CHAPTER 22

Natural law

Natural law theory has a history reaching back centuries BC, and the vigour with which it flourishes notwithstanding periodic eclipse, especially in the 19th century, is indicative of its vitality. There is no one theory; many versions have evolved throughout this enormous span of time. Kelsen exposed some of them as masks for political ideologies. Natural law theory, however, should not be dismissed simply on account of its variety. On the contrary, this very fact is a clue to its understanding. No other firmament of legal or political theory is so bejewelled with stars as that of natural law, which scintillates with contributions from all ages. A single chapter cannot possibly do justice to this rich and varied material, so all that will be attempted here is to deploy those portions of it that will help to embroider the topics which seem to be central in contemporary thought. Old ideas have been abandoned or refurbished and new ones put forward, while forgotten lessons have blossomed with new significance.

The term 'natural law', like positivism'[1], has been variously applied by different people at different times. (1) Ideals which guide legal development and administration. (2) A basic moral quality in law which prevents a total separation of the 'is' from the 'ought'. (3) The method of discovering perfect law. (4) The content of perfect law deducible by reason. (5) The conditions *sine quibus non* for the existence of law. It is not always possible to classify a given writer as naturalist or positivist. For instance, it has been pointed out that Scotus, Ockham and Kant have been treated as positivists by some natural lawyers and as naturalists by some positivists; besides which there are differences among those who are normally classed as naturalists or positivists[2]. Also, natural law thinking in one form or another is pervasive and is encountered in various contexts. Values, for instance, as pointed out, play an indispensable part in the development and day-to-day administration of law[3]. In a different sphere natural law theory has tried to meet the paramount needs of successive ages throughout history, and an account has been given of the ways in which it supported power or freedom from power according to the social need of the time[4]. All this is part and parcel of its very nature. Further, natural law thinking could offer indirect help with two contemporary problems, namely, the abuse of power and the abuse of liberty[5]. Positivism, on the other hand, by seeking to insulate legal theory from such considerations refuses to give battle where battle is needed, perhaps wisely, perhaps to its own discredit, depending on the point of view. Nevertheless, the readiness of natural lawyers to meet challenge is a tribute

1 See p 331 ante.
2 J Hall *Foundations of Jurisprudence* ch 2.
3 See ch 10 ante.
4 See pp 71-85 ante.
5 See chs 5, 6 ante.

to the springs of their inspiration, which has a vitality like that of the phoenix[6].

A distinction should be drawn between two kinds of natural law thought, 'natural law of method' and 'natural law of content'. The former was the older, dating from ancient times and was also prevalent in the early middle ages. It concerned itself with trying to discover the method by which just rules may be devised to meet ever-varying circumstances. It is a prescription for rule-making, not a catalogue of rules'[7]. The 'natural law of content' was a feature of the 17th and 18th centuries and was characterised by attempts to deduce entire bodies of rules from absolute first principles. These were manifestations of the then fashionable assertion of 'natural rights' and were accompanied internationally by schemes for ensuring perpetual peace. It was this 'natural law of content' which was the target for damaging criticism, resulting in the eclipse of natural law thinking throughout most of the 19th century, when it reached its nadir and was superseded by positivism. As long as social conditions remained stable, positivism could flourish. This in turn faltered when those conditions were upset by the convulsions that beset nations since the second half of the last century, and a reaction set in against the excesses resulting from a rigid adherence to formalism. It failed through sterility in that it could give no guidance midst the challenge to accepted moral and social beliefs; it failed because it could give no help in avoiding or remedying monstrous abuses of power and liberty that have been, and are still, prevalent. With its decline there has arisen a new preoccupation with social justice, which includes, among other manifestations, a revival of natural law doctrine more in line with the older 'natural law of method' and endeavours to avoid the criticism of the past and to meet the problems of today.

It is against this background that theories of natural law should be approached. Since their concern has always been with the needs of particular ages, only theories with contemporary relevance will be discussed here. Those that were tailored to suit bygone times, eg those of Aristotle and Grotius, will not be dealt with. A start might be made with the doctrine of St Thomas Aquinas (1224/5-1274), which is not only outstanding in itself. but whose enduring value was indorsed in 1879 by Pope Leo XIII, who enabled it to become part of the teaching of the Catholic Church[8].

ST THOMAS AQUINAS

The Thomist scheme has to be set in the context of its time[9]. There was, first, a need for stability in a world emerging from the Dark Ages. Secondly, the struggle between Church and State was beginning and there was need for the Church to establish its superiority by rational argument rather than by force, since secular authority had the monopoly of force. Thirdly, it was necessary for Christendom to unite in the face of the spreading heathen menace and a need was felt for a unifying Christian philosophy. The available philosophic material consisted largely of the natural law philosophies of Greece and Rome. The *Decretum Gratianum* (c 1140) had already identified

6 To say with Ross, 'Like a harlot natural law is at the disposal of everyone' (*On Law and Justice* p 261) is to miss the point.

7 Montrose *Precedent in English Law* (ed Hanbury) p 40, and generally ch 3.

8 Encyclical *Aeterni Patris*.

9 See pp 77-78 ante.

the law of nature with the law of God, which paved the way for resort to classical literature as authority. Aquinas endeavoured to meet all three needs and his doctrine may be presented as follows.

There is a connection between means and ends. There is an unshakeable relation in the nature of things between a given operation and its result. Natural phenomena have certain inevitable consequences: fire burns, it does not freeze. So, one adopts a particular method because of its 'natural' properties. There is also a tendency to develop in certain ways, which is naturally inherent in things: an acorn can only evolve into an oak; it will not evolve into a larch. Appreciation of both these, namely, the relation between means and ends and the process of growth towards fulfilment, is open only to intelligence and the faculty of reason. An acorn does not think, but Man does. He appreciates the relation between means and ends and the destined development of phenomena around him. He can also, within limits, choose for himself the ends which he wants and devise means of achieving them. For example, a person in authority may decide that the health of society is an end worth achieving. He will then consider how best to accomplish this and prescribe appropriate regulations of social behaviour. Laws thus consist of means of achieving ends. The relation between an end and the method by which its fulfilment is sought is initially conceived in the mind of the legislator, but those who are required to conform to his directions can also appreciate the connection by the exercise of their own reasoning faculties. Where the achievement of the end sought by the legislator depends on adherence by others to the prescribed patterns of conduct, it is essential that these should be made known to them. Therefore, law in an all-embracing signification is 'nothing else than an ordinance of reason for the common good, made by him who has the care of the community, and promulgated'[10].

Though Man can to a large extent control his own destiny, he too is subject to certain basic impulses, which can be perceived by observing human nature. At the lowest level there is the impulse towards self-preservation; at the next level there are the impulses, shared with other creatures, to reproduce the species and rear children; at the highest level there is the impulse to improve, to take such decisions as are necessary for the attainment of higher and better things[11]. This last is peculiar to Man by virtue of his reason. These basic impulses point in a definite direction; they are seen to be the means of achieving, not only survival and continuity, but also perfection. They are an inescapable part of human nature and show that Man also, to a lesser extent than an acorn, is limited by nature. If then, the framework of human nature is itself a means to certain ends, the establishment of the ends and these means of achievement could only have originated in the reason of some superhuman legislator. This is the eternal law: 'the eternal law is nothing else than the plan of the divine wisdom considered as directing all the acts and motions'[12] to the attainment of the ends. Man, however, unlike the rest of creation, is free and rational and capable of acting contrary to eternal law. Therefore, this law has to be promulgated to him through reason. This is natural law. There is no need of promulgation to other created things, for they lack the intelligence of Man. 'The natural law is

10 Aquinas *Summa Theologica* I, 2, Q 90, art 4.
11 *Aquinas* I 2, Q 94, art 2.
12 *Aquinas* I, 2, Q 93, art 1.
13 *Aquinas* I, 2, Q 91, art 2.

nothing else but a participation of the eternal law in a rational creature'[13], ie the dictates revealed by reason reflecting on natural tendencies and needs. 'The primary precept of the law is that good should be done and pursued and evil avoided; and on this are founded all the other precepts of the law of nature'[14]. By reflecting on his own impulses and nature Man can decide what is good. In this way he perceives the three basic drives mentioned above. In addition, reason reflecting on experience yields further; more detailed precepts. The moral law thus contains a variety of them of greater or less generality.

Certain doubts might be mentioned at this point. The fact that reason is needed to appreciate the orderings in nature does not necessarily imply that reason established them; nor does the fact that Man by his reason can set himself a goal of his own and utilise the existing ordering of nature as means for its achievement necessarily suggest that the order in nature was appointed by reason. It might conceivably be argued that it is only the faculty of *appreciating* order, implanted in the mind, that should be ascribed to the Deity. On that supposition eternal law would be what Man creates in his own mind, not something external to it and comprehensible by reason. This question, of course, strikes at the root of religious belief and, as such, is too large a matter to be debated here. Another point concerns the nature of the 'ought' behind Aquinas's view of natural law. It amounts to saying: Man's nature is such that he is necessarily impelled to seek good in survival, continuity and perfection; therefore, he ought to do things to achieve these and not do things to frustrate them. Superficially it might seem that this is no more than the functional 'ought' behind the adoption of a certain course of action as the effective means to a certain end[15]. This is not the case here. With the functional 'ought', the failure or refusal to pursue the end is morally neutral. Thus, while it is true that if a person wishes to make a gratuitous promise, he ought to make it under seal, there is no moral failure on his part for not wishing to make such a promise. Aquinas's moral imperative is something different; to go against the ends is morally wrong[16]. It is not wrong because God has forbidden contravention of natural law; God has forbidden it because it is wrong, ie contrary to reason by which He Himself is bound. This being so, Aquinas's argument looks as if he is deriving the 'ought' logically (by reason) from an 'is' (Man's observable nature). Finally, there is the difficulty in that procreation was treated by him as a basic drive of human nature and hence good, but he himself subscribed to clerical celibacy. His answer was that Mankind 'ought not only to be multiplied corporeally, but also to make spiritual progress. Sufficient provision is made if some only attend to generation, while others give themselves to the contemplation of divine things for the enrichment and salvation of the whole human race'[17]. This is tantamount to saying that this natural law is addressed to people generally but nobody in particular. If so, the imperative behind its stands in need of elucidation as well as the connection between sin and contravention of natural law.

In addition to eternal and natural law there is divine law, which is eternal law revealed through the Scriptures; and lastly there is human or man-made law. The latter should conform to reason and thus to the law of God. These

14 *Aquinas* I, 2, Q 94, art 2.
15 See p 44–45 ante.
16 It is also different from Kant's 'categorical imperative': see p 475 post.
17 *Aquinas* I, 2, Q 152, art 2.

four, then, eternal law, natural law, divine law and human law, comprise the Thomist system.

This scheme may justly be regarded as the first of its kind in the history of jurisprudence. Its outstanding features were (1) that it combined ancient philosophy, the law of the Romans, the teachings of the Christian Fathers and contemporary pragmatism with consummate power and skill. Unlike the teaching of St Augustine, law was no longer the product of original sin, but part of the Divine scheme[18]. Nor is there any suggestion that body and natural things are synonymous with corruption and a clog on the spirit. What is striking is its uncompromising appeal to reason. Man was created so that he might strive towards perfection within the limits of mortality. Reason dictates that he has, therefore, to be free. God cannot alter this state of affairs. To do so would contradict His own nature, since God Himself is bound by reason. To match this stupendous assertion one has to go back to the Jewish hypothesis of the Covenant. It is not surprising that, consistently with this, the law of God itself was declared to be 'nothing else than the reason of divine wisdom'; and Christianity was said to be supreme reason: *credo quia rationabilis est*. (2) Natural law furnishes principles rather than rules for detailed application. (3) Another feature is the empirical approach to eternal and natural law. Inferences are drawn from human nature as observable by everybody. (4) Reason becomes the foundation for all human institutions. Social life, whether in the form of families or the state, are founded on human nature. Reason reflecting on this shows that these are necessary for the realisation of Man's full potential and are thus natural institutions[19]. An extension of this is the ideal of a single organisation of all Mankind in a world-state. (5) Aquinas sought to strengthen the authority of the Church by asserting that human dignitaries were responsible to the Church in matters relating to eternal law, and buttressed that contention with the proposition that the Church is the authoritative interpreter of divine law in the Scriptures. Nevertheless, the state, which existed before the Church, is itself a natural institution. It serves the common good, and by means of its laws should bring about the conditions conducive to Man's proper development. (6) The test, then, by which laws are to be judged is the following dictate: 'every human law has just so much of the nature of law, as it is derived from the law of nature. But if at any point it departs from natural law, it is no longer a law but a perversion of law'[20]. (7) The need is stressed for the union of prescriptive patterns of behaviour, ideals and inward obedience if law is to achieve its objectives. In so far as human laws are founded on reason there is a duty to obey them; from which it would follow that if a law is unreasonable and unjust no such duty arises. Interestingly enough, however, Aquinas qualified this inference by saying that there may be subtle dictates of morality which enjoin obedience even to an unreasonable positive law, for instance to avoid social disruption. Unjust laws, he said, 'do not bind conscience unless observance of them is required in order to avoid scandal or disturbance'[1]. The qualification might well have been a concession to the need of the time to preserve social stability. Even more significant, was the implicit recognition of the growing importance of man-made law. (8) The corollary of this was that an unjust ruler may be

18 Gilby *Principality and Polity* pp 146 et seq.
19 *Aquinas De regimine principum* 1.1.
20 *Aquinas* I, 2, Q 95, art 2.
1 *Aquinas* I, 2, Q 96, art 4.

overthrown, unless revolution would create as bad, or worse, state of affairs than before. Sedition is a social evil; and he warned against rebellion in circumstances which do not justify it. As before, the qualification reflects the need of the time. (9) The identification of natural law with reason was destined in later times to bring about a separation of natural law from theology. For with the advent of the Reformation, the Protestants denied the authority of the Church to be the unchallengeable exponent of the law of God; Man was said to have direct access to God through his own reason.

In the era which followed that of Aquinas, the dream of an united Christendom was finally abandoned, Europe emerged from feudalism and there arose the modern municipal state. These developments had to be justified by theories, which were more power-orientated than in the preceding age. Then, abuse of power by sovereigns over their subjects led to revolutionary stirrings and assertion of fundamental rights of the individual, which called for immunity-orientated theories. Both these movements manifested themselves in successive variations of the social contract theory[2]. Side by side with this, there was international chaos produced by the exercise of unlimited freedom of action by states in their mutual relations, which led to the birth of international law and schemes for perpetual peace evolved out of reason. These factors fostered the rise of 'natural law of content' theories, which supposed that by appealing to reason perfect systems could be deduced in detail. Throughout this period the emphasis was very much on the individual and his rights.

TRANSCENDENTAL IDEALISM

The close of this epoch was marked by another line of thought, which was equally uncompromising in its insistence on individual freedom, but wholly idealistic in character. Kant (1724–1804), whose doctrines were developed by Fichte, taught that sensory perception is the avenue to knowledge of the objective world, but that all such perception is shaped by *a priori* preconceptions. Thus, preconceptions of space, time and causation filter one's experience of nature. In so far as Man is part of the world of reality, he is subject to its laws and is to that extent unfree, but his reason and inner consciousness make him a free moral agent. Man thus participates in two worlds, the 'sensible' and the 'intelligible'. Law and morality belong to the latter. The actions of Man as a free agent are governed by aims, and the ethical basis of action has also to be accepted *a priori*. Justice, according to Kant, originates in pure practical reason. People know *a priori* how to act justly. The ultimate aim of the individual should be a life of free will; but it is when free will is exercised according to reason and uncontaminated by emotion that free-willing individuals can live together. People are morally free when they are able to obey or disobey a moral law. Kant propounded two principles of practical reason. (a) 'Act in such a way that the maxim of your action can be made the maxim of an universal law (general action)'[3]. This is his famous 'categorical imperative'. (b) 'An action is right only if it can co-exist with each and every man's free will according to universal law'. This is his 'principle of right'[4].

2 See pp 79–84 ante.
3 Kant *Philosophy of Law* (trans Hastie) p 34.

The first point to note is the emphasis on the individual. A feature of Kant's doctrine is his proclamation of the autonomy of reason and will. Human reason is law-creating and constitutes moral law. Freedom in law means freedom from arbitrary subjection to another, and law is the complex totality of conditions under which maximum freedom is possible for all. To this end a separation of powers is necessary to prevent the emergence of a despotic régime, and the sole function of the state is to ensure the observance of law. Kant proceeded to urge that the individual should not allow himself to be made the means to an end, since he is an end in himself[5]; and that he should, if need be, retire from society if his free will would involve him in wrongdoing[6]; for Kant did perceive the necessity for rules in social existence, guided by a just general policy. Society unregulated by right results in violence. Social existence and violence are incompatible; so reason demands that Man has an obligation to enter into society and to avoid wronging others. Such a society has to be regulated by compulsory laws, and if these laws are derived by pure reason from the whole idea of social union under law, Man will be able to live in peace[7]. What is needed is a rule of law, not of men[8]. The second point is that the Kantian ideal of laws bears no relation to any actual system of law. It is purely an ideal to serve as a standard of comparison, not as a criterion of the validity of law.

NATURAL LAW OF IDEAL CONTENT

Until the beginning of the 19th century natural law theory was a philosophy of content, ie it sought to deduce the contents of just laws from fixed premises. That century witnessed a decline in its popularity. The existence of absolute principles was attacked, notably by Hume (1711-1776), who pointed out that there is no causal connection between facts and ideas. One cannot logically derive an 'ought' from an 'is'. Cause and effect is an empirical correlation to be found in the physical sciences. Conceptions such as good and evil, for example, are subjective emotional reactions. Values are not inherent in nature, nor is justice. Reason can only work out the means that will lead to specified results; it cannot evaluate the latter. It is of some relevance, perhaps, that Hume was writing at a time of comparative tranquillity. Whereas the timorous Hobbes, amidst the alarms of the Civil War, reached for the shelter of an omnipotent sovereign's wing, Hume was concerned, if anything, with preserving stability. He argued against discretion that would allow for justice in individual cases, suspecting a threat to stability in relying on a fluid conception such as justice He favoured instead the firm and inflexible application of rules, although he conceded that these should be wisely designed in the first place and should be changed when conditions demand. On these lines he attacked the prevailing conceptions of natural law. The conception of a perfect, complete, discoverable system was challenged. If there was such a thing, why are there so many divergent interpretations, and why is positive law needed at all? At the dawn of the 19th century a reaction also set in against excessive individualism, fostered by later natural law theories, which had resulted in the French Revolution. Then, there grew up in the course of that century a new preoccupation with

5 *Kant* p 54.
6 *Kant* p 54.
7 *Kant* p 163.
8 *Kant* pp 230-231.

society, a collectivist outlook on life, which has gathered momentum ever since. Natural law theories of the age immediately preceding, adapted as they were to an individualist outlook, fell into disrepute.

Objections also came from another quarter. The teachings of historians and sociologists laid stress on environment. Historical investigation helped to explode many assumptions; the social contract, in particular, came in for damaging criticism. Research into the early history of society exposed the mythical nature of the contract. The unit in early society was the family, or clan, not individuals. There was, moreover, the technical difficulty that the social contract theory endeavoured to ascribe the validity of law to contract whereas normally the reverse is the case. Some rule has to be presupposed which prescribes that agreements ought to be kept. These objections aside, even as a hypothesis to account for the present state of affairs the theory fell short, since it only heaped fiction upon fiction. Alternative explanations of the origin of society not only fitted the facts but were truer in themselves.

The *a priori* methods of the natural law philosophers were likewise unacceptable to those nurtured in the pragmatic spirit of science. Natural law postulates were subjected to critical examination with disastrous results. Their bases were revealed as unsubstantiated hypotheses or else the results of false inferences. Where, for instance, is the foundation for the assertion that Man must always seek society, or that Man is necessarily selfish? Again, it is a wild inference to assume that because certain institutions in different countries are alike, that must be because they are reflecting some universal law. It has even been suggested more recently that the idea of natural law is no more than a psychological reflex. The very diversity that is observable in systems of positive law raises in the mind, it is said, an anti-thesis of a fixed and changeless law. This coupled with an innate tendency to attribute reality to ideas prepares the way for belief in the existence of natural law. For these reasons it became evident that the increasingly complex problems of the 19th century required a realistic and practical approach, not the easy application of abstract preconceptions.

In the new climate of opinion the prevailing natural law theories could not survive, and in their place arose analytical and historical positivism with increasing stress on a sociological approach to problems. These have been dealt with earlier, but something should now be said of the revival of naturalist doctrines towards the end of the 19th and in the 20th centuries.

One reason for this was the admission of scientists of the extent to which their own subjects were in fact founded on assumptions. Another was the failure of positivists to find answers to the problems that were coming to the forefront. The indispensability of values was increasingly felt as guides for legal development. This need was associated with the increasing use of broad, flexible concepts which admit latitude in application, and also with the realisation that judicial reasoning is creative and not purely syllogistic. The shattering effects of world wars, the decline in standards, a growing insecurity and uncertainty have stimulated anew the quest for a moral order, which was a boon afforded by natural law in the past. The growth of totalitarian régimes, both right wing and left wing, has called for the development of some ideological control which could prevent a cloak of legality being cast around every abuse.

In these circumstances it is hardly surprising that there has been a return to natural law in a new form, which strives to take account, not only of

knowledge contributed by the analytical, historical and sociological approaches, but also of the increasingly collectivist outlook on life. A feature is the returning emphasis on a philosophy of method rather than of content, which leaves the details of actual laws to vary with time and place and also opens up a possibility of establishing evaluative criteria empirically.

NATURAL LAW OF METHOD

One form which the revival of natural law has taken is the adaptation of the doctrines of St Thomas Aquinas. In the face of present-day divergences and conflicting tendencies there was some attraction in the method offered by Aquinas whereby philosophical reflection might find a way of synthesising prevailing needs and circumstances from a Christian point of view. Pope Leo XIII's Encyclical *Aeterni Patris* 1879, which drew attention to the value of his synthesis and encouraged the adaptation of his method, gave a stimulus to an intellectual flowering already in bud. Although the philosophy of Thomism has come to be very much associated with Catholicism, it is not in fact officially part of it.

Neo-Thomism

Neo-Thomists, as Aquinas's modern followers are known, are prepared to accept the descriptions of reality provided by scientists, but they maintain that it is for philosophy, starting, like scientists, from certain hypotheses and utilising scientific insights, to give the full explanation of reality through reason and reflection. They also adopt the humanism of Aquinas to steer a course between, on the one hand, an exclusively individualist view of Man and, on the other, a totalitarian view of society in which the individual counts for nothing. Natural law is both anterior and superior to positive law. Aquinas believed that natural law was the attainment of the eternal law of God through the exercise of reason. Following from that the neo-Thomists formulate certain broad generalisations, so abstract that they can be universal. In the evolution from these principles of rules of positive law variations will be found from place to place and from age to age. It is not clear to what extent a dictate of positive law which flouts natural law is void, but the mere fact that a law is unjust does not render it invalid.

One of the principal representatives of this school is Jean Dabin[9], who maintained that the law of nature was 'deduced from the nature of man as it reveals itself in the basic inclinations of that nature under the control of reason'. Since human nature is identical in people everywhere, the precepts of natural law are universal despite historical, geographical, cultural and other such variations[10]. These prescriptions are, however, only generalisations, and their detailed working out is left to the Catholic Church. One of the precepts of natural law is concerned with the good of society[11], which is the purpose of state and law. The state provides order and laws are means to that end: '*ubi jus ibi societas*'[12]. By virtue of this paramount function the

9 Dabin *General Theory of Law* (trans Wilk, *20th Century Legal Philosophy Series: IV*) pp 227–470.
10 *Dabin* para 203.
11 Following Aquinas's definition: see p 472 ante; *Dabin* paras 135 et seq.
12 *Dabin* para 9.

state is superior to all other groups, while state law 'is the sole true law'[13]. The *jus politicum* he defined as

> 'The sum total of the rules of conduct laid down, or at least consecrated, by civil society, under the sanction of public compulsion, with a view to realising in the relations between men a certain order—the order postulated by the end of the civil society and by the maintenance of the civil society as an instrument devoted to that end.[14].

Laws may be expressed variously, eg in statutes, precedents, customs; but they are general regulations of conduct, not of conscience. They are in the main obeyed, but when they are not obeyed, compulsion under the authority of the state has to be employed[15]. By saying that laws are directed to conduct and not to conscience, Dabin was able to argue that there is a moral duty to obey those positive laws which conform to the natural law principle of promoting the common weal. If a law fails to conform to this principle it is not morally binding, because 'everybody admits that civil laws contrary to natural law are bad laws and even that they do not answer to the concept of a law'[16]. This is ambiguous. If they are not 'laws', there is no question of moral bindingness. What is not clear is whether they remain legally valid, though not morally binding[17]. The question whether it would be immoral to disobey even such a law, because disobedience might be injurious to social stability, is not faced.

In order to fulfil the common good laws have to be adapted to the needs and ethos of the particular community. This is a matter of legal technique. So the actual making and applying of positive law with a view to giving effect to the dictates of natural law is an art which only jurists are competent to exercise[18]. For rules of law do not simply put natural law into effect; in most cases practical factors need to be taken into account.

All this reflects the attempt to harmonise the restoration of natural law with the variability of human societies and at the same time to follow the new emphasis on society.

Stammler

Another development was 'natural law with a variable content', of which Stammler (1856–1938) was an exponent[19]. He distinguished between technical legal science, which concerns a given legal system, and theoretical legal science, which concerns rules giving effect to fundamental principles. The former deals with the content of the law, the latter relates them to ultimate principles. He thus proceeded to distinguish between the 'concept of law' and the 'idea of law', or justice, and he approached the concept of law as follows. Order is appreciable through perception or will. Community, or society, is 'the formal unity of all conceivable individual purposes'[20], and by this means the individual may realise his ultimate best interests. 'Law,' says Stammler, 'is necessary *a priori*, because it is inevitably implied in the idea of

13 *Dabin* para 12.
14 *Dabin* para 6.
15 *Dabin* paras 26 et seq.
16 *Dabin* para 210.
17 On this, see Patterson *Jurisprudence* pp 356-358.
18 Cf Savigny's view of the function of lawyers: p 382 ante.
19 Stammler *The Theory of Justice* (trans Husik).
20 *Stammler* p 152.

co-operation'[1]. A just law aims at harmonising individual purposes with that of society. Accordingly, he sought to provide a formal, universally valid definition of law without reference to its content. He defined it as 'a species of will, other-regarding, self-authoritative, and inviolable'. Law is a species of will because it is concerned with orderings of conduct, other-regarding because it concerns a man's relations with other men, self-authoritative because it claims general obedience, and inviolable because of its claim to permanence. The idea of law is the application of the concept of law in the realisation of justice. Every rule is a means to an end, so one must seek a universal method of making just laws. A just law is the highest expression of Man's social activity. Its aim is the preservation of the freedom of the individual with the equal freedom of other individuals. In the realisation of justice the specific content of a rule of positive law will vary from place to place and from age to age and it is this relativity which has earned for the theory the name of 'natural law with a variable content'. In order to achieve justice, a legislator has to bear in mind four principles. These are, firstly, two Principles of Respect:

> (1) 'The content of a person's volition must not depend upon the arbitrary will of another.'
> (2) 'Every legal demand can only be maintained in such a way that the person obligated may remain a fellow creature.'[2]

Secondly, there are two Principles of Participation:

> (1) 'A person lawfully obligated must not be arbitrarily excluded from the community.'
> (2) 'Every lawful power of decision may exclude the person affected by it from the community only to the extent that the person may remain a fellow creature.'[3]

With the aid of these four principles Stammler set out to solve actual problems which may confront the law courts. His solutions may sometimes be questioned on the ground that they do not necessarily follow from his principles, or that they are not the only possible just solutions. He did not deny validity to laws which fail to conform to the requirements of justice. His scheme is a framework for determining the relative justness of a rule or a law and for providing a means for bringing it nearer to justice. The approach is Kantian in so far as it is maintained that human beings possess certain *a priori* forms of apprehending the idea of law. The difference lies in the variability that is allowed in its content and in the collectivist, rather than individualist, slant of the whole theory. Despite its ingenuity it has not found wide acceptance.

It is in America that contemporary natural law theory might be said to have found something like a congenial home.

John Rawls

A thorough-going attempt to formulate a general theory of justice is that of Professor John Rawls (b. 1921) of Harvard University, who writes mainly from the angle of philosophy and political science rather than of law[4]. Natural law

1 *Stammler* p 55.
2 *Stammler* p 161.
3 *Stammler* p 163.
4 Rawls *A Theory of Justice*.

is not dealt with as such; but in so far as his scheme is based on reason, concerns social justice and purports to be comprehensive, it is naturalistic in conception. Since its publication in 1971 it has received wide attention.

Professor Rawls assumes that society is a more or less self-sufficient association of persons, who in their mutual relations recognise as binding certain rules of conduct specifying a system of co-operation. Principles of social justice are necessary for making a rational choice between various available systems[5]. The way in which a concept of justice specifies basic rights and duties will affect problems of efficiency, co-ordination and stability. This is why it is necessary to have a rational conception of justice for the basic structure of society. Practical rationality has three aspects, namely, value, right and moral worth. The 'concept of right' relates to social systems and institutions, individuals, international relations and also the question of priority between principles. With regard to social systems and institutions, the concept of right yields 'Principles of Justice' and 'Efficiency'.

The approach to principles of social justice through utilitarianism and intuitionism respectively is considered critically and rejected. The latter in particular is faced with the difficulty of answering, first, Why should intuitive principles be followed? and, secondly, What guidance is there for choosing between conflicting principles in a given case? Professor Rawls endeavours to meet the first question by grounding his own principles in the exercise of reason in an imaginary 'original position'; and the second by calling in aid certain 'principles of priority'. He arrives at his theory as follows.

Fairness results from reasoned prudence; and principles of justice, dictated by prudence, are those which hypothetical rational persons would choose in a hypothetical 'original position' of equality. The insistence on prudence excludes gamblers from participating in the 'original position', but will bring in, on the whole, those who are conservatively inclined. The concept of the 'original position' is not quite a modernised version of the 'social contract', nor is it offered as being anything other than a pure supposition. On the one hand, people in this 'original position' are assumed to know certain things, eg general psychology and the social sciences, but, on the other hand, a 'veil of ignorance' drapes them with regard to certain other things, eg the stage of development of their society and especially their own personal conditions, places in that society, material fortunes etc. In short, all this is designed to exclude personal self-interest when choosing the 'Basic Principles of Justice' so as to ensure their generality and validity. What is needed is a form of justice which will benefit everyone, ie the disinterested individual's conception of the common good. Leaving aside the wholly fictitious nature of this 'original position', it is necessary to question the underlying assumption that what would be judged prudent in these hypothetical circumstances will eventually coincide with what people in actual societies will regard as just[6]. Moreover, the 'veil of ignorance' introduces needless complexities into what is no more than the simple requirement of impartial judgment[7].

The Basic Principles of Justice are generalised means of securing certain generalised wants, 'primary social goods', comprising what is styled the 'thin theory of the good', ie maximisation of the minimum (as opposed to a 'full theory')[8]. These primary social goods include basic liberties, opportunity,

5 *Rawls* p 4.
6 For criticism, see Barry *The Liberal Theory of Justice* pp 15-18.
7 *Barry* p 12.

power and a minimum of wealth. The *First Principle* of Justice is: 'Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all'[9]. The basic liberties include equal liberty of thought and conscience, equal participation in political decision-making and the rule of law which safeguards the person and his self-respect[10]. The *Second Principle* is: 'Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity'[11]. The 'just savings principle' is designed to secure justice between generations and is described as follows. 'Each generation must not only preserve the gains of culture and civilisation, and maintain intact those just institutions that have been established, but it must also put aside in each period of time a suitable amount of real capital accumulation'[12]. With the aid of these Principles Professor Rawls seeks to establish a just basic structure. There has to be a constitutional convention to settle a constitution and procedures that are most likely to lead to a just and effective order; next comes legislation; and lastly the application of rules to particular cases[13]. In this way it is claimed that the Basic Principles will yield a just arrangement of social and economic institutions.

Many criticisms have been levelled at various aspects of Professor Rawls's philosophic methods and economics into which it is unnecessary to enter. One attack, launched by more than one critic, has been to question whether his conclusions follow from his 'original position'. For instance, distribution of goods is said to follow need, not merit[14]. How does the 'original position' yield this? Again, would people in this position necessarily choose liberty? Professor Rawls does not specify any particular period in history, so that people may find themselves in a time when there is need for power rather than liberty, or, as one critic suggests, the need may be for food in a time of famine rather than liberty[15]. The answer to the last point might be that, as Professor Rawl says elsewhere, liberty is to have priority only *after* a certain point[16]; but this raises another difficulty with regard to his priority principle, as will appear. Even so, when looked at from an economic or philosophical point of view, it is not easy to see how the balance between liberty and needs follows from the 'original position'[17]. Indeed, the 'veil of ignorance' is so restrictive that one wonders how people in that carefully defined state of nescience could arrive at any of the Rawlsian conclusions. Although they are supposed to know general psychology and social science, they are ignorant of the stage of development of their society: what is not clear is whether people in a primitive state of development are supposed to possess the sophisticated psychological and social scientific knowledge of modern people[18]. The insistence on excluding motivations of self-interest as well as knowledge of the state of society is designed to make the choice disinterested, but

9 *Rawls* p 302.
10 *Rawls* p 205 et seq, 221 et seq, 235 et seq.
11 *Rawls* p 302.
12 *Rawls* p 285.
13 *Rawls* pp 196 et seq; criticised by *Barry* chs 13-14.
14 *Rawls* pp 310 et seq.
15 Raphael Review in (1974) 83 Mind 121.
16 *Rawls* pp 45, 542-543; p 483 post.
17 *Barry* pp 7-10.
18 *Raphael* p 122.

nonetheless it remains personal. It has been pointed out that the fact that something is good for the individual does not imply that it will, therefore, be good for society. Thus, the benefit to an individual of being able to exercise a liberty may be lost to him if it were enjoyed by all[19]. If, then, the Basic Principles do not necessarily follow from the 'original position', their ultimate acceptance (if, indeed, they do come to be accepted) must derive from their intrinsic moral appeal rather than reason. Thus, the fact that particular principles may have been thought suitable in an 'original position' of limited knowledge and uncertainty is no basis for continuing to impose them later in the face of changed conditions and fuller knowledge. If it is contended that people would have chosen the principles anyway even in the light of later knowledge, this can only happen because they are thought to be just *per se*. The 'original position' then becomes irrelevant[20]. All this shows that the concept of the 'original position' and the 'veil of ignorance' and what it covers and does not cover only provide a semblance of justification for reaching certain desired conclusions[1].

An objection to intuitionism is, as Professor Rawls points out, that it gives no guidance in choosing between conflicting principles. To meet this difficulty he offers certain 'Principles of Priority'. Such priority is 'lexical', ie the first has to be fully satisfied before the second falls to be considered[2]. The *First Priority Rule* is the priority of liberty: 'liberty can be restricted only for the sake of liberty'[3]. He continues: '(a) a less extensive liberty must strengthen the total system of liberty shared by all; (b) a less than equal liberty must be acceptable to those with the lesser liberty'[4]. The *Second priority Rule* is the lexical priority of justice over efficiency and welfare: '(a) an inequality of opportunity must enhance the opportunity of those with the lesser opportunity; (b) an excessive rate of saving must on balance mitigate the burden of those bearing this hardship'[5]. These principles, in effect, ensure that as between liberty and need, liberty prevails; as between need and utility, need prevails; and as between liberty and utility, liberty prevails.

An objection to the lexical priority of liberty is that if equal liberty is accorded such priority, then anything involving unequal liberty can never fall to be considered, since the former has to be fully satisfied before one passes to something else[6]. More seriously, Professor Rawls concedes that liberty is to be given this kind of priority only *after* certain basic wants are satisfied[7]; but if liberty is not prior to needs all the time, lexical priority becomes meaningless.

With reference to the individual, Professor Rawls contends that reason yields principles of natural duties and fairness. The former include the duty to uphold just institutions, to help in establishing just arrangements, to render mutual aid and respect, not to injure or harm the innocent. The fairness principle gives rise to obligations, including promises; and in connection with fairness he strikes a topical note when discussing civil disobedience[8]. The

19 Hart 'Rawls on Liberty and its Priority' (1972–73) 40 U Ch LR 534; *Barry* ch 11.
20 Dworkin 'The Original Position' (1972–73) 40 U Ch LR 500.
1 *Dworkin*; *Barry* p 22; *Raphael* p 123.
2 *Rawls* pp 42–43, 244.
3 *Rawls* p 302. On the importance of assessing basic liberties as a whole, see p 203.
4 *Rawls* p 302.
5 *Rawls* pp 302–303.
6 *Raphael* p 126.
7 *Rawls* pp 45, 542–543.
8 *Rawls* pp 350–391.

principle is that one should play one's part as specified by the rules of the institution as long as one accepts its benefits ('fair-play'), and provided the institution itself is just, or at least nearly just, as judged by the two Basic Principles of Justice[9]. Civil disobedience is said to be justified when 'substantial injustice' occurs, all other methods of obtaining redress fail and disobedience inflicts no injury on the innocent. In these circumstances disobedience is an appeal to the society's sense of justice, which, it is said, is evidenced by the reluctance of the community to deal with it. This is hardly in accord with observed facts; it is more realistic to say that such reluctance is rooted more often than not in apathy and even fear, no matter how strongly people may condemn the disobedience.

In the result it would seem that Professor Rawls has not succeeded in showing how his principles, desirable as they may be, derive from reason. Leaving that aside, however, it should be noted that the thrust of his theory is for stability, especially in Part Three of his book where he deals with objectives, and in his emphasis on obedience grounded in fair-play.

Law is only one institution of social justice in Professor Rawls's scheme. Professors Clarence Morris and Jerome Hall make it their exclusive concern, which makes their theories less extensive in scope.

Clarence Morris

Professor Morris (b. 1893) begins with the proposition that 'justice is realised only through good law'[10]. Laws without just quality are doomed in the long run; but the implication of his statement that justice cannot exist without good law does not follow. Justice may be realised through many other institutions; indeed, according to Marx and Engels, in a communist society laws will wither away and justice for all will remain. Apart from the likelihood or otherwise of this prediction being fulfilled, it needs to be borne in mind that they were using 'law' in a narrow sense, since, as Engels went on to say, though 'law' will disappear, there will remain 'an administration of things'[11]. Professor Morris, however, uses 'law' in a broader sense. 'I use the word 'law' he says 'to mean more than statutes and ordinances; it includes both adjudicated decisions of cases and social recognition of those legal obligations that exist without governmental prompting' (customs and practices)[12].

Justice is one of three principal justifications of law, the other two being rationality and 'acculturation'. His theory concerns the method of realising justice and is not a theory of just content. 'Doing justice' through law means that law-makers serve the public by advancing its 'genuine aspirations', which are 'deep-seated, reasonable, and non-exploitative'[13]. Law-making contrary to them is doomed to failure, for without public support legislators toil in vain. One difficulty lies in knowing who constitutes the 'public'. Would Jews in Nazi Germany or Africans in South Africa count as the 'public'? 'Genuine aspirations' is a vague phrase, as Professor Morris admits[14]. To speak of them as 'deep-seated, reasonable, and non-exploitative' does not carry the matter much further. Who, for instance, decides what is

9 *Rawls* ch 6; pp 314-315 ante.
10 Morris *The Justification of Law* p 21.
11 See pp 398, 402-403 ante.
12 *Morris* p 23.
13 *Morris* p 23.
14 *Morris* p 58, and ch 3 generally.

'reasonable'? In South Africa today it is not unfair to say that a majority of the European minority regard many African aspirations as unreasonable, and may even feel that some exploitation of Africans is reasonable. Such sentiments are deep-seated. Yet, the tenor of Professor Morris's book seems to be against regarding that régime as just. Another question is why it should be supposed that justice is achieved only so long as legislators follow public aspirations. May they not, with justice, sometimes seek to lead[15]? The point is not faced.

The second justification of law, rationality, concerns the reasoning processes of the law, both judicial and legislative[16]. Reason is a major ingredient of justice, but is of a special kind. By accepting judicial appointment, a judge is said to incur a duty to implement public aspirations within the leeways of the judicial process. Although legislation, too, must reflect them, this does not imply that an unjust law is not a 'law'; a court remains bound to apply it. At this point Professor Morris enters the familiar ground of judicial reasoning and legislative techniques, which need not be rehearsed.

The third justification is 'acculturation', which is conformity with culture. The purport of a statute, for example, can be more easily gathered when one is in tune with the legislator's cultural environment[17], and the point is developed with reference to ancient Chinese legislation. Under the heading of 'acculturation' is included a plea for an awareness in law-making of man's responsibility towards his environment, since destruction and pollution of this will redound on himself[18]. What is not clear is whether the idea of justice is here being stretched to cover conservation.

Professor Morris's general thesis is that law has to be justified morally, socially and technically. He does not specifically assert that just quality is a necessary condition of the continuity of laws, but this seems to be implicit. He certainly stops short of saying that just quality is a requirement of the validity of a 'law', for he does speak of 'unjust laws'. So, mindful of the point made at the start of this chapter, perhaps Professor Morris is not to be classed as either naturalist or positivist, for his thesis would not be rejected by either side.

Jerome Hall

Not only does Professor Hall (b. 1901) insist on unifying moral, social and formal considerations, but he also takes the further step of saying that moral value needs to be included in a definition of positive law[19]. It is certainly appropriate to treat him as a naturalist.

Until the time of Hegel, jurisprudence was treated as part of philosophy. Since then it has become fashionable to diversify different aspects of philosophy, including jurisprudence. The positivist belief in the 'neutrality' of jurisprudence as an autonomous discipline is said to be associated with belief in logical analysis as a 'neutral' method of reasoning. It is obvious, however, that logical analysis will yield neutral results only if the premises are neutral; if values are part of the premises, then the results of logical analysis are likewise value-laden. The real issue is how one should view the premise, ie

15 Cf Plato, Aristotle, Marx: pp 74-75, 403 ante.
16 *Morris* chs 4-6.
17 *Morris* p 151.
18 *Morris* ch 8.
19 Hall *Foundations of Jurisprudence*.

the subject matter of jurisprudence, namely, 'positive law'[20]. The time has come, says Professor Hall, to re-unite disciplines, and to this end he argues that jurisprudence should be 'adequate' in the sense that it will combine positivist, naturalist and sociological study, namely, rules, values and social conduct[1]. The result will be what he calls 'integrative jurisprudence'[2]. The focal point of this is the action of officials, and he calls the concept 'law-as-action'[3]. The word 'action' is preferable to 'behaviour'; 'behaviour' occurs, whereas 'action' brings in the idea of purpose guided by the value of achieving goals[4]. Law-as-action from the point of view of officials relates rules, values and social behaviour in the following way. Rules come in to explain official actions in prescribing, judging and ordering and applying sanctions[5]. Values come into the idea of validity. The way in which validity is understood depends upon whether law is viewed as law-as-rules or law-as-action. The former leads to a Kelsenian-type concept whereas the latter will include moral attitudes, principles and ideals[6]. Thus, it is not sufficient to say of the actions of officials in deciding disputes that their decisions are in conformity with law, one has also to say whether they are correct, fitting or useful. 'Correctness' reflects sound values in the rules, which means that from this perspective rules, too, acquire moral validity. In so far as law-as-action concerns the achievement of goals, 'correctness' also partakes of the morality of the goals[7]. Social behaviour comes in through the idea of the effectiveness of law, which covers a whole range of phenomena, including sanctions, mere conformity, conscious obedience and compliance (obedience plus approval). Obedience has to be gauged in relation to results, which are aimed at, as distinct from consequences, which simply occur. So, probable consequences have to be considered, which necessitates continuous re-assessment. Even the very enforcement of a law alters the facts in the sense that the situation is different after enforcement from what it was at the time the law was made. Laws, therefore, are effective when actual behaviour in accordance with them maximises the values of their goals[8].

The conclusion thus becomes irresistible that, when looked at from the point of view of law-as-action, moral value must be included in any definition of positive law[9]. In addition, Professor Hall points to customary law which, he says, represents experience in settling problems in just and rational ways. 'It is the deliberate blocking out of the history of juridical experience that supports restrictive positivist analysis'[10]. He also points to the avowal of a 'minimal natural law' by at least one modern positivist as 'tantamount to surrender'[11].

The need still remains to distinguish positive law from morality and other

20 *Hall* pp 64 et seq, especially p 67.

1 *Hall* pp 17-20.

2 *Hall* ch 6; and see previously, 'Integrative jurisprudence' in *Interpretations of Modern Legal Philosophies* (ed Sayre) p 313: 'From Legal Theory to Integrative Jurisprudence' (1964) 33 U Cin LR 153.

3 *Hall* pp 20.

4 *Hall* pp 156-157.

5 *Hall* pp 127, 157 et seq.

6 *Hall* pp 173 et seq.

7 *Hall* pp 174-175.

8 *Hall* pp 170-172.

9 *Hall* pp 49, 120.

10 *Hall* pp 50-51.

11 *Hall* p 51. The 'minimal natural law' referred to is that of Hart, as to which see pp 493-494 post.

norms, and to this end he offers six criteria for law: (i) ethical validity reflected in certain attitudes; (ii) functions; (iii) regular (rather than system atic) character; (iv) range and character of public interest expressed in a state's laws; (v) effectiveness, which, if tied to the moral validity of law, has both a descriptive and prescriptive meaning; (vi) supremacy and inexorability in its sphere of relevance[12]. Only law possesses all six features[13].

The main difficulty about Professor Hall's thesis is a practical one. For all the persuasiveness of his theoretical demonstration that a moral value has to be included in a definition of positive law, the question remains: how does this help in the day-to-day business of law-as-action? What is the correct, fitting or useful action to be taken by a judge if he is confronted, eg with a duly enacted decree requiring the killing of all new-born babies in order to save the state from the effects of the population explosion? Nowhere does he say that an immoral law is not 'a law'. Validity in the sense of law-quality for the purpose of deciding this or that case is different from validity in the sense of law-as-action. The practical implications of the latter are unclear. An explanation may lie in the fact that his theory presupposes a continuum of time[14]. His thesis that morality must be included in a definition of law has to be understood in that context. Moreover, his stress on the need to integrate rules, morality and sociology, and the need to study law-as-action (functioning) give striking support to many of the contentions previously advanced in the present book.

Side by side with attempts, such as those considered, to work out a natural law of method, there have also been endeavours to base natural law on fact. Of especial interest in this connection is the theory of *John Wild* (b. 1902)[15]. He proceeds on the idea that 'there are norms grounded on the inescapable pattern of existence itself'[16] and his method of arriving at these is not that of logical deduction, but a different though equally logical process, namely 'justification'. 'How', he asks, 'is moral justification to be explained? We cannot explain it without recognising that certain moral premises must somehow be based upon facts'[17]. The core of his thesis is that 'value' and 'existence' are closely intertwined. Existence has a tendency towards fulfilment or completion[18], and if the completion of existence is considered good, then existence itself must be valuable. The same act is good so far as it is realised, but evil so far as it is frustrated or deprived; an influence that enables something to act is good for it, and one that frustrates it is bad. Goodness, then, is some kind or mode of existence, evil is some mode of non-existence or privation[19].

Tendencies are the facts on which value-statements are founded[20]. All individuals share in a common human nature, which has existential tendencies and which move them to their natural end[1]. Such tendencies are at the root of the feeling of obligation which men possess. From it one can pass back to the values which require the act obliged, from the values to the needs

12 *Hall* pp 137-138.
13 *Hall* p 140.
14 See eg *Hall* p 168.
15 Wild *Plato's Modern Enemies and the Theory of Natural Law*.
16 *Wild* p 107.
17 *Wild* pp 226, 228.
18 *Wild* p 65.
19 *Wild* pp 64-65, 105, 107.
20 *Wild* p 227.
1 *Wild* p 68.

which they satisfy, and factual evidence can be produced to demonstrate that these needs are essential rights. Accordingly, Wild reaches the following conclusions. (1) The world is an order of divergent tendencies which, on the whole, support one another. (2) Each individual entity is marked by an essential structure which it shares in common with other members of the species. (3) This structure determines certain basic existential tendencies that are also common to the species. (4) If these tendencies are to be realised without distortion or frustration they must follow a general dynamic pattern. This pattern is what is meant by natural law. It is grounded on real structure and is enforced by inexorable natural sanctions. (5) Good and evil are existential categories. It is good for an entity to exist in a condition of active realisation; if its basic tendencies are hampered and frustrated, it exists in an evil condition. When all these principles are applied to human nature, three ethical theses may be derived: (a) the universality of moral or natural law; (b) the existence of norms founded on nature; and (c) the good for Man as the realisation of human nature[2]. Natural law may therefore be defined as 'a universal pattern of action applied to all men everywhere, required by human nature itself for its completion'[3].

Wild's opponents, notably Kelsen and Julius Stone[4], have fastened on the hiatus between fact and norm in his theory. There may be factual grounds for the content of the rules of natural law, but these do not show that natural law *ought* to be binding[5]. Again, it may be a fact that human beings have certain tendencies and have a sense of obligation; but they do not explain why people *ought* to obey this sense[6]. Mere existence is not enough, since, in Wild's view, the fact is the tendency of existence towards fulfilment or completion. How are these to be determined? Opinions will vary so enormously that this tendency ceases to be objective fact and becomes purely subjective. Besides, the fulfilment of existence of one entity may thwart or destroy the existence of another[7], and in such a case one wonders which is the natural law.

John Finnis

A sophisticated version of natural law has been put forward by John Finnis, who admits to having been schooled in the analytical tradition[8]. His theory is in the tradition of Aristotle and Aquinas. Every theorist has to evaluate in order to select or form concepts with which to describe aspects of human affairs, such as law. Without some idea of the practical reasonableness of a concept no theorist can know its central use, in Aristotelian terms, its 'focal meaning'. By 'practical' is meant 'with a view to decision and action'[9].

'In relation to law, the most important things for the theorist to know and describe are the things which, in the judgment of the theorist, make it important from a *practical* viewpoint to have law—the things which it is,

2 *Wild* p 134.
3 *Wild* p 64.
4 Kelsen 'A Dynamic Theory of Natural Law' in *What is Justice?* p 174; Stone *Human Law and Human Justice* pp 196-201.
5 *Kelsen* generally.
6 *Stone* p 199.
7 Kelsen asked how the continued existence of a poisonous snake could be a natural law on Wild's theory when it is so inimical to the continued existence of human beings.
8 *Finnis Natural Law and Natural Rights.*
9 *Finnis* p 12.

therefore, important in practice to 'see to' when ordering human affairs'[10]. He goes on to say that 'a theory of natural law claims to be able to identify conditions and principles of practical right-mindedness, of good and proper order among men and in individual conduct'[11]. It has been argued from the beginning of the present book that lawyers are, and if not they should be, concerned with justice and the moral authority of law. Both these considerations are said by Finnis to import natural law.

According to him, natural law consists of two sets of principles: the first consisting of certain basic values that are good for human beings, the second consisting of the requirements of practical reasonableness. These values are known because they are self-evident. One basic form of good is knowledge itself[12], which is reached, not by intuition, but through experience and reflection. The human mind has the ability to appreciate without demonstration or intuition the fundamental features of a good life and the methods of achieving it. In addition to knowledge, the values in the first set are[13]: life, play, aesthetic experience, sociability (friendship), practical reasonableness and religion, meaning thereby, not any particular faith, but 'recognition of, and concern about, an order of things "beyond" each and every man'[14]. This list is exhaustive. The second set of principles consists of the basic requirements of practical reasonableness[15]. Out of a variety of possible ways to live, it is necessary to choose a rational plan of life to enable people to participate in these goods. Practical reasonableness and its principles are the means of achieving these goods; together they produce morality. The requirements are: a coherent plan of life, no arbitrary preferences among basic values, nor among persons, detachment (avoiding fanaticism), commitment (avoiding apathy and abandoning commitments lightly), limited relevance of consequences (efficiency of means within reason), respect for every basic value in every act, the requirements of the common good, and following one's conscience.

How far would denial of any basic value or requirement of practical reasonableness amount to a denial of natural law? Perhaps, merely restructuring the list, or redistribution of emphasis, would not constitute rejection as long as some (or a majority?) of basic values and requirements of practical reasonableness are accepted as self-evident. Reason may devise different plans for co-ordinating and resolving problems of communal existence, so no particular plan can claim preference. The theory thus allows for varying manifestations of the principles.

Save where unanimity can be achieved, problems of co-ordination have to be resolved by authority[16], which is where law comes in. Authoritative rules can emerge out of customs, which Finnis discusses with reference, *inter alia*, to international law[17]. There has to be convergence of practices and opinions, not only on the need for *a* solution, but also on a particular solution. With custom the process is beset with doubt, so it is simpler to have someone or body to settle co-ordination problems authoritatively and effectively[18]. Since

10 *Finnis* p 16.
11 *Finnis* p 18.
12 *Finnis* ch III.
13 *Finnis* ch IV.
14 *Finnis* p 90.
15 *Finnis* ch V.
16 *Finnis* p 232.
17 *Finnis* pp 238 et seq.
18 *Finnis* p 246.

the central use of a concept is its 'focal meaning', the 'focal meaning' of law is to 'see to' co-ordination for the common good, which reason requires as being necessary, although the different forms which such co-ordination may assume can be left to be worked out.

Justice is 'other-directed', ie it concerns relations with others; it is owed as a duty to another; and it involves equality in the sense of proportionality[19]. All these aspects are directed towards the common good, which reflects basic values and the requirements of practical reasonableness; and 'distributive' and 'commutative' justice are examined in this light. The author's interpretation of these shows that the distinction between them is not as sharp as in Aristotle's presentation and is 'no more than an analytical convenience, an aid to orderly consideration of problems'[20]. For example, compensation in tort on the basis of the allocation of risks involved in communal activities could be classified as distributive or, as is more usual, commutative: just distribution requires compensation for all who suffer injury in the course of such activities, not just making a wrongdoer restore the equilibrium which has been upset by his fault. 'Right' and 'obligation' are also components of the common good, for they are limited by each other and other aspects of common good.

It follows that 'the moral authority of the law depends ... on its justice or at least its ability to secure justice'[1], and derives from the dictate of reason which shows this to be necessary. Law is an aspect of practical reasonableness and there are some goods that can be secured only through law. It also creates conditions for the good society and to that extent is a precondition of it, but part of it at the same time. Coercion and punishment are unavoidably necessary. More important, however, is that law introduces predictability through a framework of rules; it provides for their creation; it also allows individuals to create or modify rules for themselves; and it provides special techniques for regulating the future in an all-sufficient way, without 'gaps', on the basis of past acts of rule-creation. The definition of law derived from all this is that it refers

> 'primarily to rules made, in accordance with regulative legal rules, by a determinate and effective authority (itself identified and, standardly constituted as an institution by legal rules), for a complete community, and buttressed by sanctions in accordance with the rule-guided stipulations of adjudicative institutions, this ensemble of rules and institutions being directed to reasonably resolving any of the community's co-ordination problems (and to ratifying, tolerating, regulating, or overriding co-ordination solutions from any other institutions or sources of norms) for the common good of that community, according to a manner and form itself adapted to that common good by features of specificity, minimisation or arbitrariness, and maintenance of a quality of reciprocity between the subjects of the law both amongst themselves and in their relations with the lawful authorities'[2].

By 'rule of law' is meant a system in which (i) its rules are prospective, (ii) possible to comply with, (iii) promulgated, (iv) clear, (v) coherent with each other, (vi) sufficiently stable, (vii) the making of decrees and orders is guided by rules that are themselves promulgated, clear, stable and relatively general, (viii) those who administer rules are accountable for their own

19 *Finnis* pp 161-162, and generally ch VII.
20 *Finnis* p 179.
1 *Finnis* p 260.
2 *Finnis* pp 276-277.

compliance with rules relating to their activities and who perform these consistently and in accordance with law[3].

Social schemes that contravene basic values and practical reasonableness are unjust; so, too, is any infringement of the individual's liberty to assign his own priorities among the basic values. Prima facie there is a moral obligation to obey laws directed to achieving the common good, but as long as common good is not impaired, disobedience on grounds, eg of conscience, would be permissible. The question whether an unjust law is 'law' is said not to be central to natural law thinking. As to this, the author's distinction is best stated in his own words:

> 'The ruler has, very strictly speaking, no right to be obeyed; but he has the authority to give directions and make laws that are morally obligatory and that he has the responsibility of enforcing. He has this authority for the sake of the common good (the needs of which can also, however, make authoritative the opinions—as is custom—or stipulations of men who have no authority). Therefore, if he uses his authority to make stipulations against the common good, or against any of the basic principles of practical reasonableness, those stipulations altogether lack the authority they would otherwise have *by virtue of being his*'[4].

The book concludes by reaching into an explanation of existence and natural law as participation of Eternal Law. What is crucial to its thesis is 'self-evidence' based on experience and reflection. It is not clear how far, if at all, there is room for disagreement about self-evidence itself. On a different point, is it possible to detect in the self-evident basic values and requirements of practical reasonableness the conditions essential to the continuity of a good society? Perhaps, one ought not to read into the theory something not alluded to by the author; but the question serves as a lead into that aspect of natural law.

NATURAL LAW OF CONTINUITY: TEMPORAL APPROACH

The 'natural law of method' is a way of working out just laws, and the 20th century has seen versions of 'natural law with variable content'. The temporal approach is in line with this thinking. Factors but for which a thing would not be and continue to be and function are part of the conception of it as a continuing phenomenon. The nature of things being what it is, such factors dictate a 'natural law of existence'. The 'ought' behind it is that behind the conditions *sine quibus non* of achieving any end—in this case, continuity. It is not the 'ought' of duty, so there is no question of deriving an obligatory 'ought' from an 'is'. Such an approach is politically neutral in that it does not support any particular kind of order. Even if the present one were shattered to pieces and a different one established, the continuance of that, too, will require the same conditions.

A similar line of argument is adopted by Professor Lon L Fuller who might perhaps be regarded as a leading natural lawyer. The core of his thesis concerns the conditions *sine quibus non* for the functioning of laws[5]. For him, law 'is the enterprise of subjecting human conduct to the governance of rules'[6]. Its morality has two aspects, external and internal. 'External morality'

3 *Finnis* pp 270-271. Cf Fuller's 'inner morality' of law, p 230 ante.
4 *Finnis* pp 359-360.
5 Fuller *The Morality of Law* (revised edition).
6 *Fuller* pp 74, 96, 106, 122.

is the 'morality of aspiration', ideals; and towards the end of his book he submits that it is possible to derive a 'substantive natural law' from it. This is more than a recipe for mere survival; it is a recipe for 'meaningful contact with other human beings'[7] whereby men can improve and enrich themselves. This substantive natural law concerns itself with those fundamental rules without which such meaningful co-existence could not obtain. There is also the 'internal morality' of law, which makes no appeal to external standards, but is, in Professor Fuller's own words, 'a procedural version of natural law'[8]. It is the morality that makes the governance of human conduct by rules possible. A judge may well stay neutral with regard to external morality, but it would be 'an abdication of the responsibilities of his office' for him to stay neutral with regard to the internal morality[9]. The content of it, which has been considered in connection with the functioning of duty[10], consists of eight desiderata: (i) generality, (ii) promulgation, (iii) prospectivity, (iv) intelligibility, (v) unself-contradictoriness, (vi) possibility of obedience, (vii) constancy through time, and (viii) congruence between official action and declared rules[11]. This 'inner morality' is not something superimposed on the power of law, 'but is an essential condition of that power itself'; it is, in other words, 'a precondition of good law'[12]. Immoral policies are bound in the end to impair the 'inner morality' and so the very quality of law.

It was argued earlier that these are conditions *sine quibus non* for the functioning of duties. If they are called 'natural law', they are 'natural' in that they are founded on the nature of things—human beings and human society are made in such a way that their natural limitations constitute the conditions for the successful functioning of duty-creating laws. It will be noticed that these conditions apply to the governance of any society of human beings so that they do not of themselves help to distinguish the functioning of the rules of a legal system from those of a club; nor does Professor Fuller claim that they do. The question may be raised, however, as to what a judge should do when faced with a decree violating the 'internal morality', eg that of Caligula, which was promulgated in such a way that no one could read it. Should he refuse to acknowledge it as 'a law'? Professor Fuller does not give an answer. In the sort of régime in which the 'internal morality' is likely to be violated, a judge who refuses to accept a decree on this ground will receive short shrift indeed. So Professor Fuller's thesis seems likely to avail least where it would be most needed.

Professor Hart and others have drawn attention to a different point. The former has pointed out that the eight desiderata are 'unfortunately compatible with very great iniquity'[13], eg Herod's order for the massacre of the innocents satisfied all the conditions. Professor Fuller's reply is to doubt whether an evil ruler could pursue iniquitous ends and also continue to respect the 'inner morality'. He calls for 'examples about which some meaningful discussion might turn' and which would show that 'history does in fact afford significant examples of régimes that have combined a faithful adherence to the internal morality of law with a brutal indifference to justice and

7 *Fuller* p 186.
8 *Fuller* p 96.
9 *Fuller* p 132.
10 See p 230 ante.
11 *Fuller* ch 2.
12 *Fuller* p 155.
13 Hart *The Concept of Law* p 202; Friedmann *Legal Theory* p 19.

human welfare'[14]. This is hardly an answer, but it does reveal an interesting point about the difference of opinion here. His contention is that iniquitous régimes have not *continued* to exist, nor could they *continue* to combine evil policies with fidelity to the 'internal morality'. In other words, he is thinking in a continuum, which is consistent with his idea of conditions needed for the continued functioning of laws. Professor Hart's objection concerns the position here and now of an inquitious decree rather than the question of its continuance. In other words, the two parties are not at issue since they are thinking in two different time-frames.

Professor Hart (b. 1907), who is a leading contemporary positivist, has himself essayed an incursion into natural law[15]. He admits that there is 'a core of indisputable truth in the doctrines of Natural Law'[16], if survival is taken as the minimum aim of human existence[17]. The conditions *sine quibus non* for achieving this end require that account be taken of five 'facts': (i) human vulnerability, (ii) approximate equality of people, (iii) limited altruism, (iv) limited resources,. and (v) limited understanding and strength of will[18]. Because of these there is a '*natural necessity*' to protect persons, property and promises in varying degrees. This necessity imposes some limit on the content of laws and this, he says, is the answer to a positivist who thinks that laws may have *any* content[19]. It is by no means clear what this last statement implies. Professor Hart would hardly maintain that a law contrary to any of his five requirements is void, for he has strenuously upheld the positivist separation of law and morality and has urged that it is both intellectually honest and conducive to clarity to say 'This is law; but it is too iniquitous to be applied or obeyed'[20]. Such being his position, it would seem that the five requirements only furnish a standard of evaluating actual laws and guidelines for what they ought to be. Yet, his assertion that they are the answer to a positivist who thinks that laws may have any content suggests something more than this, something quite un-positivist[1]. Another point is that, even as guidelines, the requirements are too vague to offer meaningful guidance. Thus, human vulnerability has not prevented life in most modern societies being made increasingly hazardous through various technological advances. Does vulnerability require that law should be used to discontinue such activities, or only to provide suitable compensation when injuries are sustained? If it is the latter, it seems odd that the minimal natural law should manifest itself, not in seeking to avoid threats to one of its basic 'facts', but only in seeking a remedy in ways which can hardly 'remedy'; for no amount of money can mend broken bones. Again, the 'approximate equality' of people suffers from the weakness, previously noted, that everything depends on the criterion of equality and who applies it[2]. Finally, it is to be observed that survival even as the minimum aim of human existence, as well as the five 'facts' of the human condition, are not supported by any evidence, ie they are intuitive, self-evident. Professor Fuller has doubts about survival,

14 *Fuller* p 154.
15 *Hart* pp 189–195.
16 *Hart* p 176. See also p 196.
17 *Hart* p 188.
18 *Hart* pp 190–193.
19 *Hart* p 195.
20 *Hart* p 203.
1 See D'Entrèves *Natural Law* App C.
2 See p 65 ante. For Hart's appreciation of the difficulty, see *Hart* p 202.

even as an assumption: survival may be a means to other ends, but as the core of human striving, he says, it is open to question[3].

It may seem ironic that this account of natural law should end with a leading positivist expounding on the 'core of indisputable truth in the doctrines of Natural Law', but this may at least indicate that the gulf between the two groups is not as wide as it used to be. Positions are less clear-cut now. It further underlines the point that classification into 'naturalist' and 'positivist' applies to views, not individuals. Certain doctrines may be labelled 'naturalist' and others 'positivist', but people may subscribe more or less strongly to one type or the other depending on the issue.

IMPLICATIONS OF A TEMPORAL APPROACH

The temporal approach, as outlined in the first chapter, only offers a way of looking at phenomena and not some new revelation. Jurisprudential study has broadened immeasurably in modern times, and the theme of this book has been to emphasise the essential inter-relation between law and other disciplines, principally philosophy, sociology, politics and ethics. No one can be a good lawyer who only knows the law. It does not require a temporal approach to appreciate the connection between law and these other subjects, but such an approach can provide a framework which will unite their study. Whenever phenomena are viewed in a continuum, factors but for which they would not come into being, continue to be, and function become integral to one's concept of them. Origins include moral and social factors, reaching back perhaps to the very springs of governmental and other established social institutions. Function, or purpose, brings in the study of policies and values and the multifarious parts these play. They help to relate contemporary problems to the whole sweep of human thought from ancient philosophies down to the most modern. Functioning brings in the actual operation of laws in society, including the important parts played by the institutional structure of society, the interplay of social and moral factors, and so on. In this connection the study of legal concepts also comes in, for they are necessary instruments in the task of doing justice in deciding disputes. The idea of an instrument includes its use, and the way it is used shapes the instrument.

Next, a temporal approach might help by assigning inquiries to their appropriate context. It has been suggested, for instance, that statutes should be thought of in a continuum, since they are designed to operate over indefinite periods of time[4]. This will make it easier to see that statutory interpretation is an open-ended process of applying a given set of words to ever-changing situations rather than a linguistic exercise in trying to elucidate the referents of words. There is an *ad hoc* character about the latter, which is quite out of keeping with the nature of the enterprise, which should be one of statute 'application' or even 'construction', not 'interpretation'. It is submitted that the present unsatisfactory position is the result of approaching this task in the wrong temporal context. So, too, the *ratio* of a judicial precedent is not some 'thing', which can be isolated here and now, but an open-ended process of continuous adjustment[5]. Again, the dispute as to whether or not sanction is an essential part of the concept of duty is the

3 *Fuller* p 185.
4 See p 170 ante.
5 See pp 140, 144 et seq ante.

product of a failure to see that each view is appropriate in its own context[6]. Sanction is indeed part of the duty concept when duty is viewed in a continuum, where its functioning falls to be considered and with it the machinery of enforcement. Viewed as a tool of legal reasoning for the purpose of doing justice in this or that case, the concept of duty divorced from sanction is frequently used[7]. The controversy arises when an inference from one time-frame is illegitimately transferred to the other. 'Validity' (law-quality) is a concept which is appropriate in the present time-frame, where the question, Is this proposition 'law'?, is asked with a view to identifying it as 'law' for the purpose in hand, usually the deciding of a dispute. It is necessary to keep the means of identification as clear-cut as possible. One does not have to consider the need to decide of this or that case when thinking in a continuum, so different questions are asked: Why was this criterion of validity adopted? Why does it continue to be adopted[8]? The operation of Savigny's mystical *Volksgeist* is discernible, if at all, only over a continuum, but his mistake, it is submitted with respect, was to utilise a factor operative in a continuum as a criterion of validity here and now[9]. Professor Hart, whose concept of law and society imports continuity, changes his ground in order to defend positivism and he shifts his argument to the need for clear-cut criteria of validity in the day-to-day business of identifying 'laws'[10].

The temporal approach cannot resolve every puzzle, but it might at least shed new light on some. In connection with customs, there is the age-old antinomy between the apparent bindingness of customs and the unlimited discretion which courts appear to have in accepting or rejecting them. At least an explanation of why this problem has arisen, if not a solution, is suggested by a consideration of the requirements of customs in a temporal perspective[11]. Two other famous controversies need separate treatment. They are the question whether international law is 'law', and the positivist-naturalist debate.

THE PROBLEM OF INTERNATIONAL LAW

International law did not fit Austin's definition of 'law properly so called', so he excluded it from further consideration; which was unobjectionable in itself. Unfortunately what he said, in effect, was, 'This is the definition of 'law' which I propose to adopt. It is the proper meaning, and I exclude international law because it is not properly called 'law''. As might have been expected, international lawyers, incensed at this denigration of their subject, took issue with him. Had they, for their part, simply replied: 'Use the word 'law' how you like, but we shall use it for our subject', no controversy need have arisen. Instead, they took issue with him on the 'proper meaning' of the word 'law'. To this extent the controversy was verbal and sterile.

It is a fact that the respect which states pay to international law is less than that which individuals pay to municipal law. There has always been a need to enhance the prestige of international law by calling in aid the magic of the word 'law', especially in creating a sense of obligation. This is one

6 See pp 245-246 ante.
7 For examples, see pp 240-245 ante.
8 See pp 53-59 ante.
9 See p 382 ante.
10 See pp 355-356 ante.
11 See p 191 ante.

reason why international lawyers are sensitive about Austin's exclusion of their subject from his imaginary paradise and why they are so anxious to avail themselves of the emotive connotation of the word 'law'. Professor G L Williams pointed it out very clearly.

> 'The word 'law' stimulates in us the attitude of obedience to authoritative rules that we have come through our upbringing to associate with the idea of municipal law. Change the word for some other and the magic evaporated. Accordingly these writers felt obliged to embark upon the unprofitable discussion as to the 'proper' meaning of the term 'law'[12].

Hence the attempts to prove that the subject is 'really' law[13].

Professor Hart thinks that the controversy is more than just a disagreement about words, because the application of the general term 'law' to a whole discipline like international law is different from the application of a name to an object. The question, he says, is one of analogies. (a) There are rules prescribing how states ought to behave, which are accepted as guiding standards just as in municipal law. (b) Appeals are made to precedent, writings and treatises as in municipal law; not to rightness or morality. (c) Rules of international law, like those of municipal law, can be morally neutral. (d) Again, like rules of municipal law, they can be changed by conscious act, eg by treaty[14]. Accordingly, Professor Hart submits that there are sufficient analogies of content, as opposed to form, to bring rules of international law nearer to municipal law than to any other set of social rules[15].

Despite these resemblances, two important differences should not be overlooked. One is that the subjects of international law are primarily states, and the disparity in strength between them far exceeds that between individuals in society[16]. Besides, there are other institutions which have claims, duties etc, but which are not states. Examples would be the United Nations Organisation, the Holy See between 1871 and 1929, various other specialised agencies and so on. Individuals as such are increasingly becoming subjects of international law, which enhances the disparity between the various subjects.

The other difference is that whereas the courts of a municipal order appeal to the same criterion, or criteria, by which to identify 'laws', there is no co-ordination in the ways in which rules of international law are identified. There is no single criterion of identification, because there are unrelated sets of tribunals, each of which identifies international law differently. There is, first, the International Court of Justice, which identifies its rules with reference to art 38 of the Statute of the International Court. Paragraph (1) specifies treaties, custom, general principles of law, and, subject to art 59, judicial decisions and writings of jurists. Paragraph (2) empowers the Court to decide *ex aequo et bono* if the parties agree. There are other international tribunals, such as arbitration tribunals, which are not bound by the Statute of the International Court. They may, and usually do, resort to much the same sources, namely, treaties (especially the treaty setting up the tribunal) custom, general principles of law, judicial decisions and writings of jurists.

12 Williams 'International Law and the Controversy Concerning the Word 'Law'' in *Philosophy, Politics and Society* (ed Laslett) at pp 143-144.
13 This idea seems also to underlie the attempt to prove that international law is '*per se*' part of the common law: pp 217-218 ante.
14 Hart *The Concept of Law* ch 10.
15 *Hart* p 231.
16 There is not that 'approximate equality' between subjects which Hart mentions elsewhere: pp 190-191, mentioned p 493 ante.

Municipal courts also are often called upon to apply principles of international law. Their criteria of identification are regulated by their own municipal systems. A British court, for instance, finds rules of international law primarily in statute and precedent. Only in the absence of a rule of statute law or common law applicable to the case in hand will it go outside and, even then, only as a matter of discretion.

When one considers international law in a continuum the differences become more pronounced. In the first place, it follows from what has just been said that no consistent answer can be given to the question why the criteria of identification were adopted. In most cases the adoption is *ad hoc*, for the purpose of the instant dispute, not once and for all. The predictability of decisions in any international tribunal is less than in municipal tribunals because there are fewer agreed rules and because of the greater intrusion of political considerations and national self-interest. Indeed, 'vital interests' and 'national honour' prevent every important issue ever going before courts.

More interesting is the manner in which rules of international law work, with which is associated the question of obedience to it. The basis of the 'binding force' of international law is commonly ascribed to consent, which is not a satisfactory explanation. A basis in consent presupposes some rule which makes consent obligatory; and the basis of that rule then requires elucidation. Again, if consent is the basis, it would follow that once consent is withdrawn, the obligation to obey ceases. It has been pointed out with regard to municipal law that consent is unrealistic[17]. Individuals are never asked if they consent to be bound by municipal laws, which are treated as binding regardless of consent. The point only arises when some dissident declares that he no longer accepts a law, in which event the question is not whether consent makes a law binding, but whether withdrawal of compliance can deprive it of its obligatory force; which is a different matter. Here, the coercive power of the state, manifested in its sanction machinery, comes into play, and this is so overwhelming as to make it quite immaterial what the individual thinks. Accordingly, as has been suggested, there is no point investigating 'the binding force' behind laws as if this is some 'thing' which can be isolated, but it would be more meaningful to ask: Why do people obey? and, What machinery is there for dealing with disobedience[18]? The so-called 'binding force' rests in the psychological reactions inducing people to obey, among which fear of organised force is one factor. In the international sphere, there is no effective machinery for applying overwhelming, organised force. The principal reasons why states choose to obey international law are fear, if at all, of their neighbours and self-interest. Fear operates through war, reprisals, retaliation, pacific blockade and naval and military demonstrations. These have comparatively little effect and, in any case, are calculated to deter weak rather than strong states. Fear of action taken by the United Nations Organisation is very slight, for such action is inhibited by the use of the veto in the Security Council. The greatest shortcoming of international law is the absence of effective machinery to carry out sanctions. In any case, such action as might be taken is more likely to influence weak rather than strong states. The result, therefore, is that whether or not a given state at any time abides by a given rule of international law depends upon a balance between various considerations, eg a

17 See p 314 ante.
18 See p 248 ante.

desire to secure fair treatment for its own nationals at the hands of other states, nationalism, tradition, morality, diplomacy, economic interests and, possibly, fear. All this makes the working of international law very different from that of municipal law. In brief, international law continues in being mainly because states and international lawyers find it useful and profitable.

The result is that when one considers the matter in the present time-frame the resemblances between international and municipal law are such as to tilt the balance in favour of hallowing the former with the sanctity of 'law'; when one considers it in a continuum the functioning of international law is so different from municipal law that the balance gets tilted the other way. The temporal approach does not answer the question whether international law is 'law' or not, but it could account for the persistence of the question and why it resists all efforts to lay it to rest.

THE POSITIVIST-NATURALIST DEBATE

The chapter on Positivism drew attention to the points of conflict[19], some restatement of which is necessary in order to highlight, not just the area of disagreement, but also of agreement. The submission is that the temporal approach will resolve some parts at least of the conflict. It will have become obvious that naturalists think mainly in a continuum and positivists in the time-frame of the present. The former include a moral element in their conception of law since they think of it as an indispensable factor in the continued existence and functioning of law; the latter exclude a moral element since they are mindful of the necessity of having clear-cut means of identifying laws for the practical purposes of the present, unclouded by impalpable moral considerations. So for a good deal of the time the two sides appear to be shadow-boxing on different planes.

In the course of the discussion of the is/ought dichotomy it was pointed out that a *total* separation of the 'is' and the 'ought' is not possible[20]. Law is what its makers think it ought to be. For instance, in rule-making and rule-applying including the constant restructuring of concepts, it is undeniable that moral, social, political and other such factors make them what they are; and where there is no authority on a point, the judge will declare the rule to be what he feels it ought to be[1]. Again, principles and doctrines, as Professor Dworkin has argued, 'are' law now, but they are themselves pointers to what laws ought to be[2].

When naturalists talk of the moral quality of law they are thinking of law in a continuum, ie as a purposive social activity extending over an indefinite period of time. They are certainly able to make out a powerful case[3]. A separation of law from morals is not possible when the moral quality of law is one of the factors that brings it into being and determines its continued existence; all such factors are a part of the concept of law as a continuing, functioning phenomenon. A person may be very ill, and for the purposes of the moment the concept is that of a sick human body. It will not remain so, for forces are at work to get rid of the disease, and should they fail that body

19 See pp 332-335 ante.
20 See p 333 ante.
1 Sir Garfield Barwick CJ in *Mutual Life & Citizens' Assurance Co* (1968) 42 ALJR 316 at 318, quoted p 333 ante.
2 See pp 45-46, 333 ante.
3 See ch 5 ante.

will perish. The forces which make for health and continued life are part of the concept of an enduring human body. Similarly, morality is a factor that governs the health and continued life of laws. Is there, or is there not, in every community a morality which will assert itself in the long run however impalpable it may be, just as there is a normal state of healthiness of a human body which tends to re-assert itself in the long run however much the details of that condition may vary? The answer must surely be in the affirmative, if only because experience has shown that immoral régimes just do not last indefinitely[4].

Positivists, on the other hand, think mainly in the present time-frame where the need is to determine whether a given precept is or is not a 'law' for the purpose in hand. Their case for resting identification on a purely formal criterion is overwhelming[5].

So far naturalists and positivists are not at issue, and the fact that they have been operating in two different frames of thought can be revealed by a few sample writings. When Austin declared that 'a law' is the command of a sovereign supported by a sanction, he was only providing a method, inaccurate at that, of identifying what he called a 'positive law'. Nowhere did he concern himself with the conditions of continuance. Kelsen's hierarchical scheme is a demonstration of how the law-quality of every norm at any given moment is derived from the *Grundnorm*; and by insisting on 'purity' for his theory he excluded all dynamic forces that make for continuity. Professor Hart begins by equating 'law' with 'legal system', which is an on-going phenomenon; but in arguing the case for positivism he bases it on the need for a clear-cut method of identifying laws at any given moment of time[6]. Elsewhere he has alluded to 'the acceptable proposition that *some* shared morality is essential to the existence of any society'[7]. Thus, when he thinks of continuity, morality is said to be essential; when defending the need here and now for clear-cut, formal means of identifying laws, he takes refuge in the present time-frame.

On the other hand, when Professor Fuller, a naturalist, proffers his eight conditions, which comprise the 'inner morality' of law, he is stating, as has been pointed out, indispensable requirements for the continued functioning of laws[8]. His positivist critics have not been slow to point out (a) that all these conditions are compatible with very great iniquity, and (b) that there is no reason why an immoral precept may not be likened to a 'sick law', but a 'law' nonetheless. Both objections betray the critics' obsession with the present time-frame of thought in which alone they are meaningful. For they overlook the crucial point that the conditions required to keep a thing going, to cure or kill it are included in any conception involving its endurance. An unjust law may indeed satisfy the eight conditions and even function, but Professor Fuller's point is that it will not continue to function. However, he does not answer the question whether or not an immoral precept is to be

4 Fuller *The Morality of Law* p 154. Positivists admit this, eg Savigny's *Volksgeist* moulds or abrogates the law (see ch 18 ante); Hart admits that '*some* shared morality is essential to the existence of any society': *Law, Liberty and Morality* p 51. The Watergate scandal of 1974 in America might be regarded as an instance of the moral sense of the nation asserting itself.

5 See pp 334-335 ante.

6 Hart *The Concept of Law* p 203, (quoted p 355 ante). See also Hart 'Positivism and the Separation of Law and Morals' (1958) 71 Harv LR 593.

7 Hart *Law, Liberty and Morality* p 51.

8 Fuller *The Morality of Law* ch 2. For discussion, see pp 230 et seq ante.

treated as 'law' at this moment. He side-steps that point by asking instead whether 'history does in fact afford significant examples of régimes that have combined a faithful adherence to the internal morality of law with brutal indifference to justice and human welfare'[9]. This is a matter of *continuance* and shows that he, for his part, is thinking in a continuum. The time-frame approach thus shows that the two sides are not on the same plane.

It follows that the relation of morality to a concept of law cannot be stated simply in the form of a stark alternative that the former is *either* externally *or* internally related to the latter. It is both, depending upon the time-frame of reference. Morality tends to be externally related to law in all such identificatory concepts operating in the present time-frame. Thus it is that an immoral precept can be regarded as 'law' in that context. On the other hand, when the question is one of the durability of a law, consonance with morality is one of the conditions which makes for endurance, and here the naturalists have an equally strong case. Morality is then internally related to law in any concept which takes account of the implications of continuity. For, notwithstanding that an immoral precept is 'law' at this moment, it will not continue to be 'law' indefinitely[10]. The inter-relation between law and morality is perceptible by looking backwards over a long period, by retrospective rationalisation. If so, why not also look forwards and prospectively?

The real confrontation comes when naturalists step into the present time-frame and seek to incorporate a minimum moral content in the criterion of validity by which to identify propositions as 'laws' here and now. They do not reject the Positivist attitude, which leads to certainty and hence is an aspect of justice. Nor do they contend that everything which is moral is 'law'; what they say is that validity has to depend on a formal plus a minimum moral criterion[11]. The inclusion of both a formal and moral element will ensure that there will continue to be some separation between what is law and what ought to be law so that the latter can serve as a standard by which to evaluate the former. What naturalists are anxious to secure is that precepts, which violate minimum morality, will not become 'laws'.

It is necessary to separate two questions: Is there presently a minimum moral criterion of validity? and Ought there to be such a criterion? With regard to the first, the answer must be in the negative, save where a moral element has been written into a constitution in some form or other. There have been occasional judicial utterances of wider import, but these are not decisive and should not be generalised.

The second question is whether a minimum moral element ought to be incorporated into the criterion of validity. This has been discussed at length in Chapter 5 in relation to the abuse of power. Naturalists, arguing on the basis of the conditions essential to continuity, advance good reasons why it should be[12]. Positivists, while not questioning the desirability, advance equally cogent reasons why a moral test as such would be impracticable in the daily workings of the law[13]. This casts the onus squarely on naturalists to

9 *Fuller* p 154.

10 Professor Taylor 'Law and Morality' (1968) 43 NYULR 611, approaches this idea when he says that in explaining what is *a law* there should be a separation of law and morals, but that they are re-united when considering *law* as an activity. It is submitted, however, they are united even when *a law* is considered as an enduring phenomenon. The distinction lies in a time-frame.

11 See p 87 ante.

12 See p 89 ante.

13 See pp 334–335 ante.

find a practicable way of incorporating a moral test into a formal criterion of validity. It is proper that they should accommodate themselves to a formal test, since the method of identifying laws for the purpose of daily business has to be clear-cut and impersonal for the compelling reasons given by positivists. Indeed, if naturalists choose to enter the lists in the present time-frame, as they are doing here, they must submit to the requirements dictated by its circumstances. If such a method could be found, then both positivitsts and naturalists should be satisfied, the former because their insistence on a formal test will have prevailed, the latter because their demand for a minimum moral criterion will also have been met. The possibilities of achieving this were considered in Chapter 5 though it is doubtful if any of them can be regarded as providing a wholly satisfactory answer. So, finding such an answer remains an unattained goal in the general pursuit of social justice, but there is no reason why positivists and naturalists should not co-operate in making the quest a joint enterprise.

NATURAL 'RIGHTS'

These came into prominence with the rise of individualism. Each person was thought of as enjoying an area of sanctity. 'Natural rights' are abstract versions of claims, liberties and immunities and at this level of generalisation are akin to principles, standards and doctrines. It is in this sense that they have been embodied in sundry Bills of Rights, Charters of Fundamental Freedoms and Constitutions; they are called 'natural' perhaps because they are thought to be essential to social existence. Rules of law crystallise out of them and it is a mistake to equate them with specific claims, liberties and immunities expressed in rules of positive law. As previously pointed out[14], principles etc exert pressure on the law to develop according to them, but such pressure may be overriden by other pressures in particular instances.

A modern case for 'fundamental rights' has been argued by Professor Dworkin[15]. Although he dislikes the description of his 'rights' as 'natural', his thesis is not dissimilar to 'natural rights' as traditionally conceived. He distinguishes between 'background rights, which are rights that hold in an abstract way against decisions taken by the community or the society as a whole, and more specific institutional rights that hold against a decision made by a specific institution'. Legal rights are institutional rights to decisions in courts. Intuitions about justice presuppose a fundamental right, namely, 'the right to equality, which I call the right to equal concern and respect'[16]. The utilitarian approach to justice is rejected on the ground that the individual has 'rights' against the government, from which it follows that justice cannot lie in the subordination of the individual simply because doing so would, on balance, benefit the common weal. Now, the 'right of free speech' of one individual can indeed be limited by the 'right' of another individual to the integrity of his reputation; and another major qualification is that the 'right' of the individual may be overridden even by government 'to prevent a catastrophe, or even to obtain a clear and major public benefit'. What is not permissible is for government 'to act on no more than a judgment that its act is likely to produce, overall, a benefit to the community'[17]

14 See p 46 ante.
15 Dworkin *Taking Rights Seriously*. See also Finnis *Natural Law and Natural Rights* ch VIII.
16 *Dworkin* p xii.
17 *Dworkin* pp 191 192.

Dworkin also rejects the positivist conception of law as consisting solely of rules. These are not enough in themselves since justice and obligation have a moral dimension. Individual 'rights' are principles, which are required by 'justice or fairness or some other dimension of morality'[18]; and law as a whole incorporates rules and principles. Positivists maintain that in 'hard cases' judges have a discretion to decide on 'policy' grounds. Dworkin disputes this on the ground that there is always a right answer, which entitles one party to the decision on principle. Decisions that look like policy decisions are decisions about existing 'rights' of individuals.

The law has of necessity to reflect the majority view of the common good. 'Fundamental rights' represent the promise by the majority to minorities that their views on this will be respected. Such 'rights' are against government and enjoy authority superior to and independent of government (unlike, eg the 'right' to drive both ways down a street, which is created only by government and can be restricted by it); and they are usually found in guarantees of due process and equal protection, which call for respect for fairness and equality. Where there is a 'fundamental right' a person has the 'right' to do something even though it is forbidden by law. Therefore, with regard to civil disobedience it follows that, subject to the qualification referred to above, the individual has a 'right to follow conscience'. There is, however, a distinction between a person having a 'right to do something' when it would be wrong for government to punish him, and something being 'the right thing for him to do'. If one believes a law to be morally bad, breaking it is 'the right thing for him to do'; and if the majority break it on this ground, respect for law requires its repeal. On the other hand, when the 'right to do something' interferes with another's 'fundamental right', it is no longer 'the right thing to do'.

Dworkin's demonstration of the law-quality of principles and the shortcoming of positivism in failing to accommodate them is acceptable; so too is his contention that, unlike rules, they have a dimension of weight, which exerts pressure on the development of rules. The point, however, is that pressures of any kind may be outweighed by others, which does give judges discretion to decide on policy or other grounds[19]. All this falls short of the contention that the choice is only between competing 'rights' so that there is always a correct answer in principle, that policy considerations do not come in, and that such 'rights' have superior weight, which makes it wrong to condemn people for exercising them against government. The issue boils down to whether these 'rights' carry with them, in addition to the duty to accept them as 'law (which is acceptable), a further duty to apply them, or at least to choose only between them, as opposed to a liberty to apply them or not. A mental leap is required from the acceptable part of his argument to these further contentions, which he does not appear to have bridged.

Reservations that might be felt about the practicalities of his 'fundamental rights' have been expressed earlier in connection with disobedience[20]. While the sincerity of some dissidents cannot be doubted, it would be unwise to trust the sincerity of others who often join in 'fundamental rights' actions for motives such as the overthrow of the system, or to gain positions of power which will enable them eventually to deny equal 'rights' to those disagreeing

18 *Dworkin* p 22.
19 See p 46 ante.
20 See p 315 ante.

with them. The presence, or even the (justified) suspicion of the presence, of the latter under the banner of 'fundamental rights' weakens the appeal of the 'right to follow conscience'. The thrust of the Dworkinian thesis is anti-government, which in itself is no bad thing; but in the real world of today the naivety of this kind of attack on authority is like sawing away at the branch on which one is safely ensconced, so far.

Why, it may be asked in the end, is there talk only of 'natural rights'; what of 'natural duties'? Nothing in justice or principle suggests that the slant should only be towards 'rights'. Indeed, social cohesion and better social justice might be achieved by at least equal emphasis on 'natural duties'.

TEMPORAL APPROACH TO LEGAL SYSTEM

The word 'system' implies continuity, since any concept of inter-relationships and organisation is pointless except in the way in which they continue to hold together while functioning. The inclusion of powers in a concept of law makes a temporal perspective unavoidable, since, as pointed out, the power, eg to make an offer and the power to accept and the claim-duty relationship which they create cannot co-exist[1]. If, then, a time dimension has to be introduced, the implications of this have to be faced. The endurance of a legal system is of course on a much larger scale than this limited example suggests. Factors but for which continuity would not be possible are part of the concept of a continuing phenomenon. Positivist and naturalist concepts of law reflect respectively views of law as a piece of machinery and as an activity. A parallel might be drawn between the concepts of a 'motor car' and 'motoring'. The latter implies more than just a 'car'; it imports use, technique, road-sense, destination and the like. Even the concept of a 'car' is incomplete without its motive power. So, too, a legal system is incomplete without its motivating force and all factors that keep it in being. Of these doing justice is not only an important purpose, but also a condition of continuance. It is not possible to maintain a system indefinitely through fear: people must have faith in it as being substantially a just order and as dispensing substantial justice. Doing justice in deciding disputes is the principal concern of lawyers. This is a task which brings into consideration the equipment used in legal reasoning and above all values, which play so decisive a part in the decisional process. Doing justice further involves consideration of what is actually accomplished in social life through the operation of laws and decisions. So the attribute of justice has to be incorporated into any concept of legal system.

The establishment and maintenance of a just order requires for a start a just allocation of benefits and burdens[2]. Two essential prerequisites for this are moral restraint in the exercise of power by those who have to decide these matters, and moral restraint in the exercise of liberties of action by all those who are in a position to wreck any scheme of allocation[3]. Positivists on their own confession are unable to help with these problems. Their purely formal concepts of law and of legal system are like charts depicting the structure of a machine without its motive power. The structure of every machine has to be devised so as to make *controlled* use of motive power, and

1 See pp 43-44 ante.
2 See ch 4 ante.
3 See chs 5, 6 ante.

all formal depictions of structure are based on the *assumption* that there is, or will be, such control. Legal machinery is only partly the product of human calculation; it is also the product of ideological and social forces over which human control is limited, since human beings as members of society are themselves in the grip of these forces. There is thus all the more reason to incorporate control of these forces into a concept of legal system, for otherwise uncontrolled forces can shatter the system and society. The recurrent tragedies of history have resulted, not from the support given to power or liberty according to the paramount need of the age, but from failure to control whichever movement was in the ascendent. A contented society is the antithesis of tyranny and anarchy. It has been observed that natural law theory is in a sense always a reaction against abuse: abuse of power, which is tyranny, or abuse of liberty, which is anarchy.

Two conditions *sine quibus non* for the continuity of any legal system are thus control of power and of liberty. Power is manifested through laws, and in Chapter 5 ways and means were explored as to how disabilities might be built into, or imposed upon, the criterion of validity. If this were to come about, it could be accommodated within a formal concept. This, however, is not enough. A formal structure stands until changed and, as pointed out, failure to adapt to change is as much an abuse of power as direct exercises of it[4]. What is needed is a concept of legal system which transcends formality and embodies the *need* for control of power as an indispensable part of the very idea of law.

The same applies with even greater force to the restraint of liberty, since the problem of its abuse cuts deeper than that of power[5]. One must begin by asking whether one wants society at all; and if one does, the next question is how it would be possible to have a stable society without providing safeguards against the two most potent forces of destruction, namely, abuse of power and abuse of liberty. Some exercise of power there will have to be in order to suppress certain forms of liberty. Outside the area of prohibition, restraint on liberty can only come from self-restraint and self-discipline, for which there is no alternative but the acceptance of a set of shared values, which results from faith in a just way of life, namely religion. The sooner the implications of this are realised the better.

The question what sort of concept would be appropriate for this purpose will depend, in the first place, on whether liberty is treated as falling within or outside a concept of law. Clearly, it can form no part of a concept which confines 'law' to positive regulation of conduct. It was pointed out in an earlier discussion that there is justification for including all aspects of conduct within 'law', whether positively or negatively regulated[6]. Besides, apart from specific regulation, the law can indirectly influence the exercise of liberties in many ways, and moreover the continued existence of law itself depends on a sense of freedom with responsibility. On this view it is necessary to bring liberty within a concept of law. The choice between the two kinds of concepts, that which includes and that which excludes liberty, is not dependent on logic, but is simply a question of which is more suited to the task of law as one sees it. To rule is to educate; that is a lesson which has been preached from ancient times down to the present. Education includes education in

4 See chs 5. 13
5 See ch 6 ante.
6 See pp 31-32. 359 ante.

values and in moderation, which is inspired by breadth of view and dispassionate, reasoned judgment. Abuse of power and of liberty are productive of fear and both hinder the development of ideas. No matter how difficult the task of curbing these may be at present, the failures of today can be made into stepping-stones towards the success of tomorrow. For neither dictatorship nor anarchy can last indefinitely; they carry in themselves the seeds of their own eventual doom.

READING LIST

St T Aquinas *Summa Theologica* (trans Fathers of the English Dominican Province) 1.2.Qq 90-97.
J Dabin *General Theory of Law* (trans K Wilk 20th Century Legal Philosophy Series IV) pp 227-470.
T E Davitt 'Law as a Means to an End—Thomas Aquinas' (1960-61) 14 Vanderbilt Law Review 65.
R M Dworkin *Taking Rights Seriously* chs 4-13.
A P d'Entréves *Natural Law.*
J Finnis *Natural Law and Natural Rights.*
L L Fuller 'Positivism and Fidelity to Law—a Reply to Professor Hart' (1957-58) 71 Harvard Law Review 630.
L L Fuller *The Morality of Law* (revised edition).
A L Goodhart *English Law and the Moral Law.*
C G Haines *The Revival of Natural Law Concepts.*
J Hall *Foundations of Jurisprudence.*
H L A Hart 'Positivism and the Separation of Law and Morals' (1957-58) 71 Harvard Law Review 593.
H L A Hart *The Concept of Law* chs 9-10.
D Hume *A Treatise of Human Nature.*
I Kant *The Philosophy of Law* (trans W Hastie).
C Morris *The Justification of Law.*
R Pound *The Ideal Element in Law* chs 2-6.
R Pound 'Natural Natural Law and Positive Natural Law' (1952) 68 Law Quarterly Review 330; (1960) 5 Natural Law Forum 70.
J Rawls *A Theory of Justice.*
R Stammler *Theory of Justice* (trans I Husik The Modern Legal Philosophy Series VIII).
J D Wild *Plato's Modern Enemies and the Theory of Natural Law.*

Index

Act,
meaning of, 309-310
Alton, Lord,
power, on, 70
Acts of Parliament, 53-54
existing requirements for, 93-94
Act of Union 1707,
alteration of, 98
Advantages, 68-69
Albania, 410
Allen, Sir Carleton, 19
creative power of courts, on, 163
custom, on, 190
duty, on, 229-230
morality, on, 215-216
stare decisis, on, 130
American Realists, 447-461
argument for research to include activities of lower courts, 455
contribution of, 454
empirical approach, 448
hunches of individual judges, and, 452
judicial decisions, on, 452-453
nature of, 447-448
'paper rules', 449-455
regulation of future behaviour, and, 453
rejection of rules, and, 451, 452
techniques of, 448-449
technology, as, 456-457
traditionalists, and, 454
Analytical jurisprudence, 16-20
Anarchy,
liberty, and, 110-111
Anthropological approach, 388-393
Apartheid, 441-442
Aristotle,
Educative function of law, on, 51
equity, on, 319
freedom, on, 74-75
justice, on, 65
Asquith, Lord,
judicial precedent, on, 57
Austin, John, 19, 343-351
analysis of English law, 344
Bentham compared, 351
command, on, 345
Crown in Parliament, on, 347
deivative nature of work, 343
'general jurisprudence', on, 351
identification of law, 345-346
jurisprudence, and, 4
Kelsen, and, 361
law, on, 59
Austin—*continued*
laws as commands, on, 346-348
laws of God, on, 345
method of logical analysis, 350
nature of law, on, 344
obligation, on, 344-345
ownership, on, 301
positivism, on, 331-332
sanction, on, 237-238
sovereignty, on, 346-347, 348-351
de facto and *de jure*, 348
delegation of, 348-349
indivisibility of, 348-350
statutory law, on, 346
successors in positivist tradition, 351
'tacit command', on, 347-348

Barker,
persons, on, 265-266
Barnardiston, 135
Beale,
rules, on, 450
Beneke, Edward, 429
Bentham, Jeremy, 4, 427-429
assessment of, 343
codification, on, 342-343
comparison with Austin, 351
completeness of law, on, 341
customary law, on, 342-343
definition of law, on, 335-336
'deontic logic', 338-339
expression of sovereign's will, on, 340
extent of law, on, 338
fiction, on, 318, 319
force of law, on, 339-340
individuality of law, on, 341-343
integrality of law, on, 341-342
judicial interpretation of law, on, 341-342
Kelsen, and, 373
law, on, 59, 60
law of contract, on, 342
law of property, on, 342
obedience to law, on, 339-340
objects of law, on, 337-338
positivism, on, 331-332, 335-343
principle of utility, 427-429
public good, on, 429
remedial appendages, on, 340
social philosophy of, 427-429
source of law, on, 336-337
sovereignty, on, 336-337
subjects of law, on, 337
Theory of Fictions, 335-336

Bentham—*continued*
unity of law, on, 342-343
Biological interpretation, 386-387
Blackstone,
declaratory theory of common law, 151-152
stare decisis, on, 134
Bohannan,
primitive law, on, 391
Bolsheviks, 405
Bracton, 133
judicial precedent, on, 57
Brightman, Lord,
judicial control, on, 91
Brinz,
persons, on, 265-266
Brown, Jethro,
custom, on, 190
sovereignty, on, 349
Buckland, 4, 15-16
custom, on, 190-191
liberty, on, 36
sovereignty, on, 349
Burrow,
reports of,
value of, 135
Burrow's Reports, 134

Ceylon,
House of Representatives, 94-95
China, 410
Church,
authority of, 77
Cicero,
equity, on, 319
natural law, on, 76
Civil disobedience, 313-318
consent to authority, and, 314
failure of legal process, and, 316-317
'fair-play' argument, 314-315
justified, whether, 315-317
limits of, 317-318
meaning of, 313
means of, 313
moral justification, 314
necessity, and, 315-316
non-prosecution of offences, and, 316-317
setting bad example, 314
Claim,
correlation of duty and, 26-27
immunity distinguished, 39-40
liberty distinguished, 29-31
meaning of, 25
power distinguished, 33-34
statutory duty, and, 26-27
Claim-Duty Relation, 25-27
Codification, 324-327
case for and against, 326-327
degree of generality, 325-326
form of, 325
future reforms, and, 327
growth of law, and, 326
nature of, 325
shape of, 325
simplicity, and, 326-327

Codification—*continued*
undeveloped systems, and, 324-325
unification of law, and, 327
Coke, Chief Justice,
common law, on, 100
fiction, on, 318
judicial precedent, on, 57
reports of, 133
value of, 135
supremacy of law, on, 83
Common law,
supremacy of, 100
Communism, 417-418
primitive societies, in, 391-392
Company. *See* CORPORATION AGGREGATE
Compensation, 123
Computers, 307-308
information storage by, 307-308
law reporting, and, 308
privacy, and, 308
Comte, 420
Conceptual analysis, 226-227
Contract,
equality of bargaining positions, and, 210-213
social welfare, and, 207
usages incorporated as terms of, 191-192
Control of liberty, 109-124
Corbin, 6
Corporations aggregate, 253-255
characteristics of, 255
conduct of individuals, and, 257
control of liberty, 256-260
control of power, and, 255-256
criminal law, and, 258
evasion of statutory obligations, and, 259
fraud, and, 259
interests of justice, and, 262
'lifting the mask' of corporate personality, 256-260
national safety, and, 258-259
nationalisation of, 256
personality of, 254
public policy, and, 259
survival of, 255
taxation, and, 259-260
tort, and, 257-258
Corporations sole, 251-253
Crown as, 252-253
purpose of, 251
Courts, 12-13, 61
moral basis of validity of enactment, and, 56
Court of Appeal, 128-130
conflicting decisions of, 128-130
earlier decision inconsistent with subsequent decision of House of Lords, 129-130
precedent, and, 128-130
previous decision given *per incuriam*, 130
Criminal law,
corporate liability, and, 258
Cross, Lord,
Nazi Government confiscatory decree, on, 88

Crown,
corporation sole, as, 252-253
Cujas, 376
Customs, 58-59, 187-193
acceptance by judges, 59
conditions for acceptance, 188-190
development of statute, and, 189
general, 192-193
itinerant justices, and, 188
local, 187-191
'law', as, 190-191
'local', meaning of, 189
meaning of, 187
non-conformity, and, 58-59
products of development over time, as, 191
reason for acceptance as law, 188-190
reasonableness of, 189-190
slow growth of, 187
usages. *See* USAGES
Czechoslovakia,
Russian intervention, 409-410

Dabin, Jean, 478-479
Darwin, Charles,
On the Origin of Species, 386
***Decretum Gratianum*, 77-78, 471-472**
Definitions, 9-12, 45
Democracy, 85
Denning, Lord,
'duty', on, 214-215
equity, on, 321
judicial precedent, on, 57
mischief rule, on, 176
statutory interpretation, on, 181
Devlin, Lord,
law and morality, on, 113-114, 115, 116
statutory interpretation, on, 177
Dialectic interpretation, 384-386
Diamond,
criticism of Maine, 390
Dietze,
permissiveness, on, 121
Disabilities, 68
Disadvantages,
meaning of, 68
Dishonesty, 216
Disputes, 126-138
justice in deciding, 126-138
Distributive justice, 64-82
Dixon, Sir Owen,
parliamentary sovereignty, on, 94
Doctrines, 45-46
Documents,
interpretation of, 170
Dow,
House of Lords reports, 134
du Parcq, Lord,
statutory interpretation, on, 170-171
Duguit, 436-439
criticism of doctrine of sovereignty, 437-438
function of government, on, 439
influence of, 439

Duguit—*continued*
rights, on, 439
social life, on, 437
'social solidarity', on, 438
State, on, 437-438
Duty, 226-249
approval, and, 234-235
breach of, 247-248
classes of persons contemplated, 233-234
conduct regulated by, 27
conduct related to, 230-231
conflicting, 246-247
contemplating behaviour alone, 232
contemplating behaviour both in relation to specified circumstances and consequences, 232
contemplating behaviour in specified circumstances, 232
continuance of, 229-230
correlation of claim and, 26-27
disapproval, and, 234-235
enforceability, 235-236
function of, 229-230
functioning of, 248
kinds of behaviour contemplated by, 232-233
legal rule, and, 231
liability distinguished, 34-35
liberty, and, 28-29
machinery for dealing with disobedience, 248
other-regarding, 231
part conduct, and, 231-232
power, coupled with, 37-38
primary, 235-236
purpose to be achieved, 235
reasons for obedience, 248
recognition of, 234
result of conduct, and, 233
sanction attached to breach, 236-246. *See also* SANCTION
secondary, 235-236
specific enforcement of, 235-236
structure of, 230-247
'subjection' distinguished, 35-36
Dworkin, Professor,
Hart's theory, on, 354-355
natural rights, on, 501-502
Dyer, 133

Economic approach, 395-419
conclusion as to, 417-419
evolution, and, 417
extent of economic influence on content of law, 417
indispensability of law, and, 417
religion, and, 418-419
Ehrlich, 425-427
problems and facts of social life, on, 426
social evolution, on, 306
State organisation, on, 426
thesis of, 425
Eichorn,

Emmett, 17-18
Employment,
equality, and, 211-213
Employment Appeals Tribunal,
statutory interpretation, on, 170-171
Enforceability,
meaning of, 235-236
Engels, Frederick, 396-408
'administration of things', on, 402-403
causation, on, 400
'ideology', on, 400-401
law as instrument of domination, on, 399-400
'scientific method', and, 401-402
Epinasse, 135
Equality, 208-213
distributive justice, and, 209-210
hierarchy of values, and, 210-213
justice, and, 66
natural justice, and, 208-209
precedent, and, 209
redress proportionate to injury, 208
Equity, 319-321
function of, 319-320
Praetors, 320
Roman law, and, 320
European Court of Human Rights, 104
European Economic Community, 104-108
Decisions, 104
Directives, 104
evolution of law, 106
law *sui generis*, 104
national law, and, 106-107
parliamentary sovereignty, and, 105-106
precedent, and, 131
Recommendations, 105
Regulations, 104
UK statutes, and,
burden on courts, 107
withdrawal from, 107-108

Facts,
statements of facts distinguished, 7-8
Feudalism, 78
Fiction, 318-319
convenience, and, 319
emotional conservatism, and, 319
intellectual conservatism, and, 319
policy, and, 319
Finnis, John, 488-491
custom, on, 489-490
eternal law, on, 491
justice, on, 490
natural law, on, 488-489
'rule of law', on, 490-491
Fitz-Nigel, Richard,
judicial precedent, on, 56
Fleta, 133
Fortescue, 133
Fox L. J.,
disobedience to law, on, 317
Frank, Judge Jerome, 447
'fact skeptics', on, 456
Frank—*continued*
'Father-symbol', on, 450, 453
judicial decisions, on, 450, 451
Law and the Modern Mind, 449-450
Llewellyn, and, 458-459
'probable law', on, 453
'rule skeptics', on, 456
rules, on, 450-451
Frankfurter, J.,
judicial impersonality, on, 221
Freedom, 70-72
balance between freedom from power and freedom of self-assertion, 71-72
immunity, as, 70-71
liberty, as, 70-71
unrestrained, 71
French Revolution, 84
Friedmann, Professor,
Kelsen, on, 372
Friedrich,
justice, on, 66
Friendly societies,
personality of, 263-264
Fuller, Professor Lon L., 491-493
duty, on, 230
fiction, on, 318, 319
natural law, on, 491-493
power and duty, on, 354
Fundamental rights, 501-503

Germany,
nationalism in, 84
Gierke, 383-384
persons, on, 269
Glanvil, 133
Gluckman, 390, 391
Goodhart,
possession, on, 282-283
Gray,
jurisprudence, on, 8-9
law, on, 449
Grotius,
'father of international law', 81
natural law theory, 80-81
Groups, 439-444
institutions, as, 442-443
unity of, 439-440
values, and, 440

Habit,
rule distinguished, 48
Hägerström, 461-462
Hale, Sir Matthew,
sovereign power, on, 91-92
Hall, Jerome, 485-488
criteria for law, 486-487
customary law, on, 486
difficulty of thesis of, 487
'integrative jurisprudence', on, 486
Halsbury, Lord
distinguishing of cases, on, 145-146
Hargreaves,
ownership, on, 294

Hart, Professor H. L. A., 351-356
Austin, on, 352
avowed positivism of, 355
concept of law, 352
international law, on, 496
law and morality, on, 114-116, 119
legal and pre-legal state of affairs, on, 353-354
'legal system', on, 352-353
morality, on, 112, 355-356
natural law, on, 493-494
obligation, on, 228-229, 239, 352-353
positivism, on, 331
rule of recognition, on, 354
'tacit command', on, 347
Hauriou,
institutions, on, 442
Hegel, 384-386
dialectics of, 402
explanation of history, 385
influence upon Marx, 396
legal philosophy, on, 384-385
Hengham, 133
Historical approaches, 375-394
concept of law apt for, 393-394
lasting effect of, 393
Historical factors,
significance of, 393
Hitler, 387
Hobbes, Thomas, 476
government, on, 101
new view of natural law, 80
state of nature, on, 79-80
Hocart,
functions of modern government, on, 392
primitive law, on, 390
ritual, on, 392-393
Hoebel,
Cheyenne Indians, investigation into, 456-457
Maine, on, 390
Hogbin,
primitive law, on, 391
Hohfeld,
allegations that analysis incorrect and incomplete, 41
application of analysis to social and political slogans, 42-43
criticism of, 40-41
equity, on, 321
evaluation of analysis of, 40-44
general concept of 'right', and, 42
objection that terminology not unusual enough, 41-42
persons, on, 267
table of jural relations, 24-25
temporal perspective of scheme, 43-44
unusual terminology of, 41
utility of scheme, 42
Holdsworth,
ownership, on, 293-294
Holland, 19
Holmes, J.,
Holmes—*continued*
possession, on, 287-288
Spencer, on, 387
Honoré,
advantages, on, 69
claims, on, 68
'group', and, 60
institutional nature of laws, on, 443-444
justice, on, 66, 67-68
social justice, on, 90
House of Lords,
free to depart from previous decisions, 130
Hume, 476
Hungary,
Russian intervention, 409
Husband and wife,
position in tort, 243-244

Ihering, 376-377, 423-425
aim of law, on, 424
career of, 423
persons, on, 266-267
reconciliation of conflicting social and individual interests, on, 425
social control, on, 424
theory of possession, 276-277
Immunities,
distribution of, 69-70
Immunity,
claim distinguished, 39-40
liberty distinguished, 40
Immunity-disability relation, 39-40
Impact of laws on society, 425-427
Incorporated Council of Law Reporting, 134
Institutions, 439-444
conceptual, 443-444
groups as, 442-443
International comity, 217-219
extradition, law of, 218-219
International law, 217-219
binding force of, 497
criteria of identification, 496-497
identifying critera for, 372
Kelsen on, 369-372
natural law, and, 495-498
prestige of, 495-496
Soviet attitude towards, 416
subjects of, 496

Jellinek, 407
Jennings, Sir Ivor,
definition of 'statute', on, 95-96
parliamentary sovereignty, on, 94
Jewish theory, 72-73
abuse of liberty, and, 73
direct rule of God, 72
independence of individual, 72
Jolowicz,
law reform, on, 323
Judges,
prestige of, 58
Judicial Committee of the Privy Council,

Judicial control, 91-102
drawbacks to, 99-101
historical context, 91-93
'manner and form' check, 93-102
Judicial discretion, 151-158
case-by-case method, 156
consistency, need for, 156
inductive reasoning, and, 153-154
differences from scientific induction, 154
justification, and, 155-157
manipulation of authorities, and, 156
no rule of law, where, 157-158
public need and social expediency, 155
reasoning by analogy, and, 154-155
syllogistic reasoning, and, 152-153
Judicial impersonality, 220-225
class and background influences, 222-223
'collectivist' outlook, and, 224
Industrial Court, and, 223
non-election of judges, and, 223-224
Roberts v Hopwood, 223
shared values, and, 224
subconscious influences, 221-222
Judicial precedent, 56-58
acceptance of, 57
antiquity of doctrine, 56
law-quality attributable to absence of code, 57-58
Normans, and, 57
prestige of judges, 58
reason for acceptance of, 56
Judiciary,
independence of, 99-101
piecemeal principles evolved, 101
politics, and, 101
power, relation to, 101
review of validity of legislation by, 97-98
Jural contradictories, 25
Jural correlatives, 25
Jural opposites, 25
Jural relations, 23 *et seq.*
Jurimetrics, 459-461
computer prediction, 460-461
group approach, 459-460
Jurisprudence,
administrative technique, and, 18
advisory technique, and, 18
analytical, 16-20
comparative basis, 19
conceptual analysis, and, 226-227
conceptual framework for study of, 20
definition, 3-4
ethics, and, 17-18
history, and, 16-17
judicial technique, and, 18
legislative technique, and, 18
linguistic precepts, and, 5-14
logical analysis, and, 9-10
sociology, and, 16-17
temporal approach, 20-21
thoughts about law, and, 4-5
use of word, 3-4
Just allocation of advantages and disadvantages, 66-70
Justice, 64-82
disputes, and. *See* DISPUTES
equal treatment in law of things inequal in fact, 65-66
equality, and, 66
Greek period, 73-75
Jewish theory. *See* JEWISH THEORY
just allocation of advantages and disadvantages, 66-70
liberties, and, 69
Medieval period, 77-78
power, and, 70 *et seq.*
powers, and, 69
Reformation, and, 78-79
Roman period, 75-77
values, and. *See* VALUES
Justice in adapting to change, 305-328
Justice in deciding disputes. *See* DISPUTES
Justinian, 48, 76

Kant, 475-476
Kelsen, and, 359
Kantorowicz, 11
Kelsen, 358-374
Austin, and, 361
Bentham, and, 373
claim, on, 369
concept of 'person', on, 369
criticism of, 372-373
distinction between legal and other 'oughts', 360
general jurisprudence, on, 358
Grundnorm, on, 361-373
adaptation of, 362
ceasing to derive minimum of support, 363-364
difficulties raised by concept, 364
distinction between 'public' and 'private' law, and, 368
distinction between validity and effectiveness, 363
effectiveness of 'total legal order', and, 365-366
features deserving attention, 362-363
hypothesis, as, 367-368
international law, and, 371
'pure' theory, and, 364
revolution, and, 366-367
social environment, and, 364-365
weak point in theory, as, 368
hierarchy of norms, on, 359
international law, on, 369-372
Kant, and, 359
law, on, 59
liberties, on, 60, 369
norms, on, 358-359
'ought' propositions, on, 359-360
pacta sunt servanda, and, 370
persons, on, 267-268
primacy of international over municipal law, on, 371-372
'pure' theory of law, 358
relationship between international and municipal law, 370

Kelsen—*continued*
sanction, on, 361
State, on, 369
Kocourek,
Hohfeld, on, 41
Korean War, 416
Krushchev,
classless nature of Soviet society, on, 410
Comrades' Courts, and, 414-415
denunciation of Stalin, 409
peaceful coexistence, on, 404

Laband, 407
Labeo, 47
Language, 5-14
functions of, 7
Lauterpacht, Sir Hersch,
Kelsen, on, 372
Law,
adaptation of, 20
association with 'standard', 47-48
concept presupposing legal system, 59-60
conceptual institutions within, 61-62
disobedence, and, 89
ethics, and, 15-16
function of, 14-15
functioning of, 14-15
identification of, 59
improvement of, 20
liberty as, 31-32
moral disapproval of, 89
moral quality of justness, and, 87
nature of, 14-15
philosophy, and, 15-16
politics, and, 15-16
psychological significance of word, 52
shaping of moral ideas by, 52
social institution, as, 15-16
sociology, and, 15-16
thoughts about, 4-5
validity of, 61
law-constitutive medium, and, 55
Law and morality,
Lord Devlin on, 113-114, 115, 116
Professor Hart on, 114-116
Law-applying institutions, 61
Law-enforcement institutions, 61
Law Reform, 20, 322-324
adequacy of existing law, and, 322-323
collation of existing law, 322-323
drafting, and, 324
language in which drafted, 324
Law Commission, 323
machinery for implementing, 323-324
positivism, and, 322-323
Royal Commissions, 322
Law Reports, 132-136
assessment of, 134-136
history of, 133-134
value of, 135
Year Books. *See* YEAR BOOKS
Laws, 59-60
Legal material, 23-46
Legal sociologists,
sociological jurists distinguished, 444-445
view of, 422-423
Legal system, 60-62
functioning of, 62
institutional structure of, 61
pattern of interrelation, 61-62
purpose of, 62
Legal theory, 331 *et seq.*
Legislation, 321-327
adaptability of law, and, 321-327
manner and form, 96
meaning of, 166
review of validity by judiciary, 87-98
Legislative authority,
effectiveness of, 54, 55
Legislative power,
moral check on, 89
Lenin, 396, 397
'one man management', concept of, 406
State, on, 405
Liability,
duty distinguished, 34-35
Liberty, 28-33, 109-124
abolition of law, and, 120
acceptance of standards underlying law, and, 119
anarchy, and, 110-111
claim distinguished, 29-31
competing values, 110
control of, 504. *See also* CONTROL OF LIBERTY
courts, and, 118
discipline, and, 112
distrust of authority, and, 124
duty, and, 28-29
duty not to exercise power, and, 109-110
easing of laws and penalties on anti-social conduct, 121
enforceability of law, and, 120-121
government, and, 109-110
immunity distinguished, 40
individual liberties of action, 118-119
industrial action, and, 122-123
'institutional' basis, 113-114
kinds of, 32
'law', as, 31-32
law and morality, 111-113
limits of, 32-33
Lord Devlin on, 113-114, 115, 116
limitation of, 109-117
machinery of the law, 116-117
moral, 118
moral restraint of, 121
religion, and, 122
ownership, and, 301
power, and, 117-118
power coupled with, 36-37
power distinguished, 36
preservation of 'moral atmosphere', and, 119
Professor Hart on, 114-116
restraint of, 117-124
self-discipline, and, 112, 123-124
sense of obligation, with,

Liberty—*continued*
social obligation, and, 124
'utilitarian' basis, 114-116
Liberty—No-claim Relation, 28-33
Linguistic precepts, 5-14
Llewellyn, Karl N., 454-459
Cheyenne Indians, investigation into, 456-457
craftsmanship in law, on, 458
Frank, and, 458-459
'institution', on, 457
'law-jobs' theory, 457
outline of principal features of realist approach, 454-455
predicting judicial decisions, 458-459
Lloyd, Professor,
moral pluralism, on, 115-116
Locke, John, 81-82
natural law, on, 82-83
revolution of 1688-1689, and, 82
social contract theory, 81-82
unlimited sovereignty, on, 82-83
Lord Simon of Glaisdale,
educative function of law, on, 51-52
Lundstedt, Vilhelm, 462-464
social welfare, on, 463-464

MacCormick, Professor,
institutions, on, 443
Machiavelli,
freedom, on, 79
Maine, Sir Henry, 388-390
equity, on, 319
evaluation of work of, 389
fiction, on, 318
modern anthropologists, and, 389
primitive law, and, 390
Maitland,
equity, on, 321
persons, on, 269
Malinowski, 390
Marx, 396-408
causation, on, 400
class character of law, on, 398
class struggle, on, 401
communism, on, 397
dictatorship of proletariat, on, 397
doctrine of economic determination of law, 398
Hegelian dialectics, and, 402
identity of law and state, on, 398
'ideology', on, 400-401
law as instrument of domination, on, 399-400, 402-403
ownership, on, 301-302
primitive tribal societies, on, 396-397
'scientific method', and, 401-402
State, on, 404
withering away of law and State, on, 398-399, 404-405
Marxism, 395-419
measurement of needs, and, 405
period from 1921-1937, 405-408
Maturana, Professor, 5

Means of achieving legal ends, 44-45
significance of, 44-45
Medical advances, 308-312
meaning of 'act', and, 309-310
meaning of 'omission', and, 310-312
organ transplantation, 312
Mental disorder,
public safety, and, 202
Mill, J. S.,
morality and law, on, 114
Modern realism, 447-469
jurimetrics. *See* JURIMETRICS
mechanical predictions, 459-461
Montesquieu, 420-421
control of government power, on, 83
power, on, 70, 102
separation of powers, on, 83
Moral position, 112-113
Morality, 215-217
law, and, 500
liberty, and, 111-113
machinery of the law, 116-117
disability, 117
duty, 117
inappropriateness of, 117
marriage, and, 216-217
religion, and, 111-112
Morris, Clarence, 484-485
Murdoch, Iris,
freedom, on, 71

National safety, 199-204
emergency, and 200-201
growing crime rate, 201-202
natural justice, and, 200
necessity, and, 201
seizure of property, and, 200-201
National Socialism, 387
Natural justice,
national security, and, 200
Natural law, 470-505
Cicero on, 76
content, of, 471
historical investigation, and, 477
history of, 470
ideal content, of, 476-478
international law, and. *See* INTERNATIONAL LAW
just allocation of benefits and burdens, and, 503-504
meaning of, 470-471
method, of, 471, 478 *et seq.*
morality, and, 500-501
natural 'rights', 501-503. *See also* NATURAL RIGHTS
neo- Thomism, 478-479
positivist-naturalist debate, 498-501
science, and, 477
temporal approach to legal system, 491 495, 503-505
implications of, 494-495
Negligence,
over-complexity of law, 161
self-simplification of law, and, 161-162

Negligence—*continued*
value-considerations, and, 204
Netherlands,
Act of Abjuration 1581, 81
No-fault insurance, 123
Nuisance,
'reasonableness', concept of, 207

Obiter dictum, 140, 143-144
weight attached to, 144
Obligation, 49, 226-249
legal, 228-229
moral, 228-229
Olivecrona, 464-466
commands, on, 346
duty, on, 231, 465
non-compliance with rules, and, 51
revolution, on, 53
rights, on, 465-466
simplicity of exposition of, 466
validity of law, on, 464
'will of the State', on, 464-465
Omission,
failure to act, and, 310-311
meaning of, 310-312
voluntariness, and, 311
Organ transplantation, 312
'Ought', idea of, 227
Ownership, 292-304
action of ejectment, and, 293-294
allocation of benefits and burdens, and, 299-301
analysis of, 293-298
benefits and burdens, 297
'better right', and, 295
burdens of, 300
chattels, and, 294-295
claims vested in persons other than owners, 297
curbs on profits, and, 303
equality of bargaining, and, 302-303
function in social ordering, 298-304
historical analysis of, 293-295
interests in land, and, 296
'legal' and 'equitable', 300-301
liberty, and, 301
Marxist analysis, 301-304
meaning of, 292
nationalisation, and, 303-304
owner divested of claims, 297-298
power, and, 301-304
relation between persons, and, 297
seisin, and, 294
social concept, as, 298-299
sovereignty, and, 299
'things', and, 295-297
variation in different systems, 298

Pakistan, 70
martial law in, 92
Papinian,
equity, on, 320
Parker, Lord, C.J.,
judicial control of administration, on, 210
Parliament,
extent of privilege of, 97
supremacy of, 87-88
Parliament, Crown in,
moral factor behind acceptance of, 55-56
Parliamentary roll, 96
Parliamentary sovereignty,
European Economic Community, and, 105-106
Partnership,
personality of, 264
Pashukanis, 407
decline of ideas of, 408
Persons, 250-271
allocation of benefits and burdens, 251-255
birth of child, 260-261
'bracket' theory, 266-267
'concession' theory, 268
corporations aggregate. *See* CORPORATIONS AGGREGATE
Corporations sole, 251-253. *See also* CORPORATIONS SOLE
criticism of theories as to, 269-270
death, effect of, 261-262
efficiency of concept, 264-265
'enterprise entity' theory, 266
'fiction' theory, 268
groupings of individuals, 261
Hohfeld's theory, 267
human beings, 251
husband and wife, 261
Kelsen's theory, 267-268
meaning of, 250
'organism' theory, 269
outlaw, 261
'purpose' theory, 265-266
'realist' theory, 269
Roman law, in, 250
'symbolist' theory, 266-267
theories on nature of, 265-270
Persuasion, 14
Per incuriam,
meaning of, 130
Plato,
absolute standards, on, 74
educative function of law, on, 51
ideal State, on, 74
Plowden, 133
Plucknett,
judicial precedent, on, 57
Pollock,
definition of law, on, 89
law reports, on, 134
possession, on, 288-289
statutory interpretation, on, 168-169
Positivism, 331 *et seq.*
British theories, 331-357
law and morality, 334-335
meaning of, 331
natural law, and, 498-501
objections to 'is/ought' distinction, 333-334
obsession with 'is', 332-333
Possession, 272-291
adverse possession of land, 285

Possession—*continued*
convenience, and, 274-275
corpus and *animus*, 290
device of convenience and policy, 285-286
different meanings under Roman law, 273-274
English law, in, 277-289
flexibility of concept, 289
flexibility under Roman law, 274
holding key, and, 277-279
Holmes's theory, 287-288
interdicts, and, 273
larceny, and, 283-284
law of tort, and, 280-281
lost property, and, 281-282
master and servant, 281
matter of law or fact, whether, 290
meaning of, 272
physical control, and 272-273
Pollock's theory, 288-289
prohibited drugs, of, 284
Rent Acts, and, 278-280
Roman law, by, 273-277
Ihering's theory, 276-277
Savigny's theory, 275-276
Salmond's theory, 286-287
'trespass by relation', and, 282
vagueness of concept, 277-278
Pound, Roscoe, 430-436
balancing metaphor, 435, 436
classification of institutions of law, 434
common law, on, 430
ideals of guidance, on, 436
individual interests, on, 431
liberties, on, 60
listing of interests, on, 435-436
public interests, on, 431
'recognition', on, 434
social interests, on, 431-433
conservation of social resources, in, 432-433
general morals, in, 432
general progress, in, 433
general security, in, 432
individual life, in, 433
security of social institutions, in, 432
sociological jurisprudence, on, 430
'waste and friction', on, 434
Power, 87-108
claim distinguished, 33-34
control of, 504-505
coupled with duty, 37-38
coupled with liberty, 36-37
disability, control by, 102
judicial control of, 91
kinds of, 38-39
legal capacity to alter jural relations, 87
liberty, and, 117-118
liberty distinguished, 36
moral check on, 90-91
ownership, and, 301-304
principles of objective and acceptable moral code, 90-91
supra-national control of, 104-108
Power—*continued*
written constitution, and. *See* WRITTEN CONSTITUTION
Powers,
distribution of, 69
private, 38-39
public, 38-39
rightful, 36-38
wrongful, 36-38
Power-liability relation, 33-39
Praetors, 320
Precedents, 126-138
ability of later judge to review material facts of, 137-138
absence of code, and, 159
application of, 136
art of knowing how to make different statements by taking different combinations of facts, 138
avoidance of inconvenience and technicality, 160-162
binding force of decisions, 127-128
bindingness of *stare decisis*, 163-164
certainty, flexibility and adaptability, 164
certainty, need for, 159-160
cessante ratione cessat ipsa lex, 147-148
changed conditions, and, 146-148
continued service of justice, and, 159-160
Court of Appeal bound by own decisions, 128-130. *See also* COURT OF APPEAL
distinction between primary and secondary facts, 136
distinguishing of case, and, 145-146
Donoghue v Stevenson, 138-139
European Economic Community, and, 131
explaining, 151
extraction of ratio decidendi, 139-143. *See also* RATIO DECIDENDI
factors that keep *stare decisis* in being, 158-162
growing number of reported decisions, 160
hierarchy of courts, and, 127-132
House of Lords, and. *See* HOUSE OF LORDS
injustice, and, 164
judge-made law, 162-163
statute, and, 163
judgment on conduct after performed, 164
Judicial Committee of the Privy Council, 130-131
judicial discretion, and, 151-158. *See also* JUDICIAL DISCRETION
knowing facts of instant case, 136-138
knowing the law, 139-143
law-quality of, 132-136
law reports. *See* LAW REPORTS
nature of legal thinking, 164
predictability, need for, 159-160
professional ethos, and, 158-159
quirks of individual personalities, and, 136
refusal to follow cases, and, 145
rule in *Young v Bristol Aeroplane Co Ltd*, 128-130
exceptions, 128-130
rules of law or practice, whether, 131-132

Precedents—*continued*
selection of material facts, 137
self-simplification, and, 160-161
statement of facts at different levels of generality, 136-137
values guiding judicial discretion, 164
Principles, 45-46
Prisot, C. J.,
Year Books, on, 133
Public corporations, 264
Public interest,
sterilisation, and, 202-203
Public safety,
mental disorder, and, 202
Puchta,
Volksgeist, on, 378. *See also* VOLKSGEIST
Pure theory. *See* KELSEN

Racial theory, 387
Ratio decidendi, 139-143
applying, 151
difficulties in relation to, 140-142
explaining, 151
extraction of, 139-143
following, 151
meaning of, 140
overruling, 148-151
circumstances strengthening authority of case, and, 149
effect of, 150
factors making court more ready to overrule, 149-150
hardship, question of, 150-151
implied, 150
revival, and, 148
when permissible, 149
plurality of judgments, and, 143
refusal to follow decision, and, 145
reversal of case, and, 144-145
subsequent history of case, and, 144
subsequent interpretation, and, 142
Rawls, Professor John, 480-484
civil disobedience, on, 314-315
criticism of, 482
individual, on, 483-484
intuitionism, on, 483
liberty, on, 483
principles of justice, on, 481-482
social justice, on, 481
Raz,
civil disobedience, on, 315
legal system as institution, on, 444
***Regulae*, 47-48**
Reid, Lord,
golden rule, on, 174
Renner,
ownership, on, 302
Repugnant legislation, 88
Res judicata, 126-127
Revolutionary régime,
legality of, 54-55
Rhodesian Revolution, 53, 54
independence of judiciary, and, 100
Rights,
meaning of, 23-24
Roles, 440-442
Roman law,
revived study of, 79
study of, 375-376
Ross, Alf, 466-468
criticism of, 468
norms, on, 467
'valid law', on, 467-468
Rousseau,
protection of individual, on, 83-84
Rule of law,
abuse of, 87
Rules, 47-59
acceptance of, 49-59
consequences of non-compliance, and, 51
association with 'standard', 47-48
characteristics of, 48
concept of, 48
habit distinguished, 48
inter-dependence of people in society, and, 50-51
internalisation of, 50-51
legal, nature of, 49
meaning of, 47
means of achieving ends, and, 50
moral rightness, and, 49-50
Russian Revolution, 53

Salmond,
ownership, on, 296-297
persons, on, 268
possession, on, 286-287
Sanction, 236-246
absence of,
duty, and, 239-240
application by tribunals, 238-239
criminal law, and, 244-245
diplomats, and, 243
existing duty, and, 242
fear of, 239
husband and wife, position in tort, 243-244
joint obligation, and, 244
meaning of, 237-238
part-payment of debt, and, 242
postponement of performance of duty, and, 242
statute-barred debt, and, 241
Statute of Frauds, and, 240-241
Statutes of Limitation, and, 241
Suicide Act 1961, 244-245
test of duty, as,
fallacy underlying, 245-246
test of legal duty, as, 237-238
unenforceable contract, and, 242-243
void transaction, and, 242
Sanctity of property, 198-199
Sanctity of the person, 197-198
Savigny, 377-384
career of, 377-388
codification, on, 326-327
persons, on, 268
social evolution, on, 306

Savigny—*continued*
theory of possession, 275-276
Scandinavian realists, 461-468
Schlesinger, Dr.,
commodity-exchange, on, 407
communism, on, 418
Scrutton, L.J.,
judicial impersonality, on, 222
Separation of powers, 102
Simon, Lord,
mischief rule, on, 176
Simonds, Viscount,
statutory interpretation, on, 181-182
Singer,
civil disobedience, on, 315
Slesser, L.J.,
judicial impersonality, on, 221
Social criterion of validity of law, 436-439
Social evolution, 305-312
change through disobedience. *See* CIVIL DISOBEDIENCE
machinery of change, 318-327
need for law to adapt to, 307
welfare state, and, 306-307
Social origins of laws and legal institutions, 423-425
Social safety, 199-204
Social welfare, 204-208
contract, and, 207
interests of individuals, and, 206-207
monopolies, and, 207-208
planning powers, 205
property rights, and, 204-207
taxation, 206
Sociological approaches, 420-446
practical contribution of, 444
task of laws in society, 427
Tübingen school, 429-430
Sociological jurists,
legal sociologists distinguished, 444-445
view of, 422-423
Sociology,
meaning of, 420
nature of, 421-422
scientific method, and, 421-422
social behaviour, and, 422
Socrates,
immutable moral principles, on, 74
Solon,
freedom, on, 73
Sophists, 73
Source of law,
meaning of, 13
South Africa,
Entrenched Clauses of Constitution, 56
Entrenched Clauses of South Africa Act 1909, 99
South Africa Act 1909,
minority rights, and, 92
Soviet Union, 395-396
broad characteristics of law in, 411-412
Constitution 1977, 404
criminal law in, 413
Soviet Union—*continued*
development of law in, 403-404
family law in, 413
guiding principle of law in, 411
individual ownership in consumer goods, 412
industrial contracts in, 412
international law, on, 416-417
justice in, 415-416
law proceeding according to social needs, 402
legal problems in, 410-411
modern developments in law, 413-414
nationalism in, 406
New Economic Policy, 405, 406-408
observance of legislation in, 413
'parental' function of law, 406
period from 1921-1937, 405-408
period from 1938 to the present, 408-417
'personality cult' in, 408-409
power-structure in, 84-85
'principle of analogy' in, 399-400
production, economic and business relationships, 412
relations between State and individuals, 412
'revolutionary legality' in, 405-406
Second Revolution, 407-408
'socialist international law', and, 416
state of emergency in, 406-407
tribunals in, 412-413
Tsarist influences, 415
Spencer, Herbert, 386-387
St Augustine,
acceptance of slavery by, 77
law of nature, on, 77
St Thomas Aquinas, 78, 471-475
divine law, on, 473-474
doctrine of, 472
natural law, on, 471-475
outstanding features of doctrine of, 474-475
Stalin, 397, 408-409
death of, 409
stability of laws, on, 408
State, on, 403-404
Stammler, 479-480
Principles of Participation, 480
Principles of Respect, 480
Standards, 45-46
acceptance of, 48-49
now coming to be accepted, 49-59
Stare decisis, 56-58, 126-127. *See also* PRECEDENT
rule of law, whether, 58
Statements,
checking of, 18
Statute,
definition of, 95-96
disuse of, 88
enrolment rule, and, 96
expiry of, 88-89
Statute of Westminster 1931,
Dominions, and, 98-99
Statutory duties,
claims, and, 26-27

Statutory interpretation, 166-186
appreciation of background of statute, need for, 183-184
compromise approach, 177-181
continuous adaptation of statutes, and, 170
control of behaviour, and, 185
creativity of judges, and, 183
descriptive information, and, 184
detailed nineteenth-century statutes, 169
different meanings of words, 167-168
different methods of interpretation to be applied to different types of statutes, 185-186
discretionary element, 168-169
documents treated alike, 170
EEC Treaty, and, 179-180
exclusion of extrinsic evidence, 172
extrinsic considerations to explain state of law at time statute passed, 178
golden rule, 173-174
historical factors, 168-169
improvements in drafting techniques, and, 185
intention of Parliament, and, 166-167
international treaty, and, 179
judges adopting opposing canons in same case, 174
judicial attitude, 181-183
Judicial Committee of Privy Council, and, 180
literal rule, 171-173
'meaning', 167
merits of dispute, 169-170
mischief rule, 175-177
situations adopted in, 176-177
motivating information, and, 184
plain meaning rule, 171-173
disadvantages of, 173
prior and subsequent legislation, resort to, 180
purposive approach, 175-177
referential approach, 171-174
reluctance of judges to intrude, and, 183
remedy in relation to mischief, 185
restrictive attitude to, 182-183
schemes framed under statute, and, 178
stare decisis, and, 184-185
statutes in a continuum, 183
syllogistic reasoning, and, 168
travaux prèparatoires, 177-178
use of extrinsic material, 177-181
welfare legislation, and, 182-183
Stone, Julius, 9
Austin, on, 350
description of jurisprudence by, 4
pure theory of law, on, 370-371
realist movement, on, 448
Strict liability, 35
Subjection,
duty distinguished, 35-36

Tarde, M.,
custom, on, 187
Tay, Professor,
possession, on, 288-289
Theodosius,
authority of law, on, 76
Thibaut, 376
codification, on, 326-327
influence of, 377
Titoism, 409
Tort,
corporate liability, and, 257-258
duty-situation, and, 203-204
influence of social and individual values, 203-204
Trade unions, 211-213
personality of, 262-263
Transcendental idealism, 475-476
Treaty,
statutory interpretation, and, 179
Tübingen School, 429-430

Ulpian,
absolute power, on, 76
Ungoed-Thomas, J.,
statute, on, 88
Unincorporated associations, 262-264
Usages, 191-192
contract, and, 191-192

Vaihinger,
fiction, on, 318
Valentinian,
authority of law, on, 76
Value-judgment,
meaning of, 196
Values, 194-225
administrative convenience, 217
certainty, and, 213
consistency, and, 213-215
doctrines, and, 214-215
equality, 208-213. *See also* EQUALITY
fidelity to rules, and, 213-215
function of judges, and, 220
functioning of laws in society, and, 196-197
international comity, 217-219. *See also* INTERNATIONAL COMITY
judicial discretion, and, 195-196
judicial impersonality, and, 220-225. *See also* JUDICIAL IMPERSONALITY
life-blood of law, as, 219-220
meaning of, 196
morality, and, 215-217. *See also* MORALITY
national safety, 199-204. *See also* NATIONAL SAFETY
principal yardsticks, 197
principles, and, 214-215
relation between law and social setting, and, 219
rules, and, 214-215
sanctity of property, 198-199. *See also* SANCTITY OF PROPERTY
sanctity of the person, 197-198. *See also* SANCTITY OF THE PERSON
social safety, 199-204. *See also* SOCIAL SAFETY

Values—*continued*
social welfare, 204-208. *See also* SOCIAL WELFARE
totalitarianism, and, 220
traditions, and, 215
variation of meanings of legal concepts, and, 195
Verdross,
international law, on, 369
Vicarious liability,
'course of employment' doctrine, complexity of, 162
Volksgeist, 378-383
codification, and, 383
continuity of, 378-379
customary law, and, 381
expulsion of Roman law from Germany, and, 381-382
imitation, and, 381
individuals, and, 379-380
legislation, and, 382-383
limitations of idea, 382
limited influence of, 380
Roman law, and, 379
slavery, and, 381
struggle between conflicting interests, and, 381
unification of Germany, and, 381

Volksgeist—*continued*
use of law to change ideas, and, 380-381

Wade, Professor,
definition of 'statute', on, 95-96
parliamentary sovereignty, on, 94
Weimar Republic, 84
Welfare State, 67
West Germany,
Bonn Basic Law, 92
Wild, John, 487
tendencies, on, 487-488
Williams, Glanville,
law, on, 496
ownership, on, 297
Word-fetishism, 50
'Workers' rights', 43
Written constitution, 102-104
effectiveness of, 103
factors affecting success of, 103
'non-justicable Bill of Rights', and, 103-104
separation of powers, and, 102
Wurzel, 3

Year Books, 133
unreliability of, 133
Yugoslavia, 409