1. THE NATURE OF LAW

Since legal theory is in general an attempt to answer the question "What is law?" we may first inquire why it is that so much time and energy should be devoted to this problem. What are the reasons that have motivated this investigation into the nature of law?

It could be argued that the need to provide a definition of law springs from the necessity of clarifying the most basic of all legal concepts, the concept of law itself. If legal theory is concerned with the analysis of legal concepts, surely the first problem is to analyze the basic concept. Further, it might be argued that this is no mere theoretical matter but one of practical legal significance. Perennial questions, such as whether international law is really law and whether an unjust law can really be law can only be solved by reference to the definition of law.[1]

The desire to define law springs also from a desire for generalization. Having learnt to define various specific crimes, we find it natural to ask for a general definition of the notion of a crime. Likewise, knowing how to tell whether a proposition is a valid proposition of Czech law, French law or any other system of law, we feel it natural to take the further step of looking for a general test of legality and searching for some abstract criterion by which to determine the validity of a rule of law.

In doing so we are also in fact trying to set up an abstract model of a legal system at work in society, just as an economist for example seeks to construct a model of an economic society. And the model produced so may afford insight into the working of concrete legal systems.

Furthermore, the word "law" is one high in emotive content. Refuse to classify unjust laws as law, and the citizen will feel more free to disregard them; cease to describe international law as law, and much of its prestige and effectiveness is gone; designate a rule of constitutional law a mere convention, and its obligatoriness diminishes. Accordingly, whether or not to apply the term "law" to such phenomena may not be a strictly legal question, but it is one of considerable non-legal or political importance.

What emerges then is that no neat and simple definition of law will do. If law were a legal concept, it might be useful to lay down clear boundaries between what shall and what shall not count as law. But the fact that the con-

[1] Bix, B. *Jurisprudence: Theory and Context*, Carolina Academic Press, 2012, p. 3

cept of law has no practical application precludes the need for this kind of definition. Nor on the other hand would such a definition solve any of the perennial problems, such as whether international law is law.

What we need is an analysis to unravel the confusions surrounding the concept of law, to highlight the salient features of a legal system and to furnish us with an insight into the nature, function and operation of law. Here the various theories of law advanced by legal theorists are of particular value, for they not only constitute a starting-point for our investigation but also serve to emphasize the different facets of law and so build up a complete and rounded picture of the concept.

It should be noted, however, that these different theories are not necessarily all attempts to answer the same question. Some theories try to define law by reference to its **formal characteristics** and to state what distinguishes law from other related phenomena.

Others concentrate rather on the **content of law** and inquire what law ought to be rather than what it is. Yet others stress the operation of law in society and attempt to describe the function of **law as it works** in actual practice. The conflicts between such theories then are not altogether real, in so far as each theory is dealing with a slightly different aspect of law.

We shall consider three particular approaches to law on account of the influence which they have had and the insight which they provide into the nature of the law. These are the **theory of natural law**, which defines law according to its content and looks to the problem of what law ought to be; the **theory of legal positivism**, which defines law according to formal criteria; and the **sociological jurisprudence**, which defines law in terms of its actual functioning and operation.

1.1. Natural law

The idea that in reality law consists of rules in accordance with reason and nature has formed the basis of a variety of natural law theories ranging from classical times to the present day. The central notion is that there are **objective moral principles** which depend on the essential nature of the universe and which can be discovered by natural reason, and that ordinary human law is only truly law in so far as it conforms to these principles. These principles of justice and morality constitute the natural law, which is valid of necessi-

ty, because the rules for human conduct are logically connected with truths concerning human nature.[2]

This connection enables us to ascertain the principles of natural law by reason and common sense, and the natural law differs from rules of ordinary human law (positive law) which can be found only by reference to legal sources such as constitutions, codes, statutes and so on. But because law can only be true law if it is obligatory, and since law contrary to the principles of natural law cannot be obligatory, a human law at variance with natural law is not really law at all, but merely an abuse or violation of law.

The attractions of the theory are self-evident. Ordinary laws all too often fall short of the ideal, and from the celebrated protest of Antigone against the tyrant's unjust decree to the rejection at Nuremberg of the defense of superior orders, men have felt the need of an appeal from positive law to some higher standard. Just such a standard is provided by natural law, which with its battle-cry "**lex injusta non est lex**" has served to criticize and restrict positive law.

Natural law also serves as a defense against ethical relativism. Indeed the idea of natural law originated in answer to a philosophical theory which challenged the obligation of all human rules and even of law itself. This theory arose out of the celebrated distinction drawn by Greek philosophers between occurrences regulated by laws of nature, e.g., the growth of plants, the movements of the heavenly bodies and so on, and conventional phenomena dependent on human choice, e.g., human customs, manners and fashions.

On this view, rules of law, like those of language or etiquette, appeared ultimately to depend not on natural necessity but rather on pure historical accident and convention; and, being arbitrary and contingent rather than necessary and obligatory, they seemed to have no special claim to obedience. It was in answer to this that Aristotle pointed out that while some laws seemed to be purely conventional; others seemed to be common to all states.

This, however, was but the germ of a natural law theory. The real construction of a theory was the work of the Stoic philosophers of the following centuries. Their philosophy was that man should live according to nature and that since the distinctive feature of man's nature was his endowment with reason, this meant that he should live according to the dictates of reason.

Now one attraction of natural law theory is the possibility which it promises of finding common moral ground for different religions and different

[2] Ratnapala, S. *Jurisprudence*, Cambridge University Press, 2011, p. 119

outlooks. Though Christianity, like Judaism, derived many of its moral tenets from divine revelation, nevertheless St. Paul had taught that conscience unaided could arrive at moral truths. On this foundation the medieval theologians were able to synthesize Christian doctrine with much of the teaching of non-Christian philosophers.[3]

Indeed later philosophers considered the validity of natural law to be independent of the existence of the deity. But whereas the medievalist had viewed natural law from the standpoint of man's function and duties, later philosophers such as Hobbes and Locke were concerned rather with man's rights, and sought to derive from the characteristics of human nature certain **natural or fundamental rights**.

The idea of natural law, however, raises formidable difficulties. These center round the problem whether moral propositions can be derived from propositions of fact, whether an "ought" can be deduced from an "is". The value of being able to make such a derivation is that factual propositions can be established as true and are therefore less open to disagreement than moral propositions. Men may disagree about whether euthanasia is justifiable, but not for example about whether arsenic is poisonous. Accordingly, if moral propositions could be deduced from factual propositions, we could establish moral truths commanding general agreement.

The way in which natural law seeks to do this is by arguing that if it is a natural law for man to act in a certain way – and this is something which observation can reveal – then he ought morally to act in this way. If for example it is a natural law for mankind to reproduce itself, then men should beget children. It would be no more right for men to act contrary to this law than for trees not to bear fruit, for each would be acting contrary to their nature.

Legal rules differ from moral rules in certain important respects. **Legal rules admit in principle of alteration by legislation**. Most legal systems provide legislative procedures for changing the law, and even where such procedures are absent, as in the case of international law, this absence is purely contingent: there is nothing illogical or self-contradictory in the notion of international law possessing a legislature.

Moral rules on the other hand do not even in principle admit change by legislation; **to change moral rules by legislation is not only factually impossible, it is unimaginable**. What sense could it make to say that certain acts which have always been morally wrong shall from now on by decree

[3] Emon, A., Levering, M., Novak, D. *Natural Law: A Jewish, Christian, and Muslim Trialogue*, Oxford University Press 2015

be morally permissible? Moral attitudes may and do change, but not in this fashion.

Secondly, there is a difference relating to the settlement of disputes. Legal disputes are essentially amenable to adjudication: a dispute about the existence, meaning or application of a legal rule can be decided with finality by a tribunal. In moral arguments final settlement is unattainable not on account of some factual defect, but by virtue of the very nature of moral disputes; for the notion of adjudication is logically inconsistent with that of a moral conflict. If two people disputing about the morality of euthanasia were to agree to accept the verdict of a third party, any finality so obtained would be illusory. For even after judgment was given either party could still question the moral correctness of the "judge's" verdict. **Moral disputes, unlike legal disputes, remain permanently open**.

But apart from this, further difficulty arises from the claim that **positive law contrary to natural law is void**. This sort of contention has been advanced in connection with the trials of the war criminals at Nuremberg. Sometimes indeed an individual is so placed that the demand of the law and the requirement of morals run counter to each other. In such a case the natural lawyer's view is that the positive law is not really law and should not be obeyed; consequently obedience to the positive law should not necessarily avail as a defense if the individual is later prosecuted. To this the positivist replies that laws are man-made and can be unjust as well as just; "the existence of law is one thing, its merit and demerit another".

In this dispute, both sides would agree as to the existence of a conflict between the positive law and the dictates of morality. Likewise, both would agree that in such a conflict law must give way to morality. The natural lawyer, however, would settle the conflict by designating the positive law as not really law, while the positivist would argue that this law can be criticized and rejected without any such theory, and that natural law theory has no monopoly over legal criticism.

From a practical standpoint, however, natural law terminology might seem to offer advantages. First, as an **antidote to legal rigidity**, it could provide flexibility, allowing rules of law to be changed from what they are to what they ought to be, on the ground that the law always is what it ought to be. But surely, this is no more than a serviceable device which detracts from the certainty and predictability of law and which in modern times should surely be replaced by more explicit methods of alteration, e.g., legislation.

Secondly, the natural lawyer's terminology, it is claimed, would **weaken the authority of unjust and immoral laws**.[4] Yet, surely it may be better in such cases to highlight the conflict between law and morals and to stress that mere formal legality alone is no title to obedience, rather than to conceal the very existence of the conflict. Indeed, adoption of natural law terminology could even weaken our capacity to criticize the law. It is easy to move from the premise that if a rule is unjust it is not law to the conclusion that if a rule is law it is just, and this without realizing that in the conclusion we may be determining in the first place that the rule is one of law by purely formal criteria.

1.2. Legal positivism

Diametrically opposed to the theory of natural law is the **positivist theory of law**. This theory distinguishes the question whether a rule is a legal rule from the question whether it is a just rule, and seeks to define law not by reference to its content but according to the formal criteria which differentiate legal rules from other rules such as those of morals, etiquette, and so on.[5]

Though this approach is often criticized as sterile and inadequate because it fails to take moral considerations into account, it was never intended by such exponents as Austin to exclude the problem of evaluating law: on the contrary, analysis was regarded as a necessary preliminary to the task of critical assessment, which in Austin's view should be made according to the principle of utility, a principle that serves as an index to such divine laws as are unrevealed.

According to Austin, whose version of the theory will be considered here, **positive law** has three characteristic features. It is a **type of command**, it is **laid down by a political sovereign** and it is **enforceable by a sanction**. A typical example would be the Czech Criminal Code, which could be described as a command laid down by the sovereign under the Czech legal system, i. e., the Parliament, and enforceable by penalties for violation.

First we must clarify the term "command". How do commands differ from requests, wishes and so on? To Austin all these are expressions of desire, while **commands are expressions of desire given by superiors to inferiors**.

[4] Finnis, J. *Natural Law and Natural Rights*, Oxford University Press, 1980, p. 351

[5] Murphy, L. *What Makes Law: An Introduction to the Philosophy of Law*, Cambridge University Press, 2014, p. 23

This agrees with ordinary usage which allows us, for instance, to speak of officers commanding their subordinates but not of subordinates commanding their officers.[6]

This relationship of superior to inferior consists for Austin in the power which the former enjoys over the latter, i.e., his ability to punish him for disobedience. Conversely, the subjection of the inferior to the superior consists in his liability to suffer a penalty for disobedience. In a sense, then, the idea of a sanction is built into the Austinian notion of command; logically it might be more correct to say that law has two rather than three distinguishing features.

Now Austin distinguishes laws from other commands by their **generality**, laws being general commands; and indeed laws seem much less like the transitory commands barked out on parade grounds and obeyed there and then by the troops, and much more like such things as the standing orders of a military station which remain in force generally and continuously for all persons on the station. But there are, however, exceptions, for there can exist laws, such as acts of attainder, which lack this type of generality. Generality alone, then, is neither necessary nor sufficient to serve as the distinguishing feature of law.

Now if particular commands can qualify as laws, how can we distinguish laws from commands which are not law? Everyday life is sprinkled with examples of people giving commands to others: masters give orders to servants, teachers to pupils, parents to children and so forth. Sometimes commands are unlawful, as would be that of a bank robber who points his gun at the bank clerk and orders him to hand over the contents of the till. Indeed some have criticized the positivist theory as a theory of "gunman law", on the ground that it makes no real distinction between a law and the command of a bank robber.

Such criticisms overlook the importance of Austin's second requirement: **to qualify as law a command must have been given by a political superior, or sovereign**. To Austin a sovereign is any person, or body of persons, whom the bulk of a political society habitually obeys, and who does not himself habitually obey some other person or persons.

In our present world, given human nature, a sovereign without the means of enforcing obedience to his commands would have little hope of continuing to rule. Law stands in need of **sanctions** – Austin's third distinguishing

[6] Schauer, F. *The Force of Law*, Harvard University Press, 2015, p. 15

mark of law. Nor for the positivist is this a mere practical need; law to him is something for the citizen to obey, not as he pleases but whether he likes it or not, and this cannot be without some method of coercion. Sanctions then are a logical part of the concept of law; they consist of the penalties inflicted on the orders of the sovereign for the violation of the law – in other words of institutionalized punishments.[7]

Now against this theory several attacks can be mounted. First, there are the natural lawyer's objections. Secondly, there is the objection that the theory conflicts with ordinary usage by denying the name "law" to rules which are generally classified as legal, e.g., rules of customary law and international law. None of these rules originate from a sovereign command: customary law springs from habitual behavior rather than from precept, international law is a system of customary rules originating from state practice.

To define law as a command can mislead us in several ways. First, though this may not be inappropriate way of describing certain portions of law, such as the criminal law, the greater part of a legal system consists of laws which neither command nor forbid things to be done, but which empower people by certain means to achieve certain results: e.g., laws giving citizens the right to vote, laws concerning the sale of property and making the wills – indeed the bulk of the law of contract and of property consists of such power-conferring rules.

Secondly, the term "command" suggests the existence of a personal commander. In modern legal systems the procedures for legislation may as well be so complex as to make it impossible to identify any commander in this personal sense. This is especially so where sovereignty is divided, as in federal states.

Thirdly, "command" conjures up the picture of an order given by one particular commander on one particular occasion to one particular recipient. Laws differ in that they can and do continue in existence long after the extinction of the actual law-giver. Again an attempt to save the definition can be made by arguing that laws laid down by a former sovereign remain law only in so far as the present sovereign is content that they should, and that since the latter can always repeal them, his allowing them to remain in force is tantamount to adopting them as his own laws. But it is not always true that the present sovereign can repeal any law: in certain states the law-making powers of the sovereign are limited by the constitution, which prevents the

[7] Meyerson, D. *Understanding Jurisprudence*, Routledge, 2007, p.10

repeal by ordinary legislation of "entrenched" clauses; in such cases no question arises of the present sovereign's allowing or adopting such clauses.

But whether we define law as a command or a rule, we must still distinguish commands (or rules) which are law from those which are not. For Austin a command can only be law if it emanates from the sovereign. This raises the question how far there can exist laws other than those made by the sovereign. Obviously, in a complex modern state it would be impossible for the sovereign legislature to enact every legal rule: much law-making will in fact be done by subordinates to whom legislative powers have been delegated. A good deal of Czech law consists of such delegated legislation, e.g., regulations made by ministers under laws of Parliament. Here Austin finds no problem, since he sees no difficulty in the notion of a sovereign conferring lawmaking powers on others.[8]

There remains the **question of sanctions**. It was amongst other things the lack of sanctions that led Austin to describe international law as positive morality rather than law. International lawyers, however, contend that while sanctions render a legal system stronger, they are not logically necessary and that the idea of a legal system without sanctions is not self-contradictory.

Of course one essential feature of law is that its subjects are bound by law whether they like it or not and cannot opt out of their legal obligations. Yet we know that on occasions the subject may refuse to obey the law and decide not to carry out his obligations. Were the majority of citizens of a society to follow this path, the legal system would break down, become ineffective and cease to be law; for it is only by being accepted and obeyed that law remains effective and continues to be law.

The question then is whether the absence of sanctions would result in a legal system ceasing to be effective. The various reasons why people obey the law are outside our present scope and form the subject rather of sociological research. It would seem reasonable, however, to estimate that less civilized a society, the greater need for sanctions to ensure obedience to law; and the more advanced society, the greater likelihood that law will be obeyed from a conviction that a law-abiding society is preferable to lawlessness and anarchy.

In most societies, however, there is at least a selfish minority prepared to enjoy all the benefits of an ordered society without accepting the burden of adherence to the rules; and here sanctions are needed, not to coerce the

[8] Ratnapala, S. *Jurisprudence*, Cambridge University Press, 2011, p. 41

law-abiding majority, but rather to prevent the minority from gaining an unfair advantage. Given human nature as it exists, it seems fair to assume that law without sanctions would fail to be completely effective.

In international law there exists nothing by way of institutionalized sanctions and yet the rules of international law, though often flouted, are far from totally ineffective. Completely effective law without sanctions may not exist, but the notion that there could exist such a system of law is not logically inconceivable. We conclude then that the idea of sanctions, though central to that of law, is not logically essential.

Though all positivists agree there are possible legal systems without moral constraints on legal validity, there are conflicting views on whether there are possible legal systems with such constraints. According to **inclusive positivism** (also known as incorporationism and soft positivism), it is possible for a society's rule of recognition to incorporate moral constraints on the content of law. Prominent inclusive positivists include Jules Coleman and H.L.A. Hart, who maintains that "the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values ... such as the Sixteenth or Nineteenth Amendments to the United States Constitution respecting the establishment of religion or abridgements of the right to vote".

In contrast, **exclusive positivism** (also called hard positivism) denies that a legal system can incorporate moral constraints on legal validity. Exclusive positivists like Joseph Raz subscribe to the source thesis, according to which the existence and content of law can always be determined by reference to its sources without recourse to moral argument. On this view, the sources of law include both the circumstances of its promulgation and relevant interpretative materials, such as court cases involving its application.

At first glance, exclusive positivism may seem difficult to reconcile with what appear to be moral criteria of legal validity in legal systems like that of the United States. For example, the Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated." Likewise, the First Amendment prohibits laws abridging the right of free speech. Taken at face value, these amendments seem to make moral standards part of the conditions for legal validity.

Exclusive positivists argue that such amendments can require judges to consider moral standards in certain circumstances, but cannot incorporate those standards into the law. When a judge makes reference to moral con-

siderations in deciding a case, he necessarily creates new law on an issue and this is so even when the law directs him to consider moral considerations, as the Bill of Rights does in certain circumstances. On this view, all law is settled law and questions of settled law can be resolved without recourse to moral arguments.[9]

The law on a question is settled when legally binding sources provide its solution. In such cases judges are typically said to apply the law, and since it is source-based, its application involves technical, legal skills in reasoning from those sources and does not call for moral acumen. If a legal question is not answered by standards deriving from legal sources then it lacks a legal answer – the law on such questions is unsettled. In deciding such cases courts inevitably break new (legal) ground and their decision develops the law. Naturally, their decisions in such cases rely at least partly on moral and other extra-legal considerations.

If the judge can resolve an issue involving the First Amendment merely by applying past court decisions, then the issue is settled by the law; if not, then the issue is unsettled. Insofar as the judge looks to controversial moral standards to resolve the issue, he is going beyond the law because the mere presence of controversy about the law implies that it is indeterminate. Thus, on Raz's view, references to moral language in the law, at most, direct judges to consider moral requirements in resolving certain unsettled questions of law. They cannot incorporate moral requirements into the law.

1.3. Sociological jurisprudence

Sociological jurisprudence seeks to base legal arguments on sociological insights and, unlike legal theory, is concerned with the mundane practices that create legal institutions and social operations which reproduce legal systems over time. It was developed in the United States by Louis Brandeis and Roscoe Pound. It was influenced by the work of pioneer legal sociologists, such as the Austrian jurist Eugen Ehrlich and the Russian-French sociologist Georges Gurvitch.

Although distinguishing between different branches of the social scientific studies of law allows us to explain and analyze the development of the sociology of law in relation to mainstream sociology and legal studies, such potentially artificial distinctions are not necessarily fruitful for the develop-

[9] Ehrenberg, K. M. *The Functions of Law,* Oxford University Press, 2016, p. 90