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Anthropological Jurisprudence

16.1 Introduction

One of Maine's great contributions was to prompt others to study the law of primitive societies, to see if they reflected his, or another, pattern of evolutionary development. Maine was only correct if study could show that primitive, static societies did in fact go through his first three stages of development, and then progressed no further. As we shall see, many of the studies that have followed have cast doubts upon Maine's sequence, but that does not deprive him of the achievement of being the first in a new and important field.

Maine was a forerunner of social jurisprudence, the historical and anthropological approach emphasising that law differs with different societies, and at different times gave an impetus to consideration of how society affects law, and what part law plays in society. Further, the pattern of development in the two fields bears an overall similarity. Early pioneers in the field, leading to studies often very much from a legal point of view overtaken by studies from a wider viewpoint and attempts to answer the general questions which caused the interest in the first place.

There are two points to bear in mind as we look briefly through the history and development of the anthropological school. Does looking at law in primitive societies help us to understand them? Perhaps, more important, does it help us to understand our own societies and to be better able to analyse properly our own concept of law?

Harris in *Legal Philosophies* identified two approaches to the study of primitive law. First, to study primitive society using conceptions of law derived from our own society. Secondly, to mould a conception of law broad enough to encompass the ways in which primitive peoples themselves see their own arrangements.

16.2 The anthropological school

No attempt will be made to cover all the writers, viewpoints and contributions of the school. Rather, an overview of major figures and the sequence of development will be attempted.

Maine and others

Maine and other early anthropologists in Germany and the USA were much influenced by the evolutionary fervour produced by Darwin's *Origin of Species*, and produced grand schemes of development of law, with different systems for different types of development (cf Durkheim, Chapter 12). While most researchers in the period immediately following Maine depended mainly on secondhand knowledge, not actually observing *in situ* themselves, two things were discovered of great importance. In even the simplest societies, regularities of behaviour could be observed, and yet often these societies had no visible means of enforcement. These discoveries open up the questions still central to legal anthropology; how does social control work in such societies? Do different forms of organisation and control go with certain stages of development or certain types of societies?

The basic answer of early researchers such as Rivers was that obedience to the regulations or customs was automatic and unthinking. Later anthropologists have criticised this conclusion. It seems at least strongly affected by ethnocentrism, ie a bias towards the forms and customs of one's own culture, in this case, our own English-type law, with courts, Parliament, statutes, etc. Ethnocentrism, for this author, means looking at the situation in primitive societies through the eyes of an Englishman, and attempting to recognise courts, rules, prisons, or their equivalents. Often, in these early and later times, a definition of law was chosen, in an attempt to categorise and arrange the material provided by the primitive societies.

Anthropology is not just about law, indeed law represents a very small part of anthropology. It should therefore be borne in mind that we are examining a relatively minor part of a very wide discipline.

The two approaches

Ethnocentrism was a great problem with early theorists, and has remained so since. It has two distorting effects. First, if we define law in order to decide which aspects of a society to study and write about, we will tend to distort those aspects by taking them out of context, ignoring their relationship to other normative material in that society; and second, when we try to fit the data into categories to explain it, we will again distort it, by arranging it in ways that suit us rather than the way it is used by and appears to the society itself.

An early example of this was Evans-Pritchard's study of the Nuer people; he said that they had no law because there was nothing to fit the definition of law as social

control through systematic application of force by society: no one had the authority to adjudicate. By looking for western institutions and concepts via that definition of law, Evans-Pritchard's view of the material was distorted.

Malinowski's study of Trobriand Islanders, *Crime and Custom in Savage Society*, was a major step forward. He studied the islanders by personal observation, so that his material was authentic; and he strongly criticised ethnocentric factors in earlier works. His own conclusions have themselves been criticised; from his studies, he concluded that the observable behaviour came about not automatically, but via continuous control mechanisms, especially the ever-present possibility of the withdrawal from reciprocal economic arrangements which were central to the islanders' livelihood. Such reciprocity he classified as the identifying characteristic of law.

Simon Roberts, in his introduction to legal anthropology, *Order and Dispute*, has identified two main approaches following Malinowski: law-centred studies inspired by western jurisprudence is one approach, and wider studies of order and dispute is the other.

The first approach

The law-centred studies are those which attempt to define law, and how the simpler societies fit into that picture. Obviously the criticisms of ethnocentrism already discussed could well apply. Apart from Malinowski's definition mentioned above, Bohannan sees laws as institutionalised customary norms (custom redefined in legal institutions), Gluckman sees laws as recognition by judges, Hoebel sees laws as coercive enforcement, and so on. It is proposed to examine these in more detail and then to draw a general conclusion.

Malinowski

In addition to the foregoing about Malinowski, it can here be added that while primitive communities generally do not have any specialist vocabulary which distinguishes legal from non-legal rules in the manner of the language of an advanced society, Malinowski in *Crime and Custom in Savage Society* sought to identify some crucial feature of primitive life by applying some distinguishing characteristic of law which for him was reciprocity. He identified the following characteristics:

1. Rules are felt and regarded as obligations and rightful claims.
2. Rules are sanctioned not by mere psychological motive but by a definite social machinery of binding force.
3. Social machinery is based upon mutual dependence and realised in the equivalent arrangement of reciprocal services.

Bohannan

Bohannan in *The Differing Realms of Law* (1965) has criticised Malinowski's approach as being too undiscriminating between customary norms as a whole and law in particular. He preferred to define law in terms of institutionalised customary norms. According to him law comes into being when customary, reciprocal obligations become further institutionalised in such a way that society continues to function on the basis of rules.

Thus, according to Bohannan, for law to work there must be:

1. a way of disengaging disputes from a particular institution and engaging them in a legal institution;
2. a framework for handling the dispute and coming to a decision;
3. a way of re-engaging it into a previous non-legal institution.

Bohannan maintains that this process of double institutionalisation explains why law is behind contemporary thought in society. The problem with this explanation is that there is no central focus in primitive society to facilitate this re-institutionalisation.

Gluckman

Gluckman in *The Judicial Process Among the Barotse of Northern Rhodesia* (1967) shows that it is obedience which is contemplated, not disobedience, in a society that rests on reciprocity but also possesses a mechanism to deal with disputes; such a society, he observed, had developed the 'reasonable man' test quite independently of the English judiciary. This assertion has given rise to much dispute and is discussed below. Gluckman's study identified the process of dispute resolution for the Barotse as involving:

1. reconciliation rather than ordering of sanctions;
2. sanctions, which will be applied only where reconciliation has failed or is not possible.

The obedience to the custom rested on the reciprocity of services.

Pospisil

Pospisil in *Anthropology of Law* suggests that primitive law is essentially a matter of degree which can be isolated by reference to a cluster of differentiating criteria among which he listed:

1. authority
2. universality
3. the sense of obligation
4. sanctions.

He did however focus on the disposal of disputes rather than behavioural guidance.

Hoebel

Hoebel in *The Law of Primitive Man* saw coercive enforcement as the sole badge of law. He observed that the more civilised man becomes, the greater his need for law. Law is but a response to social needs.

In another illuminating passage he stated that without a sense of community there is no law. Without law there cannot for long be a community.

Hoebel listed the four functions of law for primitive man as:

1. defining relationships amongst the members of society;
2. taming naked force and directing it to the maintenance of order;
3. the disposition of trouble cases;
4. the redefinition of relationships as the conditions of life change.

Harris finds this list more illuminating than those concentrating on the content or the institutions of primitive law. Hoebel criticises both Maine's and Hart's view of the static nature of primary rules (due to the absence of a secondary rule of change). In a customary society of the ideal type there would be no perceived tension between what is practised and what is thought to be right. Harris further observes that there would be no self conscious creation of rules. This is however an ideal type from which the real world differs.

It has been pointed out that if the community being studied does not distinguish law from other customary norms, then why should the observer? Barkun in *Law Without Sanctions* argues that our notion of law is too professionally orientated. In a manner similar to Ehrlich's living law approach, he sees law as a product of the society and does not confine it to the courtrooms.

The extent to which these studies are ethnocentric and thus flawed, varies. On the one hand can be put studies prepared for the practical purposes of informing western officials, who had the job of enforcing local customs and laws, what those laws were: these studies tended to be lists of laws in English type categories, and therefore very much subject to the second pitfall of ethnocentrism (distorting information by putting it in inappropriate western categories). On the other hand, even some studies which confined themselves to law and what were seen as legal institutions were of value and interest.

Malinowski studied why people followed the patterns of behaviour in the society studied; Gluckman and the Llewellyn-Hoebel study *The Cheyenne Way* looked at what happened to disputes and conflicts. From the latter, we can see that even primitive societies do alter the law (as a result of disputes); Gluckman's study of the Barotse in Northern Rhodesia explored how rules actually affected decision making.

In considering language Bohannan maintains that one cannot juxtapose one language to another; since there is no possibility of true translation this would have the effect of negating the use of language. Bohannan denies the possibility of cross-cultural knowledge and in order to reinforce this descends into the pessimism of infinite relativism. Bohannan then speaks of the use of a folk system relying heavily on the use of folk terminology. Gluckman developed an analytical model in an

attempt to avoid stagnation, to engage in comparative studies and educate against ethnocentrism. In doing so Gluckman may have been presumptive in that his descriptions are not total (is it possible to have total descriptions?) and that therefore his analysis is engaged too early. Further, his description stage suffers from the problem of ethnocentrism as in the eyes of the describer rests the description. This can be represented on the following diagrammatic representation of Gluckman's analytical model.

The second approach

If a wider approach is taken to avoid the danger of ethnocentrism created by using a definition of law (which danger does not always, as we have seen, actually occur), a similar problem is reached. Some boundary to our study must be set: if we are not imposing our own limited view of law, we must still decide which features of the simple societies we want to study. Roberts suggests that the best framework is to look at order – the way order is preserved in society; and disputes – how disputes are considered and solved. Freed from the corrupting influence of our ideas and rules, courts and coercion, a more complete and correct picture of primitive societies can be acquired, without distortion.

Studies following this wider approach have found wide variety between societies. Various factors push them into considering the processes of the society and how they affect the individual and how he views them; particularly, disputes are seen as a necessary part of society, and are considered from a longer-term perspective: attempts to compromise, various forms of outside intevention, and how the society returns to normal. In some societies, discussion is not used to settle disputes and force is!

These wider studies enable better perspectives to be gained, and ultimately answer the questions of how societies are controlled, and whether different legal mechanisms and organisations are present in different societies.

16.3 Evaluation

The outline of anthropological thought related to law given above is sketchy and brief, but raises interesting topics. The two approaches are complementary. The wider based studies of dispute processes, particularly in societies without institutions and formal rules, introduces an element missed by narrower attempts to study the law and legal system – even those that manage to avoid the dangers of parochialism. It is interesting to ask whether more is learnt about primitive societies or about our own by the various writings. While much can be learned about the societies themselves, a lot can also be learned about ourselves. The wider perspective enables us to see that law is not unique, and that our type of legal system is far from being so. Primitive societies with their wide variety of methods show us that courts and strict laws are not the only, or even the best, way to control society and deal with

disputes. Above all, perhaps the importance of negotiation and conciliation found in many studies contains a lesson we could certainly benefit from.

Although there is also a wide variety of content of laws in primitive societies, it does seem clear that something like Hart's minimum content of natural law is a universal feature.

Findings such as Llewellyn's and Hoebel's (that the Cheyenne did create new rules) and the decreasing attention paid to evolution, have led to Maine's actual conclusions not now being accepted. The continuing vitality of the anthropological approach remains as a monument to his innovative work.

One of the main difficulties with anthropological studies is the tendency that they have towards ethnocentricity. This involves the study of others through concepts developed by ourselves. On the other hand, it could be said that on the micro level at least, phenomena of our society also occur in primitive societies. In primitive society the study of these common phenomena may be more simple since they are less likely to be complicated and obscured by the complexities of an advanced industrial society. This view looks to the study of primitive society as if it were a laboratory for the understanding of our own society. The validity of this approach in itself is highly suspect.

Even if this laboratory thesis is accepted, then the anthropologist will still have to develop a mechanism for the avoidance of the tendency towards ethnocentrism by which the scientist will largely invalidate his study, as he takes law out of its context and arranges his observations according to preconceived yet inapplicable notions. Malinowski attempted to get around this defect in his study *Crime and Custom in Savage Society*. Perhaps the only effective way is through the avoidance of translation! In his study of the Barotse of Northern Rhodesia (now Zambia), Max Gluckman came across the notion of the reasonable man which he observed was employed in the same way as in our courts to arrive at an objective test by which to assess the conduct of the defendant. Bohannan isolated the problem as being one of language, hence the point above about translations. He claimed that Gluckman analysed the Barotse according to the doctrines of the common law which is clearly not applicable to them. Bohannan insists that if there is to be any potential for anthropology truly to understand any tribe then it must use tribal terms and not western concepts.

Although Durkheim tried to draw a distinction between mechanical solidarity and organic solidarity type societies, it has to be observed that western industrial society has both restitutive and repressive laws and that both of these are expanding. That fact does not necessarily defeat the usefulness of Durkheim's model in helping us to understand the difference between the two types of laws, but the conclusion drawn by Durkheim has been proved wrong.

If the models used in the anthropological method from primitive societies are applied to advanced post industrial society then that exercise may well enhance our understanding of our own society through sociological inquiry. It is my view, though, that the conclusions reached in the anthropological studies are inapplicable

to our own society so far as the institution of law is concerned and I take it that that must be the prime area of interest of the jurisprudence student. In *The Law of Primitive Man* Hoebel has said that the more civilised man becomes, the greater his need for law: law is but a response to social needs. He thought that the institution of law was a necessity. He observed that without a sense of community there is no law and that without law there cannot for long be a community. The Andaman Islanders (in the Indian Ocean) have no suprafamilial authority. There social control is exercised by and within the family. However, in our society the individual is independent of both the family and the clan. Such a mechanism as is applied in the Andaman Islands would be inadequate here.

Anthropological studies can show us that conclusions that are relevant to primitive societies are not relevant in our advanced society. Felsteiner's study, *Influences of Social Organisation and Dispute Processing*, shows that the form of dispute settlement flows from the social organisation. He distinguished between TCRS (technologically complex, rich society) and TSPS (technologically simple, poor society) and observes that cross comparisons between these are of very limited value. Von Savigny had a point in this regard when he noted that each society develops the law it needs and that indeed law is a reflection of the particularities of each society (the *Volksgeist*).

Anthropological studies do have certain advantages not least of which is that they provide us with an understanding of law in societies other than our own. Certain heuristic devices have also been developed through anthropological studies and these may well be useful models for a study of law in our own society. At the micro level anthropological studies have pointed to the working of some aspects of our own society. Gluckman's model of testing not only cases, which undergo a transformation when taken to court, but also looking at rules and praxis (the way people act under the law) does not however explain the purpose of law, but is useful as far as it goes.

Take for example Gulliver's negotiation and adjudication models where he observed that in adjudication the dispute is settled on a zero/sum basis where one party wins and the other loses, whereas in negotiation the dispute is settled on a mini/max principle where both parties minimise their loss and maximise their gain. Perhaps in industrial relations (and in particular the fiasco surrounding the Industrial Relations Act 1971) where the relationship is one of reciprocity a lesson might have been learnt from anthropological studies that in such circumstances adjudication is not an appropriate mechanism for dispute resolution and preference should be given to negotiation. The industrial relations court had an impossible task, not because of the law, but because of the nature of the reciprocal relationship that the law was attempting to regulate in a compulsory adjudicatory method.

Rather than focus considerable attention and resources on anthropological studies it would be preferable to pay greater attention to sociological inquiry into our own society from the point of view of the needs of the jurisprudence student. In particular one would look for an inquiry into the nature of our state; the form and function of law; the source, distribution and location of power in our society and the

study of conflict in our society. Admittedly, these are rather parochial issues; however they represent a view that although lessons can be drawn from primitive societies such as that coercive law is not always the best dispute resolution technique, these lessons are already drawn and these anthropological studies merely cloak a conclusion in a robe of authority. Our society had already invented tribunals long before Nader told us that they were a good way of resolving certain disputes.

17

The Origins of Marxism and Its Application in Real Societies

17.1 Introduction

To identify the genuine Marxist attitude towards law is a difficult task. The writings of Marx and Engels have spawned as much diversity and factionalism as the Bible. The Marxist approach might, however, be summed up as being centred on a particular notion that society and history are governed largely by economic and material factors.

In common with other nineteenth century theories based upon social analysis, Marx's own views on law denied that it was autonomous or objectively separated from society. Law follows and reflects the material forces of society to an extent that he views ideas of legal objectivity as simply legal fetishism. For this reason, a brief account of the Marxist theory is needed as a background to understanding Marxist jurisprudence.

17.2 The Hegelian dialectic

Marx's and Engels' philosophy was based on the insights of Hegel who viewed all aspects of civilisation, including law, as having a defined place in the progress of the human mind towards freedom. He used as his model of historical progress the concept of the dialectic. The dialectic theorises that progress is a result of conflicting forces, in Hegel's theory, ideas. The clash of contradictory thesis and antithesis results in a sort of compromise called the synthesis. The synthesis is reacted to by another antithetical idea resulting in another synthesis. Thus, through the process of conflict society progresses towards the truth.

Marx was a law student and initially influenced by the German Historical School, although he moved towards the Hegelian left. The influence of Hess is apparent, who viewed law and morality as disposable when people are freed from their lack or self-awareness. Under the influence of Fuerbach, Marx adopted the view that Hegel had made a mistake in viewing the dialectic as one of ideas; instead ideas were the product of social life and as such the dialectic of history was one of social conflict.

Thus, Marx's dialectic materialism sees history as conflict resulting in a synthesis. Ideas are the awareness of the social situation and as such are a result of social conflict. Social conflict arises from economic differences; thus ideas, including law, are predominantly expressions of the economic conflict in society.

The processes of history see the development of feudalism, which historically resolves itself by dialectic means into capitalism. In feudal times the feudal lords dominated the means of production, land, and were therefore in conflict with serfdom. The development of better means of production results in a shift towards capitalism, where the bourgeoisie, owning the means of production, dominate the working class, the proletariat. Ultimately, this conflict will result in revolution of a violent or non-violent kind that will cause the overthrow of the bourgeoisie and bring about the dictatorship of the proletariat. Thus, the means of production will be returned to the people who produce, resulting in the eradication of repression and a communist state, where neither state nor law will be necessary.

Since ideas are reflections of social conflict, they are incomplete and partisan. Law is simply an aspect of these false ideas or ideology. The makers of law, as with other ideas, are subliminally influenced by social conflict. As a result law rides on the processes of historical materialism.

17.3 Law as superstructure

Marxism sees society divided into base and superstructure. The base is the actual relations between people involved in production, the economic structure of society. The dominant class in a society is the class that is the exploiter in these economic relationships. Superstructure represents:

1. A reflection of these relationships in legal and political forms.
2. The dominant class view of the world.
3. The development of awareness of social conflict, resulting in a critique of the above.

Law represents a mirror of inequalities in society, often obscured by the ruling classes' presentation of it as impartial and detached. Thus, Marx speaks of the laws of contract. They seem as if there is an equality of bargaining power. However, the reality of relations of production is that the employer is more equal than the employee. The judge may believe that he is working with objective categories, but they are simply the product of the economic forces. Thus, law is false consciousness.

Consequently, we can expect that in feudal society, where the emphasis is on the retention of land, that this will be the role of law. Equally, in capitalist society, commercial relationships will be much of the concern of law. This view is the crude materialist approach. However, Marx and, to a greater extent, Engels, concede that other factors influence the base, such as tradition, which will be reflected in superstructural institutions such as law. Thus, the material and economic forces are the ultimate, rather than the only, determining factors in the progress of laws.

17.4 Law as ideology

Marx and Engels view opinions and beliefs about law as ideology. By this they mean, as Kolakowski puts it, false consciousness or an obfuscated mental process in which men do not understand the forces that actually guide their thinking, but imagine it to be governed by logic and intellectual influences. Ideology might be the product of the dominant class, who are normally, by virtue of their opportunities, the dominant intellectual class. Thus, Victorian morality might be one classic example of ideology. Equally, the commonly held views about the nature of the world are likely to be ideology, since these will normally be warped by a lack of awareness of social conflict. The broader contributions of the arts and sciences would to a certain extent fall into this category.

17.5 The tension between material forces and ideology

There is, to a certain extent, a contradiction between the influence of economic forces and the false nature of legal ideology. Engels brought this contradiction out in his letter to Conrad Schmidt:

> 'The determining element in history is, in the last resort, the production and reproduction of real life. More than this neither Marx nor I have ever asserted. If therefore someone twists this into the statement that the economic element is the only determining one, he transforms it into a[n] absurd phrase. The economic situation is the basis but the various elements of the superstructure ... constitutions ... forms of law, and even the reflexes of

> all these actual struggles in the brains of the combatants: political, legal, philosophical theories ... and their further development into systems of dogma, all these exercise their influence on the course of historical struggles ...'

Thus, law can itself exert influence on the base in three ways:

1. Law has a crystallising effect that maintains traditions, customs and religious conceptions. These are restrictive on the achievement of awareness of class struggles and as such hold up the inevitable processes of history.
2. The more antagonistic the forces in society, the more law seeks to achieve a compromise of conflicting interests.
3. The demystification of law has a critical effect on raising class consciousness necessary for revolution.

Marx was not unaware that he himself was contributing to ideology and that his terms were quite frequently like those used by a feudal jurist.

Thus, by the end of Marx's life, Engels commented: 'We, the revolutionaries, the rebels, are thriving far better on legal methods than on illegal methods and revolt.'

However, although Marx and Engels see law as having a relative degree of autonomy, they scarcely give a definition of law, rather seeing it as an ideological cloak that hides the truth about social conflict either by compromise or conservatism and an aspect of state control. The Marxist perspective of law is dependent on the Marxist conception of the state.

17.6 The state

Marx writes that the state acts as an intermediary in the foundation of all communal institutions and gives them political form. Hence there is an illusion that law is based on will, that is on will divorced from its real basis, free will. The state is thus an illusionary community serving as a screen for the real struggles waged by classes against each other. It is political in character and an instrument by which the real relationships in society can be controlled, either by the ruling class or on their behalf. Because the state arose from the need to hold class antagonisms in check, but because it arose, at the same time, amid the conflict of these classes, it is, as a rule, the state of the most powerful, economically dominant class, which through the medium of the state, becomes also politically dominant, and thus acquires new means of holding down and exploiting the oppressed class. So says Engels in *The Origins of the Family*, prompting the notion that the state, and its means, including law, are instruments of class oppression.

However, where the struggle within society is strong, there may be a need to allow the state autonomy. Thus, the ruling class may, as was the case after the *coup d'état* of Louis Napoleon, place the apparatus of state in the hands of an autonomous bureaucracy. The state is nonetheless a means of coercion and therefore alienates people and is alienated from people.

In summary therefore:

1. The state is a means for furthering economic domination.
2. The state acts to mediate in class tensions, maintaining the inequalities in society.
3. The state takes on a more or less autonomous role, depending on the relative strengths of classes in conflict in society.
4. The state is thus a means by which people are prevented from achieving genuine freedom.

In his earlier writings, Marx expresses his views on bureaucracy:

> '... wherever the bureaucracy is a principle of its own, where the general interest of the state becomes a separate, independent and actual interest, there the bureaucracy will be opposed [to the cause of the citizen]'.

17.7 The withering away of the state

The state and its instruments, such as the judiciary, is in Marxist theory, doomed by the dialectics of history. The state is a particular manifestation of the oppression of the ruling class. The ultimate overthrow of the ruling classes by the proletariat might employ the state as an instrument for bringing about total awareness, under the dictatorship of the proletariat. Lenin was to transform this idea when his time approached to apply Marxism. Ironically, Marx claimed not to be a Marxist since Marxism was to be applied revolutionary theory. He was perhaps wise so to distance himself.

17.8 The emergence of dichotomy

Marx's and Engels' philosophical theory was one open to multiple interpretations. Before we turn our attention to the main current of Russian Marxism, it is interesting to see how Marx's ideas had affected both believers and non-believers.

Kelsen, in *Sozialismus und Staat,* criticises Marxism on the basis of its Utopian view that the state could be abolished, since law will be necessary until such time as humans are transformed into angels. In response, Adler, an Austro-Marxist, simply asserts that this is exactly what Marxism entails. It is this aspect of the Romantic ideal in Marxism that is perhaps abandoned in Leninism.

Lenin was faced with the practical problem of applying Marxism. For a while he had been in sympathy with the social democracy characteristic of people such as Kautsky, which advocated universal suffrage. However, certain conclusions became apparent to him, as Kolakowski points out:

If law, for instance, is nothing but a weapon in the class struggle, it naturally follows that there is no essential difference between the rule of law and an arbitrary dictatorship. (When his adversaries were able to point out that he was in conflict

with something Marx had actually said, for example, that dictatorship did not mean arbitrary despotism, they were proving Marx's own inconsistency rather than Lenin's unorthodoxy).

Lenin thus began to see the state and laws as means to ends, as instruments of the struggle for freedom. This contrasts with Marx, who saw the ends as predetermined by economics.

The dichotomy mentioned in the heading was thus between those who advocated the gradual reform of capitalism and the utilisation of the legacy of the bourgeois state, and the pragmatists, exemplified by Lenin.

17.9 Lenin's theoretical contribution

Lenin's ideal was a pure democracy, at first conditioned by coercion, but ultimately achieved without restraint. Equal pay and elected officials feature in his Utopian view in *Materials Relating to the Revision of the Party Programme*. The party would be the educating force, bringing the oppressed the self-awareness that would prompt the arrival of the socialist state. This would necessitate a transitional proletarian state. However, it is his approach to law that concerns us. In the proletarian state the judiciary would be elected by the workers. However, Lenin's theoretical attitude to law was already less than Utopian from my bourgeois point of view.

Lenin had the following attitudes to law, which were built upon after the Russian revolution:

1. Categories such as freedom and human value were to be qualified by the question of what class they serve. Thus, bourgeois freedom is a tool of the bourgeois class struggle.
2. International law is not a matter of concern. Lenin would cite Clausewitz that war is simply the continuation of politics in another form.
3. Democracy and its institutions are simply the legal expression of class conflict. In the light of this, the bourgeois state should be smashed immediately to be replaced by the proletarian state that would wither away.
4. The proletarian state is necessary to remove the traces of bourgeois values and as such democracy can only come about when capitalism has been eradicated by the dictatorship of the proletariat. In *The Victory of the Cadets and the Tasks of the Workers' Party* he states, 'Dictatorship means unlimited power, based on force, not on law.' He frequently reiterated this view.
5. The blueprint of this was found in his 1918 party programme:

   Abolition of parliamentarianism (as the separation of legislative from executive activity); union of legislative and executive state activity. Fusion of administration with legislation.
6. In a letter to Kursky after the revolution, Lenin wrote that the courts must not ban terror but must formulate the motives underlying it, and legalise it as a principle.

These principles were carried into action in the Russian revolution. This reformulation of Marxism might best be termed Marxist-Leninism. This doctrine of law was transmitted to Stalin when Lenin died. It is interesting to note that the official support for Marxist-Leninism was only withdrawn in 1991.

17.10 Pashukanis

Pashukanis was the head of the department of legal studies in the Soviet Communist Academy. His *General Theory of Law and Marxism* is thought to be representative of the legal theory of the Thirties. He argues that, not only the content of legal norms, but the form of them, are intrinsically linked to fetishist commodity relations. Law was created, therefore, as an instrument of trade that was extended to personal and other relationships. Legal relationships reduce humans to abstract juridical categories, according to Pashukanis. The continued existence of law in the USSR was, thus, a sign that the society was still in a transitory stage.

A similar approach is taken by Stuchka, who suggests that law is the weapon of class struggle and as such is necessary to fight hostile forces and saboteurs. Stuchka was a member of the Cheka, the Soviet secret police. The task of the Cheka was to fight against the forces that sought to overthrow the proletarian state. To further this end, Lenin had proposed an amendment to the criminal code which permitted draconian punishment for anyone whose statements might objectively serve anti-revolutionary forces. Ultimately, such a law is a strict liability catch-all! Such approaches became the norm under Stalin whose contribution to Marxism was the adding of numbers to a manual on the Marxist ideology and reducing the numbers of Soviet citizens by millions, which was termed socialist legality.

17.11 Post-Stalin

Until the 1990s, the Soviet government had not lost sight of the revolution and future communist state. They saw the Soviet Union as an all-people's state, and no longer a workers' state: the internal enemies of the workers are sufficiently under control for the state to be considered classless. The concept of a classless state, even an all-people's classless state, does, however, run counter to the strict reading of Marx (the state comes from class division and inequality). Similarly, there is no justification in Marx for the developed socialist society once claimed in the USSR as a necessary step on the road to communism.

Clearly, a communist state has not arrived in the USSR, and law has not withered away even to the extent foretold by Lenin and Engels. The state remains important; so does law. The Soviets have given many reasons for the continued existence of the state and law. These may be summarised as follows:

1. Capitalist encirclement where there is an external physical threat. This was relied on by Lenin and Vyshinsky. The immediate post revolution experience of the USSR and the Nazi invasion lend force to this.
2. Law is an important lever in establishing the foundations upon which communism will be built. This is a notion developed by the rather more sophisticated theorists Ioffe and Shargorodskii and represents a considerable development from beliefs existing at the time of Stalin.
3. Law is a necessary ideological tool enabling re-education of the masses who have been exposed to ideology
4. Parental law, as it was known in the Soviet Union, allowed for the inculcation of communist morality. There is lots of propaganda ensuring citizens are aware of the law, the aim being an internalisation process (cf Olivecrona), the law inculcating the dictates of communist morality. As Lloyd and Freeman point out, the legal process itself has an educational role. Courts go out to the provinces, and there is considerable lay participation. A question which arises here is why is there still a need for this seventy years after the revolution?
5. A more sophisticated and longer lasting explanation war that law is necessary for the administration of a complex society and the central planning of the economy.
6. Because the process spoken of by Marx of the spread of the revolution has not taken place, the USSR maintain that they require the state and law to act as a defence against any reassertion of bourgeois materialism.

17.12 Alternative schools of Marxism

Whether the Soviet experience was applied Marxism or simply a totalitarian empire that adopted an ideology that suited it, is a matter of hot debate. The virtual collapse of the Soviet empire has shown that, as with the failure of revolution to materialise in the West, the predictions of the Soviet ideologues were to prove to be unfounded. We shall discuss the effects of these changes in the next Chapter.

However, independently of the Soviet development, Marxism was and still continues to be an important analytical framework. It is worthwhile addressing some of the alternative conceptions of Marxism. This we shall do in the next Chapter, since the Marxist trends that have developed in capitalist societies have been of use as critical, rather than political tools. It has been suggested by Lloyd and Freeman that it is possible to use the Marxist attitude towards law as a jurisprudential guide, without necessarily accepting the predictive aspects of the theory. It is submitted that in the light of recent developments, this is possibly the most useful way in which we can employ the Marxist perspective of law and state.

18

Contemporary Marxism

18.1 The failure of applied Marxism

It may well be argued that Marxism, like God, is dead. However, like religion, Marxism claims considerable intellectual support. The experience of Marxism would seem to refute the intellectual adherence to the idea. In Eastern Europe the communist state has withered away in a manner not anticipated by Marx. In China, the crude Maoist Marxist theory is becoming diluted by capitalist reforms, while the recent experience of Ethiopia suggests that the Marxist state is not the reforming success anticipated even in the third world. However, it is easy for Marxists to argue that this is not real Marxism, but the adoption of a label in order to sanction a different political regime. There are certainly contradictions, as witnessed by the Soviet experience.

Ideology and economy

Lenin differed from Marx in his belief that political power, rather than economic forces, could influence the coming of a socialist society. As a result, it might be suggested, the Russian revolution may not have been the outcome of the inevitable forces of materialist history, but an ideological coup. This argument would suggest that Russia was seeking to run before it could walk. Certainly, most Marxist states have developed in societies throwing off feudal or colonial power, rather than capitalist orders. However, Marx was aware in later life that Russia was a likely place for a communist revolution. Ideology, rather than historical materialism, was the dominant force behind most of these revolutions.

The Leninist-Marxism of the Soviet Union further subverted the laws of history by restraining the development of production by centralised planning and under-investment. Much of the means of production in Soviet society has remained the same as it was in the distant past. Such restraint on technology is, to a certain extent, to restrain one of the essential elements in the evolutionary process of history according to Marx. However, it might also be said that the progress of society towards socialism will never happen because the constant advance of means of production through technology means that surplus capital will always be accrued. Thus, if a person in an unregulated socialist society invented a new way of manufacturing food more cheaply, and using less labour, he would exploit this and recreate capitalism. The only reason why Marx does not envisage this happening is because he believes that in a post-capitalist state everyone would act in harmony according to the maxim from each according to his means; to each according to his needs. It must be submitted that this Romanticism is not an accurate reflection of human nature as it is now.

The proletarian revolution

Marx believed that it was only when the proletariat became aware, that the revolution would take place. However, the Soviet revolution happened before such awareness came about. It may even be suggested that such an awareness is not necessarily a feature of historical development into communism. The anti-communist revolution, although spearheaded by intellectuals, such as Havel in Czechoslovakia, is largely a proletarian one.

The development of a bureaucratic caste in Russia was a predictable part of the retention of the state structure. Lenin was aware of this himself, as was Stalin. However, their solution was the imposition of more bureaucracy. It may be submitted that, on the death of Stalin, there was a complete bureaucratic takeover and the subsequent legal reforms and limited rule of law were merely to protect their interests. As we saw in the last Chapter, Marx was well aware that the bureaucratisation of a state adds to, rather than detracts from, conflict in the state.

The Soviet state

Lenin's concept of the proletarian state which protects its own interests is in Marxist thinking inevitably self-perpetuating, particularly when bureaucratised. The identification of the real proletariat with the state is a feature reminiscent of the adoption of natural law theories such as divine right, to sanction older totalitarian regimes. Stalin stated that he was, himself, the proletariat. Furthermore, he believed that the proletariat in Russia were too uneducated to produce their own ideas, but would simply emulate capitalist ideology. Consequently, the state justified its existence as being the conscience of the proletariat, until such time as they became aware, yet intellectual autonomy was prevented, thus stopping the proletariat from

developing this awareness. This inevitably became the justification for the continuation of the state.

It is interesting to note that Marx, in his early critique of the German press laws, asserted that censorship can never be in the interest of the state, since it is thereby blinded to the conflicts that threaten it. It may be contended that this prediction was accurate with regard to the Soviet empire.

A further observation is that the state in Hegelian views tends to get stronger with the forces of history. Hegelianism was the foundation of fascist theories of law and state. It may be that the Hegelian notion of the laws of history is a more accurate prediction than the Marxist one. However, the Marxist experience seems to confirm that the state is an alienating feature that falsifies production relations and increases conflict.

The Italian Marxist Gramsci directed this criticism equally at Marxist and fascist states:

> 'It is regressive when it aims at restraining the living forces of history and maintaining outdated anti-historical legality that has become a mere empty shell ... when the party is progressive it functions democratically ... when it is regressive it functions bureaucratically (in the sense of bureaucratic centralism). In the latter case the party is merely an executive, not a deliberating body ...'

Gramsci rejected the scientific socialism of Lenin, which advocates the indoctrination of the proletariat with the correct doctrine. He saw this as anti-historical and anti-democratic.

International order

It is submitted by many Marxists such as Renner that the worldwide, or even national, revolutions expected by Marx were averted by the effect of colonialism. The modern world is viewed in terms of global, rather than national, economic forces. Even in the post-colonialist world, we still benefit from the effects of economic colonialism, which increases surplus in capitalist societies, thus funding the reform of capitalism.

The Soviet Union as an element in the economic world was, in economic terms, doomed since it continued to have to compete in global economic markets for commodities that were necessary.

The change in necessary commodities

In Marx's time technology promised to be able to deliver the answer to people's basic needs: that of health, housing, food etc. However, technology has the remarkable side-effect of creating new needs. The utilisation of technology for need functions such as communications, transport, domestic efficiency, creates demand for televisions, cars, washing machines, etc, which in the modern world are viewed as necessities. Needs can therefore be seen, in the technological age, to increase at an

ever greater rate than means. Thus, the producers' wares are always insufficient to satisfy demand. I feel it is the development of technology that inevitably falsifies the means-needs beliefs of Marxism. If technology can supply a commodity, then it is no good saying that you do not need this, since this is viewed as economic oppression. The consumerist aspirations of those in communist society, as much as the urge for free thought and democracy, must be seen as an important factor in the decline of communism in the Eastern bloc.

18.2 The implications for law of Marxist-Leninist contradictions

1. In the absence of human perfection, law is necessary for the purposes of ensuring the distribution of commodities according to needs.
2. It seems fairly obvious, even from the British point of view, that administrative and executive action requires internal objective regulation and has a tendency towards bureaucracy. Rules are necessary if any kind of normatisation is required, including scientific socialism.
3. Stalin and Lenin thought that social coherence will progress largely from political domination through scientific socialism. The socialist legality of scientific socialism inevitably assumes the continued existence of social diversity and may be said to perpetuate social conflict. Part of the inevitable definition of law is that, as Kelsen pointed out, people do not always obey it. Therefore the claim to have achieved an all-people's state accepts the necessity of continued legal control to achieve socialism.
4. According to Marx the state does not wither away because of ideologies, but as a result of economic forces and the real relations in the base. Thus, the idea that law may be used to stimulate the withering away of law, which is at the heart of scientific socialism, is an obvious self-contradiction.
5. It is clear from the Soviet experience that social deviance is not necessarily a feature of class conflict, but may be related to other social phenomena.

18.3 The failure of the revolution to materialise in capitalist countries

What is particularly damning about Marx's predictions is the failure of revolution to take place in developed capitalist countries. As a result, it is asserted by some Marxists that the reform of capitalism is to be blamed. However, the reform of capitalism may be seen as stemming from a duality of forces. On the one hand, capitalist forces are viewed as bribing the proletariat with reform in order to retain their economic dominance. On the other, some Marxists and socialists have seen the reform of capitalism as the way in which socialism may be brought about. As such, Marxist conceptions have crept into the everyday language of capitalism. We need

only to hear the language of current English conservatism to realise that the classless society on the basis of minimising state intervention in economic affairs appeals equally to Marxist ideology and to capitalist *laissez-faire* philosophy. This is, obviously, not to suppose that the Conservative Party are Marxists, but that class conflict and economic oppression are still considered to be real issues. Ironically, socialism seems to advocate the increased use of legal intervention in modern democratic society. It may be suggested that the democratic reforms which enfranchised the working class have instigated a weak instrumentalism in the proletarian use of law.

As a result, there seems to be some point in a continued evaluation of law in the light of Marxist jurisprudence.

18.4 Modernised Marxist conceptions of law

Historical influences on modern Marxist criminology

While Engels saw crime as a result of the demoralising effect of the condition of the poor, Marx was also aware of the parasitic lumpen proletariat that are the criminalised class. A consistent criminology was not, however, a feature of early Marxist thought. Nonetheless, the sociological evaluation of law tended towards an analysis of the correlation between crime and social conditions. Additionally, the feature of social alienation due to economic disparities is to be found stressed in some sociological studies. Consequently, in the last twenty years there has been more interest in Marxist thinking and its application to crime. As a result there has been a rediscovery of non-orthodox Marxist jurisprudence of which the following are influential examples:

Karl Renner, a Marxist, yet also a noted Austrian statesman, began to emphasise the way in which law could be useful in the manipulation of material conditions. His *Institutions of Private Law and Their Social Functions* affirmed that law could mould the social conditions of a society. Renner emphasises that the relationships between law and economy are subtle ones. He views the base-structure distinction as a metaphorical one that illustrates the division in society.

The Frankfurt School of critical theory used Marxism as an analytical tool, but incorporated philosophical and psychological learning in their search for understanding.

Horkenheimer, in *Studies on Authority and the Family*, introduced the conception that law and other political institutions increased in importance as socialising or normatising as parental authority is transferred or declines. All the contributors to this study saw social relationships as being bureaucratised, while individuals were increasingly controlled by law. This was the result of the effect of mass media and other technocratic controls, which sought to create a false culture among the mass of society, using utilitarianism and pragmatism. People were being turned into consumer robots.

Of particular interest to criminologists are the methods of Adorno, who used empirical methods to understand what factors contribute to the obedience of some individuals to authority and what creates deviance.

Similarly, Fromm's post-Freudian analysis of society and the urge for social order is an interesting one. Capitalism liberates creative forces and gives men the awareness of their individual dignity and responsibility. However, they also become aware of the competing and conflicting human interests. As Kolakowski describes his theory:

> 'Personal initiative has become the decisive factor in life, but increased importance also becomes attached to aggression and exploitation. The sum total of loneliness and isolation has grown beyond measure, while social conditions cause people to treat one another as things and not persons.

Fromm's conclusion is that, to coin a phrase, 'All you need is love'. It might be argued that Fromm over-emphasises the humanist tendencies in Marx's writings; however his views are nonetheless influential in understanding social deviance.

The Frankfurt School consisted of other, very interesting thinkers such as Marcuse. However, the relevance of these is limited for our present purposes. The publication of their journal had a considerable effect in 1960. Its criticisms of institutional values and its emphasis on a revolution of minorities, together with cultural reform and mental reflection were imported into America as a result of the war and have had a considerable effect on both society and the interpretation of society.

Modern Marxist theory of law and state

The new criminology

The approaches of social scientists investigating the nature of crime was beginning to be questioned in the 1960s. The Marxism of the above thinkers led Marxists such as Quinney to view some elements of crime as being proto-rebellion against falsified values. The radical movement that asserted the rights of gypsies, homosexuals, drug-users and so forth required an understanding of the relationship between criminality and the state value system. Thus, Taylor, Walton and Young, in *The New Criminology*, called for a fully social theory of deviance that would demonstrate that criminality was politically, economically and socially induced by material forces. They identified the relationships between law and the means of production as follows:

English civil law is largely centred around the three concepts of:

1. property;
2. rights of possession;
3. contractual obligation.

All these things favour the accumulation and retention of capital.

The criminal law has a preoccupation with property crimes, such as theft, criminal damage etc. The concept of equal treatment before the law means that the existing economic distribution is maintained. This is precisely the Marxist thesis.

However, it has been pointed out by some that the law also protects, to a greater or lesser extent, the working class from having their meagre resources taken by the rich. However, the economic relationship with law is thus tenuously established. The view that the law is somehow impartial and separated from economic forces becomes less tenable. However, this does not exclude the moral element involved in the making of criminal law. This view is rather too simple.

One application of Marxist theory is the suggestion that crime is largely the domain of surplus populations that have no real role in the means and relations of production – the unemployed and unemployable. This lumpen proletariat certainly exists in modern society and is the source of much crime. However, it does not account for the violence of the so-called lager-lout of the mid-1980s, who, rather than being poor and unemployed, tended to be well-paid working class, falsifying the demoralisation as well as the lumpen proletariat thesis.

The function of a capitalist state

Hall and Scraton argue that in modern democracies, the state is viewed as being bound by the will of the people, but urge us to look at what the state does. Their argument is more complex:

The principal purposes of the state are economic ones.

The capitalist state is as its label implies capitalist, that is, committed to individuals being able to make profits if they have the means to. It lives on the extracted surplus of these profits and its health and importance is measured by the production of the country.

Therefore it employs law which will help in the maintenance of this system.

Consequently, employee share participation on the small scale that we see in current English society represents an incentive towards better productivity. Education models the new minds necessary for modern production techniques. Even unionisation allows for easy collective bargaining and normatised protest.

This view is sustainable without any implication of conspiracy. It differs from the Marxist conception of law as purely an economic reflection of the present, but is compatible with the view that law, state and economic activity act in concert to a certain degree. This view is somewhat at odds with the crude class instrumentalism of Quinney who views law as simply the weapon of the ruling class.

With more subtlety, Miliband argues that the majority of those in judicial positions are of a particular class and inclined towards their own cultural views. This is true, as the profession itself accepts, although the judiciary do have remarkably broad minds considering their backgrounds! However, there is an institutionalised distinction to be found in a system that sends a lawyer who has embezzled client funds to an open prison and a person who steals a car to a more secure one. Presumably the latter is more likely to escape!

The structuralist approach

For Poulantzas, the law and state are the mediators that legitimise existing relationships within society, although not all of them. Thus, dominant economic classes can claim that the law is concerned with the general interest. Contrary to being synonymous with classes, the law treats, according to Poulantzas, everyone as an individual of equal status, thereby blinding us to the economic domination of a class of people. Thus, legal concepts such as citizenship, equality before the law and rights amount to an isolation effect by which people become unaware of the minority that own the majority. However, it might be pointed out that this does not account for the existence of the welfare rights that protect the less fortunate sections of the population. Poulantzas' structuralist approach is therefore limited.

18.5 A critical evaluation of main Marxist conceptions

Marx himself argued that every movement is a product of its own time. Questions have been raised as to whether the same can legitimately be said of Marxism. Was the theory a product of its time?

In his analysis of capitalism in crisis Marx identified certain important issues and offered an explanation of them in terms of a conflict theory (the history of all hitherto society has been the history of class struggle). He developed a science of historical materialism that offered an explanation for everything in economic terms. This was attractive and remains so to some people. The question is to what extent is it still valid. The response could be addressed in Marxist terms by looking at changes in society in economic terms and observing that as our society has changed from the rather naked exploitative capitalism of the mid nineteenth century through the Welfare State, working class participation and more recently the advent of the Thatcherist enterprise culture, the distinction between working class and capitalist class has become blurred. Workers now own shares, if not in the recently privatised concerns then in their own workplaces. The real distinction in Britain today seems to be between those who have a job and those who do not – between the working class and the non-working class.

The explanation offered in original Marxism that the state and law are but parts of a superstructure that is reflective of the economic base – the relations of production – concerned itself to show that the superstructure served those that controlled the means of production. This class instrumentalism is rather crude and more recent studies such as those of Ralph Miliband have sought to update Marxism by showing that the relationship is more symbiotic, resembling more a partnership rather than a position where one determines the other. In essence what Miliband is trying to do is to show that Marxism can explain modern phenomena and is not restricted in time to the last century.

Another modern Marxist, Alan Hunt, has sought to explain modern events in the post industrial society in terms of economic factors and of the conflict theory. This

is a clear attempt to show that Marxism is relevant and can enter the current debate rather than address itself only to obscure and historical points. The argument used by modern Marxists is that unless they can offer such an explanation then their theory will lapse into obscurity and they will be excluded from the current political debate. With regard to criminology, Taylor, Walton and Young as Marxists have sought to participate in current debates the agenda for which is not set by Marxists, and have developed an approach to criminology that does not just call on the rather simplistic Marxist explanation of crime but seeks to explain crime in more complex terms whilst remaining faithful to the essence of Marxism as they see it, namely the importance of economic factors and the conflict model of society.

Lloyd and Freeman, who are not Marxists, argue that it is legitimate to accept Marxist analysis without Marxist conclusions. That is to say that Marx identified important factors at work in society and that his explanation of naked capitalism in the mid nineteenth century is essentially accurate. If that is the case then Marxism has only a value in terms of the historical development of ideas whose time has since passed, rather like the explanation of the flat earth society. The student of jurisprudence need not then be concerned with Marxism. Marx would reject such an approach. As has been stated, Marx attempted to provide an explanation for everything. Marx would see ideology as a product of economic factors. He argued that those who control the means of production also control mental production and that truth would not be truth until applied. He would then regard the discrediting of Marxism in economic terms as an ideology or false consciousness designed to mystify the exploited class and to legitimate the position of the dominant class as those who control the means of production.

Hence while it is probably accurate to argue that original Marxism as an analysis of naked capitalism is dated and not therefore of much relevance to the modern student, it is rather the analysis of the modern post industrial capitalist state that remains of considerable importance. Here Marxists, rather than Marx, speak of the relative autonomy of the state, the explanation of which can be found in Poulantzas' *Political Power and Social Classes* wherein it is pointed out that the state which is also the Welfare State and the provider of laws on consumer protection that appear to be in the interests of the working class, remains the state of the ruling class. The Marxist explanation of the separation of state from civil society, which observes that those who govern are not those who control the means of production, points out that in the capitalist mode of production there is no need for those who own the means of production to rule just so long as their rights in capital are protected; the state can otherwise be relatively autonomous. This can be summed up in the phrase of Sigman that the capitalist class rules but does not govern.

Whether these approaches are correct is a matter for considerable argument. The student of jurisprudence must recognise the importance of that argument and therefore there is much in Marxism that is still relevant to the student of jurisprudence. The fact that half the world subscribes to what it terms Marxism, even though Marx might have difficulty in so recognising it, further reinforces the argument as to its relevance.

The theme which therefore runs through this discussion is that while original Marxism may have little to offer by way of explanation of those matters that properly concern the student of jurisprudence today, there has developed a new Marxism that does attempt to offer explanations in Marxist terms of developments in modern British society. If for only this reason Marxism is still relevant.

18.6 Evaluation

We have outlined Marxist views on law in a capitalist society. Briefly, law is one of the institutions of the superstructure of a society; the superstructure reflects the base, the relations of production; this is because the dominant class controls law and state and uses them to oppress the workers. Is this view satisfactory?

Is there a clear base-superstructure division? Is law just part of the superstructure?

In the theory, the *base* of the society consists of the relationships of production, that is, the relations between the owners of the means of production and the workers; this economic base is reflected in the superstructure of the society, of which law is a part. In fact, the real situation is more complex than this simple model suggests. Law plays an important role, not only in the superstructure, but also in the base. It defines the relations of production and upholds them. In capitalism, one side of the relationship is the owners' side: ownership is a legal concept, with large bodies of law defining it (law of real property, of personal property, of conveyancing) and enforcing it (law of theft, to prevent appropriation; trespass, to prevent improper invasion: conversion, etc). Further, owners frequently rely on forms of combination which are defined and controlled – and to an extent aided, in tax terms – by law (partnerships, companies). Money is raised through institutions controlled (to an extent) by law (the stock exchange, banks); ownership is subject to nullification by law (compulsory purchase, bankruptcy, insolvency).

On the other side, the workers – what counts as an employee, rather than a contractor, is defined by law; combinations of workers are controlled by law (trade union legislation).

The relationship between the two sides is defined by law (contract of employment), and is subject to legal control (employment protection legislation giving protection from redundancy and unfair dismissal; fair wages control; Factories Acts and Health and Safety at Work Acts controlling conditions of work; a complex network of torts and immunities relating to strikes, picketing and other industrial action).

Law, then, is an integral part of the base. Collins suggests that this criticism is not a fatal one: law can be understood as superstructural in that it reflects the dominant ideology; but it closely governs the relations of production (presumably thereby reflecting the relations of production) and so acts in the base.

Law reflects the economic base: class instrumentalism

Law is held to reflect the economic base, and the dominant ideology: this works through a process of class instrumentalism, that is, the law is used by the owners to oppress the working classes. Does this analysis fit the facts?

In some areas of law, it clearly does. Recent Employment Acts removing immunities from strikers fit the model. So does the lack of a required minimum wage, complex company legislation (which allows for flexibility in setting up companies, and by limited liability allows owners to attempt to make profit without risk, allows for access to money via the Stock Exchange, without losing control of the company, and allows, if financial affairs are carefully planned, for lower taxation levels), insurance laws (to allow risks to be minimised), banking laws (to give further access to required capital), commercial laws, and so on. A whole battery of laws exist to permit owners of the means of production to combine and make agreements between themselves and with workers, allowing for the maximum possibility of profit-making with the minimum risk. One could clearly analyse all this as the dominant bourgeois ideology at work.

Other laws, however, are not as easy to fit into the picture of an oppressed working class. Some laws appear to contradict it even in the economic base. Employment protection legislation which gives workers the right to have details of their contracts, and to payments for unfair dismissal and redundancy; the Health and Safety at Work Act, protecting workers at their place of work; and immunities for workers involved in trade disputes from actions for various economic torts, thus in effect giving a right to strike. Other laws, acting clearly in the superstructure, contradict the general picture of a dominant class oppressing the working class: consumer protection legislation including the Sale of Goods Act and similar statutes, and the various provisions of a Welfare State (National Health Service, National Insurance, Social Security).

There are also laws in other areas which seem remote from the class oppression picture altogether – family laws, law relating to crimes of violence, wills, charities, and so on. Another view would be that many laws protect monopoly since they make it more expensive for new enterprise to get started by raising the capital cost of establishment in compliance with safety and consumer legislation.

Can a Marxist properly explain all these laws? Taking the third category first, those laws which appear remote from class conflict, there is a ready Marxist answer for many of them. We have seen that the dominant class ideology will support the retention of the status quo. For this reason, laws against violence and against sexual crimes, and laws relating to family, etc, can be seen as part of the social fabric, preserving the present stable social order and an acceptable level of community morality. They prevent social unrest and disquiet from rising to too great an extent. It is rather more difficult to justify laws regarding charities, or even freer moral laws relating to homosexuality or abortion, on this rationale: perhaps these can be seen as sops to the conscience of various groups in society. The laws of probate and

intestacy allow the means of production to be preserved in the families of the dominant class.

The contradictory laws in the superstructure can be explained, by a Marxist, in different ways. They can be seen as proving that the dominant class does not control each and every law passed by the legal system, but allows it relative autonomy, that is, only preventing the passage of laws which would be harmful and ensuring the passage of vital laws, allowing any other laws to be passed. This can be accepted, just about, as an explanation of the Welfare State. Although the owners will have to pay a large part of the cost out of profits, they do benefit, because they and their workers are kept healthy and alive between jobs, and they can manipulate the tax system so that the working classes bear a large proportion of the cost themselves. Whether relative autonomy could be used to explain consumer protection legislation must be regarded as more open to doubt, since it is clearly harmful to the owners of productive means not to be able to sell their products as they wish. A further possible explanation is that these superstructural laws are sops to the working classes, given to keep them happy and to prevent them forming a coherent class consciousness (a necessary prelude to revolution).

This, of course, can be used to explain away any contradictory laws, even those of the first type (that is, those forming part of the base). A third possible explanation is that these laws are concessions wrung out of the dominant class by the developing consciousness of the working class. The dominant class, however, retains overall control of the system. Presumably the recent anti-union legislation can be seen as the dominant class reasserting its position, when the present economic climate makes the concessions unnecessary (a recession obviously works against working class solidarity, since personal concerns such as getting and keeping jobs become more important). The contradictory laws in the base could also be explained thus, as concessions wrung out of the ruling class.

Are these various explanations satisfactory? Can all laws be justified as being oppression – directly or indirectly by preserving the status quo – of the working classes, or instances of relative autonomy, or sops to the working classes, or concessions wrung out of the dominant class?

Obviously these questions are empirical ones. There is at least one counter-interpretation. This view would say that the various types of contradictory law merely show the theory to be incorrect. Whatever the earlier capitalist situation, in a developed capitalist society – by electoral reform and other means – the working classes now play a full role in the law-making process, and the distribution of benefits and burdens in society take their interests into account as well as the interests of the owners. The Welfare State, as well as consumer and employee protection are simply manifestations of the concern of the law-making process with the interests of the working class and the poor. Further, it is a mistake to see law simply in terms of the power balance between the classes. Doesn't law have other functions, such as regulation of law and order and upholding commonly upheld standards of decency and family life?

Class reductionism

One final point of evaluation, and then we can move from discussion of the capitalist state, to the revolution, when law and state will wither away.

This point concerns the Marxist division of the population into just two classes, the bourgeoisie and the workers. In present-day Great Britain, for example, many pressure groups and interest factions play a part in the political and legislative process, lobbying MPs and party leaders. What is more, sometimes those from the same Marxist class will take differing sides. For example, agricultural owners and fishing boat owners will often clash with developers of land and/or seaports; a good case in point is the clash over damage done to the owners of the fishing industry by entry into the EEC (which has imposed quotas), which entry was, of course, supported by most industrialists. Further examples of conflict within the Marxist classes could be given. To avoid the charge of class reductionism (that is, over-simplifying the class position by seeing only two classes), a Marxist would have to argue that pressure and interest groups are just short term, and are not as fundamental as the real classes. Class conflict, in the sense of conflict within the classes, arises because of a lack of class consciousness, not sufficiently developed in the working class and not required at present in the bourgeoisie, who can afford to wrangle and still dominate. Is this answer convincing? Could a Marxist give any other answer?

Charges of class reductionism have another aspect too. The two class divisions can now be seen to be a simplification because many members of the working class now form part of the ruling class. Pension funds and trade union funds, building societies and banks all invest in, own shares in and therefore partly own, companies, etc. The money in these various funds comes from the man in the street, who also sometimes saves more directly by buying shares himself. Most working people own at least some stake in the means of production. In fact, the people at the top of the big companies often own little or no stake therein. The controllers of the means of production no longer necessarily own it. Further, the institutions which might be included in a wider definition of the ruling class (see, for example, Griffith *The Politics of the Judiciary*, especially the last Chapter), the courts, civil service, police, armed forces, etc, cannot really be seen as having a different ideology from the ordinary person: and remember that the ordinary person controls, ultimately, by the power of the ballot box.

Isn't seeing capitalist society as divided into two classes, the owners of the means of production and the workers, thus a gross misinterpretation?

19

Feminist Jurisprudence

19.1 History

Although anthropologists suggest that many primitive societies were essentially matriarchal, historical evidence from the Roman era till the present time indicates that most legal systems have treated women in an unequal fashion in comparison with their male counterparts.

There have, of course, always been exceptional women who as individuals have overcome many disadvantages to achieve considerable authority. The Empress Theodora, for example, who in 523AD saved the Byzantine Emperor Justinian, when the imperial palace was seized by the rioters and the Emperor was about to flee the city. But although Theodora ruled as joint Empress, the system of law which Justinian codified treated the head of the family (the oldest male) as alone possessing contractual and political rights. Both Roman and Byzantine law, and the civil law of the Middle Ages, relegated women to an inferior status.

The nineteenth century English liberals were among the first jurists seriously to question the position of women in society: see especially J S Mill *On the Subjection of Women*. Mill questioned the traditional, to some extent religious, view that women were inferior beings destined to obey their husbands, which had found expression in the old marriage service, where the woman promised to obey, and in the common law rule that a woman's property belonged to her husband, not abolished until the Gladstonian liberals introduced the Married Women's Property Act in 1882.

Towards the end of the century Marxist writers began also to question the way in which women were treated under the law and economically, championing women as an oppressed class. See for example Engels *The Origins of the Family, Private Property and the State* reprinted in Mitchell and Oakley *The Rights and Wrongs of*

Property and the State reprinted in Mitchell and Oakley *The Rights and Wrongs of Women* (1986). See also Safiotti *Women and Class Society.*

In Marxist eyes it is the male capitalist who is the villain. Women and workers are the oppressed and exploited victims. The perception of women as the victims of male political and economic dominance is a theme which recurs from the martyrdom of Joan of Arc by the English in France in the Middle Ages to the murder of Rosa Luxemburg by the Nazis in Germany. So modern writers, such as Zaretsky (*Capitalism, the Family and Social Life*, 1976), attempt to show that male dominance is as much an evil as capitalist oppression. To what extent female emancipation was really achieved in Marxist and post Marxist societies, however, is open to debate. Today there may be more female than male doctors in Russia, but political power remains largely in male hands. See for example Mackinnon *Feminism, Marxism, Method and the State* (1983).

In the West, the suffragettes of the early twentieth century were instrumental in securing votes for women in 1919 and 1929; and educational and career opportunities were gradually equalised as the twentieth century progressed. Since then the question of women's rights has come to present a number of interesting issues in jurisprudence. Claims in Lloyd's *Introduction to Jurisprudence* that the growth of a 'women's' view of law arose naturally out of both the suffragette movement and, more recently, the relatively large influx of women law students (2 per cent in 1960; about 50 per cent today – see Twining *Blackstone's Tower: the English Law School* (1994)). It is pointed out that the approach is more 'concrete' and that the movement:

> '... seeks to analyse the contribution of law in constructing, maintaining, reinforcing and perpetuating patriarchy and it looks at ways in which this patriarchy can be undermined and ultimately eliminated.'

You should note, however, that there is another clear context in which feminist concerns in jurisprudence grew, namely, the critical legal studies movement. That challenged the orthodox way of looking at law so that what was seen as 'just', or 'fair', or as 'establishing equality' was now regarded by members of this movement as at best a superficial gloss and at its worst a cynical disregard for justice, etc, other than from the point of view of those wielding power (the law schools, amongst others ...!). It was an easy jump from this view of things to say: the justice, fairness, etc of the law is male justice, etc. So it would be true to say that a number of fairly obvious factors combined to produce the modern feminist approach to law.

19.2 Natural rights and women's rights

The emergence of the women's rights movement parallels in some degree the rise of natural law. For example, if in Dworkin's terms (*Taking Rights Seriously* (1972)) there are principles underlying the laws that the courts apply, do these principles include the principle that rights should not be abrogated on account of race, sex,

language or religion? Dworkin would say yes, citing the 14th Amendment to the US Constitution. His fundamental principle is, after all, a principle that all people should be treated as equals.

In Rawls' analysis (*A Theory of Justice* (1972)) there are principles of equal rights to the most extensive total system of equal basic liberties, and a principle that social and economic inequalities are to be arranged so that they are both to the greatest benefit to the least advantaged and attached to offices open to all in conditions of fair equality of opportunity.

Notice such contemporary American decisions as *Griswold* v *Connecticut* (1967) in which state laws banning the manufacture, sale or use of contraceptives were held to be unconstitutional as an infringement of the right of privacy inherent in the 14th Amendment. Likewise, *Roe* v *Wade* (1973) holding that the anti-abortion laws of the State of Texas infringed the right of privacy, and the right of a woman to decide whether or not to bear a child.

It is significant to compare recent English developments in the law.

A decision such as *C* v *S* (1987), in which the House of Lords held that, in the matter of abortion, the father has no rights, may be open to the criticism that sometimes the protection of the rights of the woman may involve denying rights to the father or the unborn child.

A recent decision such as *R* v *B* (1991), holding that a husband may be convicted of rape against his wife, may be justified by saying that in late twentieth century England the principles which underly the relationship of marriage differ from those which existed in earlier generations. Dworkin acknowledges that the interpretation of the principles which underlie the law may change as society develops, and arguably today the principle of equal concern and respect best fits that interpretation which requires a free and continuing consent, in a marriage which is today regarded as a relationship between equals.

The case of *R* v *Thornton* (1992) holding that provocation does not encompass the conduct of the husband in beating his wife, which had occurred some time before the wife killed her husband, raises wider issues about the scope of the defence of provocation of interest to feminists. Note too the case of *Davis* v *Johnson* (1979) in which the House of Lords held that a battered girlfriend was not entitled to the protection of the Domestic Violence and Matrimonial Proceedings Act 1973. It is, perhaps, out of step with a society in which 40 per cent of parties are unmarried.

Rhode *Justice and Gender* (1989) discusses the question whether the law treats women fairly, and concludes not. See also Smart *Feminism and the Power of Law* and Dahl *Women's Law*.

19.3 Equal rights versus separate rights

Initially, the women's rights movement argued in favour of equal rights based on a principle of equal concern and respect. This is still the mainstream attitude. For

example, Phillips *Feminism and Equality* (1987) adopts the widely accepted view that gender should not preclude equal treatment of either sex, and also discusses the question of positive discrimination in favour of women. Such feminist writers as Germaine Greer (born in Australia 1939) and Simone de Beauvoir (*The Second Sex* (1965)) symbolise the generation of women who achieved such changes in the law as the Abortion Act 1967, the Equal Opportunities Act 1973 and the Sex Discrimination Acts 1975 and 1986.

However, in recent times there has emerged a group of women's rights activists who argue that the only answer to male dominance is for women to seek a new society in which men and women are separate and equal. Important here is Alice Walker (born in Georgia, USA, 1944, author of *The Color Purple* (1983)) who discusses the dual problems of being female and of living in the southern United States before the Civil Rights era. She advocates men and women living in separate communities, and visiting one another to reproduce: 'This is the pattern of freedom until man no longer wishes to dominate women and children or always to have to prove his control.' For precedent, she refers back to such mythical Greek societies as the Amazons and the Priestesses of Vesta. Whether separatism is socially practicable or morally justifiable must be open to doubt.

Whereas Germaine Greer and Simone de Beauvoir argue in favour of equal treatment for men and women, Alice Walker takes the different position (similar to that of some Civil Rights activists) that women are not the same, and that separation is the solution. Whether separate societies would suit everyone is, however, a matter for question, and Alice Walker could be interpreted as advocating that women have the right to live separately *if they so choose*. To achieve this it is necessary to put an end to economic, social, domestic and legal dependence.

Richards in *Separate Spheres* (in Singer *Applied Ethics*, 1986) discusses the question whether feminism requires the acknowledgement of the equal but separate spheres of men and women, an argument which has similarities to that of the US Supreme Court in *Plessy* v *Ferguson* (1894) when interpreting the 14th Amendment, which was ultimately rejected in regard to educational segregation in *Brown* v *Board of Education* (1954). Richards is perhaps influenced by the libertarian views of Nozick, and other contemporary American philosophers who have addressed their attention to the 14th Amendment.

Such issues also raise the question whether there is exploitation of women in sexual pornography and in the use of women in advertisements for male orientated goods such as motor cars. Maybe, as in any successful social revolution, there is eventually a possibility of reaction by those whose dominance is being displaced.

Jagger *Feminist Politics and Human Nature* and Einsenstein Z R *The Sexual Politics of the New Right* discuss this topic, and the reaction of the new right who represent a masculine counter-reaction to the separatist movement. Levitas R *The Ideology of the New Right* discusses the relation between this and Republican politics in the United States. Note, for example, President Ford's instructions to the Justice Department in preparing a list of candidates to succeed Associate Justice William

Douglas in 1975: 'Survey the field and don't exclude women from your list ... The final choice was between two men ... I pored over their legal opinions myself ... It was a close call ... I selected Stevens (a man) and the Senate confirmed him by a vote of 98 to 0.' Perhaps, significantly, it was Associate Justice Rehnquist, who dissented in *Roe* v *Wade*, whom President Reagan chose as Chief Justice in the 1980s. The way ahead is by no means clear.

19.4 Sexual discrimination: provocation and rape

Law's insistence on treating like cases alike creates the pretence that certain important differences between people (blacks/whites; men/women; advantaged/disadvantaged) are not real differences: the law thus reinforces unjustifiable differences in treatment. This is the thesis of feminist jurisprudence; for example, it is advanced by Iris Young in her book *Justice and the Politics of Difference* (1991). In fact, many feminists take the view that the virtue of equality in general, not just that equality that pertains to law, is an idea *detrimental* to oppressed groups' interests. This idea has the same force as the idea that certain offices are open to all when we know that, to take the bar and the judiciary, for example, some offices are hardly at all open to blacks, women or the working class.

A more specific example is that of the defence of provocation; the law requires a 'temporary loss of self-control so that the defendant is not for the moment the master of his mind'. Women do not, it is said, react in 'white-hot rage' because it is not in their nature (and there are biochemical reasons why they do not). Decisions whereby women who murder their husbands, after a long period of abuse, are *not* afforded the defence of provocation on the ground that they have not acted in the spontaneous way the law requires, are therefore given as examples where the law fails (and is oppressive) because it treats women as in the same position as men.

It is useful considering criticisms of Young's (and others') approach. Note that if we take a natural law type approach, that is, we assume morality to be part of the law (like Hoffmann LJ in *Airedale National Health Service Trust* v *Bland* (1993): see 'Ronald Dworkin and contemporary case law' in section 11.16 above) we can discern strains of the requirement, not of naked, computer-like, consistency, but of *moral* consistency – equality – in the application of the idea of the rule of law. The moral argument must then be joined; there are differences between men and women that are morally relevant, say, to the defence of provocation in the criminal law. The law, in the name of consistency, properly understood, can deal with these differences.

Take the case of provocation again; it is not difficult to see that a justifiable difference can be extrapolated from the law. In the case of *DPP* v *Camplin* (1978), the action of a 'reasonable man' requirement was interpreted to include not only a man but a boy, and a retarded sensitive boy at that. The present state of legal argument is not so thin as to disallow the extension of reasonable man to include, in the circumstances of provocation in the context of domestic abuse, the reasonable woman.

There is a triumph for women in the marital rape case of *R* v *R* (1992) in which the House of Lords decided that it was, after all, possible for a man to rape his wife. This was despite the belief, held by many, lawyers included, that the implied consent of the wife, by remaining married to the defendant, provided an adequate defence. It was argued around the Sexual Offences (Amendment) Act 1976 which defines rape to be unlawful sexual intercourse and the argument was that 'unlawful' here meant 'outside marriage'. Lord Keith simply said 'the fact is that it is clearly unlawful to have sexual intercourse with any woman without her consent' and dismissed the idea that the word 'unlawful' added anything. Despite the doubts of John Smith, who wrote the commentary on this case, the reasoning is good. In a nutshell it is this: there is no such thing as implied consent (remember the nonsense we can make of the idea of 'tacit command' in Austin!); rape is therefore rendered lawful by the state of marriage; marriage thus gives men the right to treat their wives as chattels and not persons. That is why the decision is a triumph for women, since the decision will make some men think twice before behaving in a barbaric way.

19.5 Feminism in perspective

There is an excellent introduction to problems of political philosophy in J Wolff's *An Introduction to Political Philosophy* (1996), which is useful in general for obtaining a birds-eye view of problems of political philosophy as they impinge on law. It is particularly clear, however, on problems of feminism and students are recommended to read the admirable Chapter 6, entitled 'Individualism, Justice, Feminism' concentrating on the section on rights for women. At pp229–230 Wolff makes useful reference to a number of classic works on feminism. His account in 'Rights for Women' is both sympathetic to the feminist movement and intellectually rigorous and it is an impressively clear overall account given the length of the piece.

Wolff points out that, indeed, women have been systematically if not intentionally, discriminated against in the past. For example, in Britain in 1970 before the equal pay legislation, women earned on average only 63 per cent of the average male wage. But he also notes that merely making pay equal between men and women is insufficient in itself to secure the appropriate social advance since there are other relevant differences between men and women, for example, a wrongly perceived difference in physical (and mental) strength, a wrongly perceived difference in attitudes to work, the fact that women but not men bear children, and so on. That is why some feminists say that it is gender differences that are generally irrelevant in determining the just social structure rather than just sex differences, since gender differences are different at different times and in different societies. (Gender difference is, as some say, a 'socially constructed' idea.)

So there are feminists who wish to abolish gender differences by bringing about social change so that, for example, men do not see it as automatic that women stay

at home, do housework and look after the children. A discussion of this sort of approach leads Wolff to consider the status of social programmes of reverse discrimination. Those focused on sex discrimination would seem to be the most important projects for feminists to encourage, perhaps through legislation and certainly through other means, by supporting extra justification for appointment to otherwise seemingly equal positions of money and status, to boost the status, income and political weight of women, and so achieving, for example, more woman judges, more woman politicians, more women QCs, more women professors, etc. This line is a natural one to take. If women are in a disadvantaged position for morally irrelevant reasons then social means must be taken to offset the disadvantages.

Wolff usefully discusses the difficulties in this area. Briefly, such programmes can be disastrous in practice, creating stigma and feelings of injustice and that, at first sight, reverse discrimination seems to rely on making discriminations on the basis of sex even though it was sexual discrimination which caused the problem. There is, furthermore, great difficulty in justifying why we should raise the status of women today in order to right wrongs done to women in the past, and perhaps a very long time ago. But he thinks there are answers to be supplied. For example, one can argue that:

1. the equality that really matters is equality of *opportunity* rather than merely making women equal;
2. social policy of long term equality justifies the short-term inequalities;
3. reparation now for injustices in the past is justified because women today are discriminated against by the culture that was brought about in the past; and
4. there is great symbolic power in reverse discrimination which can break the habit of thinking that women are pre-destined to serve only in certain sorts of roles.

However, very importantly, Wolff points out that much of this line of thinking is frowned upon by feminists. One reason is that the social programmes of reverse discrimination, changing and raising consciousness, etc, do not question the general political, legal and economic structures of our society. Reverse discrimination takes place in a generally capitalist, generally liberal-type society (reflected in our democratic procedures and our idea of 'equality before the law'), and that means that the values of this structure are implicitly assumed to be *true*, and *fair*. Therefore, some feminists say that these values must be examined since here the deepest prejudices will be implicit. There are prejudices in favour of capitalism which infuse our discourse about the justice within which reverse discrimination arguments are made. When feminists take this view, they abandon the 'male liberal' endorsement of emancipation by, say, reverse discrimination programmes, and become critics of 'liberal individualism'. In fact, it is in this area that the major amount of writing is now done by the feminists and, unsurprisingly, they focus on the role of the family – in which the woman plays an 'inferior' role – its private 'sphere of influence', its relation to the State and its public area of influence.

The idea that justice is a 'gendered' concept which provides a prejudiced

justification for its treatment of men and women through its allocating a private sphere of influence to the family is, says Wolff, an 'astonishing charge' since justice is supposed to be about treating people equally. But it can be given some credibility. He points to the argument by some feminists (notably N Chodorow, *The Reproduction of Mothering* (1978) and C Gilligan, *In A Different Voice* (1982)) that there is a fundamental difference between men and women in the way that they form their relationships with others. Women value 'connectedness' and 'caring' whereas men value 'separation' and 'independence'. If so, the fact that men have been in control of the political institutions for so long means that our way of thinking about justice is weighted towards allocating rights to people which keep them at an 'uncaring' and 'disconnected' distance from other people. Thus the idea of 'private spheres of influence' and a 'right to privacy' – upon which, in the US the right to abortion is dependent (see *Roe* v *Wade* (1973)) – are male ideas which perpetuate insidious gender differences into our political structure.

Carol Gilligan develops the arguments in the debate by claiming that men's different approach to 'caring' means that they argue justice in terms of general rules (eg 'no person *shall*, etc ...') and principles (eg 'no person *should* profit from crime'). The woman's perspective, on the other hand, is to make moral decisions on the basis of a 'case by case' basis. The kind of situation that a woman will want to decide differently from a man will be the one where immediate sympathy 'floods the moment' and casts aside the man's 'stern' reference to the rule and the injustice of making exceptions. Thus Gilligan and other feminists talk in terms of the man's 'perspective of *justice*' as opposed to the woman's 'perspective of *care*'.

Wolff points out how much of these arguments are speculative and, perhaps, draw stereotypes. After all, there are caring men just as there are uncaring women. Further, sometimes rules of justice and the ethic of caring conflict where women would concede that compliance with the rule would come first (eg choosing between not giving your child a Christmas present she wants and obtaining one by shoplifting it). But he also says that there is a sense in which the idea of rights cannot define close relationships, borrowing an idea from J Waldron, 'When Justice Replaces Affection: the Need for Rights' in Waldron's *Liberal Rights* (1993). In this idea, that rights form a kind of protective shield around relationships – acting as a sort of 'fall-back', or 'hands-off' position – while providing nothing of substance within, is the germ of political philosophy which gives sense to the feminist doctrine that 'the person is political'. As Wolff says (at p215) '... individualism seems particularly inept at explaining the moral relations within a family' because family relations are not chosen ('you choose your friends but not your relations') and so seem to impose obligations that are independent of individual choice.

But it is too simple to say (as Wolff hints) that the family and the values of free choice are incompatible. Clearly, we do not just choose our obligations. You have an obligation to another in danger to protect him or her from it when there is little or no cost to you. Another form of obligation appears to arise just from a family relationship as, for example, that of a mother to her baby. But note that there is no

duty to love another! Nor is there a special duty towards another merely because that other loves you! In fact, it is not too difficult to say that there is nothing special about family relationships beyond that they are often more complex or demanding than relationships outside the family, governed by principles of liberalism.

There is, therefore, nothing particularly problematic about the family which requires feminists to proclaim that we must start seeing individuals within the family as 'political'. We are all 'political' in the sense that we are owed liberal duties. In fact, if we stop seeing 'the family' so preciously, as so distinct, then it is not difficult to see the injustices perpetrated within it. It is not necessary to espouse a 'critique of man's justice' or of 'man's liberalism' or 'man's concept of privacy' or 'man's discourse of equality', in order to see that child abuse is wrong or that men raping their wives is wrong (and so a good argument for reinterpreting or creating law: see *R* v *R* (1992)) or the other forms of subtle domination and bullying that occurs within families. Of course, the extent to which the community can protect weaker parties raises a difficult problem but not one that is solved by imagining a 'different discourse' or a 'radical reconstruction' of the 'private/public dichotomy'. Better education, policies of reverse discrimination (if they can be shown to work), fairer wealth distribution and, if necessary, the criminal law, are all standard tools of liberalism for bringing about a better – more just – community culture. As Wolff concludes at p220:

> 'Feminist criticism requires not that we replace the ethic of justice with the ethic of care at the heart of political philosophy but that we apply the idea of justice with an enriched sensitivity to the ways in which our institutions can embody and reproduce injustice ... A society that has a tendency to create ruthless, egotistical exploiters is worse than one with a tendency to produce charitable, altruistic co-operators, even if, in formal terms, both societies can be described as just.'

Justice

20

Arguments about Justice

20.1 Introduction

Utilitarianism has already been discussed as moral theory, setting out a theory of justice, in the context of the early positivists who were also utilitarians. In this section, we shall briefly sketch the outlines of some alternative conceptions of justice, and try to discover their bases and starting points. Many writers have put forward ideas of justice in social arrangements, and it will not be possible to consider them all.

In this section we shall briefly consider social contract theories, natural rights theories and Marxist theories. In fact the first two go together very often, as we shall see; we differentiate them now because two of the modern theorists Rawls and Nozick (Chapters 21 and 22) do not combine them, but use a social contract and natural rights model respectively. We first should make several points about method, bearing in mind the idea of 'reflective equilibrium' discussed in Chapter 4.

There is a universal appeal to justi ce. All persons are aware of the need for justice, yet there is no agreement on the nature of justice or what arrangements constitute a just ordering of society. Hence justice, Hart suggests, is shared as a concept; however, there are many conceptions of justice. Justice, on this analysis, would defy definition. The purpose of this Chapter is to illustrate some of the conventional theoretical approaches to the question of the nature of justice.

David Hume wrote that justice can only be meaningful in conditions of moderate scarcity. In his view, a conception of justice is inapplicable where there would be no resources because the population would be starving and shelterless. The issue would be one of survival, rather than justice. On the other hand, where everyone has everything they want, then distributive justice (as opposed to procedural justice) would be unnecessary. Justice in this sense can be seen as the justification for the distribution of resources in society. Distributive justice is concerned with the distribution of both material resources and legal rights to material resources.

Aristotle sought to draw a distinction between distributive and corrective justice. The former idea is concerned with the fair division of benefits and burdens, that of

giving to each according to his just deserts. Corrective justice seeks to ensure a fair equilibrium by redressing any unfair distribution. The latter might be seen to be more properly the occupation of the courts, while the former is more properly an issue of political or social justice.

A further distinction may be made between procedural and substantive justice. Procedural justice might be viewed as expressing the tension between what Herbert Packer terms due process and rule of law. Due process is concerned that people, when faced with the courts, should be treated in accordance with the procedural requirements laid down by a particular legal system. This ensures that the rules are not bent; however, it may allow a mass killer to be set free on a technicality. Rule of law conceptions of procedural justice entail the primary motivation of the courts being the punishment of the wrongdoer if it is clear that he has broken the law, irrespective of procedural technicalities.

However, although this might correspond more strongly with the popular idea of justice, it does present a watering down of the checks that are designed to prevent the innocent being wrongly punished. One might also refer to Fuller's inner morality of the law as providing a theoretical framework for procedural justice. In essence procedural justice is therefore a concern with how legal rules are applied.

Substantive justice, on the other hand, is concerned with the content of a law itself. It is a question of juxtaposing the existing legal system with ideals or standards of political morality. The difference between issues of procedural justice and issues of substantive justice can be illustrated by the contrast between a just decision in a court and the justness of the law that the court has upheld.

Social contract theories

These base the justice of society's organisation on the fact that the individuals in the society have, or would have, or may be presumed to have, entered into a contract agreeing that society should be so patterned. It is often unclear whether the contract or covenant is thought actually to have existed: in its modern exponent, Rawls, it is clear that it is a hypothetical justificatory construct.

Natural rights theories

These emphasise the importance of society being formed in such a way as to protect and not enfringe upon natural rights, rights which people have either from God or from their nature.

The major exponents of social contract theory in its first heyday in the seventeenth century also placed great emphasis on natural rights: because of their different stresses it seems right to consider Hobbes' as a social contract view, and Locke's a natural rights one, but both included the idea of a state of nature including natural rights, and a contract leading to civil society.

Hobbes

Hobbes argued that men had their natural rights in a state of nature. Since men had a tendency to compete and infringe on the rights of others (and, in the famous words, the state of nature would therefore be nasty, brutish and short) they would find this state of nature unsatisfactory, and would therefore wish to join a society where the urge to competition was controlled and restrained by a political sovereign. This sovereign could become so by force or by contract, it didnt matter: people in the state of nature would be prepared to covenant or contract to transfer their natural right to protect themselves, and all their powers to a sovereign. They are then subject to an all powerful unlimited sovereign (cf Austin), subject to political obligation because of a contract they had made or would be prepared to make. On the applied level I think it is clear that Hobbesian philosophy has been and is used by military dictators following a *coup d'état* in order to justify their actions. So long as the absolute ruler (Leviathan) maintains order then his rules shall be obeyed as being just, for he has improved the lot of men by removing them from anarchy. The justification for despotism is obvious. Military leaders do indeed argue that the reason for their takeover is to preserve order or to prevent the country from slipping into anarchy.

Locke

In the state of nature, man had rights including that of appropriation of land. The two limits to this (to prevent waste, and to leave enough and as good for others) can be shown to be removed by the advent of money, leaving an unconditional right of appropriation, along with a right to protection of life, liberty and estate. Man could live in the state of nature, but some will try to gain property by trespass rather than just acquisition. Locke has a more optimistic view of man in the state of nature. There is a need simply to channel men's natural goodness. To protect their property, men will enter into a covenant agreeing to a civil society. This society is there to ensure natural rights, and the state is still subject to them; if the state passed laws infringing these rights, rebellion would be justified. All law then must conform to the standard of natural rights. The application of this theory justifies revolution in the face of tyranny. Locke's discussion of certain rights which cannot be assigned to the state has laid the foundation for the recent re-emergence of the concept of inalienable rights in human rights treaties, such as the right to national self-determination.

Rousseau

A third theorist tying social contract and natural rights was Rousseau, whose work was seized on as a philosophical justification for the French Revolution. By the social contract, a man transferred his rights not to an actual sovereign but to society which was the general will: to obey this was to obey oneself. The state should grant the citizen his freedom and, if it did not, it could be overthrown or revoked by the general will. The state held these rights on trust. The society is just to the extent that it follows the conditions which the contracting members would impose and accept. If it does not do so, like Locke, Rousseau would justify rebellion.

Marxism

We have already considered Marxist theories of law and the state (Chapters 17 and 18). It is not proposed to repeat that discussion here. What will emerge from a discussion of a Marxist conception of justice is that it is a collectivist theory and that it maintains that a just ordering of society occurs when each contributes according to his ability and receives according to his needs. An example of an attempt to organise on such a principle would be the National Health Service in Britain. Those who are earning contribute whether or not they are ill. Those who are ill receive treatment as often as necessary regardless of their contributions, if any.

Since these theories are included for background information it is not proposed to examine them in depth. However, some critical evaluation will point to the content and structure of the more modern theories that do represent a part of the course. At first, difficulty might be seen in relating these theories to our theme of justice, since Hobbes, for example, concentrates on political obligations to the state, not the obligations of the state to conform to standards of justice. Clearly the natural rights stress of Locke does suggest a standard of justice, namely, a society will be just if it respects the natural rights of its citizens (similarly Rousseau). This is the view of Nozick (Chapter 22). However, although Hobbes does not allow the social contract to be used in the direction of obligations of the state, it seems that individuals who were contracting in such a way would lay down conditions to control the state, and determine how it would operate. So the social contract model suggests a standard of justice as well, viz a society will be just if it follows the conditions which contracting members of society would impose and accept. This sort of approach can be seen in the work of Rawls.

Those are only a few of the types of individualistic theories of justice. Others include *perfectionism*, which organises things to promote a particular good or value, and *intuitionism*, which denies that any acceptable complete criteria of justice can be worked out, and therefore results in each decision being made by the intuition of the decision taker. The former is only acceptable if we accept the idea in question; the second only if no complete criterion proves satisfactory.

20.2 The enforcement of morality by law

Introduction

The extent to which courts and legislators should reflect our moral and intellectual interests is a matter of considerable debate. Certainly, we feel that in a democratic society, law should be sensitive to social attitudes. However, one must address the issue as to how far the law should go to protect us from ourselves. The law is, of its very nature, an instrument of restraint frequently associated with the enforcement of more enlightened morality, such as the prohibition of sexual and racial prejudice.

We have, to a certain extent, relied heavily on the critique of morality favoured by Hume. The empiricist view of morality seems to be one that offers us no absolute moral facts. However, when we approach the question of how people should act, there seems to be a convergence of views. Professor Isaiah Berlin suggests that the fact that people do react consistently when they communicate matters of morality would seem to suggest a relative stability in moral values. Moral values may thus be found in the consistency of attitudes, rather than resulting from some empirical or logical process.

The modern view of ethical philosophers shies away from the relativist concept of moral norms. Singer, a notable ethical philosopher, observes that human nature has its constants and there are only a limited number of ways in which human beings can live together and flourish. Now, how ethics has arrived at this view is hard to understand and still harder to explain, but it suggests that it is morally acceptable to make moral judgments about the behaviour of others. If we go further and accept Kantian ethics, which are based on equally difficult reasoning, but are largely regarded as being the right approach, we are bound to enforce moral propositions which would prevent harm to another. This is, of course, all theory.

The enforcement of morality debate is essentially a moral or ethical one; whether we prohibit homosexual activity is not a legal issue. Law either prohibits it or it does not. Unlike murder, which has a clear formula of evil intent and destruction of human life, not all moral issues easily provide pragmatic reasons for censure. Even if life had no value, the malicious killing of a slave, as property of economic value, would be wrong. Most settled issues of morality that English law enforces can be reduced to attitudes to property, especially if you reduce people to being mere chattels. Rape becomes as easily accounted for as trespass, even to the extent of the former fiction that marriage provided a sort of easement over a wife's body and therefore excluded the concept of marital rape. Thus simplified issues of enforced morality can be easily if not satisfactorily accommodated by the law.

However, the process of modern development confuses society and the state. Social cohesion is built up on moral institutions and values. The things that make it work are factors such as reliability, trustworthiness, affection, loyalty and so on, and most human endeavours are founded on these aspects of mutuality and consistency. Equally, it carries with it taboos, which do not fit easily into the legal framework. Law seeks to superimpose rules of behaviour on this matrix and to tinker with it, without destroying the links that make society work. Law is a social fact, but if society breaks down so does law. John Stuart Mill was concerned with social progress, but with a formula for legislation that did not allow the destruction or substitution of these fundamental social values with theoretical ones.

Mill was much influenced by Bentham, but like our contemporary ethical philosophers he was a believer in the synthesis of the seemingly irreconcilable doctrines of utilitarianism and Conservative idealism. He presents the dilemma of democracy in his essays contrasting Bentham and Coleridge. On the one hand [he] is deeply impressed with the mischief done to the uneducated and uncultivated by

weaning them of all habits of reverence, appealing to them as a competent tribunal to decide the most intricate question, and making them think themselves capable, not only of being a light to themselves, but of giving the law to their superiors in culture. On the other hand the pursuit of self-interest by the ruling elite has been generally to a ruinous extent (and the only possible remedy is pure democracy, in which people are their own governors). Having seen the latter achieved (after a manner) by the passing of the Reform Bill in 1832, he turned his attention to the former problem, that of the tyranny of the self-serving interests of the numerical majority.

In *On Liberty* he addresses himself to the protection of individual rights and minority interests from the popular opinion in a democratic state. However, his concept of individual rights is often seen as a charter for the permissive society. This is to take his views out of historical context. The Reform Act enfranchised the industrial middle and artisan classes, so that the interests Mill saw as a threat were largely those of the rampant capitalists. Linked to his concern is his detestation of utilitarianism as a substitute for societal values.

> 'A philosophy like Bentham ... can teach the means of organizing and regulating the merely business part of social arrangements ... it will do nothing (except sometimes as an instrument in the hands of a higher doctrine) for the spiritual interests of society; nor does it suffice even of itself even for the material interests ... All he can do is but to indicate means by which, in any given state of national mind, the material interests of society can be protected; saving the question, of which others must judge, whether the use of those means would have, on the national character, any injurious influence.'

This reflects Coleridge's concern that 'we shall ... be governed ... by a contemptible democratic oligarchy of glib economists'. Mill saw a distinction between the public realm of morality and the private realm, employing the harm principle as the acid test. The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant. This is an insurance against the danger of cultural and societal decay which he fears is the result of throwing out societal values. Bentham's idea of the world is that of a collection of persons pursuing each his separate interest and pleasure. To Mill an alternative institution should protect societal mores because he was unsure of what sort of guardian of morality the electorate would make.

Critique of Mill

The formula therefore becomes more complicated in a democratic society. Law has an educative and regulatory role; however, true democracy requires that laws be made by the people who are subject to them. Law made by the wishes of the numerical majority may result in misery for the minority. Mill, in his later work, advocates the dualism of political self-determination through the instrument of law, but elite determination of moral and cultural values. Not surprisingly, Marx criticises Mill for trying to reconcile the irreconcilable.

Other critics of Mill, such as Stephen J, in *Liberty, Equality and Fraternity* (1873) doubt that a distinction can be truly made between acts that harm others and acts that harm oneself. Individuals are, to a certain extent, what St-Exupéry called knots in the web of society. Society must be free to judge what is harmful to itself. In the present democratic system this would mean the will of the majority, which returns us to the tyranny of the electorate.

Fortunately, or unfortunately, we do not really exist in the sort of pure democracy where the electorate makes moral decisions. Parliament reserves the right to vote paternalistically on matters of conscience, such as hanging or the preservation of Sunday trading laws. Equally the courts consider, 'There is in the courts as *custodes morum* of the people a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences that are prejudicial to public welfare' (Viscount Simonds *Shaw* v *DPP* (1962)).

However, even if we grant that institutions exist that might enforce and retain a static content of morality, the problem is far from solved. The credibility, or efficaciousness of a legal system in a democratic society depends on its treading a tightrope. On the one hand, the legal system should not be seen as over-paternalistic and interfering, while on the other, it must retain a relativity to society. A legal system cannot take for granted that because it tolerates something, society will as well, for forces in society that see unrestrained deviance may be prompted to take action independent of the law. The law is placed in the situation of a schoolmaster who cannot use corporal violence, but must nonetheless maintain discipline. Law cannot dictate, but neither would it be acceptable for it to ignore society's maladies. The problem, therefore, takes on a legal dimension.

Reasonableness as a test

One attempt at solving this equation was the Wolfenden Committee's *Report on Homosexual Offences and Prostitution* (1957). The committee deployed the arguments of the harm principle and a proposition similar to that of Mills: there must remain a realm of private morality and immorality which is not the law's business. Both prostitution and private homosexual acts were determined to be unharmful to non-participants and, as such, outside the proper ambit of legal restriction. That the findings were correct, in the historical framework of societal mores, is not widely disputed. However, the employment of the harm principle was seen by some, such as Devlin in *The Enforcement of Morals*, as being unduly restrictive. Instead he appeals to the widely employed legal fiction of the reasonable man (also see Chapter 4, on the nature of morality). Devlin, in the true spirit of democracy, supports the view that law should not tolerate that which the reasonable man finds disgusting. Society needs a moral identity, because it is the moral values of society that make it cohere. For Devlin, even private acts of immorality can weaken the fabric of society if they are sufficiently grave.

The balance that Devlin seeks to achieve is placed in the context of the political morality of contemporary society, where toleration is itself a prime moral principle. Thus, there 'must be toleration of the maximum individual freedom that is consistent with the integrity of society'. Devlin's justification for the legal enforcement of morality is an extension of the harm principle to a perceived threat to society, rather than harm to other individuals. This seems quite a reasonable proposition. However, his test is one that masquerades as (1) a relevant test for the principle, and (2) an objective test. Devlin's reasonable man is not asked in sociological terms what immorality is actually threatening to society. He is asked, instead, what he feels disgust at. Most Englishmen think that eating frogs' legs is disgusting. That does not mean that they consider it harmful food. An appeal to aesthetic sense is to rely on preferences to answer what should surely be a rational question.

Furthermore, while the reasonable man test is employed as a way of alienating a courtroom issue from the subjective opinions of parties to a particular legal issue, it does not necessarily have the same effect in this situation. Devlin employs the term reasonable man to give the impression of objectivity. However, it is a fiction to suggest that there is a reasonable man when it comes to more difficult moral issues. The reasonable man of legal fiction is one who employs practical reason and due consideration when acting. However, all the practical reason and due consideration in the world will not change the preferences and prejudices that embody disgust. On the issue of homosexuality, many people intellectually feel that people's sexual orientation is not a matter for legal intervention, but they nonetheless find homosexual acts to be repellent. The reasonable man test is thus a spurious validation for prevailing societal aesthetics, rather than a test of what society feels to be threatening.

Devlin's fundamental thesis is one of conservatism. He advocates maximum privacy, freedom and toleration, subject to the overriding principles of societal harm and public outrage. Law should be slow to change since it protects the institutions that are the fabric of society. To subvert the morality of a democratic society by attacking these institutions is, to Devlin, tantamount to treason.

For a liberal, such as Dworkin in *Taking Rights Seriously*, Devlin is seeking the legislation of a sort of moral majority that can veto change to the moral environment, when it opposes that change. For Devlin, the individual in the eyes of the law is ultimately a part of society, and, as such, is morally accountable if he is, in himself, grievously deviant.

Hart's Law, Liberty and Morality

In *Law, Liberty and Morality*, Hart recognises that there does not seem to be any real widely shared morality, and there can be no freedom if we are compelled to accept only those things that others approve of.

Hart notes that there are certain constants of the human condition, which he terms the minimum content of natural law, such as the vulnerability of human beings. If we disregard these sociological facts it would be tantamount to suicide.

But beyond these facts, society is faced with a choice of what rules to adopt in order to protect us from the frailties of the human condition. Hart seems to assert that since the development of a society is a collective odyssey, the values that a society has adopted for its preservation and progress constitute a shared morality of sorts. This does not mean that the norms that a society has accepted and retained are ones that are logically necessary for the achievement of social preservation. However, they are instrumental in the maintenance of social cohesion. For this reason he would not accept Devlin's analogy of deviation from moral norms with treason against society. It may be that a change in morality can result in friction, but it need not result in the collapse of society.

Hart also adopts the harm principle, but denies that consent can be used as a mitigating factor. In the case of a minor, for example, the fact that the child consents to something does not necessarily mean that the law should not protect it from harm. Equally, immoral acts in public may be harmful to others and, as such, open to legal censure, whereas acts in private should not be a matter for the law. His justification is that while the first is the legitimate prevention of harm, the latter is the enforcement of societal will over the individual. Hart finds paternalism justified, but not enforced morality, per se.

The use of rationalistic theories to justify the enforcement of morality is somewhat undermined by the arbitrary application of those principles. Most sports are not subject to moral censure, yet there are many sports harmful to participants and non-participants alike. Arbitrariness of this nature betrays the fact that the legal enforcement of morality is a matter more settled by tradition than reason. Perhaps it may be more honest to approach the problem from an alternative perspective that the law should enforce those moral norms that it has traditionally enforced, unless it cannot be morally or rationally justified.

The danger of this is well illustrated by the situation occasioned by the offences of blasphemy, which the law still prohibits within the context of the Christian religion. The Law Commission report on *Offences Against Religion* (1985) (No 145) recommended the complete abolition of blasphemy offences, a recommendation that has not been acted upon.

An introduction to thinking about the foundations of liberalism

It is important to appreciate the intellectual difficulties of liberalism. It is intended to be more than a set of discrete beliefs, say, about rights to personal freedom, or to the treatment of people as equals, or to the exercise of personal morality. Liberalism is these things, true, and can be loosely summed up as tolerance. But it aspires to be a justified doctrine of beliefs. No liberal, like no conservative, wishes to hold a set of beliefs that could be shown to be contradictory, for example, or could be shown to have unacceptable consequences.

The problem of liberalism is that it appears two-faced. It seeks a moral justification for ignoring certain sorts of immoral conduct. It is helpful to give a short review of ways in which answers have been sought to the problem.

One very common view is that liberalism follows from the perceived impossibility of the objectivity of moral reasoning. The argument goes (I emphasise that this view is extremely common): 'My moral view is my own personal opinion only, and therefore I have no right to enforce it upon another person. It follows that everyone is entitled to his own personal point of view. It further follows that the state must be tolerant towards everyone's views.'

Another view, not common now, but very common among young people in the 1960s, is a variant of the view just expressed, and shares, like it, the liberal intuition about tolerance. Instead of accepting the dilemma that you might not approve of conduct that must be tolerated, you were urged to approve it. What you did was to be tolerated not just because it was an exercise of your freedom, but it *was actually good*. Hippy liberalism does, however, escape the crude assumptions about the subjectivity of moral opinions, and its amiable and attractive side includes both the injunction that we should, at least, take an active and approving interest in the activities in which other people engage. That is an endorsement of the imaginative possibilities of liberalism, in which we must view our lives as experiments in living.

Influential critics of liberalism have been a group of philosophers known as the 'communitarians'. They have criticised liberalism on a number of grounds, several of which can be described generally as follows. Liberalism, in preaching the virtues of tolerance, relies too heavily on 'the priority of the individual and his rights over society'. The criticisms focus on the idea that individuals cannot, for a variety of reasons, some 'metaphysical', some solely moral, be thought of as 'atomistic' beings independent of their existence within a community. The idea is that, in some important sense, an individual's good life cannot be separated from the good of the community (and vice versa).

The arguments are too diffuse to be examined in detail here. For what is not clear is that liberalism depends on any idea that community values are not important (depending, of course, on what they are) or that, in any society, individuals can only be seen as 'atomic' units. Nor is it clear that people's having rights is inconsistent with community goals.

An elegant attempt at defending liberalism against the charge that it is neither concerned with the quality of individual lives nor provides an adequate account of community, is made by Raz. His attempt denies the primacy of rights to liberalism, but it does, too, accord very special weight to the idea of personal freedom. He argues that the possibility of an autonomously led life requires that there exist within society an 'adequate' range of options. If there is only one option, or only an extremely limited range of options, then lives cannot be lived autonomously. Raz offers as an example of a life where there are clearly inadequate options that of a man who is kept in a pit. He is given sufficient food to survive. He is free to do what he likes except that he is not allowed to get out of the pit. Another example Raz gives is that of the 'hounded woman'. The woman lives on an island and there are sufficient resources to survive. Unfortunately, there is a large and ferocious animal on the island, too, who hunts the woman, so that she has to spend most of her time and energy escaping from it.

Raz's view is that valuable lives consist in the pursuit of projects and commitments to various 'forms of life' and, since such projects and 'forms of life' are frequently supported and identified by public institutions, the state has an integral role in the enhancement of autonomy. The state *is*, then, concerned with 'perfect' forms of living but not with particular ideals, for that would offend the principle of autonomy.

But forms of life incompatible with the driving principle of Raz's scheme cannot be tolerated, surely. Imagine an autonomous choice to choose a non-autonomous life (as in some ways of living as a nun). There is clearly a difficulty here. How can the endorsement of autonomy permit a non-autonomous life within one comprehensive view? Raz senses that his form of liberalism withers where it is most needed, for he rules out certain incompatible forms of life. We are not required, in his view, to tolerate forms of life that are 'repugnant'.

It is not surprising that he leaves the argument there, for he must sense that his theory, while providing a coherent and comprehensive view, does not solve the central and pressing problem of liberalism. On what grounds must we support the toleration of conduct that is repugnant to, or 'discontinuous' with our own personal ethical convictions? (See, also, Dworkin's theory of liberalism, Chapter 23.)

A practical problem

It may well help the student, in his search for a meaningful evaluation of the law and morality debate, to consider a problem issue. Much has been written on the issue of the rights of homosexuals. The problem is a useful one, since its paradigm is the clash between Judeo-Christian and liberal moralities. The debate seems to be hottest in America, where the lack of explicit constitutional safeguards and the federal system of legislatures has placed the courts in the invidious position of making what is, essentially, a moral choice.

In *Bowers* v *Hardwick* the American Supreme Court was faced with the question of the constitutionality of Georgia's anti-sodomy laws. It was argued that the broad provisions of the American Constitution should be read as being applicable to gay men. The majority of the court found the Georgian state laws to be constitutionally valid.

Bowers presents an interesting situation. On the one hand, since *Brown* it has been clear that the courts may apply the constitution as if it were higher law. The gay case was that, by reasonable implication, the constitutional protection of private life applied equally to homosexual men as to any other minority group. The state case was that the explicit legislation was designed to prevent acts, that of their nature took themselves outside the normal protection of constitutional rights. In legal terms the choice was between implicit higher law and explicit lower law. Thus, legally speaking, the court was faced with six of one and half a dozen of the other.

The moral problem may be formulated in many ways, depending on one's attitude towards the issue. Whichever way the court had decided, one could argue with equal vigour that the law was seen to be settled on moral grounds or pragmatic

grounds. The situation is thus an interesting one, for it presents us with what is essentially a moral dilemma. The dilemma is one of construction of a concept that is a moral rather than factual issue. In his consideration of the case, Mohr in *Gays/Justice*, posits the idea that the notion of homosexuality as a phenomenon is a sociological judgment, rather than a biological fact, one that is derived from the stereotypation of sexual roles.

Certainly there are those who do not agree with him on this, such as Moran. However, the law is asked to consider gays at the same time as a special case and not a special case. The criminalisation of sodomy itself is not the issue in *Bowers*. It is the restriction on the freedom of sexual expression and privacy of gay relationships that is being criticised. As such, to a certain extent, the argument is that gays are a special case. On the other hand, there is an appeal to broad constitutional provisions, that gays are equally as entitled to privacy in their private lives as heterosexuals. The vital question becomes what the nature of being gay is.

The Georgian laws do not seek to prevent a homosexual disposition, for this would be almost impossible. The effect of the law is to label homosexual activity as aberrant. By the same token, to deny equal constitutional treatment of homosexual men is either to deny homosexuality as a normal practice, to judge it to be aberrant, or simply to ignore it altogether.

Now, we might seek to apply some of the theoretical knowledge to this practical problem. The positivist view of this issue would certainly be that the law is what the law is. The only problem with this approach is that before *Bowers,* and even after *Bowers*, what the law is seems very hard to tell. The tradition of constitutional construction is one that derives fairly complex decisions from very static norms. There is no real guarantee that a differently constituted court would not make a different decision in the same circumstances.

Positivism has a view of law based on the assumption of validity of legal statements. Thus, if Georgian law states that sodomy is illegal, then it is illegal. However, to state that law prohibits such and such is to say what legal statements have been made in the past and then to presuppose that such statements will be valid in the future. But law is something more than the history of legal statements. The vital elements in a living legal system involve advocates and advisers evaluating the probability of certain legal arguments being successful. In addition personnel of legal institutions are not only required to decide what the law requires them to decide in terms of posited norms, but also to make rational judgments in the light of these norms in detailed factual circumstances that are unlikely to have been exactly determined by existing legal norms. However, practical reasoning is seldom free of moral considerations, whether it be of a personal, political or societal nature. This is, incidentally, precisely Dworkin's theory of correct reasoning in hard cases.

This view, too, would certainly be endorsed by Fuller, who appreciated the implicit nature of law as a human activity. However, Fuller's procedural morality of the law would have little to say about the problem faced by the court in *Bowers*.

In contrast there seems to be a tension between Hart's view of what law is and what he believes its role should be. Hart justifies the positivist separation of law and morality, not just on empirical grounds, but also on moral grounds. He reminds us that law is not morality and should not supplant it. He also recommends that law should be paternalistic in the prevention of harm. His concept of harm principle would censure certain classes of homosexual activities on the ground of corruption. This seems to be at issue with his advocacy of the separation of law and morality.

On the other hand, Devlin's disgust test would be of critical difficulty for the judge. The judge would have to decide whether the reasonable man can only be a heterosexual. To assume this would be almost certainly to preclude any answer other than the legitimation of state censure of homosexuality. Since the majority in America are taken to be heterosexual, this is the validation of moral standards on the basis of numbers. In the past, slavery and segregation have been regarded by the majority as morally right at the expense of the minority.

Mill's harm principle, coupled with his moral libertarianism, would isolate the problem from the danger of the moral majority, but would require an empirical and/or sociological justification for legal prohibition. This remains the subject of controversy since most empirical and sociological studies of the subject evoke emotionally charged criticisms of homophobic premises.

Still more controversial would be the application of Dias' principle that moral deviance should be cured. Previously in England, before the relaxation of controls on homosexual activity, a harsh regime of aversion and diversion therapies had been employed to cure homosexuals. The results were mixed. It seems from the body of scientific research that there is an element of conditioned rather than innate homosexuality. But to justify curing conditioned homosexuals would be to justify sexual conditioning to fit in with a perceived sexual normality. The premise would once again seem to require a pre-judgment on moral grounds.

Distinguishing 'manly sports' from sado-masochism

R v *Brown and Others* (1992) raises the issue of whether the State through its criminal law should enforce matters of private morality. The facts are sordid. A number of homosexuals committed sado-masochistic acts on each other in 'torture chambers' (and videoed what they did, which was how the activities became known to the police). Small cuts and bruises to genital areas were intentionally inflicted by the defendants in the course of acting out torture scenes. There was no real torture because there was consent (apparently) and no permanent injury (amazingly, given the descriptions of what was done). Nevertheless, the Court of Appeal said that the consents given did not amount to defences to the assaults. The judgment by Lord Lane CJ is not very helpful on general matters of principle and he decides on the basis of cases which say that a person cannot consent to acts that go beyond being 'transient and trifling'. But we have always known that 'manly sports' like rugger are exempt from this, so why not 'effeminate sports' like sado-masochism? The

difference in principle is not obvious unless you take the line that people are not permitted to make *their own choices* as to what they want to do in their spare time. Can you think of a way of distinguishing these two sorts of 'sport' which is consistent with the view that we should be free to do what we like provided we do not interfere with the freedom of others? One senses the subliminal prurience with which the Chief Justice addresses this case!

The case has recently gone to the House of Lords and is given a short report in which Lord Templeman is reported to have said:

> 'The slogan that every person had a right to deal with his body as he pleased did not provide a sufficient guide to the policy decision which must be made ... Society was entitled and bound to protect itself against a cult of violence ...'.

Here is a real test for you to decide what your liberal inclinations are. Quite apart from whether judges should come to these sorts of decision (you might think that it is just impossible to distinguish manly sports and this sort of activity *on legal grounds*), do you think that society ever has the moral right to do what these judges did? That is, do you think that outlawing this sort of activity by statute, say, could be justified? After all, the people in the *Brown* case actually consented. And since they did, they were exercising their personal autonomy so highly prized by liberalism; they were not interfering with the personal autonomy of others. Why, then, prohibit?

The test is whether you think that the prurience you feel at what they did is a sufficient ground for outlawing. Is it not the case that the real difference between the so-called 'manly sports' and the torture session is that of plain dislike – a plain feeling of, to use Lord Devlin's phrase, 'intoleration, indignation and disgust' of the acts? After all, we all like watching a game of rugby: it is 'clean', it is out in the open, and, of course, people get scratched, gashed, concussed and their bones are broken. But homosexual scratching and gashing is somehow horrible. Is that the right way to look at things? Here is one difference: the scratching and gashing was intentional, albeit consented to, but that should not make a difference because we can consent to quite severe gashing when we consent to an operation to having our appendix removed, for example. Why are medical operations justifiable, but not torture sessions? One thing about this sort of case is that there are no easy answers, although it should be clear that a simple appeal to intuition is insufficient.

Conclusion

What the arguments provide is rational justifications for preconceived moral attitudes. Conversely, the fact that such a debate exists, and the nature of the problem faced in *Bowers*, emphasises that moral judgments cannot be excluded from legal discourse, since legal discourse is simply a specialised form of human discourse. What it does reinforce, is that although there is no firm moral content to law, the nature of the legal pursuit is to regulate human behaviour. Some of the most important areas of

human activity involve moral issues. A legal system that does not address the moral facet of human behaviour is one that inadequately comprehends human nature and therefore is almost certainly doomed to failure. This is not to say that the legal system's morality needs be convergent with that of its subjects, but it requires the legislators and judiciary to be aware of the moral impulses that propel individuals.