Christian] religion is publicly assailed by methods not scandalous.’

It may seem that the culture-specific aspect of legal theory poses problems for students who hold strong personal views. In reality, however, as you will see in Section 1.7 (below), all that is required is that you should be willing to discuss all the possible views in an intellectually rigorous and critical fashion. Nevertheless, the fact remains that your view of legal theory, and of all the topics that fall within its scope, can never be more than one part of your wider world-view.

Of course, it may be argued that the ideal work on legal theory would be cross-culturally comprehensive. Perhaps. But practical constraints of time, expertise and the size of the resulting book are such that attainment of this ideal is unlikely. Furthermore, the attempt may be counter-productive. As Oliver Wendell Holmes says, having read the Appendix on the subject of *possession* in Stephen’s *Criminal Law*, the author was ‘not the only writer whose attempts to analyse legal ideas have been confused by striving for a useless quintessence of all systems, instead of an accurate anatomy of one’. (*Op cit.*, p. 475.)

The context of the question which is being answered

Quite apart from the historical and cultural contexts within which legal theories are formulated and criticized, the different answers given by legal theorists need to be assessed in the context of the questions which they are considering. For example, the classification of legal theories into *natural law* and *positivist* categories (which is outlined in Chapter 2 as a preliminary to considering some of the major theories within each category in subsequent chapters), may in some cases represent a genuine disagreement as to the nature of law itself. Alternatively, in some cases, the differences between the answers will flow simply from the fact that different questions are being asked, namely ‘*what is it that makes a statement into a statement of law?*’ and ‘*what is it that makes law into good (in the sense of morally desirable) law?*’. This is important because a theorist who is giving detailed consideration to one question may well

give no attention whatever to some other question, which is equally interesting but simply outwith the scope of the instant inquiry. In this context, it may be useful to remember that legal theory is a branch of philosophy, because:

‘Philosophy may be pre-eminently a subject where insight into one aspect of things tends to blind us to other aspects, and we should try to draw upon other people’s insights positively in order to advance our own halting and necessarily personal, but not therefore necessarily wrong, grasp on things.’ (T.L.S. Sprigge, *The Rational Foundations of Ethics*, 1990, p. 5.)

1.6 The danger of classifying legal theories

Books and courses on legal theory will inevitably classify the legal theories with which they deal, even if only into the natural law and positivist categories. However, the process of classification must never be allowed to obscure the fact that all schemes of classification are only convenient shorthand to indicate generalities rather than specifics, and they must therefore be seen only as an aid to, and not as a substitute for, understanding.

It may be valuable to recall the ancient Greek legend of Procrustes, who claimed to have a bed into which anyone would fit exactly. And indeed everyone did fit Procrustes’ bed, but only after he had stretched on a rack those who were naturally too short, and amputated the bodily extremities of those who were naturally too tall. The relevance of this tale in the present context is that there is often a temptation to treat the classifications of legal theory as a set of Procrustean beds into which every insight and every argument must be fitted, no matter what distortion of the material may be necessary. It will be obvious that this temptation must be resisted, since distorting the material in this way will necessarily distort your understanding of it.

The problem is that avoiding the kind of distortion which results from forcing ideas into Procrustean beds may deprive you of the comfortable support of a pre-existing framework and leave you with the corresponding need to develop your own ‘halting and necessarily personal, but not therefore necessarily wrong, grasp on things’. (The phrase is repeated from Sprigge’s comment quoted above.) The ‘halting’ nature of your ‘grasp on things’ may, of course, leave you holding positions which cannot be reconciled with each other. In other words, you may be open to the charge of inconsistency. However, unless you have a perfect understanding of the whole of legal theory, the only way to avoid the charge of inconsistency is either to abandon the study of the subject altogether (and thus avoid inconsistent understanding by having no understanding whatsoever), or to claim an understanding

which is limited to an area of the subject which is small enough to enable you to avoid inconsistency. A more realistic alternative is simple acceptance that inconsistency is the price to be paid for the intellectual honesty of avoiding Procustean beds; or, putting it the other way round, in the famous phrase of the American poet Ralph Waldo Emerson, 'a foolish consistency is the hobgoblin of little minds'.

1.7 Moral argument

1.7.1 Introduction

Legal theorists adopt many different approaches to the analysis of law, justice and morality, some of which will support, and some of which will contradict, your most basic personal beliefs and values. To take one of the most obvious examples, you may consider abortion to be, in some situations at least, perfectly legitimate; or you may consider it to be either never permissible, or permissible only in the most exceptional of circumstances. In other words, you will be talking the *moral* language of *right* and *wrong*.

More particularly, you may ask: 'how can we debate moral matters in the same way as we debate factual matters, when the former are ultimately only matters of opinion?'. This is an enormous question to which philosophers working in that part of philosophy known as *ethics* have offered very many answers. While it would be impossible to provide a full-scale survey of ethics here, it may be useful to outline, very briefly, three ways of arguing that absolute moral knowledge is possible, and that therefore such matters are *not* simply matters of opinion. We will then consider two further arguments. One of these rejects the possibility of moral knowledge altogether. The other constitutes a sort of half-way house by accepting the possibility of moral knowledge while nevertheless rejecting the idea that such knowledge can be *absolute*.

Before turning to the arguments themselves, it must be said that some arguments which claim to demonstrate the existence of absolute moral knowledge are based on the idea of *duty*, some on the idea of *consequences*, and some on the idea of *virtue*.

1.7.2 Arguments based on duty

Arguments based on *duty* (which in the technical vocabulary of philosophy are known as *deontological* arguments) may be broadly divided into those which rest on religion and those which do not.

Taking the religious response first, the argument is likely to be along the following lines: 'my god has revealed his (or her) truth to me (typically through a holy book, by communicating through prophets or through transcendental experience) and his (or her) truth is therefore the ultimate fact on which I base my entire life. If the truth of this fact cannot be demonstrated in the same way as the truth of "ordinary" facts can be demonstrated, that is because the ultimate facts relating to god and to his (or her) existence are not "ordinary" facts'. While believers will, of course, be wholly satisfied with this type of answer, unbelievers will remain unmoved. Two points may be made in passing.

First, some believers do claim to be able to prove the existence of their god by means of rational argument. However, the most strikingly common characteristic of such proofs is that they are much more effective at bolstering the beliefs of those who are already convinced than at delivering others from their unbelief.

Secondly, it is a common observation that religion breeds disagreement. Sometimes these disagreements are based on disputes as to the legitimacy of religious authority (as is the case in Christianity between Roman Catholicism and Protestantism). Sometimes they are based on different interpretations of holy texts and doctrines. However, whatever the source of any particular disagreement between believers, the unbeliever will commonly point out that the wide range of opinions, even within a single religion, is a curious characteristic of any system which claims to deliver ultimate truth.

Even those who believe in a god have to confront a problem which has been recognized since at least the time of Plato (c. 429–347 BC). Does their god approve of what is good; or is what is good good because their god approves of it? If the former, it follows that the quality of goodness existed before their god approved of its manifestations; which leads to the conclusion that the source of goodness, as distinct from its recognition, lies outside the activities of their god. If the latter, then (at least in the case of an all-powerful god) the quality of goodness is arbitrary, in the sense that their god could have conferred his or her approval differently in the first place and could change his or her mind at any time subsequently.

Those who find religious answers unsatisfactory may seek purely rational answers to the moral questions. One of the most influential examples of such answers is provided by the German philosopher Immanuel Kant (1724–1804). In particular, Kant argues that the only thing which is absolutely and unconditionally good is the good will, with all other things which are conventionally regarded as being good (such as wealth and health) being good only to the extent that they are

used in the pursuit of good ends. Clearly, this leads us to the question of how we can identify the good will. Kant's answer is that there is a pre-existing moral law, which humans, being rational and possessed of free will, can identify by using their reason and which they need to identify in order to know how they should exercise their free will. Kant

'takes the existence of an ordinary moral consciousness for granted.... It is the moral consciousness of this ordinary human nature which provides the philosopher with an object for analysis.... The philosopher's task is... to ask what character our moral concepts and precepts must have to make morality as it is possible.... Science is what it is, morality is what it is, and there's an end on't.' (Alasdair MacIntyre, *A Short History of Ethics*, 2nd edn, 1998, p. 191.)

It is important to realize that, for Kant, the moral law simply *is*, and our intellectual endeavours merely lead us to its discovery. In other words, we do *not* create it.

These ideas lead Kant to identify a universal moral law, which he proceeds to call the *categorical imperative*. This is *categorical* because it is *unconditional* or *absolute*, rather than *conditional* or *contingent*, and is *imperative* because it commands obedience. Despite the fact that the categorical imperative is a single idea, Kant formulates it in two ways. One formulation is that you should *make the maxim of your action such that it could be the maxim of a general action*. In other words, the *maxim* (or *motive* or *justification*) on which you rely must be such that everyone else could also rely on it; or, even more simply, it must be capable of being *universalized*. The other formulation is that *people must be treated as ends in themselves and not as mere means to ends*.

Many people find Kant's ideas attractive because they make a rational framework available to those who either have no religious belief, or at least regard whatever belief they – and other people – may have, as being purely subjective. However, Kant's ideas are not unproblematic. Two points may usefully be made.

First, Kant argues that the moral quality of an act (or, in other words, whether an act is performed with a good will) depends *solely* on the maxim underlying it. So, for example, I act morally if I perform an act of charity because I think I am under a duty to do so. On the other hand, I act immorally if I act out of self-interest (for example, giving large sums of money to charity in the hope of obtaining a knighthood), or even if I act simply out of compassion (despite the fact that many other systems of morality would rank compassion very highly).

Secondly, Kantian morality may lead to results which offend many people's intuitions. For example, we have a duty to tell the truth, because social life would be impossible if everybody considered themselves to be at liberty to tell lies whenever it suited them to do so.

Therefore, telling the truth is morally good, even if – to take a standard example – it means telling a homicidal maniac where he will find someone whom he wishes to kill. (The case of *R v Registrar-General ex parte Smith* [1991] 2 All ER 88, discussed at p. 64, provides a good example of a decision which would have gone the other way if the court had been thinking along Kantian lines.)

1.7.3 Arguments based on consequences

If you conclude that duty-based approaches are less than wholly satisfactory, you may be tempted by *consequentialist* alternatives, which hold that moral quality depends on *consequences* rather than *duties*. So, if we return to the homicidal maniac example, the consequence of telling a lie as to the whereabouts of the intended victim are better than the consequences of telling the truth, and therefore, to that extent at least, it is morally better to lie than to tell the truth.

We will give more detailed consideration to some aspects of consequentialism in Chapter 10, but the general idea may be illustrated as follows. If a highway authority finds itself with limited resources and many towns and villages needing by-passes to be built, should it not prioritize those schemes which will provide the greatest benefit? In other words, do not the consequences indicate the best way for public money to be allocated? However, we must consider three standard objections to consequentialism.

First, it may be argued that at least some consequentialist conclusions are counter-intuitive and must, therefore, be wrong. For example, consequentialism may be used to justify scapegoating an innocent minority for the benefit of the majority. (See p. 172.)

Secondly, the fact that the future is inevitably uncertain makes it impossible to identify all the possible consequences of all possible acts in order to choose the one with the most beneficial consequences.

Thirdly, consequentialism may require us to evaluate comparisons in ways which are difficult or even impossible. For example, adapting the example of by-pass building, the issue may be whether even a single by-pass should be built. Suppose experience shows that high-speed traffic on by-passes produces a relatively small number of relatively serious accidents, while low-speed traffic in town and village centres produces more, but less serious, accidents. Although, of course, there will be many factors to take into account, consequentialism requires us to say whether (taking some hypothetical figures) two fractured skulls a year are better or worse than a hundred broken legs. (Admittedly, those who analyse law in economic terms (see pp. 173–177) will try to calculate the

answer in terms of the cost of state benefits, lost working days and so on. However, quite clearly, there are some consequences which cannot be valued in purely financial terms.)

1.7.4 Arguments based on virtue

If you find neither arguments based on *duty*, nor those based on *consequences*, sufficiently compelling, you may be attracted to arguments based on *virtue*, which may be seen as being both distinct from, yet in a sense complementary to, the other two types of argument. The origins of such arguments may be traced back to Aristotle's *Nicomachean Ethics*, which approaches the question of morality in terms of the kind of values, qualities and activities which enable human beings to flourish. While this approach is, in essence, conceptually distinct from arguments based on duty, it can nevertheless be seen as one way of identifying what an individual's duty should be in specific circumstances. Similarly, while virtue theory is, in essence, distinct from arguments based on consequences, it can nevertheless be seen as one way of identifying consequences (both favourable and unfavourable) in the sense that values, qualities and activities which promote human flourishing are better than those which do not do so.

A major difficulty with virtue theory is that there is no universally agreed list of virtues, the pursuit of which will promote human flourishing, although there may be some obvious candidates for inclusion, such as charity, modesty, industriousness, courage and loyalty. However, even some virtues which may appear, at first sight, to be universally acceptable may, on closer examination, prove problematic. For example, while most people would accept that charitable giving is virtuous, even this apparently obvious identification of virtue may conceal serious and legitimate disputes. Pursuing the same example, does virtue lie in, say, giving money to an alcoholic who is living rough, rather than giving the same money to a charity dedicated to providing shelters and other facilities which may increase the chances of such derelicts reclaiming control over their own lives? Similarly, since we are using the word *virtue* in the sense of the promotion of human flourishing, can we say that it includes the enjoyment of good food and drink; or is all consumption which exceeds the needs of the body merely gluttonous? In short, may not the intuitively attractive appeal to virtue become all too easily nothing more than a device to provide a cloak of respectability for our individual preferences and prejudices?

In terms of the legal theories discussed in this book, John Finnis' theory of natural law (see Chapter 6) provides the most obvious context

within which the effects of virtue theory may be discerned. Although it must be emphasized that Finnis does not explicitly rest his argument on virtue theory, he does rely heavily on certain things which he identifies as *basic forms of human flourishing* or *human goods*. While these do not, in themselves, generate moral obligations, they are nevertheless an integral part of an argument which does claim to do so.

1.7.5 Arguments rejecting moral knowledge altogether

One argument which rejects the possibility of moral knowledge altogether is known as *emotivism*. As the name suggests, the content of the argument is essentially that statements that purport to be about morality are, when properly understood, nothing more than statements of emotion. So, if I say abortion is wrong, all I really mean is that I disapprove of it, while if I say it is right all I really mean is that I approve of it. It is obvious, therefore, why emotivism is sometimes called the *boo-hurray* theory.

Attractive though emotivism may be to those who are perplexed by the difficulties flowing from both duty-based and consequentialist arguments, it nevertheless also offends some of our most basic intuitions. Is it really impossible to say, for example, that human sacrifice, or genocide, is wrong? Can we really do no more than express our personal disapproval?

A further common objection to any argument that rejects the possibility of having knowledge of morality, and therefore the possibility of making statements about morality, is that the statement that we cannot make statements about morality is itself a statement about morality. In other words, that statement is *self-refuting*.

However, there is an equally standard reply to this objection, which is based on Bertrand Russell's *Theory of Types*. The argument may be summarized thus:

'A principle must be accepted by which any expression which refers to *all* of some type must itself be regarded as being of a different and higher type than that to which it refers. Thus there is a hierarchy of types and a rule that they cannot be mixed.' (J.C. Hicks, *The Liar Paradox in Legal Reasoning* [1971] CLJ 275 at p. 279.)

Whether you find this convincing depends on whether you fall within that category of people for whom 'this procedure of proposing a new rule... appears... to be an *ad hoc* manoeuvre and therefore an evasion of the problem rather than a fundamental solution of it'. (*Ibid.*)

1.7.6 Arguments rejecting absolute moral knowledge

Even if you are unwilling to embrace emotivism, you may be tempted by *relativism*. The central idea of relativism is that what is morally right

and wrong depends on the society in the context of which the question is being asked. So, for example, monogamy may be right in a Judaeo-Christian society, but polygamy may be right in other societies with other religious beliefs and values.

This approach is comforting to those who are unhappy with the kind of cultural imperialism which leads those in a politically dominant position to impose their values on others (or, if unable to do so through lapse of time, at least to judge others by reference to their own values). However, once again, the argument offends some of our most basic instincts. Even if we have no real problem with polygamy, and even if we are willing to stretch a point in order to accept that there are (or may have been) societies in which human sacrifice need not be regarded as immoral, are we really willing to say the same about genocide? Could Auschwitz and Belsen ever be morally acceptable?

1.7.7 Conclusion

As we have seen, all the views we have considered are open to significant objections. Nevertheless, most people find themselves (perhaps more than anything else as a matter of temperament or background, or both) inclined to favour one rather than the others, even though this means having to live with substantial counter-arguments; and some people even manage to do so with a striking degree of self-confidence. However, two final points may usefully be made.

First, in purely academic terms, it is important to have at least some grasp of the various possible arguments.

Secondly, many people accept that (whichever way their personal inclinations may lead them) this is an area in which an element of self-doubt is an integral part of any intelligent position. Those who are inclined to accept this view may well recall Oliver Cromwell's entreaty to the General Assembly of the Church of Scotland: 'I beseech you, in the bowels of Christ, think it possible you may be mistaken'. (*Letter of August 3, 1650*.) (It is, of course, a nice irony that his precise choice of words indicates how difficult it can be to distance yourself from your own personal beliefs.) Alternatively, or additionally, they may recall Tennyson's view (see, *In Memoriam, xcvi*) that

'There lives more faith in honest doubt,
Believe me, than in half the creeds'

the spirit of which applies equally to the secular context as to the religious one within which it was written. Or they may simply be among

those who find Procrustean beds even more uncomfortable than inconsistency. (See p. 7.)

Finally, surely nobody would doubt that an absolute conviction that you are right is no guarantee that you are so. As Oliver Wendell Holmes puts it, 'certitude is not the test of certainty. We have been cocksure of many things that were not so'. (*Natural Law* (1918) 32 Harv LR 40 at p. 40.) Doubting the possibility of certainty anyway, he continues:

'I do not see any rational ground... for being dissatisfied unless we are assured... that the ultimates of a little creature on this little earth are the last word on the unimaginable whole.' (*Op. cit.*, p. 43.)

1.8 Why study legal theory?

The discussion of the nature of legal theory which you have just read, and any number of similar discussions which you may read elsewhere, will leave many students saying 'So what? How will all this help me when I am a lawyer?'. You may even pray in aid Cotterrell's comment that 'no-one could suggest that legal theory has at any time been necessary to help the lawyer earn a living in everyday practice'. (*The Politics of Jurisprudence*, 1989, p. 223.) But the key word here is *necessary*, for there can be equally little doubt that cases do arise where practitioners with a knowledge of legal theory are better equipped than those who lack it. (See, in particular but by no means exclusively, the cases discussed in Chapter 11, dealing with the relationship between law and morality.) Indeed, it may even be argued that *without* a knowledge of legal theory there is a sense in which you cannot credibly claim to be a lawyer, as distinct from someone who knows some laws: 'while legal science is capable of being intelligently learnt, legal facts are capable only of being committed to memory'. (T.E. Holland, *The Elements of Jurisprudence*, 13th edn, 1924, p. 4.)

In similar vein, Holmes, having noted that the English meaning of *jurisprudence* 'is confined to the broadest rules and most fundamental conceptions', adds that 'one mark of a great lawyer is that he sees the application of the broadest rules'. He proceeds to illustrate this basic truth with a practical anecdote.

'There is a story of a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he had looked through the statutes and could find nothing about churns, and gave judgment for the defendant.... If a man goes into law it pays to be a master of it, and to be a master of it means to look straight through all the dramatic incidents and to discern the true basis [for predicting what the court will do if the matter ever comes before it]'. (*The Path of the Law* (1897) 8 Harv LR, pp. 474–475.)

Developing this point requires a return to the comment which concluded Section 1.2, that the study of legal theory takes you beyond *laws* and into *law*. Making the point more explicitly in relation to professional practice, the value of a knowledge of legal theory lies in the fact that it provides a principled overview of law as a whole, which enables practitioners to relate a large number of individualized statements of legal doctrine to, and evaluate them in the light of, each other. Practitioners with a knowledge of legal theory will be able to construct arguments, and counter opposing arguments, with more confidence, and with a greater likelihood of success, than would otherwise be the case. As Holmes puts it:

'The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.' (*Op. cit.*, p. 478.)

More polemically, if less poetically, members of the critical legal studies movement (which is considered further in Chapter 9) regard a knowledge of legal theory as being unequivocally essential to practitioners. Thus Alan Thomson challenges the view (which he takes to be prevalent among both students and practitioners), that legal theory is marginal, and that the only thing which really matters, even for a radical lawyer, is to be a good lawyer:

'Critical legal theory must... make explicit the implicit theory on which the existing legal rules, institutions and practices are based, with the aim of showing that since that theory cannot support what it claims it can, the world could be otherwise...'

and

'critical legal theory attempts to reconnect law with everyday political and moral argument, struggles and experiences, with all their attendant incoherences, uncertainties and indeterminacies. Most importantly, in rejecting a view of law as the expression of reason, critical legal theorists reveal, in different ways, law as the expression and medium of power.' (*Foreword: Critical Approaches to Law: Who Needs Legal Theory?*, in Ian Grigg-Spall and Paddy Ireland (eds), *The Critical Lawyers' Handbook*, 1992, pp. 2–3.)

Ronald Dworkin, who is by no stretch of the imagination a member of the critical legal studies movement, goes even further than Thomson, arguing that legal theory and legal practice are, in fact, two aspects of a single, seamless, whole. (See p. 132.)

Finally, however, although it is easy to justify the study of legal theory by reference to the demands of legal practice, it is not necessary to do so:

'It is perfectly proper to regard and study the law simply as a great anthropological document. It is proper to resort to it to discover what ideals of society have been strong enough to reach that final form of expression, or what have been the changes in dominant ideals from century to century. It is proper to study it as an exercise in the morphology and transformation of human ideas.' (Oliver Wendell Holmes, *Law in Science and Science in Law* (1899) 12 Harv LR p. 444.)

Summary

- ▶ Legal theory involves a progression from the study of *laws* to the study of *law*.
- ▶ Differences of terminology between *legal theory*, *jurisprudence* and *legal philosophy/philosophy of law* are largely matters of personal taste.
- ▶ The study of legal theory involves the use of sources other than the law, including works on philosophy and political theory.
- ▶ All legal theories must be seen in the context of the historical period and the culture within which their authors were working, as well as within the context of the questions which their authors were seeking to answer.
- ▶ Legal theories are classified in a variety of ways, but all classificatory schemes are only aids to understanding and not substitutes for it.
- ▶ There is no universally accepted way of identifying what is morally right and what is morally wrong, but three of the major approaches to these questions involve theories that are either duty-based, consequence-based or virtue-based.
- ▶ Legal theory can be relevant to practitioners of law when it makes them think about the basis of what they are doing. It also has its own intrinsic value as a branch of the study of ideas.

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