

Introduction

The law is rarely out of the news. It frequently stimulates controversy. While lawyers and politicians celebrate the virtues of the rule of law, reformers lament its shortcomings, and cynics question its professed equivalence with justice. Yet all recognize the law as a vehicle for social change. And few doubt the central role of law in our social, political, moral, and economic life.

But what is this thing called law? Does it consist of a set of universal moral principles in accordance with nature (see Chapter 1)? Or is it simply a collection of largely man-made, valid rules, commands, or norms (Chapter 2)? Does the law have a specific purpose, such as the protection of individual rights (Chapter 3), the attainment of justice (Chapter 4), or economic, political, and sexual equality (Chapter 6)? Can the law be divorced from its social context (Chapter 5)?

These are merely some of the questions that lie in wait for anyone attempting to uncover the meaning of the concept and the function of law. And they permeate the landscape of the philosophy of law with its generous frontiers. Charting this vast territory is a daunting assignment. I can hope, in these pages, to identify only the most prominent features of its topography. To this end, I have placed the emphasis upon the leading legal theories, for they provide the

optimum introduction to both classical and contemporary jurisprudential thought.

This approach is in no way intended to devalue the strategy that seeks to elucidate the abundant conceptual and definitional problems that beset much of legal philosophy. Indeed, Chapter 4 is devoted to two of the most significant and difficult of them: rights and justice. Other taxing matters confronted by jurists include the doctrine of precedent (under which courts are themselves bound to follow decisions of higher tribunals), the question of whether there is a moral duty to obey the law, the concept of legal personality, the complexities of causation and liability, and various theories of punishment. All have a place within legal theory's large territory, but, though some are considered indirectly in the following chapters, they lie beyond the modest objectives of these pages.

Though this book promises a very short introduction to the philosophy of law, I use this phrase interchangeably with 'legal theory', 'legal philosophy', and 'jurisprudence'. Strictly speaking, however, 'jurisprudence' concerns the theoretical analysis of law at the highest level of abstraction (e.g. questions about the nature of a right or a duty, judicial reasoning, etc. and are frequently implied within substantive legal disciplines). 'Legal theory' is often used to denote theoretical enquiries about law 'as such' that extend beyond the boundaries of law as understood by professional lawyers (e.g. Marxist approaches to legal domination). The 'philosophy of law', as its name implies, normally proceeds from the standpoint of the discipline of philosophy (e.g. it attempts to unravel the sort of problems that might vex moral or political philosophers, such as the concepts of freedom or authority). But contemporary writers tend to pay little attention to these nice distinctions; the terrain of modern legal philosophy contains few fences.

Legal theory is a far cry from legal theatre. Yet even the sensationalist criminal trials – real or manufactured – that have

become regular television fare, encapsulate features of the law that characteristically agitate legal philosophers. They spawn awkward questions about moral and legal responsibility, the justifications of punishment, the concept of harm, the judicial function, due process, and many more. The philosophy of law, it is easy to demonstrate, is rarely an abstract, impractical pursuit.

No society can properly be understood or explained without a coherent conception of its law and legal doctrine. The social, moral, and cultural foundations of the law, and the theories which both inform and account for them, are no less important than the law's 'black letter'. Among the many topics within legal theory's capacious confines is that of the definition of law itself. It stands to reason that, before we can begin to explore the nature of law, we need to clarify what we mean by this often elusive concept. We can barely begin our analysis of the law and legal system without some shared understanding of what it is we are talking about. A constructive first step is to distinguish between descriptive and normative legal theory.

Descriptive legal theory seeks to explain what the law is, and why, and its consequences. Normative legal theories, on the other hand, are concerned with what the law ought to be. Put differently, descriptive legal theories are about facts, normative legal theories are about values. There are three principal types of descriptive legal theory. First, there is the 'doctrinal' approach which propounds a theory to elucidate a particular legal doctrine. For example, freedom of expression might be justified by decisions of the courts on the limits of free speech. Doctrinal legal theory seeks to answer questions such as 'can these cases be elucidated by some underlying theory?' Secondly, descriptive legal theory may be 'explanatory'; it attempts to explain why the law is as it is. Marxist legal theory, for example, is 'explanatory' in this sense, for it offers an account of law as expressing the interests of the ruling class (see Chapter 5). A third form of descriptive legal theory concerns the consequences that are likely to follow from a certain set of legal rules. For example,

the economic analysis of law (see Chapter 4) might gauge the likely costs of imposing a regime of strict liability on the manufacturers of motor vehicles.

Normative legal theory, on the other hand, is concerned with values. A normative theory may, for instance, seek to establish whether strict liability of manufacturers of motor vehicles ought to be adopted in order to protect consumers. Would it be fair or just to do so? Normative legal theories thus tend inevitably to be associated with moral or political theories. In pursuing an evaluation of the law, normative legal theories might be either 'ideal' or 'non-ideal'. The former relate to what legal rules would create the best legal system if it were politically achievable. The latter presuppose an assortment of constraints on the choice of legal rules, such as the difficulty of enforcing such rules.

But there is no clear-cut distinction between these two categories of legal philosophy. A normative theory may rely on a descriptive theory to obtain its purchase. Thus it is hard to sustain the normative theory of utilitarianism (see Chapter 4) without a descriptive account of the consequences of the application of a specific rule. How would a utilitarian know whether rule X causes the greatest happiness (result Y) without a description of these consequences? Similarly, a descriptive legal theory may, on the basis of predictions about the likelihood of success of, say, law reform, put a brake on the normative legal theory that gave birth to the improvement.

It will also be seen (in Chapter 3) how normative and descriptive theory may be grafted together to yield a hybrid species of legal philosophy. In Ronald Dworkin's theory of 'law as integrity', for example, there is an amalgamation of the goals of descriptive doctrinal theory and normative theory. By claiming that a theory of law should both 'fit' and 'justify' the legal materials, his theory of law as an interpretative concept appears to allow descriptive doctrinal theory to coalesce with normative theory.

We live in a troubled, inequitable world. Perhaps it has always been so. In the face of wickedness and injustice, it is not difficult to descend into vague oversimplification and rhetoric when reflecting upon the proper nature and function of the law. Analytical clarity and scrupulous jurisprudential deliberation on the fundamental nature of law, justice, and the meaning of legal concepts are indispensable. Legal theory has a decisive role to play in defining and defending the values and ideals that sustain our way of life.

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