Chapter 1
Law's roots

Step on a bus. The law is there. You have almost certainly entered into a contract to pay the fare to your destination. Alight before you have paid and the long arm of the criminal law may be expected to pursue you. The bus is involved in an accident. The law is ready to determine who is responsible for the injury you sustained. Your job, your home, your relationships, your very life – and your death, all – and more – are managed, controlled, and directed by the law. The legal system lies at the heart of any society, protecting rights, imposing duties, and establishing a framework for the conduct of almost every social, political, and economic activity. Punishing offenders, compensating the injured, and enforcing agreements are merely some of the tasks of a modern legal system. In addition, it endeavours to achieve justice, promote freedom, uphold the rule of law, and protect security.

To the layman, however, the law often seems a highly technical, bewildering mystery, with its antiquated and sometimes impenetrable jargon, obsolete procedures, and interminable stream of Byzantine statutes, subordinate legislation, and judgments of the courts. Lawyers tend to look backwards. The doctrine of precedent, hallmark of the common law, dictates that what has gone before is what now should be, thereby affording a measure of certainty and predictability in a precarious world.

But the law does not stand still. Globalization, rapid advances in technology, and the growth of administrative regulation place increasing strain on the law. Domestic legal systems are expected to respond to, and even anticipate, these changes, while many look to international law to settle disputes between states, punish malevolent dictators, and create a better world. These are among the numerous challenges to which contemporary legal systems are meant to rise.

The law is rarely uncontroversial. While lawyers and politicians habitually venerate its merits, reformers bewail its inadequacies, and sceptics refute the law's often self-righteous espousal of justice, liberty, and the rule of law. Few, however, would deny that, in most societies, law has become a significant instrument for progress and improvement in our social, political, moral, and economic life. Think of the transformation that legal rules have wrought in respect of numerous aspects of our lives that were once considered personal: the promotion of sexual and racial equality, safety at work and play, healthier food, candour in commerce, and a host of other admirable aspirations. Laws to protect human rights, the environment, and our personal security have mushroomed. Nothing seems beyond the reach of the long arm of the law. This boom in the law-making business renders it impractical both for citizens to become acquainted with its myriad rules, and for the authorities to enforce them.

The law is news. Murders, mergers, marriages, misfortunes, and mendacity are daily media fodder, especially when the misbehaviour is played out in court. Sensationalist trials concerning celebrities are, alas, only the small tip of a large iceberg. Lawsuits are a negligible part of the law, as will become evident in the following chapters.

But what is law? In very broad terms, two principal answers have been given to this deceptively simple question. On the one hand is the view that law consists of a set of universal moral principles in

accordance with nature. This view (adopted by so-called natural lawyers) has a long history dating back to ancient Greece. For so-called legal positivists, on the other hand, law is nothing more than a collection of valid rules, commands, or norms that may lack any moral content. Others perceive the law as fundamentally a vehicle for the protection of individual rights, the attainment of justice, or economic, political, and sexual equality. Few believe that the law can be divorced from its social context. The social, political, moral, and economic dimensions of the law are essential to a proper understanding of its workaday operation. This is especially true in times of change. It is important to recognize the fragility of formalism; we skate on dangerously thin ice when we neglect the contingent nature of the law and its values. Reflection upon the nature of law may sometimes seem disconcertingly abstruse. More than occasionally, however, it reveals important insights into who we are and what we do. The nature and consequences of these different positions should become apparent before long.

The genesis of law

Despite the importance of law in society, its manifestation in the form of general codes first appears only around 3000 BC. Prior to the advent of writing, laws exist only in the form of custom. And the absence of written law retards the capacity of these rules to provide lasting or extensive application.

Among the first written codes is that of Hammurabi, king and creator of the Babylonian empire. It appeared in about 1760 BC, and is one of the earliest instances of a ruler proclaiming a systematic corpus of law to his people so that they are able to know their rights and duties. Engraved on a black stone slab (that may be seen in the Louvre in Paris), the code contains some 300 sections with rules relating to a broad array of activities ranging from the punishment that is to be inflicted on a false witness (death) to that to be meted out to a builder whose house collapses

1. The Code of Hammurabi, created by the King of Babylon in about 1760 BC, is among the earliest extant collection of laws. It is a well-preserved diorite stele setting out 282 laws, providing a fascinating insight into social life under his rule

killing the owner (death). The code is almost entirely devoid of defences or excuses, a very early example of strict liability!

The king was, in fact, acknowledging the existence of even earlier laws (of which we have only the barest of evidence), which his code implies. In truth, therefore, the code echoes customs that preceded the reign of this ancient monarch.

A more striking example of early law-making may be found in the laws of the Athenian statesman Solon in the 6th century BC. Regarded by the ancient Greeks as one of the Seven Wise Men, he was granted the authority to legislate to assist Athens in overcoming its social and economic crisis. His laws were extensive, including significant reforms to the economy, politics, marriage, and crime and punishment. He divided Athenian society into five classes based on financial standing. One's obligations (including tax liability) depended on one's class. He cancelled debts for which the peasants had pledged their land or their bodies, thereby terminating the institution of serfdom.

To resolve disputes between higher- and lower-ranked citizens, the Romans, in about 450 BC, issued, in tablet form, a compilation of laws known as the Twelve Tables. A commission of ten men (*Decemviri*) was appointed in about 455 BC to draft a code of law binding on all Romans (the privileged class – the patricians – and the common people – the plebeians) which the magistrates (two consuls) were required to enforce. The result was a compilation of numerous statutes, most derived from prevailing custom, that filled ten bronze tablets. The plebeians were unimpressed with the result, and a second commission of ten was appointed in 450 BC. It added another two tablets.

During the period of the so-called classical jurists, between the 1st century BC and the middle of the 3rd century AD, Roman law achieved a condition of considerable sophistication. Indeed, so prolific were these jurists (Gauis, Ulpian, Papinian, Paul, and

2. The Byzantine Roman Emperor Justinian, depicted here in one of the striking mosaics in the Basilica of San Vitale in Ravenna, oversaw the revision and codification of Roman law into the *Corpus Juris Civilis*, consisting of the Digest (or Pandects), the Institutes, the Codex, and the Novellae

several others) that their enormous output became hopelessly unwieldy. Between 529 and 534 AD, therefore, the Eastern emperor, Justinian, ordered that these manifold texts be reduced to a systematic, comprehensive codification. The three resulting books, the *Corpus Juris Civilis* (comprising the Digest, Codex, and Institutes), were to be treated as definitive: a conclusive statement of the law that required no interpretation. But this illusion of unconditional certainty soon became evident: the codification was both excessively lengthy (close to a million words) and too detailed to admit of easy application.

Its meticulous detail proved, however, to be its huge strength. More than 600 years after the fall of the Western Roman Empire, Europe witnessed a revival in the study of Roman law. And Justinian's codification, which had remained in force in parts of Western Europe, was the perfect specimen upon which European lawyers could conduct their experiments. With the establishment

3. The University of Bologna is arguably the first in the Western world. It was established around 1088, at which time masters of grammar, rhetoric, and logic began to turn their attention to the law. The University continues to boast a distinguished faculty of law

in about AD 1088 in Bologna of the first university in Western Europe, and the burgeoning of universities throughout Europe in the succeeding four centuries, students of law were taught Justinian's law alongside canon law. Moreover, the contradictions and complexity of the codes turned out to be an advantage, since the rules were, despite the emperor's fantasy of finality, susceptible to interpretation and adaptation in order to suit the requirements of the time. In this way, Roman civil law spread throughout most of Europe – in the face of its detractors during the Renaissance and the Reformation.

By the 18th century, however, it was recognized that more concise codes were called for. Justinian's codification was replaced by several codes that sought brevity, accessibility, and comprehensiveness. The Napoleonic code of 1804 came close to fulfilling these lofty aspirations. It was exported by colonization to large tracts of Western and Southern Europe and thence to Latin America, and it exerted an enormous influence throughout Europe. A more technical, abstract code was enacted in Germany in 1900. What it lacks in user-friendliness, it makes up for in its astonishing comprehensiveness. Known as the BGB, its influence

The appeal of codification

[A] man need but open the book in order to inform himself what the aspect borne by the law bears to every imaginable act that can come within the possible sphere of human agency: what acts it is his duty to perform for the sake of himself, his neighbour or the public: what acts he has a right to do, what other acts he has a right to have others perform for his advantage. … In this one repository the whole system of the obligations which either he or any one else is subject to are recorded and displayed to view.

Jeremy Bentham, *Of Laws in General*, chapter 19, para 10; quoted in Gerald J. Postema, *Bentham and the Common Law Tradition* (OUP, 1986), p. 148

has also been considerable: it afforded a model for the civil codes of China, Japan, Taiwan, Greece, and the Baltic states.

The Western legal tradition

The Western legal tradition has a number of distinctive features, in particular:

- A fairly clear demarcation between legal institutions (including adjudication, legislation, and the rules they spawn), on the one hand, and other types of institutions, on the other; legal authority in the former exerting supremacy over political institutions.
- The nature of legal doctrine which comprises the principal source of the law and the basis of legal training, knowledge, and institutional practice.
- The concept of law as a coherent, organic body of rules and principles with its own internal logic.
- The existence and specialized training of lawyers and other legal personnel.

While some of these characteristics may occur in other legal traditions, they differ in respect of both the importance they accord to, and their attitude towards, the precise role of law in society. Law, especially the rule of law, in Western Europe is a fundamental element in the formation and significance of society itself. This veneration of law and the legal process shapes also the exercise of government, domestically and internationally, by contemporary Western democracies.

The ideal of the rule of law is most closely associated with the English constitutional scholar Albert Venn Dicey, who in his celebrated work *An Introduction to the Study of the Law of the Constitution*, published in 1885, expounded the fundamental precepts of the (unwritten) British constitution, and especially

the concept of the rule of law which, in his view, consisted of the following three principles:

- The absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power.
- Equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts.
- The law of the constitution is a consequence of the rights of individuals as defined and enforced by the courts.

The antique charm of the common law

[W]hat the Continental lawyer sees as being a single problem and solves with a single institution is seen by the common lawyer as being a bundle of more specific problems which he solves with a plurality of legal institutions, most of them of ancient pedigree ... One should be frank enough to say, however, that though the English system has a certain antiquarian charm about it, it is so extremely complex and difficult to understand that no one else would dream of adopting it.

K. Zweigert and H. Kötz,
***An Introduction to Comparative Law*, 3rd edn (OUP, 1998), p. 37**

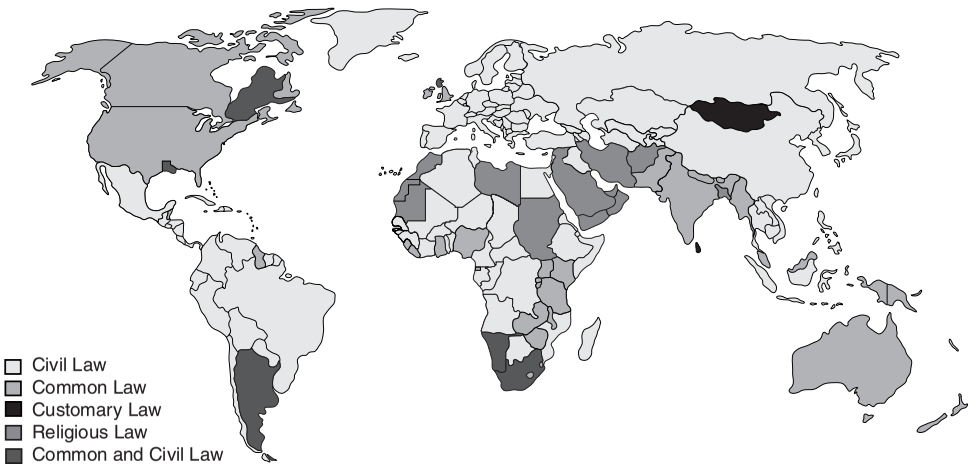
Civil law and common law

The system of codified law that obtains in most of Europe, South America, and elsewhere (see Figure 4) is known as civil law, in contrast to the common law system that applies in England, former British colonies, the United States, and most of Canada. Civil law is frequently divided into four groups. First, is French civil law, which obtains also in Belgium and Luxembourg, the Canadian province of Quebec, Italy, Spain, and their former

colonies, including those in Africa and South America. Second, German civil law, which is, in large part, applied in Austria, Switzerland, Portugal, Greece, Turkey, Japan, South Korea, and Taiwan. Third, Scandinavian civil law exists in Sweden, Denmark, Norway, and Iceland. Finally, Chinese (or China) law combines elements of civil law and socialist law. This is by no means an airtight classification. For example, Italian, Portuguese, and Brazilian law have, over the last century, moved closer to German law as their civil codes increasingly adopted key elements of the German civil code. The Russian civil code is partly a translation of the Dutch code.

Though the two traditions – common law and civil law – have, over the last century, grown closer, there are at least five significant differences between the two systems. First, the common law is essentially unwritten, non-textual law that was fashioned by medieval lawyers and the judges of the royal courts before whom they submitted their arguments. Indeed, it may be that this entrenched oral tradition, supported by a strong monarchy, developed by experts before the revival in the study of Roman law, explains why that system was never 'received' in England.

Codification has been resisted by generations of common lawyers, though this hostility has been weaker in the United States, where since its establishment in 1923, the American Law Institute (a group of lawyers, judges, and legal scholars) has published a number of 'restatements of the law' (including those on contract, property, agency, torts, and trusts) to 'address uncertainty in the law through a restatement of basic legal subjects that would tell judges and lawyers what the law was'. They seek to clarify rather than codify the law. Their standing as secondary authority is demonstrated by their widespread (though not always consistent) acceptance by American courts. More significant is the Uniform Commercial Code (UCC) which establishes consistent rules in respect of a number of key commercial transactions that apply



4. While civil law is the world's most ubiquitous system, the common law and, to a lesser extent, religious and customary law, are applied in a number of countries

across the country. With 50 states with different laws, uniformity in respect of commercial transactions is obviously vital. Imagine the confusion in the absence of such standardization: you live in New York and buy a car in New Jersey that is made in Michigan, warehoused in Maine, and delivered to your home.

Second, the common law is casuistic: the building blocks are cases rather than, as in the civil law system, texts. Ask any American, Australian, or Antiguan law student how most of his or her study-time is spent. The answer will almost certainly be 'reading cases'. Question their counterparts from Argentina, Austria, or Algeria, and they will allude to the civil and penal codes they persistently peruse. The consequence of the common lawyer's preoccupation with what the judges say – rather than what the codes declare – is a more pragmatic, less theoretical approach to legal problem-solving.

Third, in view of the centrality of court decisions, the common law elevates the doctrine of precedent to a supreme position in the legal system. This doctrine means both that previous decisions of courts that involve substantially similar facts ought to govern present cases and that the judgments of higher courts are binding on those lower in the judicial hierarchy. The justification for the idea is that it engenders constancy, predictability, and objectivity, while allowing for judges to 'distinguish' apparently binding precedents on the ground that the case before them differs from them in some material respect.

A fourth generalization is that while the common law proceeds from the premise 'where there is a remedy, there is a right', the civil law tradition generally adopts the opposite position: 'where there is a right, there is a remedy'. If the common law is essentially remedial, rather than rights-based, in its outlook, this is plainly a result of the so-called writ system under which, from the 12th century in England, litigation could not commence without a writ issued on the authority of the king. Every claim had its own

formal writ. So, for example, the writ of debt was a prerequisite to any action to recover money owing, and the writ of right existed to recover land. In the 17th century, the writ of *habeas corpus* (literally 'you must produce the body') was a vital check on arbitrary power, for it required the production of a person detained without trial to be brought before a court. In the absence of a legal justification for his imprisonment, the judge could order the individual to be liberated. It took a century for civil law jurisdictions to accept this fundamental attribute of a free society.

Finally, in the 13th century, the common law introduced trial by jury for both criminal and civil cases. The jury decides on the facts of the case; the judge determines the law. Trial by jury has remained a fundamental feature of the common law. This separation between facts and law was never adopted by civil law systems. It illustrates also the importance of the oral tradition of common law as against the essential role of written argument employed by the civil law.

The common law, chaos, and codification

[L]ife might be much simpler if the common law consisted of a code of rules, identifiable by reference to source rules, but the reality of the matter is that it is all much more chaotic than that, and the only way to make the common law conform to the ideal would be to codify the system, which would then cease to be common law at all. The myth, for that is what it is, owes its attractiveness to another ideal, that of the rule of law, not men. … It consequently distorts the nature of the system to conceive of the common law as a set of rules, an essentially precise notion, as if one could in principle both state the rules of the common law and count them like so many sheep, or engrave them on tablets of stone.

A. W. B. Simpson, 'The Common Law and Legal Theory', in William Twining (ed.), *Legal Theory and Common Law* (Blackwell, 1986), pp. 15–16

There are also certain jurisdictions, such as Scotland, that, though their legal systems are not codified, preserve varying degrees of Roman influence. On the other hand, some jurisdictions have avoided the impact of Roman law, but because of the prominence of legislation, these systems resemble the civil law tradition. They include Scandinavian countries, which inhabit an unusual place in the 'Romano-Germanic' family.

Other legal traditions

Religious law

No legal system can be properly understood without investigating its religious roots. These roots are often both deep and durable. Indeed, the Roman Catholic Church has the longest, continuously operating legal system in the Western world. The influence of religion is palpable in the case of Western legal systems:

> [B]asic institutions, concepts, and values ... have their sources in religious rituals, liturgies, and doctrines of the eleventh and twelfth centuries, reflecting new attitudes toward death, sin, punishment, forgiveness, and salvation, as well as new assumptions concerning the relationship of the divine to the human and of faith to reason.

In Europe in the 12th century, ecclesiastical law played an important role in a number of fields. Ecclesiastical courts claimed jurisdiction over a wide range of matters, including heresy, fornication, homosexuality, adultery, defamation, and perjury. Canon law still governs several churches, especially the Roman Catholic Church, the Eastern Orthodox Church, and the Anglican Communion of Churches.

The rise of secularism has not completely extinguished the impact of religious law. The jurisdiction of Western legislatures and courts over exclusively religious matters is frequently curtailed, and many legal systems incorporate religious law or delegate to

Talmudic law

[The Talmud] represents a brilliant intellectual concept, a book of law which contains endless differences of opinion from all ages and dealing with all that had gone on before, while seen as never definitely finished and thus leaving room for still more opinion, as each age engages with it. There is no equivalent to it in any legal tradition.

H. Patrick Glenn, *On Common Laws* (OUP, 2005), p. 131

religious institutions matters of a domestic nature. Nevertheless, one of the hallmarks of Western legality is the separation between church and state.

While a number of prominent religious legal traditions co-exist with state systems of law, some have actually been adopted as state law. The most significant are Talmudic, Islamic, and Hindu law. All three derive their authority from a divine source: the exposition of religious doctrine as revealed in the Talmud, Koran, and Vedas respectively.

Hindu law

Hindu law recognizes the possibility of change, both of law and the world, but … [i]t just tolerates it, without in any way encouraging it, as something that's going to happen, but which shouldn't disturb the basic harmony of the world. If it does, it's bad karma, and this too will be dealt with. Thus, for a written tradition, Hindu tradition is incredibly roomy. Toleration is not at the perimeter of it, but at the centre. And toleration turns out to have its own kind of discipline.

H. Patrick Glenn, *Legal Traditions of the World*, 2nd edn (OUP, 2004), p. 287

All have influenced secular law in a variety of ways. For example, Talmudic law had a significant impact on Western commercial, civil, and criminal law. In addition to common and civil law systems, it is possible to identify four other significant legal traditions.

Islamic law (or the *Sharia*) is based largely on the teachings of the Koran. It extends to all aspects of life, not merely those that pertain to the state or society. It is observed by more than one-fifth of the population of the world, some 1.3 billion people.

At its core, Hinduism postulates the notion of *Kharma*: goodness and evil on earth determine the nature of one's next existence. Hindu law, especially in relation to family law and succession, applies to around 900 million individuals, mostly in living in India.

Islamic law

Islamic law … seeks constancy with common-sense assumptions about humanity, not through the refinement of categories of its own creation. [It] is a system of adjudication, of ethics and of logic that finds its touchstone not in the perfecting of doctrine, but in the standards of everyday life, and measured in this way it is enormously developed, integrated, logical and successful. Man's duty is to conform to God's moral limits, not to try to invent them. But within these limits established by God one can create relationships and traffic in the knowledge of their existence, intricacies and repercussions.

Lawrence Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (CUP, 1989), p. 56; quoted in Malise Ruthven, *Islam: A Very Short Introduction* (OUP, 1997), p. 89

Customary law

To constitute custom, the practices involved require something beyond mere usage or habit. They need to have a degree of legality. This is not always easy to discern, though customary law continues to play an important role, especially in jurisdictions with mixed legal systems such as occur in several African countries. The tenacity of custom is evident also in India and China. Indeed, in respect of the latter, the Basic Law of the Special Administrative Region of Hong Kong provides that customary law, as part of the laws previously in force in Hong Kong (prior to 1 July 1997), shall be maintained.

Mixed legal systems

In some jurisdictions two or more systems interact. In South Africa, for example, the existence of Roman-Dutch law is a consequence of the influence of Dutch jurists who drew on Roman law in their writing. This tradition was exported to the Cape Colony in the 17th and 18th centuries. The hybrid nature of South Africa's legal system is especially vivid, since, following the arrival of English common law in the 19th century, the two systems co-existed in a remarkable exercise of legal harmony. And they continue to do so:

> Like a jewel in a brooch, the Roman-Dutch law in South Africa today glitters in a setting that was made in England. Even if it were true (which it is not) that the whole of South African private law and criminal law had remained pure Roman-Dutch law, the South African legal system as a whole would still be a hybrid one, in which civil- and common-law elements jostle with each other.

The mixture is no longer nearly as effective in Sri Lanka or Guyana, to where Roman-Dutch law was exported in 1799 and 1803 respectively, but where the common law now predominates.

Chinese law

Traditional Chinese society, in common with other Confucian civilizations, did not develop a system of law founded by the ideas that underlie Western legal systems. Confucianism adopted the concept of '*li*': an intense opposition to any system of fixed rules that applied universally and equally. Though Chinese 'legalists' sought to undermine the political authority of this Confucian philosophy of persuasion by championing 'rule by law' ('*fa*') in place of the organic order of the Confucian '*li*', the latter continues to dominate China.

The spectacular modernization of China has generated a need for laws that facilitate its economic and financial development. But this new legalism has not been accompanied by an ideological partiality for law along Western lines. The role of law in modern

The future of the law in China

I would venture to suggest that as economic and social changes sweep through China as a result of the current economic reforms, the social context for the closed elements of traditional legal culture will, in the course of time, be replaced by a context more favourable to elements more consistent with liberalism, democracy, human rights, and the rule of law. They will thus find their place in a rejuvenated Chinese culture, which can and will continue to be informed and inspired by the open elements of the Chinese tradition, such as Confucian benevolence, moral self-cultivation, and the quiet but unending spiritual quest for harmony of 'heaven, earth, humanity and the myriad things'.

Albert H. Y. Chen, 'Confucian Legal Culture and its Modern Fate', in Raymond Wacks (ed.), *The New Legal Order in Hong Kong* (Hong Kong University Press, 1999), pp. 532–3

China remains decidedly instrumental and pragmatic. Its system is essentially civilian and hence largely codified, but this has not yet engendered either greater esteem for the law or a diminution in the control of the Communist Party.

The allure of the law

Individuals aggrieved by iniquity often complain, 'There ought to be a law against that!' There is an understandable tendency to look to the law to resolve our problems. And the law's failure to provide a remedy may provoke a sense of frustration and anger. Yet legal regulation of antisocial behaviour is not as simple as it may appear, as should become clear when the challenges to the law of technology are considered in Chapter 6. Before we reach for the law – or a lawyer – it is worth recalling the words of the great American judge Learned Hand, who prescribed this antidote to an excessive faith in the law:

> I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.

The validity or otherwise of this assertion should become evident in the course of these pages.

The functions of law

Order

Football, chess, bridge are unthinkable without rules. A casual poker club could not function without an agreed set of rules by which its members are expected abide. It is not surprising therefore that when they are formed into larger social groups, humans have always required laws. Without law, society is

barely conceivable. We tend, unfortunately, towards egoism. The restraint that law imposes on our liberty is the price we pay for living in a community. 'We are slaves of the law' wrote the great Roman lawyer Cicero, 'so that we may be free'. And the law has provided the security and self-determination that has, in large part, facilitated social and political advancement.

The cliché 'law and order' is perhaps more accurately rendered 'law *for* order'. Without law, it is widely assumed, order would be unattainable. And order – or what is now popularly called 'security' – is the central aim of most governments. It is an essential prerequisite of a society that aspires to safeguard the well-being of its members.

Thomas Hobbes famously declared that in his natural state – prior to the social contract – the condition of man was 'solitary, poor, nasty, brutish and short', though more than one student has rendered this maxim as '… nasty, *British* and short'. Law and government are required, Hobbes argues, if we are to preserve order and security. We therefore need, by the social contract, to surrender our natural freedom in order to create an orderly society. His philosophy is nowadays regarded as somewhat authoritarian, placing order above justice. In particular, his theory – indeed, his self-confessed purpose – is to undermine the legitimacy of revolutions against even malevolent governments.

He recognizes that we are fundamentally equal, mentally and physically: even the weakest has the strength to kill the strongest. This equality, he suggests, engenders discord. We tend to quarrel, he argues, for three main reasons: competition (for limited supplies of material possessions), distrust, and glory (we remain hostile in order to preserve our powerful reputations). As a consequence of our inclination towards conflict, Hobbes concludes that we are in a natural state of continuous war of all against all, where no morals exist, and all live in perpetual fear. Until this state of war ceases, all have a right to everything,

including another person's life. Order is, of course, only one part of the functions of law story.

Justice

Though the law unquestionably protects order, it has another vital purpose. In the words of the 20th-century English judge Lord Denning:

> The law as I see it has two great objects: to preserve order and to do justice; and the two do not always coincide. Those whose training lies towards order, put certainty before justice; whereas those whose training lies toward the redress of grievances, put justice before certainty. The right solution lies in keeping the proper balance between the two.

The pursuit of justice must lie at the heart of any legal system. The virtual equation of law with justice has a long history. It is to be found in the writing of the Greek philosophers, in the Bible, and in the Roman Emperor Justinian's codification of the law. The quest for clarity in the analysis of the concept of justice has, however, not been unproblematic. Both Plato and Aristotle sought to illuminate its principal features. Indeed, Aristotle's approach remains the launching pad for most discussions of justice. He argues that justice consists in treating equals equally and 'unequals' unequally, in proportion to their inequality. Acknowledging that the equality implied in justice could be either arithmetical (based on the identity of the persons concerned) or geometrical (based on maintaining the same proportion), Aristotle distinguishes between corrective or commutative justice, on the one hand, and distributive justice, on the other. The former is the justice of the courts which is applied in the redress of crimes or civil wrongs. It requires that all men are to be treated equally. The latter (distributive justice), he argues, concerns giving each according to his desert or merit. This, in Aristotle's view, is principally the concern of the legislator.

In his celebrated book, *The Concept of Law*, H. L. A. Hart maintains that the idea of justice:

> ... consists of two parts: a uniform or constant feature, summarised in the precept 'Treat like cases alike' and a shifting or varying criterion used in determining when, for any given purpose, cases are alike or different.

He contends that in the modern world the principle that human beings are entitled to be treated alike has become so well established that racial discrimination is usually defended on the ground that those discriminated against are not 'fully human'.

An especially influential theory of justice is utilitarianism, which is always associated with the famous English philosopher and law reformer Jeremy Bentham. In his characteristically animated language:

> Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. ... The *principle of utility* recognizes this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law. Systems which attempt to question it, deal in sounds instead of sense, in caprice instead of reason, in darkness instead of light.

To this end, Bentham formulated a 'felicific calculus' by which to assess the 'happiness factor' of any action.

There are numerous competing approaches to the meaning of justice, including those that echo Hobbes' social contract. A modern version is to be found in the important writings of John Rawls who, in rejecting utilitarianism, advances the idea of justice

as fairness which seeks to arrive at objective principles of justice that would hypothetically be agreed upon by individuals who, under a veil of ignorance, do not know to which sex, class, religion, or social position they belong. Each person represents a social class, but they have no idea whether they are clever or dim, strong or weak. Nor do they know in which country or in what period they are living. They possess only certain elementary knowledge about the laws of science and psychology. In this state of blissful ignorance, they must unanimously decide upon a contract the general principles of which will define the terms under which they will live as a society. And, in doing so, they are moved by rational self-interest: each individual seeks those principles which will give him or her the best chance of attaining his chosen conception of the good life, whatever that happens to be.

Realism about law

The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.

Justice Oliver Wendell Holmes, *The Common Law*, 1

Justice is unlikely to be attained by a legal system unless its rules are, as far as possible, reasonable, general, equal, predictable, and certain. None of these objectives can be achieved in absolute terms; they are ideals. So, for example, the law can never be utterly certain. Occasionally the facts of a case are obscure and

difficult to discover. Similarly, the law itself may not be easy to establish – especially for the non-lawyer faced with a profusion of statutes, decisions of the courts, by-laws, and so on. The Internet has rendered the task of finding the law slightly easier, but, in the face of an escalating spate of legal sources, it remains a formidable challenge. The maxim 'hard cases make bad law' expresses the important principle that is better that the law be certain than that it be bent to accommodate an unusual case.

Justice requires more than just laws; the process whereby justice is attained must be a fair one. This entails, first, an impartial, independent judicial system (discussed in Chapter 5). Second, there must be a competent and independent legal profession (also discussed in Chapter 5). Third, procedural justice is a vital ingredient of a just legal system. This necessitates, amongst other things, access to legal advice, assistance, and representation, and the guarantee of a fair trial (discussed in Chapter 4).

In a just or nearly just society, few obstacles beset the path of the judge who, in a general sense, seeks to advance the cause of justice. Heroism is rarely required. Where injustice pervades the legal system, however, the role of judge assumes a considerably more intractable form. How could a decent, moral, fair-minded person in a society such as Nazi Germany or apartheid South Africa square his conscience with his calling? This moral quandary is perhaps encountered also by ordinary individuals who inhabit an unjust society. Should the fact that the judge is a public official distinguish him from others who participate in the legal system or who simply derive benefit from its injustice? Are there compelling reasons for morally differentiating judges from others, particularly lawyers? The honourable judge attempts to do justice when he can, admitting that his autonomy is curtailed in several major areas of the law. But is a conscientious lawyer not in the same boat? He strives to do good, often at great personal cost, within the strictures of the legal system. He too lends legitimacy to the system. Is the moral dilemma not the same?

There are no simple answers to this sort of predicament. Institutionally, judges differ from lawyers: they are officers appointed or elected to implement the law. Their legal duty is plain. Lawyers, on the other hand, are not state officials. They owe a strong duty to their clients. They must, of course, work within the system, but their responsibility is to utilize the law, not to dispense justice. They may find the law morally repugnant, but their role within an unjust legal system is easier to justify than that of the judge. So, for example, lawyers in apartheid South Africa themselves recognized this distinction, and several prominent senior lawyers declared that on grounds of conscience they would decline appointment to the bench. Yet they continued as lawyers. And, though the temptation to withdraw from the system was often powerful, many lawyers played a courageous, sometimes heroic, part in the struggle for justice.

A lawyer may, however, decide that his or her participation in the legal system serves to legitimate it. This is a perfectly proper moral response. But it does not follow that the dilemma is therefore the same as for the state official. This is because of the important functional differences between the two. In particular, lawyers, unlike judges, are not concerned exclusively with the forensic process. Indeed, lawyers do some of their most worthwhile work when they advise clients of their rights, whether or not litigation is intended or anticipated (see Chapter 5). Thus, while appearance before the court may be regarded as a more palpable acceptance of its legitimacy, advising clients may not.

The law lays down certain ground rules. Murder is wrong. So is theft. Legal rules against these and other forms of antisocial behaviour are the most obvious, and the most conspicuous, instances of legal regulation. Modern governments seek to persuade us to behave well by means other than compulsion. Often the carrot replaces the stick. Advertising campaigns, official websites, and other forms of public relations exercises exhort us to do X or avoid Y. But by setting standards of conduct,

the law remains the most powerful tool in the hands of the state.

Further, the law establishes a framework within which unavoidable disputes may be resolved. Courts are the principal forum for the resolution of conflict. Almost every legal system includes courts or court-like bodies with the power to adjudicate impartially upon a dispute and, following a recognized procedure, to issue an authoritative judgment based on the law.

The law facilitates, often even encourages, certain social and economic arrangements. It provides the rules to enable parties to enter into the contract of marriage or employment or purchase and sale. Company law, inheritance law, property law all furnish the means by which we are able to pursue the countless activities that constitute social life.

Another major function of the law is the protection of property. Rules identify who owns what, and this, in turn, determines who has the strongest right or claim to things. Not only does the law thereby secure the independence of individuals, it also encourages them to be more productive and creative (generating new ideas that may be transformed into intellectual property, protected by patents and copyright).

The law seeks also to protect the general well-being of the community. Instead of individuals being compelled to fend for themselves, the law oversees or coordinates public services that would be beyond the capacity of citizens or the private sector to achieve, such as defence or national security.

Another dimension of the law that has assumed enormous proportions in recent years is the protection of individual rights. For example, the law of many countries includes a bill of rights as a means of seeking to protect individuals against the violation of an inventory of rights that are considered fundamental. In some

cases a bill of rights is constitutionally entrenched. Entrenchment is a device which protects the bill of rights, placing it beyond the reach of simple legislative amendment. In other jurisdictions, rights are less secure when they are safeguarded by ordinary statutes that may be repealed like any other law. Almost every Western country (with the conspicuous exception of Australia) boasts a constitutional or legislative bill of rights.

The sources of law

Unlike manna, the law does not fall from the sky. It springs from recognized 'sources'. This reflects the idea that in the absence of some authoritative source, a rule that purports to be a law will not be accepted as a law. Lawyers therefore speak of 'authority'. 'What', a judge may ask a lawyer, 'is your authority for that proposition?' In reply, the common lawyer is likely to cite either a previous decision of a court or a statute. A civil lawyer will refer the court to an article of, say, the civil code. In either case, the existence of an acknowledged source will be decisive in the formulation of a legal argument.

In addition to these two conventional sources of law, it is not uncommon for the writings of legal academics to be recognized as authoritative sources of law. There are also certain sources that are, strictly speaking, non-legal, including (though it may be hard to believe) common sense and moral values.

Legislation

The stereotypical source of law in contemporary legal systems is the statute enacted by a legislative body that seeks to introduce new rules, or to amend old ones – generally in the name of reform, progress, or the alleged improvement of our lives. Legislation is, however, of quite recent origin. The 20th century witnessed an eruption of legislative energy by law-makers who frequently owe their election to a manifesto of promises that presumes the existence of an unrelenting statutory assembly line. In most

advanced societies, it is not easy to think of any sphere of life untouched by the dedication of legislators to manage what we may or may not do.

Statutes are rarely a panacea; indeed, they not infrequently achieve the precise opposite of what their draftsmen intended. Moreover, language is seldom adequately lucid or precise not to require interpretation. The words of a statute are rarely conclusive; they are susceptible of different construction – especially where lawyers are concerned. Inevitably, therefore, it falls to judges to construe the meaning of statutes. And when they do so, they normally create precedents that provide guidance for courts that may be faced with the interpretation of the legislation in the future.

A number of technical 'rules' have developed to assist judges to decode the intention of law-makers. A classic example that demonstrates the various approaches to the legislative interpretation is a hypothetical statute that prohibits 'vehicles' from entering the park. This plainly includes a motor car, but what about a bicycle? Or a skateboard? One solution is to adopt the so-called 'literal' or 'textual' approach which accords the text in question its ordinary everyday meaning. Thus the definition of a 'vehicle' would not extend beyond an automobile, a truck, or a bus; bicycles and skateboards are not, in any ordinary sense, vehicles. Where, however, the plain meaning gives rise to an absurd result, its proponents concede that the approach runs into trouble, and the words or phrases in issue will need to be interpreted in a manner that avoids obvious illogicality.

A second approach seeks to discover the *purpose* of the legislation. In our example, we may conclude that the purpose of the provision is to secure the peace and quiet of the park. If so, we are likely to find it easier to decide what is the real intention of the legislation, and hence to distinguish between a car (noisy) and a bicycle (quiet). This approach also permits judges to consider

the wider purposes of the legal system. Where either the narrow or broader purpose suggests an interpretation different from the literal meaning of the language, the purposive approach would prefer a liberal to a literal interpretation.

It is an approach that holds sway in several jurisdictions. Courts in the United States routinely scrutinize the legislative history of statutes in order to resolve ambiguity or confirm their plain meaning. A similar approach is evident in Canada and Australia. And under the European Communities Act of 1972, a court is required to adopt a purposive approach in construing legislation that implements European Community (EC) law. Indeed, since EC legislation tends to be drafted along civil law lines – expressed in fewer words than common law statutes, but with a high degree of abstraction – a purposive approach is unavoidable, and broad social and economic objectives are frequently considered by the courts. The European Court of Justice also tends to favour a purposive approach.

It is, I think, fair to say, that there is no single ideal approach to unlock the door to an ideal construction of a statute. Indeed, there is considerable doubt as to whether the 'rules' are, or can be, uniformly applied. No less a distinguished author on statutory interpretation than Professor Sir Rupert Cross shared the doubts expressed by his Oxford pupils:

> Each and every pupil told me there were three rules – the literal rule, the golden rule and the mischief rule, and that the courts invoke whichever of them is believed to do justice in the particular case. I had, and still have, my doubts, but what was most disconcerting was the fact that whatever question I put to pupils or examinees elicited the same reply. Even if the question was What is meant by 'the intention of Parliament?' or What are the principal extrinsic aids to interpretation? Back came the answer as of yore: 'There are three rules of interpretation – the literal rule …'

Common law rules of statutory interpretation

The literal rule

If the language of a statute be plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results.

Lord Atkinson in *Vacher v London Society of Compositors* [1913] A.C. 107, 1211

The golden (or purposive) rule

[The] golden rule … is that we are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification, and to justify the Court in putting on them some other signification, which though less proper, is one which the Court thinks the words will bear.

Lord Blackburn in *River Wear Commissioners v Adamson* (1877) 2 App Cas 743, 764–5

The mischief rule (or the rule in Heydon's Case)

In applying the mischief rule, the court is required to ask four questions: (1) What was the common law before the statute was passed? (2) What was the defect or mischief for which the common law did not provide? (3) What remedy did the legislature intend to provide? (4) What was the true reason for that remedy?

***Heydon's Case* (1584) 3 Co Rep 7a, 7b**

Moreover, there are those who cynically contend that the rules simply justify solutions reached on wholly different grounds.

Another difficulty intrinsic to the legislative process is that law-makers cannot be expected to predict the future. Legislation designed to achieve a specific objective may fail when a new situation arises. This is especially true when innovative technology materializes to confound the law. Some of the awkward challenges to the legislation on copyright or pornography posed by the rise of digital technology and the Internet are discussed in Chapter 6.

Common law

One normally associates the phrase 'common law' with *English* common law. But common laws, in the sense of laws other than those particular to a specific jurisdiction, largely in the form of legislation, are not peculiar to England and English-speaking former colonies. Numerous forms of common law have existed, and endure, in several European legal systems, including France, Italy, Germany, and Spain. They developed from Roman roots and achieved their commonality by indigenous reception instead of imposition. In England, however, the judge-driven common law tended to be defined in jurisdictional and remedial terms. But though the common laws of Europe (Germany, France) seem to have transmogrified into national laws, they are not dead. Despite the advent of codification and the doctrine of precedent these – non-English – common laws, though battered and bruised, still survive. And they circulate tirelessly through the veins of various legal systems.

In respect of the common law of England – and those many countries to which it has been exported – previous decisions of courts (judicial precedents) are a fundamental source of law. The doctrine of precedent stipulates that the reasoning deployed by courts in earlier cases is normally binding on courts who subsequently hear similar cases. The idea is based on the principle

'*stare decisis*' ('let the decision stand'). It is, of course, designed to promote the stability and predictability of the law, as well as ensuring that like cases are, as far as possible, treated alike.

Every common law jurisdiction has its distinctive hierarchy of courts, and the doctrine of precedent requires courts to follow the decisions of courts higher up the totem pole. In doing so, however, the lower court need follow only the *reasoning* employed by the higher tribunal in reaching its decision – the so-called *ratio decidendi*. Any other statements made by the judges are not binding: they are 'things said by the way' (*obiter dicta*). For example, a judge may give his opinion on the case, which is not relevant to the material facts. Or she may pontificate on the social context in which the case arose. In neither case need a subsequent judge regard these utterances as anything more than persuasive.

Discerning the *ratio decidendi* of a case is not infrequently an arduous journey through an impenetrable thicket. Judgments may be long and convoluted. Where the court consists of several judges, each may adduce different reasons to arrive at the same conclusion. Though judges and academics have supplied various road maps, there is no easy route. No simple formula is available to uncover the binding chunk of the judgment. As with much in life, it requires practice and experience.

The notion that previous decisions (often ancient) should determine the outcome of contemporary cases is occasionally ridiculed. Most famously, Jeremy Bentham stigmatized the doctrine of precedent as 'dog law':

> Whenever your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me.... [T]he more antique the precedent – that is to say, the more barbarous, inexperienced, and prejudice-led the race of men,

> by and among whom the precedent was set – the more unlike that the same *past* state of things … is the *present* state of things.

It is frequently assumed that continental systems of law do not employ an equivalent doctrine of precedent under which judges are bound to follow decisions of a higher court. This is mistaken. In practice, a judgment of the French *Cour de Cassation* or the German *Bundesgerichtshof* will be followed by lower courts no less than the judgment of a common law court of appeal.

Other sources

In a perfect world the law would be clear, certain, and comprehensible. The reality is some way from this Utopian vision. Law in all jurisdictions is a dynamic organism subject to the vicissitudes of social, political, and moral values. One influential foundation of moral ideas has already been mentioned: natural law, the ancient philosophy that continues to shape the teachings of the Roman Catholic Church. As we saw, it proceeds from the assumption that there are principles that exist in the natural world that we, as rational beings, are capable of discovering by the exercise of reason. For instance, abortion is regarded as immoral on the ground that it offends natural law's respect for life.

In spite of the caricature of law, lawyers, and courts existing in an artificial, hermetically sealed bubble, judges do reach out into the real world and take account of public opinion. Indeed, on occasion courts respond with unseemly alacrity, such as when the media laments the alleged leniency of judges in a certain case or in respect of a particularly egregious offence. Judges may react rashly (dare one say injudiciously?) by flexing their sentencing muscles apparently to placate perceived public opinion.

More prudently, perhaps, courts, much to the gratification of academic lawyers, increasingly cite their scholarly colleagues' views as expressed in textbooks and learned journals. To be

quoted in a judgment is recognition, not only that one's works are actually read, but also that they carry some weight.

In the absence of direct authority on a point of law, courts may even permit lawyers to refer to 'common sense' to support an argument. This might include widely accepted notions of right and wrong, generalizations about social practices, fairness, perceptions of the law, and other common conceptions that cynics occasionally represent as foreign to the legal process.