

1 What Is Law?



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LEARNING OUTCOMES

After reading this chapter, you will be able to:

- Explain how law is commonly defined.
- Describe how law relates to morality, justice, and religion.
- Define key theories of law, including natural law theory, legal positivism, and legal realism.
- Understand the concept of rule of law.
- Differentiate between the main divisions of law.
- Describe the nature of legal language and some recent developments in that area.

Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as the question “What is law?”

HLA Hart, *The Concept of Law*, 2nd ed (Oxford: Oxford University Press, 1994) at 1

Introduction

A defining characteristic of most societies is the existence of an imposed order on what would otherwise be unpredictable and unsafe social environments. One of the instruments societies use to create and maintain order is law.¹ In this chapter, we explore the concept of law at a basic level to set the stage for a more detailed examination of Canadian law in later chapters.

We begin with some definitions of law and then examine the law’s relationship to morality and ethics, justice, and religion. Next, we consider some prominent theories of law—including natural law theory, legal positivism, and legal realism—and the rule-of-law doctrine. In the final sections, we look at the divisions of law and at some of the challenges and developments associated with legal terminology.

Exploring these ideas will raise questions that cannot always be answered. Absolutes and certainties are sometimes unavailable, and accepting the limitations of the law can be challenging. However, despite its imperfections, the law is an endlessly rich and fascinating field with the potential to engage you for a lifetime.

¹ One historian’s view is that law, religion, and other social constructs, such as human rights, are “fictions” or “myths” that are not rooted in instinct or objective reality outside of people’s imaginations. They are tools used to allow large communities of relative strangers to cooperate and work together toward common goals. These “imagined” orders can be relatively stable if there are enough believers. Changing an imagined order involves the simultaneous substitution of a new order in the consciousness of these believers. This requires a complex catalyst, such as a political, an ideological, or a religious movement. See Yuval N Harari, *Sapiens: A Brief History of Humankind* (Toronto: Penguin Random House Canada, 2016). There are contrary views. For example, in the area of equality rights, there is some evidence that the desire for equal treatment and opportunity is in our biology (a part of our social DNA), so equality is more than a fiction or myth that can be changed with a new system of beliefs. Selfishness and greed, assuming that these traits are also instinctual, must then compete against fairness at a biological and not just an intellectual level.

How Law Is Commonly Defined

Is the law simply what we say it is, or is there more to it than that? Is it subject to higher standards? Do our legal rules have to meet these standards in order to qualify as law? For example, if our Parliament passed a law providing that all green-eyed babies must be given up for stem cell research, would that law be valid? Why or why not?

We will return to these questions later in the chapter, in connection with various conceptions of justice and theories of law. For now, though, we need a basic definition of law to help us get our bearings. There are many definitions available (see Box 1.1). For our purposes, the law can be defined as *a system of enforceable rules that governs the relationship between the individual members of a society and between those members and the society itself*. The law allows us to live in communities safely and to balance the needs of the individual with the needs of the community.

BOX 1.1

Definitions of Law

The more laws and restrictions there are, the poorer people become. ... The more rules and regulations, the more thieves and robbers.

Laozi (ca. 6th century BCE),
Tao Te Ching

[L]aws were invented for the safety of citizens, the preservation of States, and the tranquility and happiness of human life.

Marcus Tullius Cicero (106–43 BCE),
De Legibus, or On the Laws

Law ... is nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated.

Thomas Aquinas (1225–1274),
Summa Theologica

Law ... is the perfection of reason.

Edward Coke (1552–1634),
Institutes of the Laws of England

No enactment of man can be considered law unless it conforms to the law of God.

William Blackstone (1723–1780),
Commentaries on the Laws of England

[L]aw [may be thought of] as a set of rules which are generally obeyed and enforced within a politically organized society.

Peter Shears & Graham Stephenson,
James' Introduction to English Law, 13th ed
(London, UK: Butterworths, 1996) at 6

Types of Rules

The rules that make up the law can be divided into many categories. A good place to start is to say that there are three types of rules:

1. *General norms or standards of behaviour.* These rules usually prohibit certain activities, such as murder or careless driving.
2. *Condition rules.* These rules establish conditions or requirements that must be met before certain activities can be carried out. Licensing requirements for conducting a business, getting married, or driving a car are examples of these rules.
3. *Power-conferring rules.* These rules allow you to define your own legal relationship within certain contexts. The main examples of power-conferring rules are those

relating to the law of contract; they allow you to set the terms and conditions that govern your relationship with another person, such as when purchasing or selling property and in business transactions generally. Other examples of power-conferring rules include those relating to wills, which allow you to control how your property is distributed after you die.

Structure of Rules

Whatever the type of rule involved, the form of the rules is relatively standard:

If A, B, and/or C, then X.

A, B, and C are elements (or conditions) that must be present for X (the legal result) to occur. Many legal rules involve three elements (A, B, and C), but some rules may have more elements and some fewer. More complex rules may involve sub-elements.

If the elements are joined by “and” (A, B, *and* C), the list is called “conjunctive.” This means that all elements must be satisfied or proved in order for the legal result to occur. If the elements are joined by “or” (A, B, *or* C), the list is called “disjunctive.” In this case, only one of the elements must be satisfied or proved in order for the legal result to occur. (Sometimes the elements may be part of a hybrid list, part conjunctive and part disjunctive.)

The crime of murder, simply defined, is structured in the conjunctive form. If an accused engages in behaviour (element A: the *actus reus* element) that causes the death of the victim (element B: the causation element), and if the accused means to cause the death (element C: the intention or *mens rea* element), then the accused is guilty of murder and subject to punishment (X: the legal result).

Now let’s look at a motor vehicle accident liability case. Such a case, again, simply defined, is also based on a conjunctive list of elements. If a defendant’s driving falls below the standard of a “reasonable motorist” (element A: the standard-of-care element), and this causes a loss to the plaintiff (element B: the causation element), and the loss is a compensable form of injury (element C: the damages element), then the defendant is liable in negligence and obliged to pay damages to the plaintiff (X: the legal result).

Legal claims are based on these underlying rules, regardless of their type or precise form. To succeed with a claim—that is, to obtain a legal result—you must establish all the required elements and sub-elements of the case. This is true whether you are a prosecutor in a criminal case or a plaintiff in a civil case.

How Law Relates to Other Rules

One thing that distinguishes the law from other kinds of rules is its enforceability. This enforcement occurs by way of state-sanctioned mechanisms or institutions such as police forces, regulatory agencies (such as those that license certain activities), and court systems. The state does not enforce other kinds of rules—moral and ethical codes, abstract principles of justice, and religious tenets—until they have been incorporated into or recognized as law.

Law, Morality, and Ethics

Most of us have a sense of right and wrong, and many of us are in general agreement about what is moral or immoral, ethical or unethical. Despite this common ground, ethical and moral disagreements frequently arise. What seems immoral to one person may be

acceptable to another. For example, when is it acceptable to lie? Never? Sometimes, depending on the circumstances? Always?

We can define **morality** as a system of values or principles concerning what is right or wrong with respect to human behaviour. Morality can be viewed from two perspectives:

1. descriptive, or
2. normative.

When we consider morality from a *descriptive* perspective, we are simply observing what a particular community believes to be right or wrong. We are offering no judgments or endorsements of these beliefs. We are describing things as they are.

When we approach a moral system from a *normative* perspective, we believe it to have an objective truth, or to set an ideal standard. We accept it and are invested in it. A moral code viewed in this light tells us how we should behave. Conduct that offends the code is considered immoral.

However, regardless of the perspective, when morality's relationship to law is examined, we are confronted with difficult questions. When is a matter a purely moral issue and therefore outside of the law's reach? When does immoral conduct also become illegal? Whose moral code is the standard?

These questions have been debated for decades. In Britain in the 1960s, Lord Devlin (1905–1992) and HLA Hart (1907–1992) argued opposing views. Devlin's conservative position was that a shared morality is the foundation of society and should be broadly enforced by the law. Hart's more liberal position was that there are many personal moralities that the law should only minimally enforce (when necessary for safe and peaceful cooperation in society).² In Canada, Pierre Elliott Trudeau (1919–2000) championed a similar view to Hart's when he stated that “there's no place for the state in the bedrooms of the nation.”³

More recently, changes to Canada's *Criminal Code*⁴ relating to prostitution, the recreational and therapeutic use of cannabis, and assisted dying have sparked similar debates. In general terms, it is fair to say that accepted morality is reflected in the law in some respects and that changing moral views can be a stimulus for legal change.

Ethics also deals with standards of human behaviour—with what is right or wrong, good or bad. Ethics, like morality, can be approached from either a descriptive or a normative point of view. There are many branches and sub-branches of ethics; one of these is meta-ethics. This area deals with basic questions, such as how we determine what is good or bad and the nature of behavioural standards.

There is no generally accepted distinction between morality and ethics. One view is that morality focuses on personal character and behaviour, whereas ethics focuses on standards of behaviour in defined social settings. The word “ethics” is frequently used in professional contexts to describe standards of conduct. Most professions, including the legal profession, have codes of ethics. Members who offend these codes may be disciplined by their governing bodies. We will examine codes of ethics in the legal profession in more detail in Chapter 17.

morality

standards of right and wrong, often associated with personal character

ethics

standards of right and wrong, often applied to specific groups—for example, professions

2 The Hart–Devlin debate took place in the context of calls for the liberalization of laws in the areas of “private” morality, dealing with such things as abortion, prostitution, and homosexuality. Hart's view won the day, and the law was liberalized in these areas. Capital punishment was also abolished.

3 Trudeau made the statement in 1967 as justice minister when questioned about a bill he had introduced in the House of Commons that decriminalized homosexual acts. The bill, which also covered other matters, including the easing of abortion rules, was passed into law (see also Box 1.4).

4 RSC 1985, c C-46.

Concerning the relationship between law and ethics, Earl Warren (1891–1974), a former American chief justice, said the following: “In civilized life, law floats in a sea of ethics.”⁵ In other words, a civilized society contains many ethical rules and standards; they vary according to context and generally do not have the status of law. They do, however, underlie the society’s laws, which are applicable to everyone and enforceable by the state. Both the law and the myriad ethical rules and standards are rooted in a common value system.

Law and Justice

A Roman statesman once said the following regarding justice: “Let justice be done, though the heavens fall.” This view posits that justice must prevail regardless of the consequences. But what is justice? Where does it come from? Are conceptions of justice fixed, or can they change? The answer to these questions depends, of course, on how we define justice (see Box 1.2).

BOX 1.2

Definitions of Justice

What I say is that “just” or “right” means nothing but what is in the interest of the stronger party.

Plato (429–347 BCE),
The Republic

Revenge is a kind of wild justice; which the more man’s nature runs to, the more ought law to weed it out.

Francis Bacon (1561–1626), “Of Revenge” from
Essays or Counsels, Civill and Morall (1625)

Justice is truth in action.

Benjamin Disraeli (1804–1881),
House of Commons Speech, 1851

Injustice anywhere is a threat to justice everywhere.

Martin Luther King (1929–1968),
Letter from Birmingham Jail, Alabama, 1963

Overcoming poverty is not a gesture of charity. It is an act of justice. It is the protection of a fundamental human right, the right to dignity and a decent life.

Nelson Mandela (1918–2013),
Speech at Trafalgar Square in London, England, 2005

Everyone knows that law is not the same thing as justice.

SM Waddams,
Introduction to the Study of Law, 8th ed (Toronto: Carswell, 2016) at 4

Justice is often associated with criminal law. A person might ask, “Where’s the justice?” when a person commits a serious crime and is freed on a technicality or “Where’s the justice?” when a person commits murder but only serves jail time. Such questions, often raised during news coverage of criminal trials, reflect the view that our criminal laws place too much emphasis on the rights of criminals and process and that sentencing is generally too lenient. However, theories of justice can transcend criminal law and apply to other areas of the law too.

Justice can be considered in two ways:

1. as an end in itself, or
2. as an instrument, or a means to an end.

5 Earl Warren, “Address” (Speech delivered at the Louis Marshall Award Dinner of the Jewish Theological Seminary, Americana Hotel, New York City, 11 November 1962) [unpublished].

Proponents of justice as an end in itself take what is called a **deontological** (from the Greek *deon*, meaning “obligation, duty”) approach. This approach is non-consequentialist and rule based; it holds that certain rights and responsibilities are fundamental and universal and that justice consists in upholding them. These standards are objectively good and true and require no analysis of social consequences or outcomes for their justification. They are an end in themselves.

Proponents of justice as a means to an end (an instrument) take what we call the **instrumentalist** approach. A desired social end might be, for example, a safer community or the reduction of poverty. A method of regulation would be a just one, according to this view, if it succeeded in making the community safer or in reducing poverty. This distinction—between deontological and instrumentalist conceptions of justice—offers us a general organizing principle and a context in which to discuss three established and commonly cited models of justice: corrective justice, retributive justice, and distributive justice. And as we will see next, a state’s laws will vary according to the model of justice it accepts.

Corrective Justice

The concept of justice most closely attached to the deontological approach—that is, taking justice as an end in itself—is **corrective justice**. Central to the notion of corrective justice is the belief that a person has a moral responsibility for the harm they cause another and that the loss must be rectified or corrected, usually in the form of compensation. (Corrective justice is also known as “rectificatory justice.”) Responsibility here is defined by the relationship between the causer and the injured, and there is no regard to consequences beyond the required rectification. The rectification (or correction) itself represents justice.

An early exposition of corrective justice appears in the *Nicomachean Ethics* by Aristotle (384–322 BCE).⁶ His theory addresses the imbalance that occurs when one person injures another; corrective justice restores the status quo, which is presumed to be good. The parties to an injury (the injurer and the injured) are assumed to be in a position of material equality before the injury. The theory holds that the injurer removes a benefit from the injured party and gains an equivalent benefit themselves (regardless of whether they *actually* derive any benefit from their action). Justice seeks to restore equality by compensating the injured party at the injurer’s expense; it requires the return of the victim’s original benefit in order to restore the balance.

Certain parts of Aristotle’s theory raise doubts and questions. For example, why should we presume that the injurer and the injured start from a position of equality, or that the injurer always receives a benefit equivalent to the injured party’s loss? While this may occur in the case of a theft, what about in a case involving physical injury? And how does the degree of culpability affect responsibility? For example, does corrective justice apply where an injury is caused indirectly, or to losses caused by a failure to act (nonfeasance), such as failing to help a person whose life is in danger where there is little or no risk to yourself in helping? Enlightenment and modern philosophers have developed, refined, and supplemented Aristotle’s ideas about corrective justice, but there is still no consensus about the extent of its application or its limitations.

Despite these uncertainties, corrective justice theory is still relevant today. In 2002, a Supreme Court of Canada (SCC) judge remarked that private law—and, certainly, tort law (a specific area of private law)—can be “viewed primarily as a mechanism

deontological

theories that focus on the inherent rightness or wrongness of behaviour, without regard to the behaviour’s consequences or outcomes

instrumentalist

theories that focus on something—for example, justice or the law—as a means to an end

corrective justice

theory of justice according to which (1) a person has a moral responsibility for harm caused to another, and (2) the latter’s loss must be rectified or corrected

⁶ See Aristotle, *Nicomachean Ethics*, translated by David Ross and revised by JL Ackrill & JO Urmson (Oxford: Oxford University Press, 1998) book V at 4, 8; Jonathan Barnes, *Aristotle: A Very Short Introduction* (Oxford: Oxford University Press, 2000) at 4-5.

of compensation. Its underlying organizing structure remains grounded in the principle of corrective justice.⁷ As the judge's words suggest, corrective justice underlies private law disputes. But it can also apply to criminal cases, where restitutionary orders—based on principles of corrective justice—are possible. For example, a person who physically or mentally injures a victim or damages their property in the course of committing a crime and is convicted of the crime may be ordered, at the time of sentencing, to compensate the victim directly for these losses.⁸

BOX 1.3

The Image of Justice

The personification of justice as a woman, blindfolded* and holding scales and a sword, is based on ancient iconography. Her earliest incarnations were the Egyptian goddesses Maat and Isis. Later, in the classical era, she appeared as the Greek goddess Themis and then as the Roman equivalent of Themis: Justitia.

In the modern context, the personification of justice is often referred to as Lady Justice. Her statues are seen outside courthouses, government buildings, universities, and other buildings where order and fairness are central ideals. The blindfold represents impartiality, her scales signify that she will weigh opposing claims and conflicting evidence, and the sword represents the power she has to enforce her judgments. This icon of justice is associated with the law in general.

* The statue of Lady Justice atop the dome above the Old Bailey courthouse in London, pictured here, does not include a blindfold. Courthouse pamphlets explain that this is because Lady Justice originally did not wear one. The blindfold did not become standard until the 16th century.



Retributive Justice

retributive justice
theory of justice based
on *lex talionis*, or the
law of retaliation

If corrective justice is more relevant to private law disputes, then **retributive justice** relates more to criminal law and to the perceived need for punishment. Does it reflect a *deontological* or an *instrumentalist* approach? Retribution can be viewed either as an end in itself—that is, as a self-evidently appropriate response to morally wrong behaviour—or as the means to socially worthwhile objectives, such as public safety or appeasement. To the extent that one accepts both views, it is a hybrid theory, with both deontological and instrumentalist aspects.

The law of retaliation, or *lex talionis*, is often cited as the guiding principle of retributive justice. We are all familiar with such phrases as “an eye for an eye,” “measure for measure,” and “let the punishment fit the crime.” These expressions are based on the idea that the response should be proportional to the wrong. Retaliation, which is linked to revenge, has always been part of human behaviour. Some of the oldest recorded references to *lex talionis* are in the *Code of Hammurabi*, a collection of Babylonian laws compiled around 1750 BCE.

When it comes to administering retributive justice, we are faced with questions of balance and measure. At first glance, it appears that retribution is based on the ideal of an equal response—an eye for an eye. In practice, however, retributive codes seem to depart

⁷ See LeBel J in *Whiten v Pilot Insurance Co*, 2002 SCC 18 at para 152.

⁸ See the *Criminal Code*, ss 718, 738.

from this ideal. In the *Code of Hammurabi*, for example, the punishment for striking your father is not to be struck yourself, but to lose your hand. Also, the eye for an eye rule varied in Babylon according to the social status of the participants. Crimes against those of lesser status called for lesser punishments. Other ancient legal codes, too, seem to depart from the ideal of an equal response. To the modern mind, some of the punishments prescribed by the Old Testament—for example, stoning to death a person who swears—seem to exceed the limits of reasonable retaliation.

The law of retaliation therefore raises questions about how it should be applied in modern legal systems. When is an equal response the right one? When are greater or lesser consequences appropriate? Whatever the answers, most people today would agree that the Babylonian practice of reducing the penalty because of the victim's "low" social standing is unacceptable. As an instrument for social order, retributive justice also raises questions of cause and effect. When it comes to public safety or crime reduction, are harsh penalties or lenient penalties more effective? Will new penalty regimes result in unintended consequences?

Although retributive justice is most relevant to criminal law, it can play a role in private law disputes—for example, in tort and breach of contract cases. This doesn't happen often because such disputes rarely involve behaviour worthy of punishment. Yet Canadian courts have awarded punitive damages—that is, damages over and above compensatory damages and designed as a form of punishment—in cases where a defendant's behaviour has been particularly offensive. Such awards have both a moral end-in-itself (deontological) purpose and an instrumentalist purpose, as the SCC has made clear. They "give a defendant his or her just desert (retribution)," but they also "deter the defendant and others from similar misconduct in the future (deterrence)" and "mark the community's collective condemnation (denunciation) of what has happened."⁹

What is the principle that courts use when determining punitive damages? The SCC has dictated that proportionality, based on a number of factors, must be the guiding principle. Key factors include the following:

- the blameworthiness of the defendant's conduct,
- the vulnerability of the plaintiff,
- the harm caused,
- the need for deterrence, and
- whether the defendant has been guilty of the conduct in the past.¹⁰

In most civil cases, the SCC's model of reasoned proportionality results in relatively modest punitive damage awards. This contrasts with US courts, which have sometimes allowed extremely large punitive damage awards.

Distributive Justice

The third form of justice, **distributive justice**, is concerned with the way assets and entitlements are shared among members of a society. In his *Nicomachean Ethics*, Aristotle also described distributive justice. His model of distributive justice provides for the distribution of a state's bounty (property and honours, for example) according to merit.

distributive justice
theory of justice concerned with appropriate distributions of entitlements, such as wealth and power, in a society

⁹ *Whiten v Pilot Insurance Co*, *supra* note 7 at para 94.

¹⁰ *Ibid* at paras 111-26.

One of the most significant modern commentators on the subject of distributive justice, and on the subject of justice generally, is John Rawls (1921–2002). In *A Theory of Justice*, he expressed his general conception of justice as follows:

All social values [or social primary goods]—liberty and opportunity, income and wealth, and the social bases of self-respect—are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone’s advantage.¹¹

Injustice, then, according to Rawls, becomes “inequalities that are not for the benefit of all.”¹²

Today, debates about distributive justice can arise in the context of, for example, automobile insurance and workers’ compensation programs. The debates concern whether and how to *distribute* the cost of injuries. Should all members of a group pay premiums or fees for the sake of the smaller number of members who will suffer injuries? If all members of the group contribute to the fund, then the few unlucky enough to suffer injuries will not have to bear the full weight of medical costs themselves. Outside of this type of context, however, distributive justice plays only a small role in Canadian private law.

Distributive justice is more concerned with public law matters than with private law. For instance, a government initiative may involve raising taxes to pay for new programs to assist a minority community. In other words, the cost of the new program, which would benefit only a portion of the population, would be distributed among all taxpayers.

BOX 1.4

Pierre Trudeau’s Just Society

The phrase “just society” was coined by former Canadian prime minister Pierre Elliott Trudeau during his bid to win the 1968 Liberal Party leadership campaign. It has become part of Canada’s political terminology.

Trudeau meant the phrase to apply not to any specific policy but to his entire platform. In the years that followed, he applied it to all of his policies: official bilingualism; decriminalizing sexual matters involving consenting adults; and his crowning achievement, the patriation of the Canadian Constitution and the enactment of the *Canadian Charter of Rights and Freedoms* (Charter).^{*} Equality was a central theme of the just society.

^{*} Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. See Appendix B.



Law and Religion

In most of the world, there is now a separation between church and state. This is not universally true, however, and as we will see in Chapter 2 (under the heading “Religious Law”) some states continue to recognize a formal connection between religion and law.

Where the separation does exist, such as in the West, it is a relatively recent phenomenon, and religion still has the potential to *influence* the law, despite the separation. For example, in one of the most important common law court decisions ever handed down, Lord Atkin formulated his neighbour principle. This principle deals with a person’s obligation to

¹¹ John Rawls, *A Theory of Justice*, revised ed (Cambridge, Mass: Harvard University Press, 1999) at 54.

¹² *Ibid.*

take care when engaging in any activity that might affect other people. In describing this principle, Atkin drew directly from the biblical parable of the Good Samaritan:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.¹³

Atkin's decision and the principle it expresses continue to shape the law of torts—specifically, the law of negligence—in Canada today (see Chapter 9 under “Negligence”).

Our Constitution also reflects the influence of religion. The preamble to the *Canadian Charter of Rights and Freedoms* (Charter) reads as follows: “Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.”¹⁴ This reference to God is slightly paradoxical in the Canadian context; the Charter's guarantee of religious freedom (s 2) in our multicultural society has made references to specific religious influences, such as Atkin's reference to the parable of the Good Samaritan, less acceptable in the last few decades.

Theories of Law: “Ought” and “Is”

Our concern in this section is with **jurisprudence**—the philosophy or science of law—and the theories that compose it. There are many theoretical approaches to the law, and there is some overlap with justice theories. A common way of classifying theories of law is to divide them into two main categories: *analytic* and *normative*. Analytic theories are concerned with what the law *is*, whereas normative theories are concerned with what the law *ought to be*. The two are not mutually exclusive. There are hybrid theories (such as feminist legal theory) and other theories (such as legal realism) that seem to challenge or subvert the distinction between analytic and normative.

Analytic jurisprudence generally concerns critical, explanatory, and value-free assessments of the law. It may involve, for example, examining the internal logic of a system of rules. Sometimes the investigations are more empirical in nature—that is, concerned with experience or observation rather than with theory. The common thread between analytic theories of law is that they do not involve value judgments. They are concerned with what law *is*, not what it ought to be.

Normative jurisprudence, on the other hand, generally concerns the rightness or wrongness of the law based on various conceptions of justice, fairness, and morality. It involves making value judgments; it is evaluative, not explanatory. Because there are no objective, universally accepted standards of right and wrong, normative legal analysis depends less on logic and empiricism than analytic jurisprudence does.

jurisprudence

also known as “philosophy of law” or “science of law”; concerns theories that are used to describe, explain, or criticize the law

13 *M'Alister (or Donoghue) v Stevenson*, [1932] AC 562 at 580, [1932] All ER 1 (HL). The case name, or style of cause, is often simply referred to as *Donoghue v Stevenson*.

14 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. See Appendix B.

The following is a brief overview of three well-established fields of jurisprudence: natural law theory, legal positivism, and legal realism.

Natural Law Theory

The idea of a higher power or source that guides our behaviour or offers us an ideal standard is likely as old as the first human communities. A person who believes this to be the case—who believes that such external standards exist—believes that human-made (or positive) law is subject or subordinate to this higher or **natural law**.

natural law
source of law that is higher than human-made (or positive) law and with which human-made law must comply in order to be valid

What is the source of natural law? Is it divine law, virtue, reason, morality, human nature, or some invisible wellspring? How do we come to know it? Do we need a special class of intermediaries to interpret it for us? How do we evaluate the standards that are to guide us? Do we base these standards on the beneficial results they promote, or do we base them on unchangeable notions of what is right, independent of the consequences they produce? Is it sometimes a combination of these? Natural law theorists have offered different answers to these questions.¹⁵

The ideas of the Greek philosopher Plato (428?–347 BCE) about justice and just laws are among the most ancient expressions of natural law. One of the starting points of Platonic thought is that there are eternal, immutable ideas of good—what he called the world of the Forms. These ideals, according to Plato, are more “real,” in a sense, than the material world of change and sensation. In *The Republic*, Plato envisages a utopia governed by philosopher rulers whom the ordinary citizens trust to know these Forms and to rule by their light. Plato’s student Aristotle, whom some consider the father of natural law theory, saw natural law as being based on virtue and the golden mean (that is, the idea that everything should be done in moderation). Aristotle developed these ideas in his *Nicomachean Ethics*, along with his theories of justice mentioned above.

In the Middle Ages, the Catholic theologian Thomas Aquinas (1225–1274) reworked Aristotle’s ideas about natural law into a Christian context. Natural law was associated with the divine wisdom of God, which humans can know and participate in through the power of reason given to us by God. According to Aquinas, when we correctly use our abilities to reason, we will be informed by permanent and immutable natural laws, which, when followed, will ensure the validity of our positive laws.¹⁶

Hugo Grotius (1583–1645) was a Dutch jurist who contributed to the natural law debate primarily by secularizing it, or removing its religious basis. He believed that natural law would still exist even if God didn’t. He grounded natural law in human nature itself, arguing that natural law was discoverable through the use of “right reason,” which, to Grotius, is a human faculty rather than a divine one.

Connected to this secularizing shift was the development of social contract theory. This is the theory that human existence in earliest times was not ideal—or, as the English philosopher Thomas Hobbes (1588–1679) wrote in *Leviathan*, it was “nasty, brutish, and short”—and that, to secure our safety and happiness, we surrendered our absolute freedom

15 In this chapter, we have employed a wide definition of natural law, one that includes all definitions of law that are not of human invention. Some writers, from a theological perspective, separate divine law (or God’s law) from natural law, resulting in three broad categories of law: divine law, natural law, and human law. Others argue that the only certain and relatively immutable laws are the laws of science. All other laws are human-made, and these are either openly acknowledged as such or attributed to a contrived external source to support their validity.

16 Aquinas believed that there were, in fact, four main types of law—eternal law, divine law, natural law, and human law—all of which are connected in some way to God’s will.

and agreed to be governed by rulers through a “contract.” The philosopher John Locke (1632–1704), Hobbes’s compatriot, believed that this contract was based on natural law, which he identified with human or natural reason. French philosopher and writer Jean-Jacques Rousseau (1712–1778) had similar ideas (see Box 1.5).

BOX 1.5

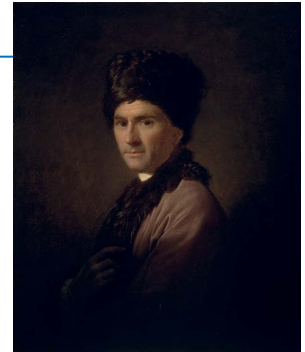
Natural Law and the US Declaration of Independence

The works of Locke and Rousseau, among others, provided a philosophical basis for the American Revolution in the late 1700s, in which 13 colonies fought a war to break free from British rule. According to Locke, natural law teaches us that we are all equal and have certain natural rights to life, health, liberty, and possessions. Locke also maintained that no government has the authority to deny its people these rights. If it does, it is placing its subjects in a state of nature, and war is justified.

Rousseau’s most famous work is *The Social Contract* (1762). It begins as follows: “Man was born free, yet everywhere he is in chains. One man thinks himself the master of others, but remains more of a slave than they.”

The second sentence of the US Declaration of Independence reads as follows: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”

These words constitute the philosophical justification for the American Revolution.



Jean-Jacques Rousseau

An important modern exponent of natural law was the Harvard law professor Lon Fuller (1902–1978). In *The Morality of Law*, Fuller wrote about the connection between morality and law and described “eight ways to fail to make law.”¹⁷ They are as follows:

1. *Deciding issues on an ad hoc basis, without laws.* This is the most obvious kind of failure: simply failing to make laws at all, necessitating decision making that is unpredictable. Laws must be made, despite the apparent difficulty in crafting them.
2. *Failing to publicize laws or make them available to the affected party.* The unfairness here is obvious. How can laws be effective if they are unknown?
3. *The abuse of retroactive legislation.* As a general rule, laws must be prospective. Retroactive legislation is legislation that applies to past behaviour. Without advance notice that such legislation will be passed, it cannot be a guide to conduct (unless you have the power of foresight), and if the power to make it is inappropriately used, it will undercut the integrity of prospective rules. Why follow an existing rule today if your now “legal” behaviour could be punished by a contrary law passed tomorrow, with retroactive effect?
4. *Failing to make rules understandable.* Rules that are too complex serve little purpose and suffer from the same failing as laws that are not publicized.
5. *The enactment of contradictory rules.* The only outcome here, for the person trying to obey the law, is failure. No matter which rule a person follows, they will be breaking another rule.

¹⁷ Lon L Fuller, *The Morality of Law*, revised ed (New Haven, Conn: Yale University Press, 1965) ch 2.

6. *Enacting rules with which the parties affected lack power to comply.* Rules that cannot be complied with cannot be a guide to action.
7. *Making frequent changes to law.* This challenges the stability of the legal system. If the law changes frequently, it becomes difficult if not impossible to plan ahead effectively.
8. *Announcing rules and then failing to enforce them.* If people come to believe that laws will not be enforced, they will not respect them and may not abide by them. Fear of negative consequences motivates many to follow the rules.¹⁸

Fuller maintained that we need to avoid these pitfalls in order to achieve a legal system that is just and consistent. Unlike earlier natural law thinkers, Fuller did not believe that we discover natural law through external absolutes based on religion or reason. Instead, he believed that law has its own “internal” moral standards (his eight principles of legality), and by following them a state’s enactments can truly be characterized as law.¹⁹

The work of Margaret Mead (1901–1978), an American cultural anthropologist, points to some interesting possibilities concerning natural moral standards—natural laws grounded in human nature that appear across cultures. Her study of human populations revealed common standards of behaviour and common rules relating to such things as justified and unjustified killing, the prohibition of incest, and, in many societies, the right to own private property.²⁰

Ronald Dworkin (1931–2013), a student of Fuller, did not count himself as a natural law theorist, but he believed in agreed-upon communal principles such as justice and fairness.²¹ He believed these principles must inform the law and be used to resolve gaps and inconsistencies in it. The law, according to Dworkin, is a “seamless web” connected by these principles, dictating the correct answer to any legal problem.

Systems founded on natural law supply us with ideals, and many other writers have suggested looking to various theories of justice and fairness to help define natural law principles. Still, there is no consensus on how to answer the key questions regarding natural law discussed earlier in this section or on how to resolve contradictions between natural law and positive law.

Legal Positivism

legal positivism
theory that the only valid source of law is the principles, rules, and regulations expressly enacted by the institutions or persons within a society that are generally recognized as having the power to enact them

Natural law’s main opposition as a legal theory is **legal positivism**. On the scale of “ought” and “is” (that is, normative versus analytic jurisprudence), legal positivism tends more toward the analytic. It evaluates laws and legal systems without, for the most part, placing value judgments on them. As legal theories go, it is a relatively recent development.

Legal positivism’s first real proponent was John Austin (1790–1859), a professor of jurisprudence at the University of London (now University College). He was a utilitarian, believing the goal of legislation to be the greatest happiness of the greatest number, but he was

18 Lon L Fuller, “The Morality That Makes Law Possible” in *The Morality of Law*, revised ed (New Haven, Conn: Yale University Press, 1965) ch 2.

19 Fuller’s principles of legality are related to procedural fairness (see below under “Rule of Law”) and are not moral principles in the ordinary sense. See also above under “Law, Morality, and Ethics.”

20 Margaret Mead, “Some Anthropological Considerations Concerning Natural Law (1961)” in Michael DA Freeman, ed, *Lloyd’s Introduction to Jurisprudence*, 9th ed (London, UK: Sweet & Maxwell, 2014) 174.

21 His most famous works are Ronald M Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard University Press, 1977) and *Law’s Empire* (Cambridge, Mass: Harvard University Press, 1986).

better known for his analytic method and his use of precise terminology to define positivist thinking. His greatest work is *The Province of Jurisprudence Determined*.²² The core positivist beliefs, according to Austin, are as follows:

1. All commands of the sovereign are valid and enforceable.
2. “Commands” means **positive law**—that is, human-made rules.
3. “The sovereign” refers to the person or agency who receives habitual obedience in a given society.
4. Laws made in accordance with the society’s existing formalized and recognized process are valid, regardless of so-called natural law, morality, or any external standard.

More recently, professors HLA Hart and Joseph Raz (1939–) have continued the positivist tradition. They have made the point that holding positivist beliefs does not prevent the person from either having moral standards or advocating for their legal recognition. However, law and morality are essentially separate spheres, and the validity of the former is not tied to the latter (see above under “Law, Morality, and Ethics”).

Hart also writes about the frailty of language with respect to the law. There will be gaps and inconsistencies in the laws we make, however hard we try to avoid them. Gaps can be filled by judicial discretion, but at some point, Hart argues, the law simply breaks down. (Dworkin’s response to this idea, in keeping with his natural law premises, is that justice and fairness fill these gaps.)

It is fair to say that the Anglo-Canadian legal tradition has a positivist basis. The principle of parliamentary sovereignty (which we discuss in more detail in Chapter 5) means that laws made in accordance with the recognized process are valid without reference to external standards. The Charter provides for self-imposed standards based on a kind of natural law, but legislators may disregard them in making law (by invoking s 33 of the Charter, the notwithstanding clause; see Chapter 8 under the heading “An Overview of the Charter”).

In times of political stability, when governments follow commonly accepted standards and the existing order is acceptable to the majority of people in the society, legal positivism is effective as an underlying theory. It endorses the validity of what *is*. But during times of war or oppressive regimes, people begin to question the validity or fairness of existing laws and to measure them against external standards. According to legal positivism, a bad law properly constituted under a cruel regime is a valid law. To many people, this might seem a shortcoming in the theory.

Legal Realism

Legal realism is a field of jurisprudence that arose in the 20th century. It was largely a response to the emphasis on logic that dominated British positivist theory in the 1800s. The first writers of legal realist theory were American (see Box 1.6), but Scandinavian countries, too, saw a strong theoretical movement in this direction. American and Scandinavian adherents shared the positivist view that law is a human invention. However, they also advocated a more intensely empirical study of the process by which laws are made and applied, and they argued that law is subject to many of the flaws and weaknesses of other human activities.

positive law

human-made law, as opposed to a higher law (natural law) that transcends persons or institutions

legal realism

theory, developed in the United States and Scandinavian countries, that encouraged a more thoroughly empirical study of the process by which laws are made and applied

²² John Austin, *The Province of Jurisprudence Determined* (London, UK: John Murray, 1832).

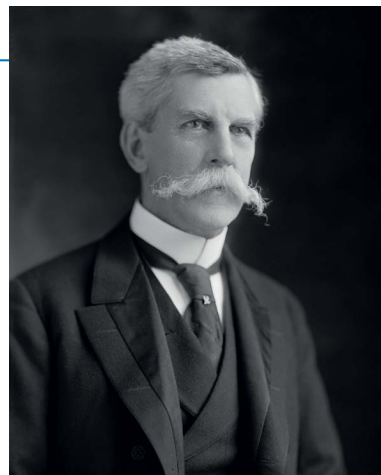
BOX 1.6

Legal Realism and Oliver Wendell Holmes (1841–1935)

Oliver Wendell Holmes was born in Boston, Massachusetts, and fought in the American Civil War on the Union side. He studied law at Harvard and practised law for 15 years before becoming, first, a legal editor, then a professor at Harvard Law School, and, finally, a judge of the Supreme Judicial Court of Massachusetts. He was appointed to the United States Supreme Court in 1902 and retired in 1932 at age 90, the oldest judge ever to serve on the Court. He left a legacy of ideas that are still relevant today.

Holmes was an early leading light in a new way of thinking about law. He is noted for many famous pithy sayings, including the following: “The life of the law has not been logic; it has been experience.”* With this statement, Holmes was not denying that logic plays an important role in the law; he was affirming his belief that practical experience is a more important factor in the law than pure reason is. Opposed to the doctrine of natural law, he took a pragmatic approach to the study of law and felt it was largely about predicting what courts would decide. He is considered by some to be the father of legal realism in America.

* Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown and Company, 1881) at 1.



Legal realism accepts that law does not operate in a vacuum; it is one of many parts in the whole social machine. It follows from this premise that an interdisciplinary approach to the study of law offers advantages. For instance, the study of non-legal fields such as history and economics will help us better understand the legal system. Legal realism also holds that law should be seen as an instrument to further desired social objectives.

Several legal realists focus on the judicial process—a single part of the overall legal system—and, specifically, on how judges make their decisions. In theory, the primary role of judges is to make decisions by applying rules to specific fact situations (in other words, the cases appearing before them). Many of us believe, or would like to think, that certainty and objectivity surround this process: in go the facts, and out comes the unerring, inevitable decision. Realists recognize, however, that the process is complicated. For example, judges’ decisions can be influenced by:

- how credible they find the witnesses,
- how much weight they give to documentary and other real evidence,
- their approach to the synthesis of complex and conflicting legal principles,
- how they go about applying general principles to specific fact situations, and
- their ability to recognize and deal with uncertainties in the rules themselves and in the facts to which these rules are applied.

Given this complexity, it is not surprising that more than just logic could influence the outcome of a case. Many realists argue that lessons from other disciplines, such as psychology and sociology, are important to consider. Also relevant are the intellectual ability, personality, morality, biases, and circumstances of the judge in question. For instance, what tensions or conflicts is the judge experiencing outside the courtroom in their personal life? How rested and prepared are they for the case? One American jurist, Jerome Frank

(1889–1957), remarked that “a judicial decision might be determined by what the judge had for breakfast.”²³ It is not surprising that experienced litigators frequently advise their clients to settle and avoid the uncertainty of going to court.

The study of legal realism has waned since the 1980s. It was a theory that pointed out some weaknesses in legal systems, but it did not come up with solutions. Other kinds of legal theories have arisen during this period, but most bear the influence of legal realism’s empiricism, pragmatism, and openness to other disciplines.

Other Legal Theories

We have described three important theories of law, but there are many others—too many to describe in detail here. However, a brief mention of some of them will give you an idea of the vast scope of jurisprudential study.

Utilitarianism is an ethical philosophy (mentioned above in connection with John Austin and legal positivism). It originated with Jeremy Bentham (1748–1832) and measures the utility or worth of actions in terms of the overall happiness they generate. It is instrumentalist (or consequentialist)—taking the law as a means to an end—and underlies any current theory of law that considers the law to be a tool for social change.

The *law and economics* movement (also referred to as the economic analysis of law) espouses one such utilitarian theory; it measures a law’s worth in terms of its capacity to increase social wealth. This theory substitutes wealth for the happiness of the utilitarian standard, happiness being difficult to measure. A prominent exponent of this legal theory is the American jurist Richard Posner (1939–). The law and economics movement has not had the same influence in Canada that it has had in the United States.

Another theory of law is the so-called *pure theory of law*, which owes its name to a book of the same name by the Czech legal scholar Hans Kelsen (1881–1973).²⁴ It is an outgrowth of legal positivism but acknowledges its normative aspects more openly than traditional positivism does. One interesting aspect of this theory is that it posits the existence of a basic norm called a *Grundnorm*, from which all others can be derived. This basic norm is to be chosen based on a principle of efficiency. A principle is considered efficient if people in general can be shown to follow it independently of any legal rules requiring them to do so. However, the theory does not tell us what this basic norm is.

The **law and society** and **sociology of law** disciplines are related in that they look at law from a broad social, interdisciplinary perspective. The difference between these two theories is that the first identifies most closely with legal studies and the second with sociology. One important issue debated in both is whether laws come about through consensus or through conflict within a society.

Marxist theories of law are based on the writings of Karl Marx (1818–1883), Friedrich Engels (1820–1895), and other advocates of communist policies. Such policies address the distribution of wealth and the class structure within a society. These kinds of legal theories are compatible with distributive justice thinking, which, as we have seen, is also concerned with the distribution of wealth (among other benefits) in a society.

Feminist theories of law cover a wide range of issues and can be seen as an outgrowth of the women’s movement in the 1960s and 1970s and as having connections with critical legal studies (described next). Although works on women’s rights are not new—for example,

law and society

kind of legal study that looks at law from a broadly social, interdisciplinary perspective

sociology of law

kind of sociological study that looks at law from a broadly social, interdisciplinary perspective

Marxist theories of law

legal theories, based on the writing of the communist philosopher Karl Marx, that are concerned with the distribution of wealth in a society; related to distributive justice theories

feminist theories of law

theories of law that generally concern the legal, social, and economic rights of and improving opportunities for women

23 Jerome Frank, *Courts on Trial* (Princeton: Princeton University Press, 1973 [originally published in 1949]) at 208.

24 Hans Kelsen, *Pure Theory of Law*, translated by Max Knight (Berkeley: University of California Press, 1960).

the seminal work *A Vindication of the Rights of Woman* (1792) by Mary Wollstonecraft (1759–1797)—feminist jurisprudence arguably did not establish itself until the 1970s. The modern literature in this field is far-reaching and diverse and goes well beyond issues concerning reproductive rights, violence against women, equal pay for equal work, and sex discrimination more generally. Feminist legal theories also examine such areas as how gender roles and women’s subordination are perpetuated and concealed by the law’s assumptions, language, and structure; how patriarchal interests are supported by the law; and what legal reforms are necessary to improve the position of women in society.

critical legal studies

theory of law largely concerned with exposing law as an instrument of the rich and powerful

critical race theory

theory of law that focuses on race-based inequities; an offshoot of critical legal studies

As a theory, **critical legal studies** (also known as “CLS” or “Crit”) is an outgrowth of American legal realism. Forged as an independent theory in the late 1970s, it is largely concerned with exposing law as an instrument of the rich and powerful. Its adherents have suggested many legal reforms. Emerging from CLS is **critical race theory** (also known by its initials, “CRT”), a kindred theory of feminist jurisprudence. The difference between feminist legal theory and critical race theory is that the latter focuses on race-based inequities in place of gender-related issues.

There are various other areas and sub-areas of legal study, as well as non-legal movements that touch on the law—for example, postmodernism, post-structuralism, deconstruction theory, and discourse analysis. All of these non-legal movements deal in some way with whether objective truth is ascertainable and with the logic of language systems and their hidden assumptions. Common to many current theories is a belief in the value of multi- and interdisciplinary study, and in the artificiality of trying to isolate any process, such as law, given that it is just one part of a complex social system.

Rule of Law

The term **rule of law** concerns fairness in the administration of the law. Its central tenets are that:

1. everyone in a society, regardless of their social or political position, should be treated equally before the law, and
2. power under the law should not be used arbitrarily.

The rule of law is one of the cornerstones of the Canadian legal system and is expressly referred to in the Charter.

Origins

Principles related to the rule of law appear in the legal culture of the Greeks and Romans. Cicero, a famous orator who lived in an era of Roman democracy, is quoted as saying the following: “[We] are servants of the law, that we all may be free.”

The concept of the rule of law was generally not recognized in the next phase of Western history, the Dark Ages. It resurfaced in the Middle Ages, when King John of England (1167–1216), after enjoying supreme power for much of his reign, was suddenly faced with a revolt by his barons. He capitulated by executing one of the most famous legal documents in the democratic world, the *Magna Carta* (1215). (See Box 1.7.) In this document, he agreed to give up some of his power and to recognize some of his barons’ liberties. The seeds of the rule of law were planted with the *Magna Carta*. Some of its provisions are still in force today in England and in Canada.

rule of law
key legal concept whose central tenets are that everyone is equal before the law and that power under the law should not be used arbitrarily

BOX 1.7

The Magna Carta: The Great Charter of English Liberties

In the early feudal era, when English kings were first establishing a strong, centralized kingdom in England, their powerful nobles resisted giving them total power. When King John raised taxes to help finance his wars in France, the nobles rebelled and forced him to agree to the *Magna Carta*, which placed limits on royal powers. One notable limit on royal power was described in clause 39 of this document:

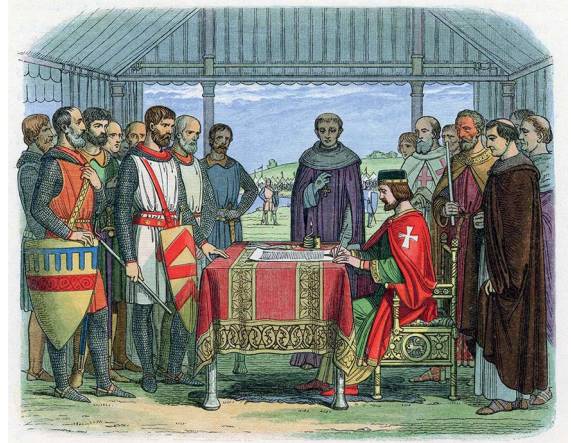
No free man shall be taken or imprisoned or disseised [stripped of his rights or possessions] or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land.*

Arthur Hogue explains how the *Magna Carta* introduced the concept of the rule of law:

In effect, each confirmation of the Charter became a solemn assurance to the realm that the king would act with a regard for the welfare of all subjects. It was an assurance, moreover, that the king would act according to clearly established procedure; in short, the king, like all of his subjects, was under the law.†

This idea—namely, that the same law applies equally to everyone and that a person’s legal rights cannot be taken away

from them except by the law of the land—is one of the great legal legacies that Canadians have inherited from English law.



King John agreeing to the *Magna Carta* at Runnymede, June 1215. (Many representations, like this one, show him signing it; in fact, he affixed his royal seal.)

* James C Holt, *Magna Carta*, 3rd ed (Cambridge, UK: Cambridge University Press, 2015) at 389.

† Arthur R Hogue, *Origins of the Common Law* (Bloomington, Ind: Indiana University Press, 1966) at 50-51.

Basic Principles

In the modern era, rule-of-law doctrine was given prominence through the work of AV Dicey (1835-1932), who is widely recognized as one of the fathers of modern English constitutional law. He popularized the phrase “rule of law” in his most influential work, *An Introduction to the Study of the Law of the Constitution* (London, 1885). We may summarize Dicey’s three core rule-of-law principles as follows:

1. The law must trump the influence of arbitrary power. It follows from this that no one can be punished except for breach of an established law as determined through an established process before the courts.
2. No one is above the law, whatever their place in society—or, to put it another way, the law applies equally to everyone. Again, recognized judicial process will make the rulings to ensure that this occurs.
3. Personal rights and liberties must be protected by giving every person the ability to apply to the courts for a remedy should any of those rights and liberties be denied.

Dicey's first principle recognizes that the arbitrary application of state power will lead to discontent. Rules must be in place and then enforced according to a set process. Otherwise, punishment for their infringement will not be seen as fair (see Box 1.8).

BOX 1.8

Roncarelli v Duplessis

The SCC's decision in *Roncarelli v Duplessis** is one of Canada's defining decisions on abuse of power. It illustrates all three of Dicey's rule-of-law principles but in particular highlights how the arbitrary use of discretionary power violates the rule of law.

Roncarelli was a Jehovah's Witness and a successful restaurateur in Montreal. During this period, in the mid-20th century, Quebec was trying to control the distribution of religious literature. A number of Jehovah's Witnesses were arrested for contravening local by-laws that prohibited peddling without a licence. Roncarelli provided bail for many of those arrested. To prevent his further involvement, Maurice Duplessis, who was then the premier and attorney general of Quebec, ordered the province's liquor commissioner to permanently revoke Roncarelli's liquor licence, which had been issued under the *Liquor Act*.† Roncarelli sued for damages.

A majority of the SCC found in favour of Roncarelli and ordered Duplessis to pay damages. Justice Rand's judgment, one of two majority judgments, is a classic from our country's highest Court. He reasoned that legislative discretion given to government administrators must be exercised in accordance with the general policies underlying the legislation itself. Extraneous factors such as differing religious beliefs or opposing political views, which are wholly unconnected to the purpose of the legislation (here the regulation of the sale of alcohol in the public interest), must not influence the use of the discretion.

Justice Rand stated the following:

In public regulation of this sort there is no such thing as absolute and untrammelled "discretion," that is, that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator. ... "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to

operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted.‡

He also stated:

To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred. ... [W]hat could be more malicious than to punish this licensee for having done what he had an absolute right to do in a matter utterly irrelevant to the *Liquor Act*? Malice in the proper sense is simply acting for a reason and purpose knowingly foreign to the administration, to which was added here the element of intentional punishment by what was virtually vocation outlawry.§

Justice Rand intimated that arbitrary power might be exercisable only if there were express statutory language authorizing such an action. He explained as follows:

[N]o legislative Act can, *without express language*, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute.¶

* [1959] SCR 121, 1959 CanLII 50.

† *Alcoholic Liquor Act*, RSQ 1941, c 255.

‡ *Supra* note * at 140.

§ *Supra* note * at 141.

¶ *Supra* note * at 140 (emphasis added).

Adherence to the second principle is a key feature of true democracies; it distinguishes them from autocracies, where rulers have absolute power, and from societies where the law applies to people differently depending on their status. Equal application of the law promotes respect for the legal system.

Dicey's third principle highlights the idea that the courts are instrumental in protecting our rights and liberties. How effective that protection is depends directly on how free our courts are from political interference. (The separation of powers between the legislative, executive, and judicial branches of government is discussed in Part II of this book.)

It has been frequently observed that Dicey's conception of the rule of law relates more to *procedural* fairness than to *substantive* fairness. In other words, it deals with when and how laws are applied (procedural) rather than with the fairness of the laws themselves (substantive). Dicey does not propose any general guidelines for determining whether laws themselves are fair.

Most modern definitions of the rule of law follow Dicey's approach; they leave substantive fairness issues to be dealt with in official bills of rights and human rights documents at both the national and international levels. This disregard for substantive fairness issues has interesting implications. For example, an established law permitting torture would not offend the idea of the rule of law so long as that law was clearly and equally applied through a recognized court process. But it might well violate whatever human rights document that society subscribes to.

No agreed-upon set of principles underlies the concept of the rule of law. There are principles other than Dicey's. For example, Joseph Raz has listed the following eight:

1. All laws should be prospective, open, and clear.
2. Laws should be relatively stable.
3. The making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules.
4. The independence of the judiciary must be guaranteed.
5. The principles of natural justice must be observed.
6. The courts should have review powers over the implementation of the other principles.
7. The courts should be easily accessible.
8. Crime-prevention agencies should not be allowed to pervert the law at their discretion.²⁵

Raz's first three principles relate to the laws themselves. The clearer and more certain our laws are, the better they will guide us, and the less scope there will be for arbitrary power. The remaining five principles relate to fairness in the enforcement process, primarily through the court system but also through the police and other crime-prevention arms of government. Note that many of these rule-of-law principles are similar if not identical to Lon Fuller's "eight ways to fail to make law," discussed above in "Natural Law Theory."

Other legal scholars have suggested other requirements for the rule of law:

- The independence of the legal profession ("the bar") must be secure.
- Lawyer–client confidentiality must be guaranteed.
- Legal services must be affordable for the average person.

²⁵ Joseph Raz, "The Rule of Law and Its Virtue" (1977) 93 Law Q Rev 195 at 198-202.

The principles above relate to the public's access to legal services generally and to the quality and integrity of those services. The legal system is complex, and most lay persons are not able to navigate their way successfully through its maze; most of us recognize the need for legally trained professionals to help us. And in Western societies, we recognize the need for an independent bench to uphold and apply the law. The need for an independent bar seems to be less obvious. In recent years, some countries have enacted laws changing the regulatory structure of the legal profession. The legal professions in these countries have gone from being largely self-regulatory (in other words, lawyers regulating themselves through law societies) to being subject to government control. What usually happens is that government representatives are appointed to a newly created body charged with regulating the legal profession.

The arguments for these changes resemble arguments for government regulation of police forces and other professional bodies. People suspect that professional organizations that discipline their own members are inclined to be lenient. Members of the "club" will receive special treatment. The main arguments in support of self-regulation are that the professions undertake this responsibility seriously; there is no evidence that it is abused.

With respect to the legal profession, there is a need for it to be free from political control so that cases can be effectively argued before the courts. This is especially true of cases where rights and liberties are at issue. And there are options other than government control. So long as the self-regulatory process is open, measures can be taken to ensure that it is effective. For example, one could appoint an ombudsperson who would have the power to embarrass through public exposure any law society that was lax in controlling its members.

Concerning lawyer–client privilege, this privilege of confidentiality is necessary to ensure that the client and their lawyer have the security needed to properly defend charges, to advance claims, and to seek and give advice.

Finally, if legal services are not affordable, then the existence of laws designed to assist or protect us will be of little use. One of the ways that the overall cost of legal services can be reduced is through the increased use of para-professionals, such as paralegals and notaries public (see also Chapter 18 and the discussion of access to justice).

Rule of Law in the International Context

Rule of law is not just an English or a Western idea anymore. It has a global influence. The United Nations, established in 1945 and now with 193 member states, has made the rule of law a standing agenda item for its General Assembly since 1992. The Security Council has focused on this issue on a number of occasions, emphasizing the need to adhere to rule-of-law principles in times of conflict.²⁶

The United Nations defines the rule of law as follows:

For the United Nations, the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.²⁷

²⁶ See "United Nations and the Rule of Law," online: *United Nations* <<http://www.un.org/ruleoflaw>>.

²⁷ Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UNSC, 2004, UN Doc S/2004/616.

Canada follows the rule of law, and all member states of the UN profess to do so. A number of organizations collect and summarize data that offer a snapshot of the rule of law around the world on an annual basis. Among them are the World Bank, which measures adherence to the rule of law in over 200 economies as one of its six governance indicators, and the World Justice Project, whose *Rule of Law Index* provides detailed data on 139 countries and jurisdictions.²⁸

The interpretation of and adherence to the principles of rule of law vary dramatically between some countries. For example, according to the World Justice Project's *Rule of Law Index 2021*, Denmark ranks first (1) and Venezuela last (139). Canada is ranked twelfth (12). The rankings are based on various indicators across eight categories:

- constraints on government powers,
- absence of corruption,
- open government,
- fundamental rights (looking at the absence of discrimination, right to life and security, due process, freedom of expression and religion, and other indicia),
- order and security,
- regulatory enforcement,
- civil justice, and
- criminal justice.

Both Denmark and Venezuela are members of the United Nations and profess to follow the rule of law. However, the evidence indicates that the recent (at the time of writing) political and economic crises in Venezuela have markedly and negatively affected its rule-of-law markers compared with more politically and economically stable countries, such as Denmark.

Divisions of Law

The law can be divided into many different subject areas (see Figure 1.1). However, not all of these areas are discrete and self-contained. For example, insurance law overlaps with contract law (many issues in insurance turn on the interpretation of insurance policies, which are usually based on a contract). Furthermore, some areas of the law are really amalgams, or combinations, of other areas: sports law, for instance, can involve contracts, torts, criminal law, labour law, and even civil liberties. Also, and quite commonly, a single fact situation may give rise to claims in different areas. For example, if one person physically assaults another person, that could lead to a private law tort claim for battery *and* a criminal law charge of assault.

Canada's Constitution—as we will see in Chapters 4 and 5—divides the power to make and regulate the law in the various areas between the federal Parliament and the provincial legislatures. Just as there is overlap between some areas of the law, the jurisdiction over some areas overlaps and is shared by Parliament (federal) and the legislatures (provincial). The area of family law, for example, and as we shall see in Chapter 10, is partly regulated by Parliament and partly by the legislatures. Furthermore, there is now a strong movement in Canada to recognize Indigenous law as a parallel system of law in relation to Canadian law generally. (Indigenous law is discussed in more detail in Chapter 3.)

²⁸ To view data maps and tables illustrating countries' rankings according to various factors, visit <https://www.worldbank.org>, <https://info.worldbank.org/governance/wgi>, and <https://worldjusticeproject.org>.

FIGURE 1.1 Divisions of Law

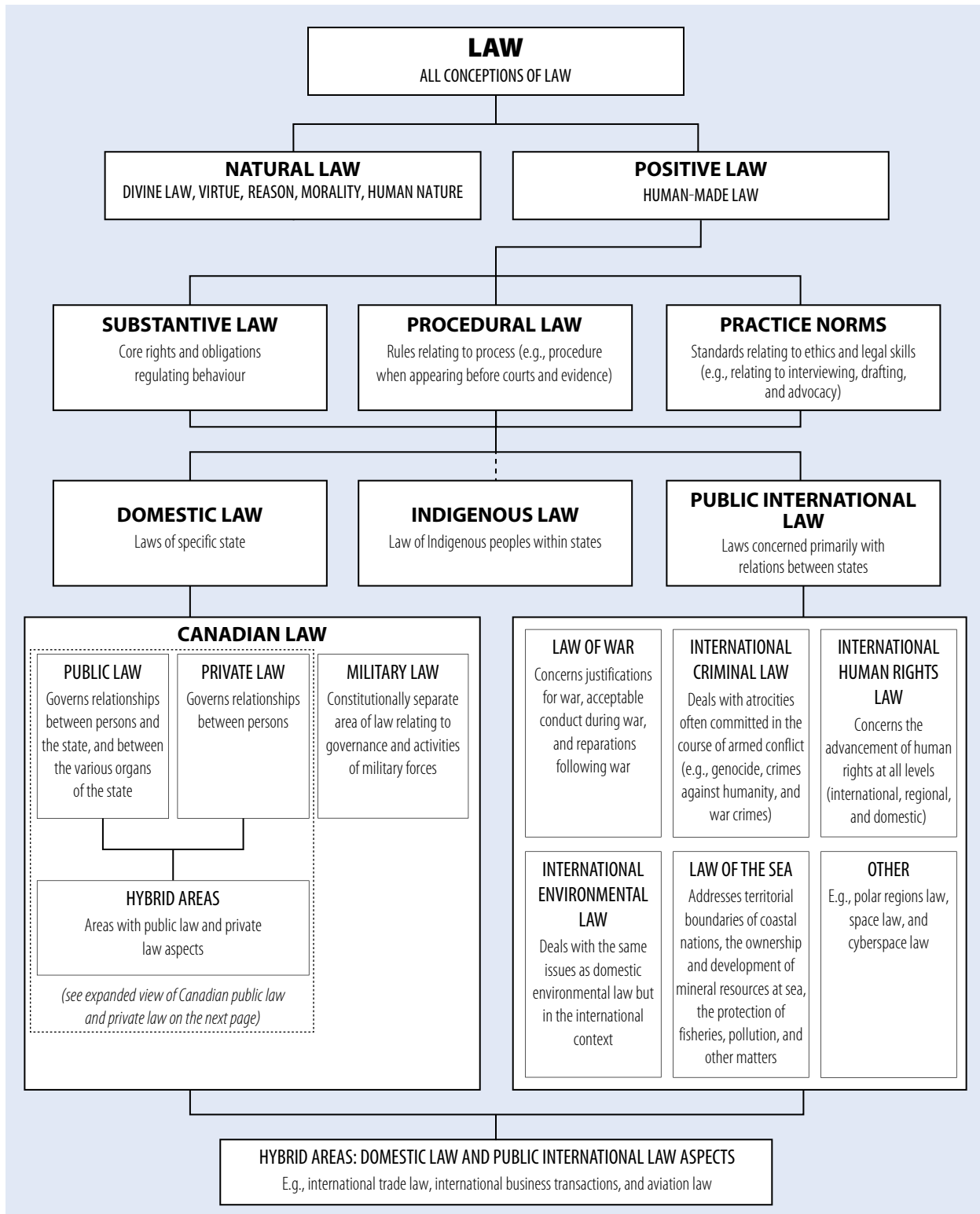
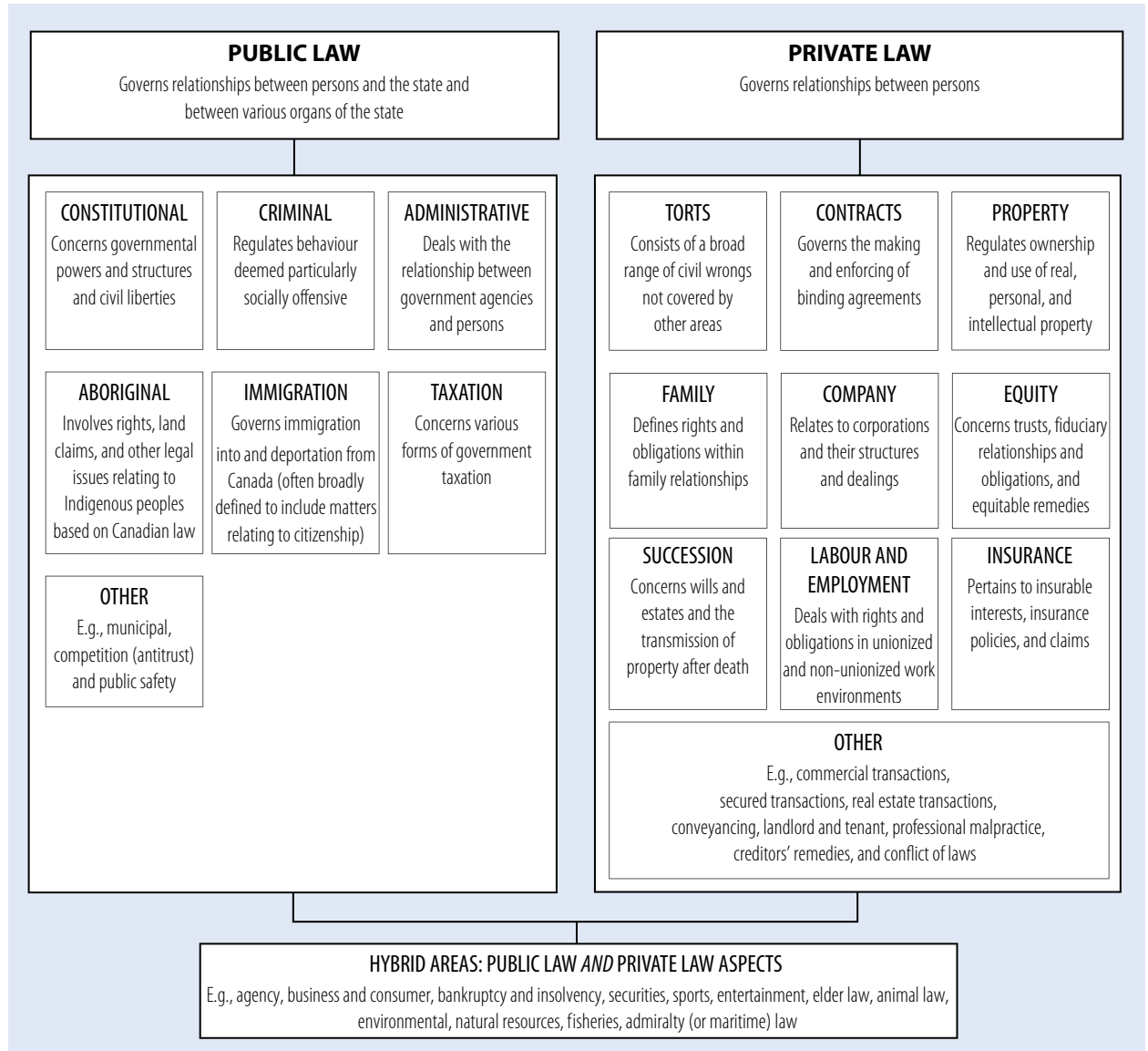


FIGURE 1.1 Divisions of Law (concluded)

substantive law

law that deals with core rights and obligations

procedural law

law relating to the process by which core rights and obligations are determined and enforced

practice norms

ethical standards and legal skills that legal practitioners must follow and possess to deliver legal services effectively

domestic law

law of a particular state or society

public international law (or international law)

law relating primarily to international treaties and customs and to interstate relationships

public law

law dealing with the legal relationship between a state and individual members of the state

private law

law that concerns the relationships between persons

military law

constitutionally separate and relatively self-contained system of law regulating the Canadian Forces

In the top box of Figure 1.1 is law in general—the whole concept, which includes positive law and natural law (as earlier defined). Figure 1.1 further subdivides positive law according to whether the laws deal with core rights and obligations (**substantive law**) or with the processes for determining and enforcing those rights and obligations (**procedural law**). Running parallel to these two basic types of law are **practice norms**, which influence the law's application when the legal profession is involved (which is frequently the case in more complex legal matters). These norms are not always legally binding, and when they are not, they are not “law” in the strict sense. However, legal professionals' adherence to high standards in practice—whether they are legally enforceable or not—is critical in any system of law that is effective and fair.

Note how these three broad categories (that is, substantive law, procedural law, and practice norms) feed into **domestic law** (law of particular states), Indigenous law (law of Indigenous peoples within states—see Chapter 3), and **public international law (or international law)** and its branches (law dealing primarily with the treaties, customs, and other legal sources governing interstate relationships—see Chapter 14). Both domestic law and public international law have substantive and procedural law aspects to them and often require the intercession of the legal profession. How these broad categories feed into Indigenous legal traditions, however, is not as easily defined.

Domestic Canadian law is divided into public law, private law, and military law. **Public law** deals with the legal relationship between persons and the state and between the various organs of the state. It can be divided into a number of different areas, many of which are set out in Figure 1.1 and some of which are covered elsewhere in this book: Chapters 5 to 8 (constitutional law), Chapter 12 (administrative law), and Chapter 13 (criminal law). **Private law**, which concerns the relationships between persons, can be subdivided into many areas. The more common ones are set out in Figure 1.1, and a few of these are examined in Chapters 9 and 10; Chapter 11 concerns business and consumer law, a hybrid area with public law and private law aspects.

Military law is a special area, a constitutionally separate and largely self-contained system of law regulating the Canadian Forces. It governs the armed forces during times of conflict and in peacetime, at home and abroad.

Finally, note that there are many hybrid areas of law—areas that defy easy classification and that cross broad subdivisions in the law. This is reflected in the boxes linking public law and private law and domestic law and public international law. Note also that military law, although usually classed as a separate area of domestic law, has public law and private law aspects, as well as a public international law aspect.

Legal Terminology

Law is expressed through language. Over the centuries, the language of the law has developed a life of its own. In fact, most students of law feel as if they are learning a whole new language when they begin reading cases and legislation. It's not just that some of the words—particularly the Latin ones—are unfamiliar; it's also the way the words are used and how legal arguments are structured.

HLA Hart referred to a shadow of uncertainty surrounding legal rules. As an example, earlier in this chapter, in our discussion of the structure of rules, we referred to the negligence rule in the context of motor vehicle accidents and noted that the standard of care used to determine negligence was based on the “reasonable motorist.” But who is the reasonable motorist? What does this term mean? How well does the reasonable motorist drive? Does it

matter if it's dark and raining or if they're rushing to the hospital because their child is sick at the time of the accident? These are the kinds of uncertainties that the language of the law is often unable to avoid. What fills these shadows or grey areas of uncertainty around the legal rules? According to Hart, it is discretion (that is, the discretion of judges when interpreting the law).

Apart from the uncertainty it involves, legal language is very specialized. Its language is so unfamiliar that it may sometimes seem to you that the legal profession has conspired to make the law more difficult than it is. Recently, there has been a reaction against such specialized, deliberately obscure professional language. This has been a positive development for students and legal practitioners, as well as the public. Expressions such as “hereinafter,” “aforesaid,” “notwithstanding the generality of the foregoing,” and “the said party of the first part” are no longer considered impressive.

A plain-language movement in business and law started in the 1970s. This change is often attributed to banks' wishing to simplify their contracts for consumers to prevent unnecessary litigation. The benefits of this measure were soon clear to all, and the plain-language movement has continued to the present day. Nowadays, in most jurisdictions, legislative counsel responsible for drafting legislation are directed to use plain language in writing or rewriting legislation; they are given lists of “difficult” words and told to replace them with clear ones. Newly appointed judges in many jurisdictions are now required to go to “judge school” for training, which includes sessions on how to write clear, structured judgments.

Despite these developments, legal language remains a challenge to new law students. To help you navigate the language of the law, there are resources that you can use alongside your other course materials. These include dictionaries and collections of legal words and phrases. (See the list of dictionary resources under “Further Reading” at the end of this chapter.) Also, be sure to use the glossaries in this and other law books. Finally, pay close attention to context when reading legal materials; there are many expressions, such as “common law” and “civil law,” that have multiple meanings within the law (see Chapter 2). The context in which they are used should help you with the intended meaning.

CHAPTER SUMMARY

Law is not easily or simply defined. We have seen that, at a basic level, it relates to the regulation of human activity by way of rules. The broad categories of rules and their forms are relatively standard, but the content of rules varies greatly. In many societies, especially liberal democracies of the West, the law is distinguished from other types of rules, such as those based on morality, justice, or religion.

There are numerous theories concerning the law and its development. Some of these theories are analytic in nature, describing what the law is. Others are normative in nature, describing what the law ought to be. Some theories have both analytic and normative elements. Many countries, including Canada, have a positivist and an analytic bias.

The concept of rule of law informs the law in most countries around the world, including Canada, although the degree to which its core tenets are adhered to varies. Rule of law concerns fairness in the administration of the law. Equality in the application of the law and balance in the use of power are key principles.

Law has many divisions and subdivisions, particularly within the domestic law category, and many areas of overlap between these divisions. As you continue your legal studies, you will become more familiar with these specific areas, as well as with the legal terminology used to describe them. With that familiarity will come a greater comfort with the whole area of the law.

KEY TERMS

corrective justice, 9	law and society, 19	procedural law, 28
critical legal studies, 20	legal positivism, 16	public international law (or international law), 28
critical race theory, 20	legal realism, 17	public law, 28
deontological, 9	Marxist theories of law, 19	retributive justice, 10
distributive justice, 11	military law, 28	rule of law, 20
domestic law, 28	morality, 7	sociology of law, 19
ethics, 7	natural law, 14	substantive law, 28
feminist theories of law, 19	positive law, 17	
instrumentalist, 9	practice norms, 28	
jurisprudence, 13	private law, 28	

FURTHER READING

BOOKS AND ARTICLES

- Arlidge, Anthony & Igor Judge, *Magna Carta Uncovered* (Oxford: Hart, 2014).
- Black's Law Dictionary*, 11th ed (Eagen, Minn: Thomson West, 2019), and the abridged version, *Black's Law Dictionary, Abridged*, 10th ed (Eagen, Minn: Thomson West, 2015).
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- Freeman, Michael DA, *Lloyd's Introduction to Jurisprudence*, 9th ed (London, UK: Sweet & Maxwell, 2014).
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- Hart, HLA, *The Concept of Law*, 2nd ed (Oxford: Oxford University Press, 1994).
- Holt, James C, *Magna Carta*, 3rd ed (Cambridge, UK: Cambridge University Press, 2015).
- Waddams, SM, *Introduction to the Study of Law*, 8th ed (Toronto: Carswell, 2016) chs 1, 3.

WEBSITES

Irwin Law, *Canadian Online Legal Dictionary*: <<http://www.irwinlaw.com/cold>>.

United Nations and the Rule of Law: <<https://www.un.org/ruleoflaw>>.

REVIEW QUESTIONS

1. Describe the basic structure(s) of legal rules.
2. What is one way to differentiate morality from ethics?
3. Is a lie ever justified in your opinion? Include in your answer the correct use of the words “deontological” and “instrumentalist.”
4. Compare corrective justice with retributive justice, including the areas of law to which they most clearly apply.
5. Briefly describe the relationship between law and religion.
6. Describe natural law in your own words.
7. Describe legal realism in your own words.
8. What is the rule of law, and what are some of its basic principles?
9. What is the difference between substantive law and procedural law?
10. Briefly describe the plain-language movement and its application to legal terminology today.

EXERCISES

1. Choose a definition of law that, in your opinion, has both strengths and weaknesses. Describe the strengths and weaknesses and then rewrite the definition to remove the weaknesses.
2. Locate and read two speeches or articles by or about Pierre Trudeau and his “just society.” Next, describe in your own words what you think a just society is.
3. In your view, does the law of retaliation reflect an innate need or a learned response? Provide reasons to support your view.
4. What is the basic difference between analytic and normative theories of law? If you had to write a paper on one or the other, which would you choose and why?
5. Using the United Nations and the Rule of Law website, locate, read, and summarize two UN documents dealing with the rule of law.

