LAW

The cornerstone of this web-site is, of course, an understanding and an examination of law, both as an significant part of any society worthy of study in itself and also as a laboratory in which I can work on ideas before exporting their application to the world more generally. And yet, the question "what is law?" is a question which lawyers frequently shy away from precisely because it is so difficult to answer once one has met so much law – the more one reads, the less it is possible to generalise – and once one has accepted that law's fluidity generally means that it is incapable of easy definition. By contrast, many social theorists and sociologists find it much easier to talk briefly of "law" because it is a discipline with which they have little technical intimacy and because when they say "law" they have in mind only a very narrow notion of "the application of criminal law to a particular part of society" or "the ideological importance of the judiciary in society generally" or "the means by which the State expresses its commands to the populace". None of these accounts does the in-depth study of law any justice.

In what follows is an attempt, quite consciously, not to account for all of the sophisticated ideas about law but rather to offer a beginning to an ordering of an answer to the question "what is law?". This page was written in the summer of 2004 and is only scratches the surface. I was prompted to write it when I recollected the lectures I have given to brand new, first-year undergraduates in trying to explain the many divisions there are in the law. It is the beginnings of that ordering (or, heaven help me, "taxonomy") which I attempt here.

A definition of law

There are three types of law.

(1) *The laws of science*. An example would be the laws of physics which describe the physical properties which all matter has under certain conditions. Matter responds to these law of physics not as a result of obedience in the sense in which we will consider law in the next two types of law but rather because the possible manner in which matter is capable of behaving is described (rather than prescribed) by those observations which are made by scientists and described then as being laws. Obedience to law is a question

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of the authority of law and the dominance of law in society; whereas, the laws of science are observations of the behaviour of natural phenomena.

(2) *Religious law* which, for example, in the Christian tradition, is the revealed word of God giving commands to human beings setting out prescriptions for the manner in which those people must live their lives. Most law, with the obvious exception of ecclesiastical law for example, is secular in the modern age as a result of the work of Hobbes and Locke and the Enlightenment philosophers who replaced superstitious belief in religious ritual and law with the notion that human beings had free will and that it was for human beings to organise laws which curtailed that freedom in proscribed areas. Much of this secular law may have been created by people who held religious belief and whose impetus in many circumstances was to effect moral beliefs based on their religious principles, nevertheless the philosophy of this law was based on humanist principles.

(3) *Law* is that body of statutes, principles, rights and obligations which are recognised by jurists and enforced by the courts in accordance with formal rules of procedure. Law is a body in the sense that its components are susceptible of change but that they are generally capable of examination and renewal where appropriate. The content of the law, however, may be unknown in many instances either because no case has come before a court to test the application of the law to a given context and/or because there is no statute directly covering a particular point, or because jurists have not discussed how the law should develop in that context in the future.

[*Criminal law as a code of proscribed activity*] Hobbes's view of the law, in part, was that every person was free to do whatever he or she pleased but that the law may proscribe certain actions as being unlawful. This Hobbesian model, however, considers law only in the terms of a criminal law which regulates our conduct and punishes it where appropriate.

[*Public law*] Public law is the legal relationship between private people (individuals and companies) and the state or public bodies. The purpose of public law is to prevent the state from infringing the rights of private people: that is, it ensures that in the state's inter-actions with private people are conducted in accordance with the law. There is a circularity here in that it is an organ of the state, in the form of Parliament, which creates the law and therefore it is the state which in part creates the limits beyond which the state is not permitted to act. Public law then permits the judicial review of administrative acts by public bodies. Criminal law could be thought of as a form of public law to the extent that it relates to the state's control, through that criminal law, of personal conduct.

[*(Civil) Private law*] There are other forms of law which offer models for human action, in the form of civil private law, for the creation of contracts, the organisation of social groups and the holding of property (to give three significant examples): these laws are not concerned with punishment but are concerned to guarantee private actors that if they act in a given manner then predictable consequences will flow from their actions. For example, the formation of an agreement by means of an offer being accepted, of consideration passing and of legal relations being created has the cumulative effect of assuring the parties to the agreement that they have formed a legally-enforceable contract which both parties will be obliged to carry out or else to pay damages if the contract is

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not performed. The law also regulates the inter-action of the individual and the State by means of a constitution expressed by public law and human rights law. Again, this area of law does not prescribe punishment necessarily but does express rights and obligations.

[*Law as rights and obligations*] All law, then, is an expression of enforceable rights and obligations between any combination of private actors between themselves or with the state. This we shall call "formal law". Formal law is comprised of substantive law, which are the "rules" (to use a blunt term for the time being) created by the statutes properly enacted by Parliament and the case law generated by the courts. Formal law is also comprised in procedural law: that is, the manner by which matters are brought before a court.

[*Informal law*] Outside formal law are other forms of what we shall term here "informal law" which may or may not be considered to be law at all: examples of this sort of informal law are regulation by bodies which are not courts but which are created by statute, for example, and alternative dispute resolution carried on by referees or arbitrators which are not courts but whose decisions are considered binding by actors within a given market or indulging in a specified activity. Regulatory bodies include the Financial Services Authority which creates detailed rules under the authority granted to it by statute. Alternative dispute resolution may be carried on by referees in football matches whereby the players agree to abide (however reluctantly on occasion) by the decisions of those referees or it may be carried on by arbitrators making decisions relating to commercial contracts in which the parties have agreed to be bound by that arbitrator's decision rather than going to court.

[*A positivist history of English law*] Law is generally understood in the English tradition as arising on the basis of one of two bases. These positions may be summarised very crudely as follows. Law may be said to arise on the basis of a positivist account whereby law is understood as being a series of commands issues by some sovereign person which are then obeyed by the subjects of that law. This point of view lends itself to an attractive history of law: from the earliest period in recorded history some have had domination over others as a result, usually, of force or annexation of territory and those in dominion have managed to enforce their commands (later in the form of edicts and laws in progressively more organised social groups) over other people. Legitimacy to create law is a result of a system of obedience and an acceptance that dominion gave the right to create rules. As societies became organised from small groups into tribes and then into kingdoms, a rule-based system of identifying leaders – those with sovereign power – and a force-based system of subjugating dissent tied together into law over time. Thus law evolved as a system of obeying the commands of the sovereign.

[*Natural law approaches*] Alternatively, law may be said to arise on the basis of some natural law such that law is understood as being drawn from a bedrock of general moral principles which are developed into a code. This latter idea is attractive in jurisdictions like the USA in which there is a genuine, written constitution prepared at a significant in history which purports to provide those principles in textual form. It is also attractive in relation to rules which seem intuitively to have a moral base, such as the law against murder or perhaps the law in favour of the protection of private property rights. Murdering another person would appear, for example, to go against Kant's imperative that we should do unto others as we would have them do unto us: that is, that I would accept a prohibition on myself being murdered being enlarged into a general prohibition

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on anyone murdering anyone else. Similarly, my desire that my freely-acquired property not be stolen from me is something which I may accept should apply to all of the property belonging to everyone else. On this basis, Kant creates his groundwork for basic morality.

[*Changing our understanding of law to a law taking its legitimacy from the people*] A third understanding of law is that the entire justice system is a service provided to the people which draws its authority from the people. These ideas are considered in greater detail in *Jurisprudence*. The suggestion made in that discussion is that we should begin to understand law not as a series of commands from a sovereign but as a system of democratic compliances with those exercising democratically-legitimate rights to create laws (whether in the form of statute or case law). The significant change in emphasis here is that law should be seen as coming from the people rather than being imposed on the people by a sovereign: in a democracy, the people are sovereign and therefore it is not useful to talk of the people as being subject to the people in the form of a sovereign: rather it is true that individual people who may wish to contravene the wishes of the people (for example by stealing property) will be made subject to the laws which have been created in the name of the majority of the people. To move away from the concept of a "sovereign" will be to signal a move away from a conception in which the people rank second behind some other force in law as opposed to all of the people being of equal rank within the law. Another by-product of this re-conceptualisation is that judges should be perceived to be public servants rather than being people who hold power above the people: rather, judges as public servants wield power which has been handed to them by the people. Finally, the law can also be understood as providing models by reference to which people can organise their lives, rather than simply reacting to law as a series of prescriptions as to how they must act so as to avoid the interference of the state in their lives.

[*Law, power and legitimacy*] These notions may be considered to be naïve. For example, it may be thought that these ideas fail to notice that law is the formalisation of the imposition of power over individuals who belong, for example, to oppressed minorities within society. On the contrary, however, my conceptualisation of law requires equality before the law in the form of equality of access to the law and to the power which the law permits. Through its critique of the privatisation of law and of the creation of private reservoirs of power within the law, my conceptualisation of law challenges the sociology of a justice system which grants preferential treatment de facto to some people at the expense of others, even if its substantive norms generally seek to operate de jure on the basis of equality. As soon as one talks of law one is talking of a claim to entitlement (in effect, a political argument) which has acquired the legitimacy of being enshrined in law with the power that that offers. This power is at the heart of my account of law as a moral force based on a grundnorm of political and democratic legitimacy which must always be capable of equal access and equal challenge.

Law is something belonging to the people and not something which is simply done to the people.

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Law, lore and ideology

As George Orwell put it in the *The Lion and the Unicorn: the English Genius*, it is a key English trait that English people believe in the law and in the impartiality of the law. (Orwell was concerned particularly with the English – I would suggest this could be enlarged to "British", with the caveats which are to follow.) These ideas are the cornerstones of our constitutional personality. We live in a society governed by law and in which we expect all to be subject to the rule of law, provided that that is a law which operates impartially.

What is surprising, then, is the level of ignorance among ordinary citizens as to the content of the substantive law. Some like Anne Barlow, to clutch at a random example, point out how many people believe that there is such an institution as "common law marriage" which has some legal effect even without a valid marriage, when no such institution in fact exists. Does the automatic respect for law and for lawyers depend then on ignorance of what the law actually is and how the legal system operates? Does an air of mystery float its status?

Alternatively – given the level of popular mistrust of all formal, legal institutions and the banal idiocy of our media – there is still a surprising level of genuflection to the law. In media reports, certain propositions are suggested to be legal or illegal, and the pronouncements of judges are taken to be gospel. Yet, once people have come into contact with the legal system – something which most people will live their entire lives doing no more than once or twice – is there still the same genuflection to it. An example of the place of judges in our society – as impartial and wise arbitrators – is evident from the number of inquiries which judges or other lawyers are asked to chair. And yet, uniquely perhaps, with reports like the Hutton Report of 2003/04 there is a sense among the media that these reports can show up only how out-of-touch these judges are. What is less frequently considered is the extent to which the judges will be clinging to the extent of their remit as investigators, weighing matters with a lawyer-like demand for proof over supposition, as opposed to the witch-hunt which propelled the Hutton Report and which damned Lord Hutton's failure to identify Blair as the scapegoat for a nation's wrath.

There is also a sense that once a law becomes "the law", then it acquires a powerful place as a result of having become law in the proper fashion. As Foucault considers in *The Archaeology of Knowledge*: it is a very important feature of our societies that once individuals have received the appropriate training and been awarded the appropriate honours that they then have the power to speak and to create law. In a celebrity culture we might also ask whether or not simply being well-known and adored is sufficient legitimacy to speak: why should I care how celebrities have reacted to a given piece of news? Why can't I hear more from eye witnesses or experts? Nevertheless, in terms of law, once legislators or judges have accepted a given proposition as being law, then it acquires a different status in one instant from another.

Law, I would suggest, often operates then as lore: that is something which is the subject of irrational belief. In short, an ideology.

What a student of law should never forget is that certain propositions become law simply because we say that they are law and because they are accepted as being law. To employ Foucault's concept of "les choses dites": once these words are spoken by a judge as being part of the law, they then become law. But, significantly, if other words were

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spoken then those other words would become law instead. Language is incredibly powerful when it becomes law/lore which then attracts the obedience of other people.

Issues to be considered in time …

The components of the law

English law is composed of the following sorts of divisions.

[*Statute and case law*] Statute is law passed by Parliament either in the form of Acts of Parliament or in the form of subordinate legislation (Statutory Instruments) which are generally created without the same amounts of debate as Acts of Parliament under powers contained in those Acts of Parliament. There are other forms of legislation such as Orders in Council which take effect by virtue of the Royal prerogatives. Aside from statute law, there is then judge-made law, which constitutes much the larger part of English law. There are many well known concepts of English law, such as the law on murder or the law on the creation of contracts, which are based on long-standing judge-made principles. This judge-made law takes effect as the common law or as a separate code of principle known as equity. The doctrine of precedent provides that courts must follow the decisions of courts of equal or higher standing, unless those previous decisions can be deemed inapplicable or can be distinguished from the present case.

[*Criminal law and civil law*] The law then also divides between criminal law and civil law. Criminal law is concerned with rules which prohibit certain conduct on pain of the imposition of penalties. Those penalties may or may not involve imprisonment, fines or community service. Criminal law involves the state imposing penalties on individuals: private prosecutions are rare in the event that the public authorities refuse to bring a prosecution. Civil law is concerned with relations between private individuals and only involve state authorities in the form of judges who resolve disputes brought before them by those private parties. There may be civil laws which have the effect of requiring one or other of the parties to pay damages or to perform other acts which we may consider similar to criminal penalties. However, such civil penalties are concerned with redress between private individuals (or occasionally the state acting as though a private person in relation to its employees) rather than with punishment as part of a public policy or on behalf of the greater public good.

[*Public law and private law*] There is a distinction between public law and private law. Public law concerns the actions of public bodies (by which is meant organs of the State or other persons having powers and duties with some public effect) in relation to individuals or other private persons (such as companies) whether in relation to the substantive, statutory obligations of those public bodies or some procedural impropriety by those public bodies in the exercise of their public functions. By contrast, private law is concerned only with private relations between individuals. For the future of human rights law in England and Wales, it is unclear to what extent human rights may be said to be capable of action and protection between private individuals as well as between individual and the state.

[*Mandatory law and organic law*] Mandatory laws are those laws which must be obeyed no matter what. For example, criminal law and the constitutional obligations of public bodies. There are also parts of civil law which cannot be avoided, whether by

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contract of private persons or otherwise. By contrast, organic law is law which offers models and capabilities to people to achieve their goals. For example, one conception of charitable trusts law is that trusts law provides the means by which ordinary citizens can create an organisation to achieve their common purposes. In such situations, the law will refuse to support purported charities which are not created in the proper fashion or which breach some principle of public policy, in either case with the effect that the State will not lend its support through the judiciary to such activities; whereas, by the other token, this law could be seen as the State supporting particular activities by enforcing those people's desires through the courts.

[*Rights and obligations*] Laws may impose obligations on people by which they are required to act in a given fashion. Obligations may be in the form of criminal penalties or liability to compensate another person if those obligations are performed wrongly or inadequately. Obligations may be positive obligations to do something, such as a trustee's obligation to invest a trust fund, or negative obligations to refrain from doing something, such as refraining from committing murder (a general negative obligation) or a trustee from using a trust fund for her personal gain (a specific negative obligation). Rights, by contrast, give their holders the power to do certain things or to compel given actions, frequently obliging others to assist, procure or refrain from interfering in the exercise of such powers.

The legal system

Equality of access

A history of English law

An anthropological historiography of law

It is frequently suggested (see Cotterrell on Durkheim and Mauss) that the earliest forms of law were property laws concerned with the preservation of land from use by any members of a tribe other than as a sacred burial ground or altar. Alternatively, such a property law may have prevented land used for rudimentary agriculture being used for any other purpose. In time, such property law may have become rules which provided that given land was preserved for the occupation of identified people. Which came first is impossible to know. Given that these are suggested to be anthropologically primitive societies, then the status of these rules as "law" would be based on the force exercised by those who considered themselves entitled to prevent other people's use of land from interfering with their "rights". The eventual emergence of more complex human society carries with it mechanisms for transmitting more complex notions of the control of the use of property and of punishing infractions of these rules or customs. Subsequently, livestock became "owned" in some way similar to the ownership of land in this fashion: it is no accident that the term "chattel" is derived from "cattle", the most fundamental form of livestock, and "pecuniary" from "pecus" meaning cow.

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Alternatively, early laws enforced socially may have derived – in the Freudian metaphor – from feelings of guilt held socially about the wrongfulness of certain actions. Freud talks of the murder of the primal father in which it is supposed that the chief of the tribe – the father – was murdered by his sons as they grew older and sought power, that his sons were guilty of what they had done, and that murder consequently became a taboo which was punishable in some way by the rest of the tribe. Philosophers differ about whether our social decisions to prohibit identified actions stems entirely from guilt at past action, or from enlightened self-interest (by which is meant the banning of certain behaviour the effects of which we would not wish to suffer ourselves), or from altruistic theoretical principles (by which is meant establishing in the abstract that given behaviour is unacceptable in the abstract, whether religiously, ethically or otherwise, and thus taboo).

The means by which the legal system operates in its familiar courtroom setting, with judges splendidly dressed in robes dealing with arguments presented by advocates, has been likened to primitive magic rituals. In such rituals, it was necessary to persuade the magician to perform the proper incantation and ceremony so as to imbue the devotee with strength or to place a curse on another person, and so on. Consequently we can see the pleadings lodged with the court by the plaintiff or prosecutor as being an attempt to start the ritual incantation. The judge in his court dress is dressed like the magician for the proper performance of the ritual and for the obedience of the devotees. Finally, the spell spoken by the judge is in the form of the judgment which is drawn from his knowledge from the ancient lore or law.

The jurisprudential accounts of law: a brief introduction

A philosophy of law

The embodied individual
The perception of law (by the law and by the people)
The individual and the social

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