Chapter 6

Law, Order and Justice

Introduction

Law is found in all modern societies, and is usually regarded as the bedrock of civilized existence. Law commands citizens, telling them what they *must* do; it lays down prohibitions indicating what citizens *cannot* do; and it allocates entitlements defining what citizens have the *right* to do. Although it is widely accepted that law is a necessary feature of any healthy and stable society, there is considerable debate about the nature and role of law. Opinions, for instance, conflict about the origins and purpose of law. Does it liberate or oppress? Do laws exist to safeguard all individuals and promote the common good, or do they merely serve the interests of the propertied and privileged few? Moreover, there is controversy about the relationship between law and morality. Does law enforce moral standards; should it try to? How much freedom should the law allow the individual, and over what issues?

Such questions also relate to the need for personal security and social order. Indeed, in the mouths of politicians, the concepts of order and law often appear to be fused into the composite notion of 'law-and-order'. Rolling these two ideas together sees law as the principal device through which order is maintained, but raises a series of further problems. In particular, is order only secured through a system of rule-enforcement and punishment, or can it emerge naturally through the influence of social solidarity and rational good sense? Finally, there is the complex problem of the relationship between law and justice. Is the purpose of law to see that justice is done, and, anyway, what would that entail? Furthermore, how is it possible to distinguish between just and unjust laws, and, in particular, does the distinction suggest that in certain circumstances it may be justifiable to break the law?

Law

The term 'law' has been used in a wide variety of ways. In the first place, there are scientific laws or what are called descriptive laws. These describe regular or necessary patterns of behaviour found in either natural or social life. The most obvious examples are found in the natural sciences; for instance, in the laws of motion and thermodynamics advanced by physicists. But this notion of law has also been employed by social theorists, in an attempt to highlight predictable, even inevitable, patterns of social behaviour. This can be seen in Engels's assertion that Marx (see p. 371) uncovered the 'laws' of historical and social development, and in the so-called 'laws' of demand and supply which underlie economic theory. An alternative use, however, treats law generally as a means of enforcing norms or standards of social behaviour. Sociologists have thus seen forms of law at work in all organized societies, ranging from informal processes usually found in traditional societies to the formal legal systems typical of modern societies. By contrast, political theorists have tended to understand law more specifically, seeing it as a distinctive social institution clearly separate from other social rules or norms and only found in modern societies.

In a general sense, law constitutes a set of rules, including, as said earlier, commands, prohibitions and entitlements. However, what is it that distinguishes law from other social rules? First, law is made by the government and so applies throughout society. In that way, law reflects the 'will of the state' and therefore takes precedence over all other norms and social rules. For instance, conformity to the rules of a sports club, church or trade union does not provide citizens with immunity if they have broken the 'law of the land'. Second, law is compulsory; citizens are not allowed to choose which laws to obey and which to ignore, because law is backed up by a system of coercion and punishment. Third, law has a 'public' quality in that it consists of published and recognized rules. This is, in part, achieved by enacting law through a formal, and usually public, legislative process. Moreover, the punishments handed down for law-breaking are predictable and can be anticipated, whereas arbitrary arrest or imprisonment has a random and dictatorial character. Fourth, law is usually recognized as binding upon those to whom it applies, even if particular laws may be regarded as 'unjust' or 'unfair'. Law is therefore more than simply a set of enforced commands; it also embodies moral claims, implying that legal rules *should* be obeyed.

The rule of law

The rule of law is a constitutional principle respected with almost devotional intensity in liberal-democratic states. At heart, it is quite simply

the principle that the law should 'rule', that it should provide a framework within which all citizens act and beyond which no one, neither private citizen nor government official, should go. The principle of the rule of law developed out of a long-established liberal theory of law. From John Locke (see p. 268) onwards, liberals have regarded law not as a constraint upon the individual but as an essential guarantee of this liberty. Without the protection of law, each person is constantly under threat from every other member of society, as indeed they are from him. The danger of unrestrained individual conduct was graphically represented by the barbarism of the 'state of nature'. The fundamental purpose of law is therefore to protect individual rights, which in Locke's view meant the right to life, liberty and property.

The supreme virtue of the rule of law is therefore that it serves to protect the individual citizen from the state; it ensures a 'government of laws and not of men'. Such an idea was enshrined in the German concept of the *Rechtsstaat*, a state based on law, which came to be widely adopted throughout continental Europe and encouraged the development of codified and professional legal systems. The rule of law, however, has a distinctively Anglo-American character. In the USA, the supremacy of law is emphasized by the status of the US Constitution, by the checks and balances it establishes and the individual rights outlined in the Bill of Rights. This is made clear in the Fifth and Fourteenth Amendments to the Constitution, which specifically forbid federal or state government from denying any person life, liberty and property without 'due process of law'. The doctrine of 'due process' not only restricts the discretionary power of public officials but also enshrines a number of individual rights, notably the right to a fair trial and to equal treatment under the law. Nevertheless, it also vests considerable power in the hands of judges who, by interpreting the law, effectively determine the proper realm of government action.

By contrast, the UK conception of the rule of law has seen it as typical of uncodified constitutional systems, within which rights and duties are rooted in common law, laws derived from long-established customs and traditions. The classic account of such a view is found in A.V. Dicey's *Introduction to the Study of the Law of the Constitution* ([1885] 1939). In Dicey's view, the rule of law embraces four separate features. First, no one should be punished except for breaches of law. This is the most fundamental feature of the rule of law because it distinguishes between rule-bound government and arbitrary government, suggesting that where the rule of law exists government cannot simply act as it pleases; for instance, it cannot punish citizens merely because it objects to their opinions or disapproves of their behaviour. Second, the rule of law requires what Dicey called 'equal subjection' to the law, more commonly understood as equality before the law. Quite simply, the law should be no

respecter of persons, it should not discriminate against people on grounds of race, gender, religious creed, social background and so forth, and it should apply equally to ordinary citizens and to government officials. Third, when law is broken there must be a certainty of punishment. The law can only 'rule' if it is applied at all times and in all circumstances; the law rules only selectively when some law-breakers are prosecuted and punished, while others are not. Finally, the rule of law requires that the rights and liberties of the individual are embodied in the 'ordinary law' of the land. This would ensure, Dicey hoped, that when individual rights are violated citizens can seek redress through the courts.

Although Dicey believed that the rule of law was typical of the UK system of government and those modelled upon it, in a number of respects the UK offers a particularly poor example of the rule of law. For instance, though Dicey strove to reconcile the two, it can be argued that parliamentary sovereignty, the central principle of Britain's uncodified constitution, violates the very idea of a rule of law. It is difficult to suggest that the law 'rules' if the legislature itself is not bound by any external constraints. This problem has been exacerbated by the growth of executive power and the effective control which the government of the day exercises over Parliament, made possible by party discipline. This encouraged Lord Hailsham (1976) to describe the UK system of government as an 'elective dictatorship'. Moreover, despite the introduction of the Human Rights Act 1998, Parliament, rather than the courts, still has the primary role in determining the extent of civil liberty. The establishment of a meaningful rule of law in the UK may therefore require far-reaching constitutional reform, including the codification of the constitution, the introduction of an entrenched Bill of Rights and the construction of a clear separation of powers between legislature and executive.

In its broad sense, the rule of law is a core liberal-democratic principle, embodying ideas such as constitutionalism and limited government to which most modern states aspire. In particular, the rule of law imposes significant constraints upon how law is made and how it is adjudicated. For example, it suggests that all laws should be 'general' in the sense that they apply to all citizens and do not select particular individuals or groups for special treatment, good or bad. It is, further, vital that citizens know 'where they stand'; laws should therefore be precisely framed and accessible to the public. Retrospective legislation, for example, is clearly unacceptable on such grounds, since it allows citizens to be punished for actions that were legal at the time they occurred. In the same way, the rule of law is usually thought to be irreconcilable with cruel and inhuman forms of punishment. Above all, the principle implies that the courts should be impartial and accessible to all. This can only be achieved if the judiciary, whose role it is to interpret law and adjudicate between the

parties to a dispute, enjoys independence from government. The independence of the judiciary is designed to ensure that judges are 'above' or 'outside' the machinery of government. Law, in other words, must be kept strictly separate from politics.

Nevertheless, the rule of law also has its critics. Some have, for instance, suggested that it is a truism: to say that the law 'rules' may acknowledge nothing more than that citizens are compelled to obey it. In this narrow sense, the rule of law is reduced to the statement that 'everybody must obey the law'. Others have argued that the principle pays little attention to the content of law. Some have therefore argued that the rule of law was observed in the Third Reich and in the Soviet Union simply because oppression wore the cloak of legality. Even its keenest defenders will acknowledge that although the rule of law may be a necessary condition for just government, it is not in itself a sufficient one. Marxist critics go further, however. Marxists (see p. 82) have traditionally regarded law not as a safeguard for individual liberty but as a means for securing property rights and protecting the capitalist system. For Marx, law, like politics and ideology, was part of a 'superstructure' conditioned by the economic 'base', in this case the capitalist mode of production. Law thus protects private property, social inequality and class domination. Feminists (see p. 62) have also drawn attention to biases that operate through the system of law, in this case biases that favour the interests of men at the expense of women as a result, for instance, of a predominantly male judiciary and legal profession. Multicultural theorists (see p. 215) have, for their part, argued that law reflects the values and attitudes of the dominant cultural group and so is insensitive to the values and concerns of minority groups.

Natural and positive law

The relationship between law and morality is one of the thorniest problems in political theory. Philosophers have long been taxed by questions related to the nature of law, its origins and purpose. Does law, for instance, merely give effect to a set of higher moral principles, or is there a clear distinction between law and morality? How far does, or should, the law of the community seek to enforce standards of ethical behaviour? Such questions go to the heart of the distinction between two contrasting theories of law: natural law and positive law.

On the surface, law and morality are very different things. Law refers to a distinctive form of social control backed up by the means of enforcement; it therefore defines what *can* and what *cannot* be done. Morality, on the other hand, is concerned with ethical questions and the difference between 'right' and 'wrong'; it thus prescribes what *should* and what *should not* be done. In one important respect, however, law is an easier

concept to grasp than morality. Law can be understood as a social fact, it has an objective character that can be studied and analysed. In contrast, morality is by its very nature a subjective entity, a matter of opinion or personal judgement. For this reason, it is often unclear what the term 'morality' refers to. Are morals simply the customs and conventions which reign within a particular community, its mores? Need morality be based upon clearly defined and well-established principles, rational or religious, which sanction certain forms of behaviour while condemning others? Are moral ideals those that each individual is entitled to impose on himself or herself; is morality, in short, of concern only to the individual?

Those thinkers who insist that law is, or should be, rooted in a moral system subscribe to some kind of theory of 'natural law'. Theories of natural law date back to Plato (see p. 21) and Aristotle (see p. 69). Plato believed that behind the ever-changing forms of social and political life lay unchanging archetypal forms, the Ideas, of which only an enlightened elite, the philosopher-kings, had knowledge. A 'just' society was therefore one in which human laws conformed as far as possible to this transcendental wisdom. This line of thought was continued by Aristotle, who believed that the purpose of law and organized social life was to encourage humankind to live in accordance with virtue. In his view, there was a perfect law, fixed for all time, which would provide the basis for citizenship and all other forms of social behaviour. Medieval thinkers such as Thomas Aquinas (see p. 158) also took it for granted that human laws had a moral basis. Natural law, he argued, could be penetrated through our God-given natural reason and guides us towards the attainment of the good life on earth.

The demands of natural law came to be expressed through the idea of natural rights. Natural rights were thought to have been invested in humankind either by God or by nature. Thinkers such as Locke and Thomas Jefferson (see p. 189) proposed that the purpose of human-made law was to protect these God-given and inalienable rights. However, the rise of rationalism and scientific thought served by the nineteenth century to make natural law theories distinctly unfashionable. Nevertheless, the twentieth century has witnessed a revival of such ideas, precipitated, in part, by the cloak of legality behind which Nazi and Stalinist terror took place. The desire to establish a higher set of moral values against which national law could be judged was, for example, one of the problems which the Nuremberg Trials (1945–6) had to address. Under the auspices of the newly created United Nations, major Nazi figures were prosecuted for war crimes, even though in many cases they had acted legally in the eyes of the Nazi regime itself. This was made possible by reference to the notion of natural law, albeit dressed up in the modern language of human rights. Indeed, it is now widely accepted that both national and international law

Thomas Aquinas (1224–74)

Italian Dominican monk, theologian and philosopher. Born near Naples, the son of a noble family, Aquinas joined the Dominican order against his family's wishes. He was canonized in 1324, and in the nineteenth century Pope Leo III recognized Aquinas' writings as the basis of Catholic theology.

Aquinas took part in the theological debates of the day, arguing that reason and faith are compatible, and defending the admission of Aristotle (see p. 69) into the university curriculum. His vast but unfinished *Summa Theologiae* (1963), begun in 1265, deals with the nature of God, morality and law – eternal, divine, natural and human. He viewed 'natural law' as the basic moral rules on which political society depends, believing that these can be elaborated by rational reflection on human nature. As, in Aquinas' view, human law should be framed in accordance with natural law, its purpose is ultimately to 'lead men to virtue', reflecting his belief that law, government and the state are natural features of the human condition rather than (as Augustine (see p. 91) had argued) consequences of original sin. Aquinas nevertheless recognized that human law is an imperfect instrument, in that some moral faults cannot be legally prohibited and attempts to prohibit others may cause more harm than good. The political tradition that Aquinas founded has come to be known as Thomism, with neo-Thomism, since the late nineteenth century, attempting to keep alive the spirit of the 'angelic doctor'.

should conform to the higher moral principles set out in the doctrine of human rights. Such ideas are discussed at greater length in Chapter 7.

The central theme of all conceptions of natural law is the idea that law should conform to some prior moral standards, that the purpose of law is to enforce morality. This notion, however, came under attack in the nineteenth century from what John Osbourne called 'the science of positive law'. The idea of positive law sought to free the understanding of law from moral, religious and mystical assumptions. Many have seen its roots in Thomas Hobbes's (see p. 123) command theory of law: 'law is the word of him that by right hath command over others'. In effect, law is nothing more than the will of the sovereign. By the nineteenth century, John Austin (1790–1859) had developed this into the theory of 'legal positivism', which saw the defining feature of law not as its conformity to higher moral or religious principles, but in the fact that it is established and enforced by a political superior, a 'sovereign person or body'. This boils down to the belief that law is law because it is obeyed. One of its implications is, for instance, that the notion of international law is highly questionable. If the treaties and UN resolutions that constitute what is

called 'international law' cannot be enforced, they should be regarded as a collection of moral principles and ideals, and not a law. A modern attempt to refine legal positivism was undertaken in H.L.A. Hart's *The Concept of Law* (1961). Hart was concerned to explain law not in terms of moral principles but by reference to its purpose within human society. Law, he suggested, stems from the 'union of primary and secondary rules', each of which serves a particular function. The role of primary rules is to regulate social behaviour; these can be thought of as the 'content' of the legal system, for instance, criminal law. Secondary rules, on the other hand, are rules which confer powers upon the institutions of government; they lay down how primary rules are made, enforced and adjudicated, and so determine their validity.

While natural-law theories are criticized as being hopelessly philosophical, positive-law theories threaten to divorce law entirely from morality. The most extreme case of this was Hobbes, who insisted that citizens had an obligation to obey all laws, however oppressive, since to do otherwise would risk a descent into the chaos of the state of nature. However, other legal positivists allow that law can, and should, be subject to moral scrutiny, and perhaps that it should be changed if it is morally faulty. Their position, however, is simply that moral questions do not affect whether law is law. In other words, whereas natural law theorists seek to run together the issues 'what the law is' and 'what the law ought to be', legal positivists treat these matters as strictly separate. An alternative view of law, however, emerged in the early part of the century, associated with the ideas of the famous American jurist, Oliver Wendell Holmes (1809–94). This is legal realism, the theory that it is really judges who make law because it is they who decide how cases are to be resolved. In this sense, all laws can be thought to be judge-made. However, as judges are, in the vast majority of cases, non-elected, this view has disturbing implications for the prospect of democratic government.

Law and liberty

While political philosophers have been concerned about broad questions such as the nature of law itself, everyday debates about the relationship between law and morality have tended to focus upon the moral content of specific laws. Which laws are morally justified, and which ones are not? How far, if at all, should the law seek to 'teach morals'? Such questions often arise out of the moral controversies of the day, and seek to know whether the law should permit or prohibit practices such as abortion, prostitution, pornography, television violence, surrogate motherhood, genetic engineering and so forth. At the heart of these questions is the issue of individual liberty and the balance between those moral choices that

should properly be made by the individual and those that should be decided by society and enforced through law.

In many ways the classic contribution to this debate was made in the nineteenth century by John Stuart Mill (see p. 256), who, in *On Liberty* ([1859] 1972), asserted that, 'The only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others'. Mill's position on law was libertarian: he wanted the individual to enjoy the broadest possible realm of freedom. 'Over himself', Mill proclaimed, 'over his own body and mind the individual is sovereign'. However, such a principle, often referred to as the 'harm principle', implies a very clear distinction between actions that are 'self-regarding', whose impact is largely or entirely confined to the person in question, and those that can be thought of as 'other-regarding'. In Mill's view, the law has no right to interfere with 'self-regarding' actions; in this realm individuals are entitled to exercise unrestrained liberty. Law should therefore only restrict the individual in the realm of 'other-regarding' actions, and then only in the event of harm being done to others. The strict application of this principle would clearly challenge a wide range of laws currently in existence, notably those that are paternalistic. For instance, laws prohibiting suicide and prostitution are clearly unacceptable, since their primary intent is to prevent people damaging or harming themselves. The same could be said of laws prohibiting drug-taking or enforcing the use of seatbelts or crash helmets, to the extent that these reflect a concern about the individuals concerned as opposed to the costs (harm) imposed on society.

Mill's ideas reflect a fierce commitment to individual liberty, born out of a faith in human reason and the conviction that only through the exercise of personal choice would human beings develop and achieve 'individuality'. His ideas, however, raise a number of difficulties. In the first place, what is meant by 'harm'? Mill clearly understood harm to mean physical harm, but there are at least grounds for extending the notion of harm to include psychological, mental, moral and even spiritual harm. For example, although blasphemy clearly does not cause physical harm it may, nevertheless, cause 'offence'; it may challenge the most sacred principles of a religious group and so threaten its security. Just such an argument was used by Muslim fundamentalists in their campaign against the publication of Salman Rushdie's *The Satanic Verses*. In the same way, it could be argued that in economic life price agreements between firms should be illegal because they both harm the interests of consumers, who end up paying higher prices, as well as those of competitor firms. Second, who counts as the 'others' who should not be harmed? This question is most obviously raised by issues like abortion and embryo research where it is the status of the unborn which is in question. As will be discussed more fully in

Chapter 7, if a human embryo is treated as an 'other', interfering with it or harming it in any way is morally reprehensible. However, if the embryo remains part of the mother until it is born she has a perfect right to do with it what she pleases.

A third problem relates to individual autonomy. Mill undoubtedly wanted people to exercise the greatest possible degree of control over their own destinies, but even he recognized that this could not always be achieved, as, for instance, in the case of children. Children, he accepted, possessed neither the experience nor the understanding to make wise decisions on their own behalf; as a result, he regarded the exercise of parental authority as perfectly acceptable. However, this principle can also be applied on grounds other than age, for example, in relation to alcohol consumption and drug-taking. On the face of it, these are 'self-regarding' actions, unless, of course, the principle of 'harm' is extended to include the distress caused to the family involved or the healthcare costs incurred by society. Nevertheless, the use of addictive substances raises the additional problem that they rob the user of free will and so deprive him or her of the capacity to make rational decisions. Paternalistic legislation may well be justifiable on precisely these grounds. Indeed, the principle could be extended almost indefinitely. For example, it could perhaps be argued that smoking should be banned on the grounds that nicotine is physically and psychologically addictive, and that those who endanger their health through smoking must either be poorly informed or be incapable of making wise judgements on their own behalf. In short, they must be saved from themselves.

An alternative basis for establishing the relationship between law and morality is by considering not the claims of individual liberty but the damage which unrestrained liberty can do to the fabric of society. At issue here is the moral and cultural diversity which the Millian view permits or even encourages. A classic statement of this position was advanced by Patrick Devlin in *The Enforcement of Morals* (1968), which argues that there is a 'public morality' which society had a right to enforce through the instrument of law. Devlin's concern with this issue was raised by the legalization of homosexuality and other pieces of so-called 'permissive' legislation in the 1960s. Underlying his position is the belief that society is held together by a 'shared' morality, a fundamental agreement about what is 'good' and what is 'evil'. Law therefore has the right to 'enforce morals' when changes in lifestyle and moral behaviour threaten the social fabric and the security of all citizens living within it. Such a view, however, differs from paternalism in that the latter is more narrowly concerned with making people do what is in their interests, though in cases like banning pornography it can be argued that paternalism and the enforcement of morals coincide. Devlin can be said to have extended Mill's notion of harm

to include 'offence', at least when actions provoke what Devlin called 'real feelings of revulsion' rather than simply dislike. Such a position has also been adopted by the conservative New Right since the 1970s in relation to what it regards as 'moral pollution'. This is reflected in anxiety about the portrayal of sex and violence on television and the spread of gay and lesbian rights. Against the twin threats of permissiveness and multiculturalism, conservative thinkers (see p. 138) have usually extolled the virtues of 'traditional morality' and 'family values'.

The central theme of such arguments is that morality is simply too important to be left to the individual. Where the interests of 'society' and those of the 'individual' conflict, law must always take the side of the former. Such a position, however, raises some serious questions. First, is there any such thing as a 'public morality'? Is there a set of 'majority' values which can be distinguished from 'minority' ones? Apart from acts like murder, physical violence, rape and theft, moral views in fact diverge considerably from generation to generation, from social group to social group, and indeed from individual to individual. This ethical pluralism is particularly evident in those areas of personal and sexual morality – homosexuality, abortion, violence on television and so on – with which the moral New Right is especially concerned. Second, there is a danger that under the banner of traditional morality, law is doing little more than enforcing social prejudice. If acts are banned simply because they cause offence to the majority, this comes close to saying that morality comes down to a show of hands. Surely, moral judgements must always be critical, at least in the sense that they are based upon clear and rational principles rather than just widely held beliefs. Do laws persecuting the Jews, for instance, become morally acceptable simply because anti-Semitic ideas are widely held in society? Finally, it is by no means clear that a healthy and stable society can only exist where a shared morality prevails. This belief, for example, calls the very idea of a multicultural and multi-faith society into question. This issue, however, is best pursued by an analysis of social order and the conditions that maintain it.

Order

Fear of disorder and social instability has been perhaps the most fundamental and abiding concern of Western political philosophy. Dating back to the social contract theories of the seventeenth century, political thinkers have grappled with the problem of order and sought ways of preventing human existence degenerating into chaos and confusion. Without order and stability, human life would, in Hobbes's words, be 'solitary, poor, nasty, brutish and short'. Such fears are also evident in the

everyday use of the word 'anarchy' to imply disorder, chaos and violence. For these reasons, order has attracted almost unqualified approval from political theorists, at least in so far as none of them are prepared to defend 'disorder'. At the same time, however, the term order conjures up very different images for different political thinkers. At one extreme, traditional conservatives believe that order is inseparable from notions like control, discipline and obedience; at the other, anarchists have suggested that order is related to natural harmony, equilibrium and balance. Such ideological divisions reflect profound disagreement not only about the concept of order but also about how it can be established and how it should be maintained.

While there may be competing conceptions of order, certain common characteristics can nevertheless be identified. Order, in everyday language, refers to regular and tidy patterns, as when soldiers are said to stand 'in order' or the universe is described as being 'ordered'. In social life, order describes regular, stable and predictable forms of behaviour, for which reason social order suggests continuity, even permanence. Social disorder, by contrast, implies chaotic, random and violent behaviour, that is by its very nature unstable and constantly changing. Above all, the virtue that is associated with order is personal security, both physical security, freedom from intimidation and violence and the fear of such, and psychological security, the comfort and stability which only regular and familiar circumstances engender.

Discipline and control

Order is often linked to the ideas of discipline, regulation and authority. In this sense, order comes to stand for a form of social control which has, in some way, to be imposed 'from above'. Social order has to be imposed because, quite simply, it does not occur naturally. All notions of order are based upon a conception of disorder and of the forces that cause it. What causes delinquency, vandalism, crime and social unrest? Those who believe that order is impossible without the exercise of control or discipline usually locate the roots of disorder in the individual human being. In other words, human beings are naturally corrupt, and if not restrained or controlled they will behave in an anti-social and uncivilized fashion. Such ideas are sometimes religious in origin, as in the case of the Christian doctrine of 'original sin'. In other cases, they are explained by the belief that human beings are essentially self-seeking or egoistical. If left to their own devices, individuals act to further their own interests or ends, and will do so at the expense of fellow human beings. One of the most pessimistic such accounts of human nature is found in the writings of absolutist thinkers such as Thomas Hobbes, who in *Leviathan* ([1651] 1968)

Absolutism

Absolutism is the theory or practice of absolute government. Government is 'absolute' in the sense that it possesses unfettered power: government cannot be constrained by a body external to itself. Absolute government is usually associated with the political forms that dominated Europe in the seventeenth and eighteenth centuries, its most prominent manifestation being the absolute monarchy. However, there is no necessary connection between monarchy and absolute government. Although unfettered power can be placed in the hands of the monarch, it can also be vested in a collective body such as a supreme legislature. Absolutism, nevertheless, differs from modern versions of dictatorship, notably totalitarianism. Whereas absolutist regimes aspired to a monopoly of political power, usually achieved by excluding the masses from politics, totalitarianism involves the establishment of 'total power' through the politicization of every aspect of social and personal existence. Absolutist theory thus differs significantly from, for instance, fascist doctrines.

Absolute government and absolute power are not the same thing, however. The absolutist principle resides in the claim to an unlimited right to rule, rather than in the exercise of unchallengeable power. This why absolutist theories are closely linked to the concept of sovereignty, representing an unchallengeable and indivisible source of legal authority. There are both rationalist and theological versions of absolutist theory. Rationalist theories of absolutism generally advance the belief that only absolute government can guarantee order and social stability. Divided sovereignty or challengeable power is therefore a recipe for chaos and disorder. Theological theories of absolutism are based upon the doctrine of divine right, according to which the absolute control a monarch exercises over his subjects derives from, and is analogous to, the power of God over his creation. Monarchical power is therefore unchallengeable because it is the temporal expression of God's authority.

Absolutist theories have the virtue that they articulate some enduring political truths. In particular, they emphasize the central importance to politics of order, and remind us that primary objective of political society is to maintain stability and security. Absolutist theories can nevertheless be criticized as being both politically redundant and ideologically objectionable. Absolutist government collapsed in the face of the advance of constitutionalism and representation, and where dictatorship has survived it has assumed a quite different political character. Indeed, by the time that the term absolutism was coined in the nineteenth century, the phenomenon itself had largely disappeared. The objectionable feature of absolutism is that it is now widely seen as merely a cloak for tyranny and arbitrary government. Modern

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political thought, linked to ideas such as individual rights and democratic accountability, is largely an attempt to protect against the dangers of absolutism.

Key figures

Jean Bodin (1530–96) A French political philosopher, Bodin was the first important theorist of sovereignty, which he defined as 'the absolute and perpetual power of a commonwealth'. In his view, the only guarantee of political and social stability is the existence of a sovereign with final lawmaking power; in that sense, law reflects the 'will' of the sovereign. Although the sovereign is above the law, in that he cannot be bound by an expression of its will, Bodin recognized the limitation imposed by natural law and what he termed 'fundamental laws', and so did not take sovereignty to imply arbitrary power. Bodin's most important work is *The Six Books of the Commonweal* ([1576] 1962).

Thomas Hobbes (see p. 123) Hobbes followed Bodin in seeing the maintenance of order as the primary goal of politics, and in accepting that this can be achieved only by the establishment of an absolute sovereign. However, his strictly rationalist account of absolutism, advanced in the form of social contract theory, did not rely upon conventional notions of natural law and allowed the sovereign's actions to be arbitrary as well as absolute.

Joseph de Maistre (1753–1821) A French aristocrat and political thinker, Maistre was a fierce critic of the French Revolution and a supporter of hereditary monarchy. His political philosophy was based upon willing and complete subordination to 'the master'. Maistre believed that society is organic, and would fragment or collapse if it were not bound together by the twin principles of 'throne and altar'. In his view, earthly monarchies are ultimately subject to the supreme spiritual power of the Pope. Maistre's chief political works include *Considérations sur la France* (1796) and *Du Pape* (1817).

Further reading

Anderson, P. *Lineages of the Absolutist State*. London: New Left Books, 1974.
Shennan, J. H. *Liberty and Order in Early Modern Europe: The Subject and the State 1650–1800*. London: Longman, 1986.
Skinner, Q. *The Foundations of Modern Political Thought*, 2 vols. Cambridge University Press, 1978.

described the principal human inclination as 'a perpetual and restless desire for power after power, that ceaseth only in death'. This explains why his description of the state of nature is so graphic. In his view, its dominant feature would be war, a barbaric and unending war of 'every man against every man'.

The traditional conservative conception of order has been deeply influenced by this pessimistic view of human nature. Conservatives have, for example, typically shown very little patience for attempts to explain crime by reference to poverty or social deprivation. Crime, and for that matter most other forms of anti-social behaviour – hooliganism, vandalism, delinquency and even plain rudeness – is nothing more than an individual phenomenon reflecting the moral corruption that lies within each human being. The criminal is therefore a morally 'bad' person, and deserves to be treated as such. This is why conservatives tend to see an intrinsic link between the notions of order and law, and are inclined to refer to the fused concept of law-and-order. In effect, public order is quite unthinkable without clearly enforced laws. Conservatives are therefore often in the forefront of campaigns to strengthen the powers of the police and calls for stiffer penalties against criminals and vandals. This was evident in the case of the UK Conservative Party, especially during the Thatcher and Major period. In the USA, a succession of presidents placed a heavy stress upon the need to fight crime by imposing stiffer punishments, in particular by the reintroduction of the death penalty. Nevertheless, the link between order and law is one which many liberals and some social democrats would also subscribe to. Although liberals tend to place a heavier emphasis upon human rationality, and to give greater credence to social explanations of crime and disorder, in believing that human beings are essentially self-seeking they accept that they are prone to abuse and exploit one another. It is notable that supposedly centre-left politicians such as Clinton in the USA and Blair in the UK have adopted the stance that they should be 'tough' on crime and not merely on the causes of crime.

The conservative analysis, nevertheless, goes further. Conservatives hold not only that human beings are morally corrupt but also emphasize the degree to which social order, and indeed human civilization itself, is fragile. In accordance with the eighteenth-century writings of Edmund Burke (see p. 348), conservatives have traditionally portrayed society as 'organic', as a living entity within which each element is linked in a delicate balance to every other element. The 'social whole' is therefore more than simply a collection of its individual parts, and if any part is damaged the whole is threatened. In particular, conservatives have emphasized that society is held together by the maintenance of traditional institutions such as the family and by respect for an established culture, based upon religion,

tradition and custom. The defence of the 'fabric' of society has become one of the central themes of neo-conservatism, advanced in the United States by social theorists such as Irving Kristol (see p. 140) and Daniel Bell, who have warned against the destruction of spiritual values brought about by both market pressures and the permissive ethic. From this point of view, law can be seen not only as a way of maintaining order by threatening the wrong-doer with punishment but also as a means of upholding traditional values and established beliefs. This is why conservatives have usually agreed with Patrick Devlin in believing that the proper function of law is to 'teach morality'.

Order has, finally, been defended on psychological grounds. This view emphasizes that human beings are limited and psychologically insecure creatures. Above all, people seek safety and security; they are drawn naturally towards the familiar, the known, the traditional. Order is therefore a vital, perhaps the most vital, of human needs. This implies that human beings will recoil from the unfamiliar, the new, the alien. In this way, for example, Edmund Burke was able to portray prejudice against people different from ourselves as both natural and beneficial, arguing that it gives individuals a sense of security and a social identity. Such a view, however, has very radical implications for the maintenance of order. It may, for instance, be entirely at odds with the multicultural and multi-faith nature of many contemporary societies, suggesting that disorder and insecurity must always lie close to the surface in such societies. As a result, some conservatives have objected to unchecked immigration, or demanded that immigrants be encouraged to assimilate into the culture of their 'host' country.

Natural harmony

A very different conception of order emerges from the writings of socialists and anarchists. Anarchists, for instance, advocate the abolition of the state and all forms of political authority, including, of course, the machinery of law and order. Marxist socialists have also sympathized with this utopian vision. Marx himself believed that the state, and with it law and other forms of social control, would gradually 'wither away' once social inequality was abolished. Parliamentary socialists and modern liberals have made more modest proposals, but they have nevertheless been critical of the belief that order can only be maintained by strict laws and stiff penalties. Although such views are critical of the conventional notion of 'law and order', they do not amount to an outright rejection of 'order' itself. Rather, they are based upon the alternative belief that social order can take the form of spontaneous harmony, regulated only by the natural good sense of individuals themselves.

Such a concept of order is based upon the assumption that disorder is rooted not in the individual himself or herself but in the structure of society. Human beings are not born corrupt, tainted by 'original sin'; rather, they are corrupted by society. This image is portrayed in the famous opening words of Rousseau's *Social Contract* ([1762] 1969), 'Man is born free but is everywhere in chains'. This is the most basic assumption of utopian political thought, examined in more detail in Chapter 12. Society can corrupt individuals in a number of ways. Socialists and many liberals point to a link between crime and social deprivation, arguing that laws which protect property are bound to be broken so long as poverty and social inequality persist. Such a view suggests that order can best be promoted not by a fear of punishment but through a programme of social reform designed, for example, to improve housing, counter urban decay, reduce unemployment and so forth. Marxists and classical anarchists have taken such arguments further and called for a social revolution. In their view, crime and disorder are rooted in the institution of private property and in the economic inequality which it gives rise to.

In addition, socialists have suggested that the selfish and acquisitive behaviour that is so often blamed for social disorder is, in reality, bred by society itself. Capitalism encourages human beings to be self-seeking and competitive, and indeed rewards them for putting their own interests before those of fellow human beings. Socialists therefore argue that social order can more easily be maintained in a society which encourages and rewards social solidarity and cooperative behaviour, one based upon collective principles rather than selfishness. Anarchists, for their part, have pointed the finger at law itself, accusing it of being the principal cause of disorder and crime. Peter Kropotkin (see p. 26) argued in 'Law and Authority' ([1886] 1977), for instance, that, 'the main supports of crime are idleness, law and authority'. For anarchists, law is not simply a means of protecting property from the propertyless but it is also a form of 'organized violence', as the Russian author Leo Tolstoy (1828–1910) put it. Law is the naked exercise of power over others; all laws are oppressive. This is why law can only be maintained through a system of coercion and punishment, in Tolstoy's view, 'by blows, by deprivation of liberty and by murder'. The solution to the problem of social disorder is therefore simple: abolish all laws and allow people to act freely.

Such beliefs are rooted in very clear assumptions about human behaviour. Rather than needing to be disciplined or controlled, people are thought to be capable of living together in peace and natural harmony. Order is thus 'natural' in the sense that it arises spontaneously out of the actions of free individuals. The belief in 'natural order' is based upon one of two theories of human nature. In the first, human beings are portrayed as rational beings, capable of solving whatever disagreements may arise

between them through debate, negotiation and compromise rather than violence. It was, for instance, his deep faith in reason which encouraged J.S. Mill to advocate that law be restricted to the limited task of preventing us from harming each other. Anarchist thinkers such as William Godwin (see p. 338), went further, declaring that 'sound reason and truth' would in all circumstances prevent conflict from leading to disorder. The alternative theory of human nature is the essentially socialist belief that people are naturally sociable, cooperative and gregarious. No dominant culture or traditional morality, nor any form of social control exercised from above, is needed to secure order and stability. Rather, this will emerge naturally and irresistibly out of the sympathy, compassion and concern which each person feels for all fellow human beings. In short, harmony and social order are simply a recognition of our common humanity.

Justifying punishment

Discussions about order invariably address the question of punishment. For example, politicians who use the phrase 'law and order' often employ it as a euphemism for strict punishment and harsh penalties. In the same way, when politicians are described as being 'tough' on law and order, this means that they are likely to support the wider use of custodial sentences, longer gaol terms, harsh prison regimes and the like. Since the 1980s, such 'toughness' has become increasingly fashionable (support for it having extended well beyond conservative parties and politicians) as crime and disorder have become more prominent political issues, with the result that prison populations have risen in most developed societies. Very frequently, however, punishment is advocated without a clear idea of its aim or purpose.

'Punishment' refers to a penalty inflicted on a person for a crime or offence. Unlike revenge, which can be random and arbitrary, punishment is formal in the sense that specific punishments are linked to particular kinds of offence. Moreover, punishment has a moral character that distinguishes it, for instance, from simple vindictiveness. Punishment is not motivated by spite or the desire to inflict pain, discomfort or inconvenience for its own sake, but rather because a 'wrong' has been done. This is why what are thought of as cruel or inhuman punishments, such as torture and perhaps the death penalty, are often prohibited. However, if punishment has a moral character it must be justified in moral terms. Three such justifications have normally been proposed, based respectively upon the ideas of retribution, deterrence and rehabilitation. Each of these is founded on very different moral and philosophical principles, and each serves to endorse very different forms of punishment. Though the tensions between them are clear, it is nevertheless possible in

practice to develop a philosophy of punishment that draws from two or more of them.

In many ways, the most ancient justification for punishment is based upon the idea of retribution. Retribution means to take vengeance against a wrong-doer. The idea is rooted in the religious notion of sin, the belief that there is a discernible quality of 'evil' about particular actions and, possibly, certain thoughts. This is a view that has been attractive to conservative thinkers, who have stressed that human beings are imperfect and unperfectable creatures. In this case, punishment for wrong-doing is a moral judgement, which demarcates firmly between 'good' and 'evil'. Wrong-doers *deserve* to be punished; punishment is their 'just desert'. Modern attempts to present the retribution argument often point out, in addition, that its benefits extend to society at large. To punish wrong-doers is not merely to treat them as they deserve to be treated, but also expresses the revulsion of society towards their crime. In so doing, punishment strengthens the 'moral fabric' of society by underlining for all the difference between right and wrong.

The retribution theory suggests some very specific forms of punishment. Precisely because punishment is vengeance it should be proportional to the wrong done. In short, 'the punishment should fit the crime'. The most famous expression of this principle is found in the Old Testament of the Bible which declares, 'an eye for an eye, a tooth for a tooth'. Retribution theory therefore provides a clear justification for the death penalty in the case of murder. Someone who has killed thereby forfeits their own right to life; death is their 'just desert'. Indeed, retribution suggests that, in a sense, society has a moral obligation to kill a murderer in an attempt to give expression to society's abhorrence of the crime. Such principles, however, rely upon an established and rigid moral framework within which 'right' is clearly distinguishable from 'wrong'. The retribution theory is, therefore, of greatest value in societies where traditional moral principles, usually based upon religious belief, are still widely respected; but it is less applicable in the secularized and pluralistic societies of the industrialized West. Moreover, in locating responsibility for wrong-doing entirely in the human individual, indeed in the phenomenon of 'personal evil', the retribution theory is unable to take account of social and other external influences upon the individual, and is thus incapable of understanding the complexity of crime in the modern world.

The second major theory of punishment is the deterrence theory. This is less concerned with punishment as a just reward for wrong-doing than with using punishment to shape the future conduct of others. As Jeremy Bentham (see p. 359) put it, 'General prevention ought to be the chief end of punishment as it is its real justification'. Punishment is thus a device

which aims to deter people from crime or anti-social behaviour by making them aware of the consequences of their actions. Fear of punishment is therefore the key to order and social stability. Whereas retribution was based upon clear and fixed moral principles, deterrence may be thought of as simply a form of social engineering. Crime, in other words, may not be an expression of personal evil which deserves to be punished, so much as a kind of anti-social behaviour which it is prudent to discourage. In utilitarian terms, punishment is a means of promoting the general happiness of society.

Unlike retribution theory, deterrence does not point to specific forms of punishment. In practice, it suggests that the punishment selected should have the capacity to deter other potential wrong-doers. For this reason, deterrence theory may at times justify far stricter and even crueller punishments than retribution ever can. To punish the wrong-doer is to 'set an example' to others; the more dramatic that example, the more effective its deterrence value. This may, for instance, justify cutting off the hand of a petty thief, as is recommended in Islamic *Shari'a* law, in the hope of preventing future thieving. The severity of the penalty imposed upon one individual must be balanced against the benefit of preventing similar crimes occurring in future. The problem, however, is that the idea of deterrence comes dangerously close to divorcing the wrong that has been done from the punishment meted out, and so runs the risk of victimising the initial wrong-doer. Indeed, deterrence theory sets no limits to the form of punishment that may be applied, even for the most trivial offence.

A further difficulty is that deterrence is based upon the assumption that criminals and wrong-doers act rationally, at least in so far as they weigh up the likely consequences of their actions. When this is not the case, deterrence theory collapses. There is reason to believe, for example, that many murderers will not be deterred by the threat of punishment, even capital punishment. This is because murder is often a domestic affair in the sense that it takes place within the family unit, and its perpetrators usually act under the most severe psychological and emotional strain. In such circumstances, the people concerned are not capable of reaching balanced judgements, still less of examining the likely consequences of their actions. If such people acted in a rational and calculating fashion, crimes of passion like these would simply never occur in the first place.

The final justification for punishment is based upon the idea of reform or rehabilitation. This theory shifts responsibility for wrong-doing away from the individual and towards society. The criminal is not thought of as somebody who is morally evil or who should be made an example of; rather, the criminal should be helped, supported and, indeed, educated. Such an idea contrasts sharply with that of retribution because it is based

upon an essentially optimistic conception of human nature that makes little or no allowance for the notion of 'personal evil'. That is why it is attractive to liberals and socialists, who stress the benefits of education and the possibilities for personal self-development. Hooliganism, vandalism and crime highlight the failings of society and not the defects of the individual. In effect, crime and disorder are 'bred' by social problems such as unemployment, poverty, poor housing and inequality. The only exception to this which rehabilitation theory would recognize is people who are traditionally mad and are responding to non-rational psychological impulses. However, even in this case, people cannot be held personally responsible for their actions.

Quite clearly, rehabilitation suggests very different forms of punishment from either retribution or deterrence. In fact, if the goal is to 'reform' the wrong-doer, punishment moves some way from the popular image of it as a penalty involving the infliction of pain, deprivation or, at the very least, inconvenience. Certainly, no justification can be found in rehabilitation theory for capital punishment – in any circumstances. Moreover, if the purpose of punishment is to educate rather than penalize, non-custodial sentences should be preferred to custodial ones; community service will be preferred to prison; and prison regimes should be designed to promote self-esteem and personal development, and should give transgressors the opportunity to acquire the skills and qualifications which will help them re-integrate into society after their release. A modern and increasingly fashionable version of rehabilitation theory can be found in the notion of restorative justice. This sets out to give wrong-doers an insight into the nature and impact of their crimes by forcing them to 'make good' any damage or harm caused, and possibly to meet with the victims of their crimes.

One difficulty with general rehabilitation theory, however, is that it views punishment as a form of personal engineering, designed to produce 'better people' through a process of re-education. In so doing, it seeks to mould and remould human nature itself. Furthermore, by dismissing the notion of personal evil, rehabilitation theories come close to absolving the individual from any moral responsibility whatsoever. To say 'hate the crime but love the criminal' is to run the risk of blaming society for all forms of unpleasantness and wrong-doing. This is to confuse explanation and justification. There is little doubt, for instance, that human beings act under a wide range of social pressures, but to 'blame' society for everything they do is to suggest that they are nothing more than robots, incapable of exercising any form of free will. To decide precisely when the individual is acting as an independent agent, morally responsible for his or her own actions, is, however, one of the most difficult questions not just in relation to punishment, but in political theory itself.

Justice

Justice has been of central importance to political philosophy for over two thousand years. Through the ages, political thinkers have portrayed the 'good society' as a 'just' society. However, there has been far less agreement about what justice stands for. In everyday language, in fact, justice is used so imprecisely that it is taken to mean 'fairness', 'rightness' or, simply, that which is 'morally correct'. Without doubt, justice is a moral or normative concept: that which is 'just' is certainly morally 'good', and to call something 'unjust' is to condemn it as morally 'bad'. But justice does not simply mean 'moral'. Rather, it denotes a particular kind of moral judgement, in particular one about the distribution of rewards and punishments. Justice, in short, is about giving each person what he or she is 'due'. However, it is much more difficult to define what that 'due' might be. Justice is perhaps the archetypal example of an 'essentially contested' concept. No settled or objective concept of justice exists, only a set of competing concepts.

Moreover, although justice is a distributive concept, it is less clear what it is trying to distribute. What rewards and penalties does the concept of justice address? Justice could concern itself with the distribution of almost anything: wealth, income, leisure, liberty, friendship, sexual love and so forth. The concept of justice could be applied to the distribution of any of these 'goods', but there is no reason why the same principle of distribution should be considered 'just' in each case. For example, those who may advocate an equal distribution of material wealth may nevertheless regard the idea of an equal distribution of sexual love as quite bizarre, if not as frankly unjust. In that sense, it is quite impossible to construct an overriding principle of justice applicable to all areas of life. As Walzer (see p. 36) argued, different principles of justice may therefore be appropriate in different spheres of life. During the twentieth century, for instance, justice came to be discussed usually in relation to social life in general, and the distribution of material rewards in particular. This is what is usually termed 'social justice', and is examined in greater length in Chapter 10.

In this chapter, however, justice is discussed primarily in relation to law, and therefore through the concept of 'legal justice'. Legal justice is concerned with the way in which law distributes penalties for wrongdoing, or allocates compensation in the case of injury or damage. Justice in this sense clearly involves the creation and enforcement of a public set of rules, but to be 'just' these rules must themselves have a moral underpinning. Two forms of justice can be identified at work in the legal process. First, there is procedural justice, which relates to how the rules are made and applied. Second, there is substantive justice, which is concerned

with the rules themselves and whether they are 'just' or 'unjust'. Questions about justice in either of these senses are crucial because they bear on the issue of legitimacy. People recognize law as binding, and so acknowledge an obligation to obey it, precisely because they believe it to be just. If, however, law is not administered in accordance with justice, or law itself is seen to be unjust, citizens may possess a moral justification for breaking the law.

Procedural justice

Procedural or 'formal' justice refers to the manner in which decisions or outcomes are achieved, as opposed to the content of the decisions themselves. There are those, for instance, who suggest that legal justice is not so much concerned with the outcomes of law – judgements, verdicts, sentences and so forth – as with how these outcomes are arrived at. There is no doubt that on certain occasions justice is entirely a procedural matter: a just and acceptable outcome is guaranteed by the application of particular procedural rules. This clearly applies, for example, in the case of sporting competition. The object of a running race is to establish, quite simply, who is the fastest runner. Justice in this respect is achieved if procedural rules are applied which ensure that all factors other than running talent are irrelevant to the outcome of the race. Thus justice demands that every competitor runs the same distance, that they start at the same time, that none enjoys an unfair advantage gained through performance-enhancing drugs, that officials adjudicating the race are impartial, and so on.

Legal systems can claim to be just in precisely the same way: they operate according to an established set of rules designed to ensure a just outcome. In short, justice is 'seen to be done'. These procedural rules can, however, take one of two forms. In the case of what John Rawls (see p. 298) called 'pure procedural justice' the question of justice is solely determined by the application of just procedures, as with the example of a running race or a lottery. In a court of law, on the other hand, there is prior knowledge of what would constitute a just outcome, in which case the justice of the procedures consists of their tendency to produce that outcome. For example, in a criminal trial the procedural rules are designed to ensure that the guilty are punished, that punishment fits the crime, and so forth.

Many of these procedural rules are, however, not exclusive to the legal system but also apply to other areas of life, ranging from formal debate in legislative chambers or committees to informal discussions among friends or family. Indeed, it is often suggested that these rules reflect a widely held

and perhaps innate sense of what is fair or reasonable, what is usually called 'natural' justice. This can be seen, for instance, in the widespread belief that it is fair in argument and debate for all parties to have the opportunity to express their views, or when decisions are taken for those affected by them to be consulted beforehand. Because the fairness of such rules is considered by many to be self-evident, there is often considerable agreement about what makes the administration of law procedurally just.

At the heart of procedural justice stands the principle of formal equality. The law should be applied in a manner that does not discriminate between individuals on grounds like gender, race, religion or social background. This, in turn, requires that law be impartially applied, which can only be achieved if judges are strictly independent and unbiased. Where the judiciary has clear political sympathies, as in the case of the US Supreme Court, or when judges are thought to be biased because they are predominantly male, white and wealthy, this may be seen as a cause of injustice. The widespread use of the jury system, at least in criminal cases, may also be justified in terms of procedural justice. The virtue of trial by jury is that juries are randomly selected and so are likely to be impartial and to be capable of applying a standard of justice commonly held in society. The defendant is judged by his or her 'peers'.

Moreover, the legal system must acknowledge the possibility that mistakes can be made and provide some machinery through which these can be rectified. This is achieved in practice through a hierarchy of courts, higher courts being able to consider appeals from lower courts. However, miscarriages of justice may be more difficult to rectify when the process of appeal is placed entirely in the hands of the judges, who may fear bringing the court system, and the judiciary itself, into disrepute. This was highlighted in the UK by the cases of the Guildford Four and the Birmingham Six, whose convictions for terrorism were overturned in 1989 and 1991, but only after they had served 14 and 16 years in gaol respectively. Procedural justice is also said to require the presumption that the accused is 'innocent until proved guilty'. This has been described as the 'golden thread' running through the English legal system and those derived from it. The presumption of innocence ensures that the mere fact of an accusation does not in itself constitute proof; the onus is on the prosecution to offer evidence which can prove guilt beyond 'reasonable doubt'. This is also why certain evidence, for instance about the accused's previous criminal record, may be inadmissible in court, since it could taint the jury's views and prevent a verdict being reached on the 'facts of the case'. In the same way, an accused person has traditionally been accorded a right to silence, on the grounds that it is the prosecution's job to establish guilt. In the USA, for example, this is enshrined in the Fifth Amendment of the Constitution which guarantees the right to avoid self-incrimination.

The principle of equal treatment has applications at every point in the legal process. For example, it suggests that ordinary citizens should not be disadvantaged by their ignorance when dealing with the police, the prosecution or the judiciary. It is normally accepted therefore that an accused person should be clearly informed about the charges made, and that he or she should be informed at the outset about their rights, notably their right to legal advice. Such rules of procedural justice have been most clearly defined in the USA. For example, in *Miranda* v. *Arizona* (1966), the Supreme Court laid down very strict procedures which the police have to follow when questioning suspects; and in *Gideon* v. *Wainwright* (1963) it guaranteed defendants the right to a lawyer, regardless of their financial circumstances. In other cases, however, governments have ignored such principles in the belief that they unnecessarily hamper the pursuit of criminals or others who threaten public order. In the UK, the Terrorism Act 2001, passed in the aftermath of the terrorist attacks on New York and Washington, included the power to hold terrorist suspects without trial, infringing the right to liberty as set out in the Human Rights Act 1998.

Substantive justice

As pointed out earlier, the requirements of legal justice cannot be entirely met by the application of procedural rules, however fair these rules may be and however scrupulously they may be applied. This is the sense in which law is different from competitive sport; its outcomes, and not merely its procedures, are claimed to be just. The legal process may thus generate injustice not because law is unfairly applied but because law itself is unjust. For instance, laws which prohibit women from voting, or which ban ethnic minorities from owning property, are not made 'just' by the fact that they are applied by courts whose procedures are fair and impartial. The content of law must therefore be judged in the light of a principle of substantive or 'concrete' justice.

Whereas there is considerable agreement about the rules of procedural justice, the same cannot be said of substantive justice. Legal justice has traditionally been linked to the idea that law aims to treat people according to their 'just deserts', or, in the words of the Roman Emperor Justinian, justice means 'giving each man his due'. The difficulty of doing this was illustrated by the earlier discussion of competing theories of punishment. Supporters of retribution may argue that in principle justice demands that the murderer's life be forfeit in punishment for his crime; those who advocate deterrence may accept capital punishment but only when empirical evidence indicates that it will reduce the number of murders; rehabilitation theorists reject capital punishment in all circumstances, regarding it as little more than a form of legalized murder. No

amount of debate and analysis is likely to shift any of these positions because they are based upon fundamentally different moral principles. The same applies to the attempt to distribute material rewards justly. While some argue that social justice requires a high level of material equality on the grounds that wealth should be distributed according to individual needs, others are happy to accept a high level of material inequality so long as this is based upon the unequal talents of the people involved.

Like all normative principles, the idea of substantive justice is subjective; at heart, it is a matter of opinion. Notions of justice therefore vary from individual to individual, from group to group, from society to society, and from period to period. Indeed, the decline of religion and traditional values, and the growth of both social and geographical mobility, has encouraged the development of moral pluralism. Ethical and cultural diversity make it impossible to make any firm or authoritative judgements about the moral content of law, or to establish reliable criteria for distinguishing just laws from unjust ones. Justice is, in this sense, a relative concept. It perhaps has meaning only for particular individuals or groups, and cannot be applied to society at large.

One way round this problem is to try to relate justice to a set of dominant or commonly held values in society. This is precisely what Patrick Devlin (1968) meant when he proposed that law should 'enforce morality'. In Devlin's view, law is based upon the moral values of the average citizen or, in his words, 'the man on the Clapham omnibus'. Thus he proposed a distinction between what he called 'consensus laws' and 'non-consensus laws'. Consensus laws are ones which conform to commonly held standards of fairness or justice; they are laws which, in Devlin's view, people are 'prepared to put up with'. On the other hand, non-consensus laws are ones widely regarded as unacceptable or unjust, normally reflected in the fact of widespread disobedience. Devlin did not go as far as to suggest that breaking non-consensus laws was justified, but he nevertheless warned that their enforcement would only bring the judiciary and the legal process into disrepute. An example of non-consensus law might be the 'poll tax' in the UK, which, when introduced in England and Wales in 1990, gave rise to a widespread campaign of protest and non-payment, based upon the belief that the tax violated generally held views of social justice.

Devlin believed that judges, who are strictly impartial and stand apart from the political process, are in the best position to apply the distinction between consensus and non-consensus law. After all, judges have had years of experience adjudicating disputes and arbitrating between conflicting interpretations of law. However, this form of judicial activism has proved to be highly controversial, allowing as it does non-elected judges to make decisions that have a clear moral and political content. The issue has been

particularly relevant in the United States in view of the widely acknowledged role of the Supreme Court in making public policy. During the New Deal period of the 1930s, for instance, the Court struck down important social welfare programmes. In the 1950s and 1960s, however, the Warren Court was responsible for advancing civil rights on a number of fronts. The danger of such 'activism', however, is that there is no way of knowing whether judges' interpretations of law reflect widely held views about what is right or acceptable, or simply their own personal beliefs. It is clear that, since they are not elected, their definition of consensus morality enjoys no electoral mandate. Moreover, in the light of the socially unrepresentative nature of the judiciary, it is questionable that the judges know much about what Devlin called 'the man on the Clapham omnibus'.

Regardless of who is empowered to define consensus morality, there are reasons to believe that the idea itself may not stand up to serious scrutiny. In the first place, it implies that a reliable distinction can be made between consensus and non-consensus laws. In practice, few, if any, issues provoke widespread agreement, still less unanimity. All governments pass legislation that is politically controversial in that it provokes protest or at least a significant measure of criticism. This could be applied to almost every area of government policy, economic management, taxation, industrial relations, education, health, housing, law and order, race relations and so on. The danger of Devlin's argument is that it threatens to classify most laws as non-consensus on the grounds that somebody or other is not 'prepared to put up with' them. This leads to difficult questions about how many people need to object, and what form their objections need to take, before a law can be regarded as non-consensus. Such difficulties, however, merely reflect a deeper problem. In many respects, the idea of a consensus morality is simply a hangover from the days of traditional and homogeneous communities. In modern societies, characterized by ethnic, religious, racial, cultural and moral pluralism, any attempt to identify consensus beliefs is doomed to failure.

Justifying law-breaking?

The question 'Why should I obey the law?' elicits from many people the simple response: 'Because it is the law.' The law, in other words, is usually acknowledged to be legitimate, in the sense that most citizens accept an obligation to obey it. Law is therefore recognized as binding upon those to whom it applies. In a formal sense, the law is the law only because it is obeyed – at least by the vast majority of the population. There is thus a sense in which laws remaining on the statute book, but which are no longer obeyed or enforced, cease to be law. This applies, perhaps, in the

case of copyright laws which prohibit the taping of audio or video cassettes and, in some countries, laws which ban the use of so-called 'soft' drugs like cannabis. Indeed, in countries such as the Netherlands an attempt has been made to formalise this anomaly by 'decriminalizing' the use of 'soft' drugs. Nevertheless, despite the general acknowledgement that law is legitimate, it is clear that all laws are broken to some degree – otherwise the machinery of law enforcement would simply be redundant. It is important to acknowledge, however, that incidents of law-breaking fall into two separate categories.

In most cases, laws are broken by people described, rather quaintly, as 'common criminals'. Common criminals seldom put forward a moral justification for their actions, and rarely portray their behaviour as other than nakedly self-seeking. Criminal behaviour of this kind undoubtedly raises some interesting questions, for example, about the psychological or social factors which help to explain law-breaking, and the possible means through which others can be deterred from pursuing the same course. However, these are descriptive questions about why the law *is* obeyed, or why it *is not* obeyed. However reluctant they may be to be caught or prosecuted, so-called common criminals usually acknowledge that they *should* have obeyed the law, and so recognize the law as binding. On the other hand, there are incidents of law-breaking which are principled and, maybe, justifiable in moral or political terms. Some legal systems, indeed, acknowledge this fact by categorizing certain law-breakers as 'political prisoners' and treating them differently from everyday criminals. The distinction between the two may, however, be both unclear and politically controversial. This has been evident in the case of terrorist groups, such as the IRA in the UK and ETA, the Basque separatist movement in Spain, which have at different times aspired to be granted 'political status' on the grounds that they are not criminals but 'freedom fighters'. Some go further and extend the notion of 'political' crimes to include criminal acts which result from social circumstances like deprivation, poverty or inequality, even though their perpetrators may not claim any conscious political motivation. Anarchists, in fact, are not prepared to recognize any distinction between criminal and political offences, in that they regard all laws as immoral and therefore tend to see moral justification in each and every case of law-breaking.

The moral justification for law-breaking can be examined in two ways. One is to ask the question: 'Why should I obey the law?' This raises the issue of political obligation and is addressed more fully in Chapter 7. The alternative is to stand the question on its head and ask: 'What justification is there for breaking the law?' This raises the issue of what is called civil disobedience, law-breaking that is justified by reference to religious, moral or political principles. Civil disobedience has a long and respectable

heritage, drawing as it does upon the ideas of writers such as Henry David Thoreau (1817–62) and the example of political leaders such as Mahatma Gandhi and Martin Luther King (1929–68). Under Gandhi's influence, non-violent civil disobedience became a powerful weapon in the campaign for Indian independence, finally granted in 1947. In the early 1960s, Martin Luther King adopted similar political tactics in the struggle for black civil rights in the American South.

Civil disobedience is an overt and public act: it aims to break a law in order to 'make a point' rather than in an attempt to get away with it. Civil disobedience is thus distinguished from other criminal acts by its motives, which are conscientious or principled, in the sense that they aim to bring about some kind of legal or political change; it does not merely serve the interests of the law-breaker himself or herself. Indeed, in many cases it is precisely the willing acceptance of the penalties which law-breaking involves that gives civil disobedience its moral authority and emotional power. Finally, at least in the tradition of Thoreau, Gandhi and King, civil

Mohandas Karamchand Gandhi (1869–1948)

Indian spiritual and political leader, called Mahatma ('Great Soul'). A lawyer trained in Britain, Gandhi developed his political philosophy whilst working in South Africa where he organised protests against discrimination. After returning to India in 1915, he became the leader of the nationalist movement, campaigning tirelessly for independence, finally achieved in 1947. Gandhi was assassinated in 1948 by a fanatical Hindu, becoming a victim of the ferocious Hindu–Moslem violence which followed independence.

Gandhi's ethic of non-violent resistance, *satyagraha*, reinforced by his ascetic lifestyle, gave the movement for Indian independence enormous moral authority and provided a model for later civil rights activists. First outlined in *Hind Swaraj* (Home Rule) (1909), it was based upon a philosophy ultimately derived from Hinduism in which the universe is regulated by the primacy of truth, or *satya*. As humankind is 'ultimately one', love, care and a concern for others is the natural basis for human relations; indeed, he described love as 'the law of our being'. For Gandhi, non-violence not only expressed the proper moral relationship amongst people, but also, when linked to self-sacrifice, or *tapasya*, constituted a powerful social and political programme. He condemned Western civilisation for its materialism and moral weakness, and regarded it as the source of violence and injustice. Gandhi favoured small, self-governing and largely self-sufficient rural communities, and gave support to the redistribution of land and the promotion of social justice.

disobedience is non-violent, a fact which helps to underline the moral character of the act itself. Gandhi was particularly insistent upon this, calling his form of non-violent non-cooperation *satyagraha*, literally meaning defence of, and by, the truth. Civil disobedience thus stands apart from a very different tradition of political law-breaking, which takes the form of popular revolt, terrorism and revolution.

In some cases, civil disobedience may involve the breaking of laws which are themselves considered to be wicked or unjust, its aim being to protest against the law in question and achieve its removal. In other cases, however, it involves breaking the law in order to protest against a wider injustice, even though the law being broken may not itself be objectionable. An example of the former would be the burning of draft cards or the refusal to pay that proportion of taxation which is devoted to military purposes, forms of protest adopted by opponents of the Vietnam War in the USA. Similarly, Sikhs in the UK openly flouted the law compelling motorcyclists to wear crash-helmets because it threatened their religious duty to wear turbans. On the other hand, Thoreau, who refused all payment of tax in an act of protest against the Mexican–American War of the 1840s and the continuation of slavery in the South, is an example of the latter. On some occasions Gandhi combined the two goals. In his famous 'march to the sea' in 1930, for instance, he sought to protest against the law banning Indians from making salt by making a symbolic amount of salt from sea water and thus courting arrest, but only as part of a larger campaign for national independence.

Whether it is designed to attack a particular law or advance a wider cause, all acts of civil disobedience are justified by asserting a distinction between law and justice. At the heart of civil disobedience stands the belief that the individual rather than government is the ultimate moral authority; to believe otherwise would be to imply that all laws are just and to reduce justice to mere legality. The distinction between law and justice has usually, in the modern period, been based upon the doctrine of human rights, asserting as it does that there is a set of higher moral principles against which human law can be judged and to which it should conform. Individuals are therefore justified in breaking the law to highlight violations of human rights or to challenge laws which themselves threaten human rights. Arguments about the existence of such rights, and about how they can be defined, are examined in the next chapter.

Other justifications for civil disobedience focus upon the nature of the political process and the lack of alternative – legal – opportunities for expressing views and exerting pressure. For example, few would fail to sympathize with the actions of those who in Nazi Germany broke the law by sheltering Jews or assisting their passage out of the country. This applies not only because of the morally repulsive nature of the laws

concerned but also because in a fascist dictatorship no form of legal or constitutional protest was possible. Similarly, the use of civil disobedience to gain votes for women in the nineteenth and early twentieth centuries can be justified by the simple fact that, deprived of the right to vote, women had no other way of making their voices heard. Civil disobedience campaigns were also used to achieve black suffrage in the American South and in South Africa. Even when universal suffrage exists it can perhaps be argued that the ballot box alone does not ensure that individual and minority rights are respected. A permanent minority, such as the Catholic community in Northern Ireland, may therefore turn to civil disobedience, and at times support political violence, even though they may possess formal political rights. Finally, it is sometimes argued that democratic and electoral politics may simply be too slow or time-consuming to provide an adequate means of exerting political pressure when human life itself is under imminent threat. This is, for example, the case made out by anti-nuclear campaigners and by environmental activists, both of whom believe that the urgency of their cause overrides what by comparison appears to be the almost trivial obligation to obey the law.

Since the 1960s civil disobedience has become more widespread and politically acceptable. In some respects, it is now regarded as a constitutional act which aims to correct a specific wrong and is prepared to conform to a set of established rules, notably about peaceful non-violence. Civil disobedience is, for example, now accepted by many as a legitimate weapon available to pressure groups. Sit-ins or sit-down protests help to attract publicity and demonstrate the strength of protesters' convictions, and may, in turn, help to promote public sympathy. Of course, such acts may also be counter-productive, making the individuals or group concerned appear irresponsible or extremist. In these cases, the question of civil disobedience becomes a tactical matter rather than a moral one. Critics of the principle nevertheless argue that it brings with it a number of insidious dangers. The first of these is that as civil disobedience becomes fashionable it threatens to undermine respect for alternative, legal and democratic means of exerting influence. At a deeper level, however, the spread of civil disobedience may ultimately threaten both social order and political stability by eroding the fear of illegality. When people cease obeying the law automatically and only do so out of personal choice, the authority of law itself is brought into question. As a result, acts of civil disobedience may gradually weaken the principles upon which a regime is based and so be linked to rebellion and even revolution. This was evident in 1989 when a mounting wave of illegal but usually peaceful demonstrations in countries such as East Germany and what was then Czechoslovakia led eventually to the collapse of their political regimes.

Summary

1. Law consists of a set of general, public and enforceable rules, usually regarded as binding in the society to which it applies. It is valued as the principal means through which liberty and order are maintained. This is usually achieved through the rule of law, the belief that all behaviour should conform to a framework of law, a doctrine closely linked to constitutionalism and limited government.
2. Whereas law is a distinctive form of social control, morality addresses normative or ethical questions: what *should* be. Although they are analytically separate, some believe that law and morality do, and should, coincide. This is advanced by natural law theorists who hold that human law reflects higher moral principles. The alternative idea of positive law suggests that its defining feature is that it is obeyed, moral questions being set aside.
3. Order may universally be regarded as a good thing, bringing with it the promise of stability and personal security, but attitudes diverge about how it can best be secured. Some argue that since human beings are imperfect, order has to be imposed; it can only be achieved through discipline and control. Others place their faith in reason and social solidarity, believing that the natural relationship amongst people is one of harmony.
4. Justice is about giving each person what he or she is 'due'. It can be understood in a procedural sense to refer to the rules which guide the legal process, and in a substantive sense to refer to the outcomes or content of law. The issue of justice lies at the heart of questions about legitimacy and orderly existence, determining whether citizens are willing to accept the law as binding.

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