higher profits (Vromen 1995, 22). In a pervasively uncertain world characterised by omnipresent chance, the winners are not always those who act rationally on the best market intelligence, but may be those who are less prudent but more daring. The trick, as Alchian saw it, is to back away from the trees – representing the optimising calculus of individual units – so we can better discern the forest of impersonal market forces operating in disequilibrium (1950, 213). The critical lesson here is that it is more useful to look at what has worked than to look at what is proposed. It is not surprising, therefore, to find entrepreneurs placing reliance on patterns (rules) of behaviour that appear to have been successful. Rules of behaviour, of course, may prove unsuccessful over an extended period, as the environment to which they are adapted is continually changing. Hence, there is a continual revision of plans as a consequence of the disappointment of earlier plans (Kirzner 1962, 381).

Evolution of commercial law

The emergence of rules of conduct in commercial dealings through purposive actions of individual actors has received much attention in law and economics literature. The mainstream view of contract is that it is not law in its own right but is the outcome of law, or at best derivative law, binding only on the parties to the contract. Thus *pacta sunt servanda* (promises must be kept) is the law, and the content of the promise is the outcome of the law. However, it is evident that private contracts are a major source of law in the field of commerce. Standard form contracts devised to suit the convenience of particular groups of traders become trade norms when adopted by a critical mass of traders (Rubin 1995, 155). National and international trade and industry associations contribute to law formation by formulating rules based on trade customs. These are imported wholesale into contracts by parties. In the field of commerce, contract and custom interact in a mutually reinforcing way. Just as successful contractual terms become custom through widespread adoption, successful customary practices are selected for application to particular transactions by express adoption in contracts (Benson 1998, 89). Contract is seen as part of the selection process by which the law evolves. There is perhaps no clearer example of this process than the so-called Incoterms (International Commercial Trade Terms), initially formulated by the International Chamber of Commerce in 1936. The Introduction to the Incoterms states that their purpose 'is to provide a set of international rules for the most common trade terms in foreign trade'. They are periodically revised (most recently in 2000) to reflect changing customs in international trade. Conversely, they set standards that become customary through adoption by traders all over the world.

The role of contracting in legal evolution is closely tied to private dispute resolution. Private dispute resolution processes such as commercial arbitration, mediation and negotiation are based on contracts under which contracting parties agree to resolve disputes by enlisting the services of private arbitrators or

conciliators. There is some debate on the question of whether private dispute resolution can produce clear rules. Landes and Posner, for example, argued that profit maximising private judges have little incentive to clarify the rules upon which they determine disputes, as clarity would reduce the incidence of disputes (Landes & Posner 1979, 238–9). Others, such as Fuller (1981), Benson (1998) and Lew (1978), contended that incentives exist for the private judges to clarify and justify their decisions. The success of trade and industry associations in attracting dispute resolution business is explained not only by their technical expertise but also by the reliability and predictability of their decisions. At any rate, it seems reasonable to assume that traders submitting disputes to commercial ADR organisations do not see themselves as entering a lottery conducted by persons having no regard to the law and customs of the trade.

Evolution of liability rules concerning tort and crime

The emergence of liability rules in tort and criminal law has been the subject of studies by Calabresi and Melamed (1972), Adelstein (1998) and others. Building on Coase's insight concerning the effect of transaction costs on what transactions will actually take place among agents, Calabresi and Melamed developed a unified theory of property rights and tort liability, in which the state is seen as the allocator of power to impose costs on others, without compensation or liberty to be free from such imposition (Adelstein 1998, 64). Coase's theorem stated that in zero transaction cost conditions the initial allocation of rights will not matter, as they will gravitate to those who value them most. Posner argued that where transaction costs are prohibitive, efficient allocation of rights will occur only if the state initially allocates them to the actor who values them most. Calabresi and Melamed argued that the state is engaged in just such an exercise in establishing property rights and liability rules. Their thesis is discussed in Chapter 9.

There is no suggestion by these institutionalists that the state is capable of, or indeed motivated to, engage in efficiency analyses of liability rules. The liability rules of tort and crime were developed by common law courts through the process of litigation, which resembles much more closely the spontaneous order model of legal evolution (Ruhl 1996a, 1996b). Similarly, the delictual (tort) liability in Roman law pre-dated codification and arose in ancient custom. The point is that a selectionist explanation – similar to that advanced by Alchian, Friedman and Becker with regard to the emergence of the firm – may be applied to deliberately created liability rules. While legislatures may be motivated by various considerations, including the vote delivering capacities of interest groups, inefficient rules will be subject to constant selection pressures. However, while we may remain optimistic about this process, there is no guarantee that the end results will be efficient rules. Evolution is a non-linear dynamical process that presents many pitfalls, from which subjects may not recover easily, if ever. The integration of this factor into institutional theory is the major contribution to evolutionary jurisprudence of the new institutionalists. The new institutionalists

reconnect old institutionalism to the spontaneous order tradition of the Scottish and Austrian schools.

Pathways of legal evolution: the lessons from new institutionalism

Game theory models indicate that conventions or self-executing patterns of behaviour emerge in populations of interacting agents, who adjust their behaviour over time in response to the payoffs that various choices have historically produced. Axelrod's idea that cooperation results from 'tit for tat' strategy among agents suggests that, over repeated encounters, agents will learn to avoid punishing behaviour and to repeat rewarding behaviour (Axelrod 1990). As agents are mostly strangers in larger societies, they depend on a process of social learning through reliance on patterns of behaviour that appear to be successful. Accordingly, game theory models take as given the idea that patterns of behaviour that appear to be successful increase their representation in the population (Mailath 1998, 84).

However, practices that appear to be successful in some communities are not found in others. This does not contradict the assumptions of the game theory models, but alerts us to the presence of costs that prevent the adoption of good practice in some communities. North claimed that game theory provides an inadequate account of 'the complex, imprecise and fumbling way by which human beings have gone about structuring human interaction' (North 1990, 15). This criticism is too harsh, but North was certainly right to point out that we will not get far in understanding social evolution if we disregard the critical role of institutions in the process. As the Scots and the Austrians realised, the origins of some of the most fundamental social norms are lost in the mists of time and some norms pre-date the emergence of human capacity to express them in words. They arose, not from rational calculations, but from regularities of action and the advantages they conferred on groups who happened to observe the regularities without any foresight of those advantages (Hayek 1982, 1, 19). The search for origins of social cooperation is doomed, but we can learn from observation some aspects of its growth and change over time. New institutional economics has made an important contribution to evolutionary legal theory by highlighting the problem of path dependence in institutional change.

We need to know precisely what is meant by 'institution' in institutional theory before proceeding further. The word 'institution' has many meanings. It derives from the Latin *institutum*, which means in this context: (a) ordinance, decree or regulation; (b) practice, custom, usage or habit; and (c) precedent (Lewis 2000, 427). Institutional theorists mean by 'institution' all of the above, as well as other informal constraints that give structure to society.

Evolution is a process of blind variation and selective retention. The variations that can occur, though, are themselves constrained by history and environment.

This is a consequence of the principle of accumulation of design that the Scots discovered. As Gould put it, 'The constraints of inherited form and developmental pathways may so channel any change that even though selection induces motion down permitted paths, the channel itself represents the primary determinant of evolutionary direction' (1982, 383). Natural history is a constant reminder that biological evolution often proceeds down one-way streets and, as presently observed, so does cultural evolution.

The human race, because of its intellectual abilities and cultural institutions, has a limited capacity to change its evolutionary course. However, human development is heavily dependent on cultural inheritance. Although, in comparison to biological emergence, the break outs in social evolution occur more frequently and more visibly, the process remains fundamentally the same – the accumulation of design. A major part of the cultural inheritance of a society is in the form of institutions that constitute the framework of rules within which social life is played out (North 1990, 4–5). Laws are not the only institutions that shape social life. There are other formal and informal constraints, such as conventions, ethical codes, etiquette, religious beliefs and superstitions. The higher order institutions – such as the constitutional dispersal of power, the representative principle, judicial independence, due process, property ownership and freedom of contract – crucially shape lower order institutions. Institutions are critical to legal evolution for three reasons: (1) they are important as historical determinants of evolutionary pathways; (2) they form part of the current selective environment; and (3) they establish the agencies through which legal change is effected.

Once a law (or less formal rule or practice) is established, individuals and organisations adapt to it and arrange their lives in the expectation that it will remain in force for a reasonable period. As public choice studies demonstrate, laws become difficult to repeal when the individuals and organisations that rely on them have greater bargaining power in the political system than those that are harmed by them. Such 'lock ins' result from the dependence of economic actors on the incentive structures created by the established institutional framework (North 1990, 7–8). Thus, already established laws predispose the legal order to evolve in particular directions. Laws that impose price controls on goods and services may, for example, engender black markets, the suppression of which requires further controls on trade. The immense volume of laws in the form of statutes, regulations, orders, discretions and official polices that makes up the welfare state shows how the legal system can gather momentum of its own after it is set on a particular course, producing consequences which no one foresaw or desired. In a world of perfectly informed persons and zero transaction costs, dysfunctional laws will be quickly revised or, more likely, will not get enacted at all. However, in the real world people work with very imperfect subjective models of their environment, which rely to a large extent on their cultural inheritance. The extent to which the models get revised depends on the feedback they receive, and the feedback depends partially on the institutions themselves.

Normative implications

The idea of evolution, in the sense of blind variation and selective retention, suggests a tautology: what is retained is retained and what is eliminated ceases to exist. According to this, our moral standards are themselves products of selection pressures, and hence we have no independent yardstick by which to evaluate the direction of evolution. However, it does not follow from our lack of freedom from the evolutionary process that we cannot or should not make judgments concerning evolutionary directions or provide inputs to the process. Deliberate inputs are perfectly compatible with accumulation of design. As Vanberg argued, 'there is no contradiction between the notion of deliberate institutional design and the notion of a competitive evolutionary process, just as there is no contradiction between the notion of deliberate organised production and the notion of a spontaneous market process in which such deliberate production experiments compete' (1994, 437). In fact, evolution itself renders redundant the question of whether human beings should seek to influence their own evolution. We have evolved into a race of incorrigible theorists, designers and constructivists. As evolutionary epistemologists, led by Popper, claim, cultural evolution is part of a continuum with biological evolution, representing a process of knowledge growth through trial and error (Popper 1963). While it is clear that design inputs are integral to the process of cultural evolution, it remains to consider what normative lessons concerning interventions the evolutionary process itself offers. There are two aspects of the evolutionary process that have normative implications. The first is the selection–competition aspect, and the second the orderliness aspect.

The trial and error process by which human problems are solved may be improved by the proliferation of hypotheses and their testing in competitive conditions. Just as scientific hypotheses seek to explain physical reality, normative rules of the legal system may be regarded as hypotheses about social reality. These hypotheses, as the spontaneous order theorists assert, are generated by the regularities of the behaviour of individual agents adapting to local conditions. The social system also generates, through its scientific and political activity, numerous hypotheses in the form of legislation. The process of theory production and testing is encouraged by open political systems, where competitive conditions are secured by constitutional rules. Constitutional safeguards of the freedoms of communication and association, the representative principle in government, and rule of law conditions, directly and indirectly create the competitive conditions that encourage knowledge growth through trial and error. Information exchange occurs not only through formal discussions but also through the conduct of persons pursuing their own different ends. Hypotheses are generated through the equilibrating process resulting from the revision of behaviour by agents responding to trial and error feedback. Freedom of contract and the freedom to hold, enjoy and dispose of property are seen as critical to the process of information

exchange through conduct. The prevalence of abstract and impersonal rules of conduct, as opposed to discretionary powers fixing rights and duties in the individual case, is a clear advantage. It provides stable areas of autonomy that allow agents to utilise knowledge that they alone possess, enabling richer hypotheses to emerge through experience. Unlike patternless interventions, abstract rules also provide contestable standards that are susceptible to revision.

The recognition of the spontaneous nature of social evolution carries normative implications. As Kauffman pointed out, spontaneous order undergirds all stages of evolution, including the capacity to evolve (1995, 71). Static things such as tables and chairs, or even completely programmed things such as clocks, do not evolve. Nor does matter, in chaotic conditions. An adaptive system needs to maintain stability while allowing its members local freedom. This is the character of all spontaneous order, including human societies. If the members are fully controlled the system will lose its adaptive capacity and ultimately die. If they obey no rules, the system will die by descending into chaos. In society, coordination and stability are achieved through abstract laws that allow members to utilise knowledge about their own circumstances. The paradox is that adaptive order is actually made possible by the simplicity and generality of laws. If there are no rules at all there are no prospects for coordination of individual actions, and if the law dictates the behaviour of each person in great detail the system will be less, not more, adaptive. This is a point that Hayek made in the first volume of *Law, Legislation and Liberty* (1982, vol. 1, 49). More than two decades on, scientists investigating complexity and the laws of self-organisation are coming to similar conclusions from experimental data (Kauffman 1995, 86–92). In his incisive book, *Simple Rules for a Complex World* (1995), Richard Epstein argued that our complex social world works best on a handful of simple rules.

Eighteenth century evolutionary thought, as later amplified by the Austrian school, brought to light the nature of legal emergence as a process of accumulation of design, much like the work of the unseen hand or the blind watchmaker. It introduced the idea that while we may certainly engage in social problem solving through legislation, we can do so only within the constraints imposed on us by the spontaneous nature of social order. This viewpoint informs us that by attaining legislative power, the human race did not gain an unambiguous advantage. Legislative power, once born, often falls into the hands of individuals and groups who use it in their own political interests. The information that is used in self-interested law making is seriously limited. Legislation to achieve particular ends frequently takes the form of *ad hoc* commands made by officials to whom discretionary power is delegated. As we have seen, this form of law incorporates even less information. Where legislative power is exercised by assemblies that are periodically elected by the people, the potential for abuse is reduced. However, as the public choice literature illustrates, the electoral process tends to become a marketplace where legislative power is bought and sold among politicians and voting groups.

As North and other institutional historians have pointed out, bargaining democracy has become entrenched because of the increasing returns that it provides to organised groups that have evolved to take advantage of it, and the prohibitive transaction costs of changing it even at the margins. However, evolution time and time again surprises us by the unexpected and unintended break out of systems from their established pathways. Although the cost of directly changing the institutional environment remains high, the cost of exit has been falling in relative terms, owing to the globalisation process, liberalisation of international trade law and new technologies. Exit provides powerful feedback to national governments and the constituencies that elect them. Yet there is no reason for us to be passive observers, optimistically awaiting evolutionary corrections that are impossible to predict. We could be pro-active in constitutional design without pretending that we can fully command our destiny.

PART 4
RIGHTS AND JUSTICE

11

Fundamental Legal Conceptions: the Building Blocks of Legal Norms

Previous chapters have focused on theories about definitions and descriptions of the law as it is or as it ought to be, and of how law is made or emerges in society. This chapter examines another vital aspect of law: namely, the internal structure of legal norms and the basic conceptions that are used in legal statements. In other words, we look for the building blocks of legal statements, the conceptions without which a law maker cannot make a law. This discussion is centred on the remarkable contribution on this subject made by Wesley Newcomb Hohfeld (1879–1918).

Not every kind of statement makes law. Assume that King Rex is the absolute ruler of a country. The rule of recognition accepted by the country's officials and citizens grants Rex the power to make law according to his will. He simply has to express it and his will becomes law. One morning on awaking, Rex says to no one in particular, 'I hope the weather will be nice this morning so I can ride my horse'. This is obviously not a law but a hope. At breakfast he tells his Queen, 'I wish my subjects will be well behaved and law abiding today'. This is also not a law but simply a wish. That afternoon he proclaims at the Royal Council: 'It is henceforth the law that no trader shall sell a standard loaf of bread for more than one dollar'. This is a law because it creates a legal duty and a legal right. The trader has a duty not to sell a loaf for more than one dollar and the customers have the right to receive a loaf by paying one dollar or less.

Law informs people of what they *may* do, what they *must* do and, most importantly, what they *must not* do. A person may make a will to bequeath an estate. The master of a ship must go to the aid of a vessel in distress. A motorist must not drive over the speed limit. It is generally thought that norms work by creating *rights* and imposing *duties*. Person A has a duty not to steal other persons' property. Property owners have a right not to have their property

stolen. When I make a will, I instantly create rights in the beneficiaries to have my property conveyed to them on my death according to my instructions. The executor then has a duty to convey the property to the beneficiaries according to my instructions.

Hohfeld argued that there is more to law than just rights and duties, and that legal rules can be understood accurately only if we discern the most basic legal categories or conceptions and the relations among them. Consider the following five statements:

1. I have a *right* to be paid my wages under the contract of service.
2. I have a *right* to walk in my yard.
3. I have a *right* to leave my property to another by will.
4. I have a *right* not to be arrested without a warrant.
5. I have a *right* to be respected by my colleagues.

The word 'right' is used in each of these sentences. A moment's reflection reveals that the term 'right' has a different meaning in each sentence. The right to be paid wages according to a contract is a *claim*, which Hohfeld called a right in the strict sense (2001, 13). The right to walk in one's yard is a *privilege* or *liberty*. The right to bequeath property by will is a *power* to bestow rights on others. The right not to be arrested without a warrant is *immunity*. What about the right to be respected by one's fellows? It is not a legal right at all, but a moral claim.

Hohfeld argued that these distinctions have always been present in the law (2001, 12–13). However, they are also neglected from time to time by judges and commentators, causing error and confusion of the law. Hohfeld was not the first to realise this, but he provided the most accurate and compelling analysis of the fundamental legal conceptions that most clearly expose juristic errors. It is useful, though, to start with the first systematic attempt in English jurisprudence to analyse and categorise basic legal conceptions – that of Jeremy Bentham.

Bentham and the classification of legal mandates

Bentham, whose general theory of law I discussed in Chapter 2, was one of the greatest analytical jurists. Bentham noted that although the law is commonly thought of as the commands of a sovereign, it does not always take the form of a command to do or refrain from doing some act. Hence, he substituted the word 'mandate' for 'command' in explaining the different kinds of law that a person encounters in society. In his book *Of Laws in General*, Bentham argued that there are only four kinds of mandates that the law can prescribe: (1) command, (2) non-command, (3) prohibition, and (4) permission (1970 (1782), 97). He offered the following four mandates as illustration:

1. Every householder shall carry arms (command).
2. No householder shall carry arms (prohibition).
3. Any householder may forbear to carry arms (non-command).
4. Any householder may carry arms (permission). (1970, 95)

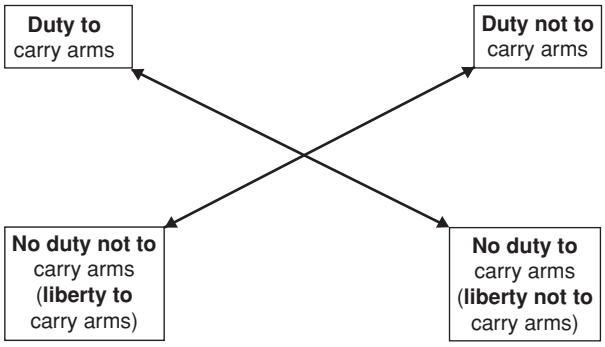

Figure 11.1 Bentham on liberty and duty

Mandates (1) and (2) create duties: the *duty to* carry arms and the *duty not to* carry arms. At any given time it must be one or the other duty, but not both. I cannot have a duty to carry arms and also a duty not to carry arms. Consider mandate (3). It means one of the following two positions:

(a) There was in force mandate (1) requiring every householder to carry arms and now, by virtue of mandate (3), householders are exempt from carrying arms. Therefore mandate (3) repeals mandate (1).

(b) Alternatively, it may mean there was no previous mandate requiring a householder to carry arms, and mandate (3) simply declares and confirms the law as it stood before.

Consider now mandate (4). This is the reverse situation. It means one of the following:

(a) There was in force mandate (2) prohibiting householders from carrying arms and now, by virtue of mandate (4), householders are allowed to carry arms. Therefore mandate (4) repeals mandate (2).

(b) Alternatively, it may mean there was no previous mandate prohibiting householders from carrying arms, and mandate (4) simply declares and confirms the law as it stood before.

Whichever is the case, it is clear that mandates 1 and 2 impose duties either to carry or not carry arms, and mandates 3 and 4 confer liberties either to carry or not carry arms. The position as regards possible mandates can be illustrated as shown in Figure 11.1.

Liberties and powers

The most fundamental principle of law in the common law world – indeed, the starting point of the law – is simply this. A person may do any act that the law does not forbid and may refrain from doing any act that the law does not require to be done. In other words, the natural liberty of a person is limited only by valid law. The corollary of this principle is that no person or authority may interfere

with the liberty of a person except by authority of law (*Entick v Carrington* (1765) 19 Howell's State Trials 1029, 1066). Bentham identified two kinds of liberty.

Liberty 1: Where liberty does not affect any other person

Bentham called these self-regarding liberties. I have a liberty to walk in my yard. The exercise of this liberty does not violate any other person's rights. My neighbour's rights are not affected and, as Hohfeld later stated, my neighbour (and everyone else) has *no-right* that I not walk in my yard. Remember, though, that we have no unrestricted liberty even within our own homes. My liberty to play music on my sound system in my house is limited by the law of nuisance that protects my neighbour's entitlement to a quiet night's rest. Hence, I have no liberty to play my music as loudly as I wish at all times.

Liberty 2 (Power): Where liberty affects the rights of another

Some laws authorise persons to do acts that affect the rights of others. The criminal law authorises a person to inflict harm on another in self-defence. A police officer with a warrant may detain a suspect. A judge may summon a witness. In each case a person's right or liberty is interfered with by authority of law. Bentham wrote: 'When the acts you are left to perform are such whereby the interests of other individuals is [*sic*] liable to be affected, you are thereby said to have a power over those individuals' (1970, 290). *Power* is therefore a liberty whereby the power holder can change the legal condition of another.

Corroborated and uncorroborated liberties and powers

Bentham realised that some liberties will not exist without some form of legal protection. He called such protection corroboration (1970, 290–1). Consider this case. I have the liberty to walk in the public park. Now, this liberty is negated if the park warden prevents me from entering the park. If the park warden lets me in, I would also like to walk freely without the fear of being waylaid and robbed. The law protects my liberty to walk in the public park by imposing duties on others. Duties carry corresponding rights. (Try to think of a duty that is not owed to someone.) The park warden has a duty not to prevent my entry. (Therefore I have a right that the park warden let me enter.) Other persons have duties, cast by the criminal law (and tort law), not to harm or impede me in my activity. (Therefore I have rights that others not harm me.) These duty–right relations support or corroborate my liberty to walk in the public park.

Although in many cases it is practically difficult to enjoy a liberty without them, corroborating rights are not theoretically necessary for a liberty to exist. There are many liberties that can practically exist without direct or immediate protection of the law. Bentham called these uncorroborated liberties. Hart's example, which I have embellished, is instructive on the point (Hart 1973, 176). Imagine that you have an annoyingly inquisitive neighbour. He is often looking over the fence to see what you are doing, who visits you, what you wear to work,

when you return at night and with whom. Your neighbour breaks no law, which means that he has a liberty to keep looking. In Hohfeld's terminology you have 'no-right' that he does not look over the fence. Equally, you have no duty not to prevent him observing your activities by any lawful means. The neighbour cannot complain if you erect a screen on your property to shut off his view. Remember, though, that you can only use lawful means. It may be cheaper for you to make him stop his habit by threatening violence than by building a screen. The trouble is that you have a duty under the law not to threaten violence. However, this duty does not directly correlate to his liberty to look. It correlates to his right not to be threatened.

Bentham thought that powers, being a special case of liberties, may also be corroborated or uncorroborated. He considered three scenarios, which I will supplement with examples.

1. The law does not assist in the exercise of power

The power is uncorroborated in this case. The common law allows a property owner to use self-help to abate a nuisance on a neighbouring property. Thus, I can enter the vacant land of my neighbour and clear it of rotting rubbish that is threatening my health. However, there is no duty on the part of the neighbour to assist me, or even not to resist me. She may not open the gate to let me enter. I may not have the physical resources to remove the rubbish. My power in this case depends on my own capacities. I can, of course, seek a court order against the neighbour, but then I am not exercising my own power but invoking the court's power.

2. Law imposes a duty not to oppose the exercise of power

Here we have a weakly corroborated power. Assume that the law grants power to the town council to enter the above described land and abate the nuisance. In this case the property owner has a duty not to oppose the council's action, but has no positive duty to assist it.

3. Law imposes a duty not to oppose and also a positive duty to assist

Some legal powers are accompanied by duties imposed on citizens to assist the power holder in exercising the power. Bentham described this as the highest and most perfect degree of power (1970, 291). An example is found in the common law rule that makes it an offence to refuse assistance to a constable in the execution of her duty to maintain or restore the Queen's Peace. The power to ask for assistance has its origin in the ancient practice of 'hue and cry', which was confirmed by the *Statute of Winchester* (1285). The Statute required all able bodied men to join the hue and cry in pursuit of a fleeing criminal. (Movie fans may be interested to know that the sheriff's posse that chases fleeing outlaws in the 'Wild West' was based on the same common law rule.) Most states in the US have long standing statutory penalties for refusing to assist police in apprehending felons (Blue 1992, 1475–6).

Bentham did not work out all the implications of his analysis of the elements of law. It was left to WN Hohfeld's remarkable essay to identify all the fundamental legal conceptions and their inter-relationships, and thus reveal the logical structure of legal statements.

Hohfeld's analysis of jural relations: the exposition of fundamental legal conceptions

Wesley Newcomb Hohfeld was Professor of Law at Stanford University when he published the first of his two famous articles under the title 'Some fundamental legal conceptions as applied in judicial reasoning'. They were published in volumes 23 (1913) and 26 (1917) of *The Yale Law Journal*. Yale University was so impressed by the first article that it recruited him to the Yale Law School. Hohfeld intended to develop his ideas further and publish them as a book, but his untimely death in 1918 at the age of 39 ended the project. The two articles were published as a book in 1919 and republished in 2001. The references in this chapter are to the latter book.

Hohfeld studied chemistry before turning to law, and brought to his legal study the chemist's instinct for breaking down compounds into their molecules and atoms. Hohfeld was gripped by the classic puzzles in legal theory about *rights in rem* and *rights in personam* in relation to equitable interests. A right *in rem* is traditionally thought to exist with respect to a thing and be applicable against the world at large, whereas a right *in personam* is thought to exist in relation to particular individuals. The rights I have over my house and land are rights *in rem* that I assert against the world at large, and my right to be paid the agreed salary is a right *in personam* that I have against my employer, the university. What, then, is the beneficiary's right under a trust? Trustee T holds a house in trust for beneficiary B, who is a minor until he reaches majority. Does B have a right *in rem* in relation to the house, or a right *in personam* against T? Most writers say that B has only a right *in personam*, some say that it is a right *sui generis* (a unique type by itself) and still others can't make up their minds. Hohfeld realised that these and similar confusions resulted from a misunderstanding of the fundamentals of legal conceptions and jural relations. Once these confusions are cleared it becomes plain that what we call rights *in rem*, for instance, are in fact separate rights that a person has in relation to every other person individually and severally. Hohfeld argued that other artificial dichotomies and constructs will also dissolve when the true nature of legal conceptions and relations is understood.

The most serious impediment to clear thinking and true solution of all legal problems, Hohfeld argued, was 'the express or tacit assumption that all legal relations can be reduced to "rights" and "duties" and that these latter categories are therefore adequate for the purpose of analyzing even the most complex legal interests, such as trusts, options, escrows, "future" interests, corporate

interests, etc' (2001, 11). As explained earlier in this chapter, Hohfeld distinguished four different conceptions that lawyers tend to lump under the term 'right'. He aimed to disentangle and clarify the four conceptions. The most effective way of doing this, Hohfeld concluded, was to construct a logical system connecting the four conceptions to their correlatives and opposites. He thought that such a system would display the sum total of the fundamental legal conceptions.

Hohfeld broke the term 'right' into four distinct basic conceptions:

- *Claim right* or right in the strict sense – I will be using the term right for simplicity.
- *Privilege or liberty* – Hohfeld preferred the term 'privilege' to 'liberty' because he felt that 'liberty' had wider connotations. In current usage, 'liberty' is probably more precise than 'privilege'. Hence, following Glanville Williams, I will be using the term *liberty* to refer to Hohfeld's *privilege,* noting that the two may be interchanged without violence to the system (Williams 1956, 1131–2).
- *Power* – like Bentham, Hohfeld regarded power as a special case of liberty. He considered this distinction to be critical for accurate legal thinking.
- *Immunity* – immunity is a special case of right and, again, it is important to distinguish the two for clear understanding of the law.

Each of these conceptions makes sense only when we take account of their correlatives and opposites. I will briefly set out the jural relations between these conceptions before addressing some of their important logical implications and questions raised by commentators.

Jural correlatives

Each of the conceptions 'right', 'liberty', 'power' and 'immunity' has an indispensable correlative. The jural correlative can be technically defined as follows:

> In any legal relation between two parties concerning a single act or omission, the presence of one conception in one party entails the presence of the correlative *in the other party*.

Thus, if A has a right that B pays him $10 under the contract, B has a duty to pay A $10. The vertical arrows in Figure 11.2 represent the correlatives.

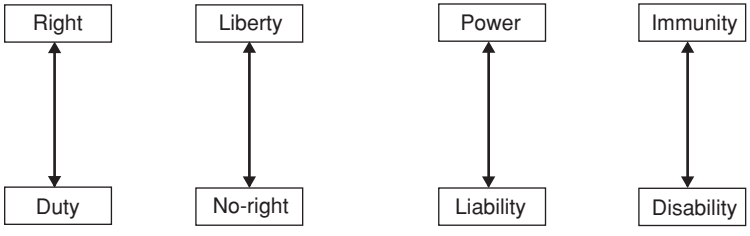

Figure 11.2 Jural correlatives

Jural opposites

Each of the conceptions 'right', 'liberty', power' and 'immunity' has a jural opposite. The technical definition of jural opposite is as follows:

> In any legal relation between two parties concerning a single act or omission, the presence of one conception in one party means the absence of the jural opposite *in that party*.

Thus A, who has a right that B pays him $10, does not also have a *no-right* in that regard. B, who has a duty to pay $10, does not have a *liberty* not to pay. This follows from the law of non-contradiction. As Aristotle stated: 'It is impossible for the same man to suppose that the same thing is and is not. One cannot say of something that it is and that it is not in the same respect and at the same time' (1968 (350 BC), 163). Thus, Socrates lives, or he does not. He cannot both live and not live at the same instant, although he can live in one instant and be dead the next. The kangaroo is a mammal, or it is not. Jupiter is a planet, or it is not. A has a right or no-right, but not both. B has a duty or no duty (which is liberty), but not both.

The diagonal arrows in Figure 11.3 represent the jural opposites.

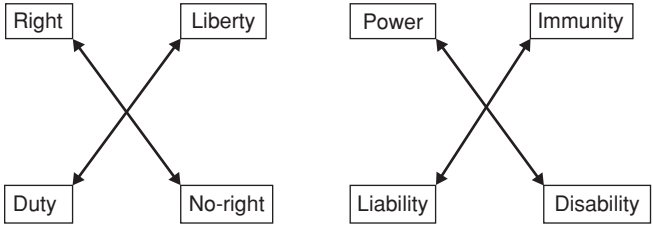

Figure 11.3 Jural opposites

Jural contradictories

Hohfeld identified only the jural correlatives and opposites. Glanville Williams perceived a third set of jural relations, which he termed *contradictories* (1956, 1135). The technical definition of *contradictory* is as follows:

> In any legal relation between two parties concerning a single act or omission, the presence of one conception in one party means the absence of the contradictory in the other party.

Thus, if A has a *right* that B pays her $10, B cannot have a *liberty* not to pay A because B has a *duty* to pay A. The jural contradictory follows logically from the jural opposite.

The horizontal arrows in Figure 11.4 represent the jural contradictories.

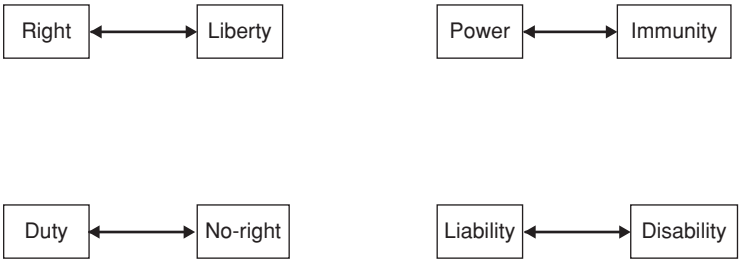

Figure 11.4 Jural contradictories

The interconnectedness of the fundamental legal conceptions

Hohfeld's analysis shows that 'right', 'duty', 'liberty' and 'no-right' are connected in a fundamental way with each other. The existence of one brings about the existence of the others. The conceptions 'power', 'liability', 'immunity' and 'disability' are similarly connected. The totality of these connections is illustrated in Figure 11.5. The vertical arrows show the correlatives, the diagonal arrows indicate the opposites, and the horizontal arrows the contradictories.

Consider the box on the left. A has a right under the contract that B pays her $10:

Correlative: A has a *right* that B pays her $10 and B has a *duty* to pay $10 to A.

Opposite: Since A has a *right* to be paid $10, A cannot have *no-right* to be paid.

Contradictory: Since A has a *right* to be paid $10, B cannot have a *liberty* not to pay.

Now consider the box on the right. A has power to arrest B:

Correlative: A has *power* to arrest B and B is *liable* to be arrested by A.

Opposite: Since A has *power* to arrest, A cannot have *disability* to arrest.

Contradictory: Since A has *power* to arrest B, B has no *immunity* from arrest.

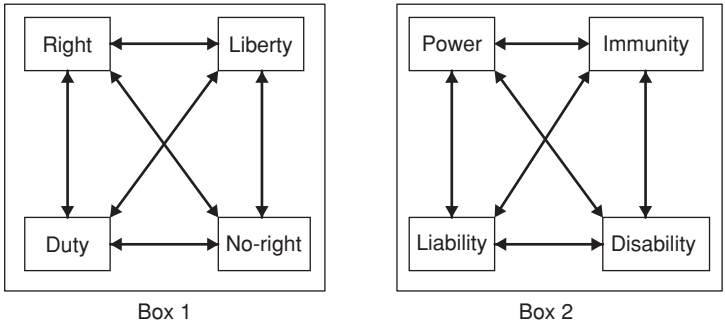

Figure 11.5 All the jural relations

Each legal relation is a relation between two individuals concerning a single action or omission

Like the engineer who disassembles a machine to learn how it works, Hohfeld aimed to break down laws into their basic elements to see how the law actually works. He found that the law works through legal relations between individuals in relation to single actions or omissions. I use the term 'individual' in a special sense to include corporate entities such as trading companies, government agencies and the legislature itself. At one level there are Hohfeldian relations within each corporate entity. Directors, managers and shareholders of a company have rights and owe duties to one another. Individual members of parliament have similar rights, duties, powers and immunities. At another level these corporate bodies act as individual corporate entities.

There are important implications of the basic premise of the Hohfeldian analysis. First, a jural relation exists between two individuals. It is never between a person and a thing. I have no jural relation with my motor car, although I claim to own it. I have jural relations with A, B, C and every other individual in the world with respect to my motor car. No person may take it without my permission. In orthodox theory, if I am the owner of Blackacre, I am regarded as having a right *in rem* against the whole world with respect to Blackacre. If I sell Blackacre, the purchaser will gain the same right *in rem* against the world. It is commonly thought for this reason that a right *in rem* is not personal, but is a right that attaches to the land. In one sense it does. Yet what is the actual effect of having a right *in rem*? It is that the owner has a right in relation to every other individual in the world with respect to a thing. In other words, the owner has millions of separate rights *in personam* against each and every individual in the world. She has a right that A does not trespass, B does not trespass, C does not trespass, and so on indefinitely. Sir William Markby observed, in his classic work *Elements of Law with Reference to Principles of General Jurisprudence*:

> If we attempt to translate the phrase [*in rem*] literally, and get it into our heads that a *thing*, because rights exist *in respect of it*, becomes a sort of *juristic person*, and *liable to duties*, we shall get into *endless confusion*. (1905, 165)

Second, ownership of a thing is generally described as a bundle of entitlements over the thing. Hohfeld's system unbundles the entitlements. My right that A, B, C and all others not enter Blackacre without my permission is one entitlement. My liberty to enter and enjoy Blackacre is a distinct entitlement. My right to be free of trespass is obviously helpful to my liberty to enjoy Blackacre, but they are nevertheless separate entitlements.

Third, it is important to keep in mind that the same set of facts may give rise to separate jural relations. The failure to do so leads to common error. A is walking in the public park and is obstructed by B, who physically restrains her. Two distinct jural relations are at work simultaneously:

- A has *liberty* to walk in the public park and B has *no-right* that A does not walk in the public park.
- A has a *right* not to be physically restrained by B and B has a *duty* not to physically restrain A.

Fourth, it is critical that we recognise that a dispute between two parties can give rise to distinct and successive legal relations. This is a point that Finnis missed when he said that we need to ask about remedies before we can say that a person has a right (1972, 380–1). Austin identified a two-tier system of rights. A primary right is one that a person initially has under the law. A seller has a primary right to be paid the price of goods under a contract of sale. If not paid, the seller gains secondary remedial rights to recover the price or to receive damages (Austin 1869, 788). Peter Birks, the leading British private law theorist in the modern era, identified a third level of rights: namely, the rights that the court creates in giving judgment. The judgment creates a new right in place of the primary right. The plaintiff may have claimed $10 000 in damages but may receive $9000 in judgment. She now has a right to receive the latter sum:

> To take the contractual example, on the primary level are the rights born of the contract; on the secondary level are the remedial rights born of the breach; and at the tertiary level is the right born of the judgment itself, which is the right enforced by the process of execution. (Birks 2000, 30)

Birks' analysis is also incomplete from the Hohfeldian viewpoint. This is hardly surprising, since British private law scholars have studiously ignored Hohfeld's system. A Hohfeldian analysis of Birks' example actually yields four levels of legal relations:

1. Each party to the contract has *primary* entitlements. For example, the buyer has a right that the seller delivers the article and the seller has a right that the buyer pays the seller the agreed price.
2. Assume that the seller fails to deliver the promised article, in breach of the contract. The breach gives rise to new *secondary* entitlements. The buyer (depending on local law) may have a power to rescind the contract and treat it as ended. If the buyer has suffered damages, she will gain a right that the seller pay the damages. Differences between the parties concerning the *secondary* entitlements may be settled through negotiation or compromise. The terms of the settlement (which amounts to a contract) may establish new rights and duties that replace the pre-existing relations.
3. If the issues concerning secondary rights are not resolved, the aggrieved party usually has some recourse to a court of law. We say that, in Hohfeldian terms, the plaintiff has a power to sue the defendant. This may be regarded as a *tertiary* entitlement.
4. If the dispute is tried by a court and judgment is entered for the plaintiff, the plaintiff gains new entitlements according to the terms of the judgment. It is usually in the form of the award of a specific amount of damages,

and exceptionally in the form of a right to specific performance by the defendant. These rights represent *quaternary* entitlements.

More examples are discussed later but, before proceeding further, we must firmly keep in mind that Hohfeld's system breaks down jural relations to their most basic level, which is the relation between two individuals with respect to a single action or omission.

Right–duty correlation

A person has a right only because some other person has a duty that *correlates* to that right. One cannot exist without the other. They represent the two aspects of one relation, just as 'heads' and 'tails' represent two sides of a coin. The baker has a right to be paid for the loaf that the customer buys because the customer has a duty to pay for the loaf. The factory owner has a duty to not pollute the neighbour's land because the neighbour has a right that the factory owner does not pollute his land. A highwayman has a duty not to rob the traveller because the traveller has a right not to be robbed. As Finnis commented, it is critically important to bear in mind that a right is never to do an act or not do an act. It is a claim that another person must do an act or not do an act (1972, 380).

Some writers have argued that there are duties that do not correlate to anyone's rights, such as the citizen's duty to pay tax. I will presently discuss their views, which I believe are mistaken.

Liberty–no-right correlation

It is noticeable that a liberty does not carry a correlative duty on the part of another. A, as owner of Blackacre, has liberty to walk on it. It means that others have no-right that A does not walk on Blackacre. Others, of course, have duties not to interfere with A's liberty. B, for example, has a duty not to prevent A from entering Blackacre and thus prevent her walking on it. The critical point is that B's duty correlates to A's right not to be obstructed from walking on Blackacre, and not to A's liberty to walk on Blackacre. This is illustrated in Figure 11.6.

As Finnis showed, the failure to maintain this distinction has led even eminent jurists to serious error in applying Hohfeld's analysis (1972, 377–8).

Power–liability correlation

As Bentham previously explained, power is a special kind of liberty. The exercise of power creates new legal relations by imposing duties and creating rights in others. A simple liberty has no such effect. A's exercise of her liberty to walk in the public park does not *create* B's duty not to obstruct A. B always had the duty not to obstruct A if she chose to walk in the park. In contrast, the police officer's arrest of the suspect brings about a restriction of the suspect's legal liberty to move as he pleases. The arresting police officer exercises a power, not

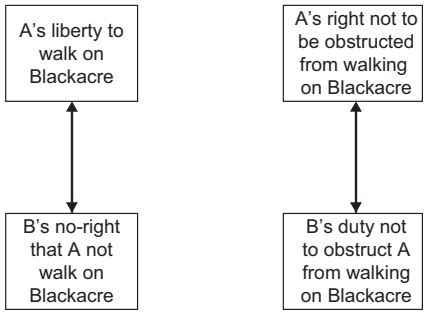

Figure 11.6 Liberty and right disentangled

a simple liberty. The person to whom a lawful power is applied is said to have a *liability*.

The special meaning of liability

Lawyers understand liability in the sense of a legal penalty or disadvantage. A person who commits a serious crime is liable to be sentenced to imprisonment. A factory owner who causes harm to a neighbour's crop is liable to pay damages. Just as power is a special kind of liberty, liability is a special kind of duty that flows from the exercise of power. However, Hohfeld used the term *liability* in an expanded sense. A person may have a Hohfeldian liability to receive a benefit. The maker of a last will exercises power to bequeath her estate as directed in the will. The beneficiaries have liability (in the Hohfeldian sense) to receive the benefits. The minister has power to grant a licence to fish in the lake. The fisherman has liability to be granted the licence to fish in the lake. Hohfeld cited a number of US decisions where judges have used the term liability in this broad sense (2001, 26–7).

Change of legal relations by natural causes and by the exercise of legal powers

Legal power must not be confused with physical power. Hohfeld was aware that legal rights and duties can change as a result of two kinds of events – those that do not involve volitional acts of human beings, and those that do:

> A change in a given legal relation may result (1) from some superadded fact or groups of facts *not under the control of a human being (or human beings)*; or (2) from some superadded fact or group of facts *which are under the volitional control of one or more human beings*. As regards the second class of cases, the person (or persons) whose volitional control is paramount may be said to have the (legal) power to effect the particular change of legal relations that is involved in the problem. (2001, 21; emphasis added)

The following examples will clarify the distinction:

1. A ship is damaged in the high seas by the physical force of a storm and is in danger of sinking with all on board. The master of every passing ship

has a duty to go to the assistance of the ship in distress. The seafarers in the ship in distress (and its owner) have a correlative right that those able to help them provide help. The storm did not create new rights and duties but activated rights and duties that existed in law.

2. The law prohibits a person from possessing a firearm except under the authority of a licence granted by the minister. The minister grants Farmer X a licence to possess a rifle. The minister exercised a power in conferring a new liberty on X to possess a rifle. Previously X had a duty to not have a firearm in his possession. The minister's decision created new rights and duties.

Do unlawful acts involve the exercise of Hohfeldian power?

C uses physical force to rob D of the money she is carrying. C had a duty not to rob D. However C, by his exercise of physical power, brought about new legal rights and duties. Consequently, D has a right that C returns the money and D has a correlative duty to return the money. Therefore, can we say that D was actually exercising a Hohfeldian *power*? The answer is 'No'. Hohfeld did not directly address this puzzle, but his answer is easily derived from the logic of his scheme.

It is clear that Hohfeld limited the conception of power to the capacity to change *legally* the existing legal relations and entitlements. He noted, with respect to power, that 'the nearest synonym for any ordinary case seems to be [legal] ability' (2001, 21). This is a necessary conclusion from the logic of Hohfeld's analysis. Remember that a power is a type of liberty. The opposite of the *liberty to* do an act is the *duty not to* do the act. It follows from the law of non-contradiction that C cannot have liberty (power) to do something and also a duty not to do it. A person has duty *d*, or does not have duty *d*, at the same time in relation to the same act or omission.

The robber C had a duty not to rob D. It was not his physical power that brought about the new legal relations, but his breach of duty. *Power* therefore must be understood as the legal capacity of a human agent to effect a change in legal relations. This means power is the *legal* competence to confer new rights and impose new duties.

Kinds of powers

People experience powers and liabilities in their daily lives. Some powers are readily identified, but there are other powers that go unnoticed. The power of Parliament to enact the *Road Traffic Act*, the power of the minister under the *Road Traffic Act* to make regulations setting speed limits, the power of the town council to permit a public meeting in the town square and the power of the testator to confer by will rights on beneficiaries are easily recognised as legal powers. Similarly, it is not difficult to see that under an agency contract the agent is given power to make decisions that are binding on the principal. Yet there are other competencies that are usually not identified as powers.

People give their friends and relatives gifts. As Hohfeld pointed out, in somewhat laboured language, the simple act of gift giving is an exercise of power (2001, 22). When a person gives a friend a gift of a book, she conveys the property in the book from herself to the friend. (In legal terms, the transfer of property occurs by the abandonment of the property by the owner and its appropriation by the recipient.) Similarly, the making of contracts involves the exercise of powers. X posts a letter to Y in which he offers to sell his car for $5000. X thereby creates a legal power in Y to create a binding contract that imposes a duty on X to deliver the car on the payment of $5000. X's initial offer is itself an exercise of power, because it has created a new legal relation between X and Y that did not exist before. (The making of the offer is the exercise of power to confer a power.) Y's power will terminate if X revokes the offer before it is accepted. Or it might expire after a reasonable time. The act of revocation of the offer is also an exercise of power, because it terminates Y's power to complete the contract. Let us assume that Y pays a deposit of $100 as consideration for X's promise to keep the offer open for one week. Now X has no power during that week to revoke the offer, so he has a disability to revoke the offer within one week (Hohfeld 2001, 23–4).

Immunity–disability correlation

Immunity is an exemption from the force of the law – specifically from the exercise of power. It is a subset of the right that I have that another person not exercise power to change my existing rights. Its opposite is disability. A diplomat has 'diplomatic immunity' not to be charged and tried in the court of a foreign country in which she enjoys diplomatic status. Thus, the Ambassador of country C in Australia who causes an accident by reckless driving in Sydney may successfully invoke her diplomatic immunity when charged for the offence in an Australian court. A donor who donates a part of his income to a recognised charity may claim an exemption (immunity) from income tax on that part of the salary. The so-called 'right to remain silent' is an immunity enjoyed by an accused person that prevents the police or the prosecution from forcing the accused to give evidence against herself.

Hohfeld regarded immunity in a more expansive way. Every disability of a person under the law creates immunity. He began with the following example. X, who is a landowner, has the power to alienate her land to Y or to any other person but Y, and every other person has no power to alienate X's land. Hence, X has immunity from having her property in the land transferred to another without her consent. Now, if judgment has been given against X authorising the Sheriff to sell her land to satisfy the debt she owes the bank, she loses the immunity, but only as against the Sheriff. The Sheriff has power granted by law to transfer her title to another. X therefore has a liability correlative to the Sheriff's power (Hohfeld 2001, 28). X continues to have immunity against all other persons. X also has immunity against the Sheriff with respect to her other properties.

It is evident that in a free society citizens have a vast range of Hohfeldian immunities. The rights and liberties of a citizen are immune from interference unless the power to interfere is granted by law. Lord Chief Justice Camden's memorable words in *Entick v Carrington* spelled out the general immunity enjoyed by all citizens:

> The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole . . . By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and find if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment. ((1765) 19 *Howell's State Trials* 1029, 1066)

Immunity, then, is my right that another not interfere with my existing right or liberty except under the authority of the law. Disability is the duty of a person not to interfere with a right or liberty of another except under the authority of law.

Connecting the two 'boxes' in Hohfeld's system

Take another look at Figure 11.5. The vertical, diagonal and horizontal arrows indicate the interconnectedness of the conceptions in each 'box'. Are the conceptions within the box on the left (Box 1) conceptually connected to the conceptions in the box on the right (Box 2)? In other words, are the two boxes fundamentally related? The answer is 'Yes'.

Hohfeld was keenly aware of the correspondence between the conceptions in Box 1 and Box 2. He wrote, near the end of his famous 1913 essay:

> Perhaps it will also be plain, from the preliminary outline and from the discussion down to this point, that a power bears the same general contrast to an immunity that a right does to a privilege [liberty]. A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another. Similarly, power is one's affirmative control over a given legal relation as against another; whereas an immunity is one's freedom [liberty] from legal power or 'control' of another as regards some legal relation. (2001, 28)

Hohfeld did not fully explain that the conceptions in Box 2 are in fact special cases of the conceptions in Box 1; however, judging by the above passage, he was almost certainly aware of it. Dias noted that Box 1 represented the jural relations at rest, while Box 2 showed jural relations in the making (1976, 64–5).

Dias thus introduced a time dimension to the analysis. Imagine that you are standing at a point in time and looking back at Box 1 and looking ahead at Box 2. You see within Box 1 a set of existing jural relations among already established rights, duties, liberties and no-rights. Looking at Box 2 you see the way new rights, duties, liberties and no-rights are being established through the exercise of power. Sumner observed that the conceptions in Box 2 were the second order counterparts of the conceptions in Box 1 (1987, 29–31). Brazil gave a more comprehensive and thoroughgoing explanation of the fundamental sameness of the two boxes (1996, 276–7). The insights that these authors provide leads to the following analysis.

In a two-party relation:

- power is the *liberty to* impose a duty or confer a liberty
- liability is the *no-right* that a duty not be imposed or a liberty not be conferred
- immunity is the *right* that a duty not be imposed or a liberty not be conferred
- disability is the *duty not* to impose a duty or confer a liberty.

This analysis leads to a further question. The conceptions in Box 2 can be logically reduced to the conceptions in Box 1. Can the conceptions in Box 1 be further reduced to a single dichotomy of liberty (duty), or as Brazil contended, to the dichotomy of duty (no-duty)? In other words, are the conceptions of right and no-right in Box 1 redundant? The answer is that they are not, because they represent logical implications of having a liberty or a duty.

Reduction (or abstraction) for its own sake is intellectually interesting and has explanatory value. However, over-reduction can deprive us of useful knowledge by obliterating important distinctions. A farmer who owns a cat, three dogs, four horses and a dozen cows can truthfully say that he owns 20 mammals, but he will thereby suppress useful information. We have learned that it is possible to reduce power to liberty; immunity to right; liability to no-right; and disability to duty. We have deepened our understanding of the conceptions in Box 2 by noticing their pedigree in Box 1. Having gained this insight, it makes a lot of practical sense for us to retain Box 2 and its contents.

Some logical puzzles in Hohfeld's system

The logic of Hohfeld's system has been assailed by generations of academics with, in my view, little result. Nevertheless, we can sharpen our understanding of Hohfeld's analysis by examining some of these challenges.

Are there duties that do not correlate to rights?

Some writers have claimed that certain duties of a public nature have no correlative rights. Jeremy Bentham argued that duties such as the duty not to counterfeit

money, the duty to pay taxes and the duty to perform military service do not correlate to anyone's rights. As Hohfeld's analysis demonstrates, this is plainly wrong if the constitutional status of the state as a rights bearer is acknowledged. A state that has the legal monopoly to issue currency has a legal right that persons not counterfeit its currency. Where the law permits private individuals or firms to issue currency, the position is identical. The authorised currency issuers have a right that others not counterfeit the private currency. In each case the duty correlates to the right of the person who is authorised to issue the currency. In the case of the duty to pay tax, the state has the right that citizens pay taxes. Where the law allows conscription (compulsory military service), the duty to provide military service correlates to the state's right to have the service rendered. There is no mystery in any of this once the Hohfeldian system is properly grasped.

White's claim concerning duties unrelated to rights is typical of the continuing misunderstanding and misapplication of Hohfeld's thesis. White considered the cases of the duty of the state to punish an offender, the duty of a football player to stop the opposing centre forward and the citizen's duty to expose a felony. He said that the application of the Hohfeldian analysis to these cases would lead to the ridiculous propositions that the offender has a right to be punished, the centre forward has a right to be stopped, and the felon has a right to be informed on (White 1984, 60). None of this follows from Hohfeld's analysis, and White revealed a monumental misunderstanding of Hohfeld's system. The duty of the judge to impose punishment on an offender is not owed to the offender. It is a duty owed to the state as representing the citizens. Alternatively, the duty is owed to each and every citizen. *A public duty is owed to the public*. The offender has a liability to be punished that correlates to the judge's power to impose punishment.

The case of the football player's duty to stop (more accurately, to try to stop) the opposing centre forward is very illuminating. Contrary to White's claim, the case illustrates the power of Hohfeld's analytical method. How does the duty to oppose the other side arise? It could be from moral obligation or from contract. Assume that the game is only a social event. Even then, each player owes a moral duty to their team mates and to the spectators to contest the opposition. The duty is primarily owed to team mates and supporters, not to the opponent. However, there may even be a duty owed to the opponents to try your best to oppose them, because if you do not try there will be no game. Now consider a professional game, where a great deal of money is involved and the player is paid a salary to perform well. In this case, the contracted player's duty to do their best against the opposition is owed to the employer. What is the Hohfeldian relation between two opposing players? Each player has, within the rules of the game, the liberty to overcome the opponent and the opponent has no-right that the player does not do so. The side that displays superior strength, skill and wisdom and enjoys a fair share of luck usually prevails. It is the existence of these liberties, constrained by duties to play by the rules, that makes the game a compelling spectacle.

As to the citizen's duty to inform on a felon, every member of the public has a correlative right in that regard under the law, although they may not have the means of enforcing it. In fact, as previously noted, the duty of a citizen to assist in the apprehension of a wrongdoer is an ancient common law obligation stretching back to the practice of hue and cry. The duty is not owed to the wrongdoer but to fellow citizens.

Holmström-Hintikka claimed that responsibilities constitute a type of duty that has no corresponding rights:

> Responsibilities may be considered obligations – or duties – without corresponding rights. The physician is responsible for her patient with respect to providing a particular treatment, the expecting mother is responsible for the well being of the fetus, the pet owner is responsible for the quality of life of his pet. None of these responsibilities correspond to a right for the beneficiary and yet laws may be created to impose such responsibilities, laws which if broken lead to punishment. (1997, 54–5)

The first example in the above passage is plainly wrong. The physician's duty of care is owed to the patient, who has a correlative right. Take the second example, of the expecting mother's responsibility for the wellbeing of the foetus. Why would the law of a particular society make it a criminal offence to harm a foetus? It may be the case that the foetus is considered to be a rights bearing entity that is worthy of protection. In that event the duty is owed to the foetus. It does not matter in the Hohfeldian scheme that the foetus is incapable of enforcing its right. Alternatively, the state, in criminalising the act or omission, is creating a duty that is owed to the state or to every member of society. The same reasoning applies exactly to the case of cruelty to animals. The animal may be regarded as a rights bearer or the society may consider that persons owe the state or each member of society a duty to desist from animal cruelty because of the offence it causes to the society's moral values. In that case, the correlative right resides in each member of society. It does not matter that many members of society are indifferent to animal cruelty and would not wish to enforce their right. A right may exist in law without the right holder desiring it. It is open to a citizen who takes offence to prosecute the violator, either by complaining to the state law enforcers or by launching a private prosecution.

The theory that public duties have no correlative rights proceeds from two significant oversights. The first is that there is nothing unusual about laws that impose on an individual the identical duty in relation to each and every member of a specified group or of the entire public. Thus, I have a duty of care towards each and every member of the public when I am driving my car. Every member of the public has a correlative right that I take reasonable care not to harm them. Every member of the public has an individual duty not to trespass on my land. I have a correlative right against each and every members of the public that they not trespass on my land. Hohfeld's analysis has the virtue of breaking down the misleading dichotomy between public and private duties.

The second oversight concerns the fact that, in Hohfeld's analysis, the question of the existence of a right is distinct from the question of the availability of a remedy for the violation of that right. The duty of the police officer to keep traffic moving confers a correlative right on the motorists, though they may have no immediate remedy if the police officer fails to do her duty. Even where an effective remedy is available – as where an injured party may sue for damages – the activation of that remedy brings about new sets of jural relations. Thus, I have a power to sue for damages and the tortfeasor has a liability to be sued. Once judgment is entered in my favour, I have a new right that correlates to the defendant's duty to pay me the awarded damages. As previously discussed, a *primary* right, in Hohfeldian analysis, is independent of consequent entitlements that result from its violation.

Liberties without rights

The conventional understanding before Hohfeld was that legal liberty was a special kind of physical liberty that was protected by rights. If a liberty was not secured by appropriate rights it was not thought of as a legal liberty. Hohfeld, as we have seen, argued that the existence of a liberty did not depend on legal protection. He demonstrated his reasoning in relation to JC Gray's now-famous hypothetical concerning a shrimp salad. Gray wrote:

> The eating of shrimp salad is an interest of mine, and if I can pay for it, the law will protect that interest, and it is therefore a right of mine to eat shrimp salad which I have paid for, although I know that shrimp salad always gives me the colic (1909, 15–16).

Gray, according to Hohfeld, made two errors. First, he spoke of 'right' in the sense of liberty. Second, he implied that the liberty to eat the shrimp salad existed because of the protection given by law. Hohfeld described the legal situation this way:

> A, B, C and D, being owners of the salad, may say to X: 'Eat the salad if you can; you have our licence to do so, but we don't agree not to interfere with you.' In such a case the privileges [liberties] exist, so that if X succeeds in eating the salad, he has violated no rights of any of the parties. But it is equally clear that if A had succeeded in holding so fast to the dish that X couldn't eat the contents, no right of X would have been violated. (2001, 16)

People enjoy many liberties with no accompanying legal rights preventing others from interfering with the liberty. These kinds of interferences are known as *damnum absque injuria* (loss without injury). Glanville Williams gave a series of examples of these situations. One is this. You and I are walking together and we see a gold watch lying ahead of us. I have liberty to run to pick it up, but so have you. The one who picks it up first acquires title that is good against all but the true owner (Williams 1956, 1143). We encounter less dramatic instances of this nature often in life. X and Y are looking for a parking space in the car park. They see one and they both have liberty to take the space. The one who reaches it first

gets to park. At our university cafeterias, there are two conventions. One is the 'first come first served' principle. The other is the convention of queuing. Students have equal liberty of hurrying to take a place in the queue ahead of others. In the evenings some of our students play rugby football. Players have liberty to force their way to the opponents' try line to score. Equally, opponents have liberty to prevent the attacking players from reaching the try line. The liberties of both sides are identical.

The reader will notice, in each of the above examples, that a person will not be able to exercise the liberty in a practical sense if they do not enjoy an array of basic rights. In the car park example, X and Y have liberty to take the parking spot, but each has a duty to avoid a collision in doing so. Hence, each has a right that the other takes due care. The liberty would be defeated in a practical sense if this right did not exist. In the example of the cafeteria queue, each student has a liberty to join the queue but has a duty not use force in doing it. Every student joining the queue has a right not to be pushed aside. In the rugby game, the players are restricted in the way they can attack their opponents' try line or defend their own try line. Every player has a duty not to commit foul play such as striking the head of an opponent or tripping an opponent. The game would become impossible to play without a set of rights and duties. So, was Hohfeld wrong?

Hohfeld's contention was that a right cannot be logically derived from the existence of a liberty. 'Whether there should be such concomitant rights (or claims) is ultimately a question of justice and policy; and it should be considered, as such, on its merits. The only correlative logically implied by the privileges or liberties in question are the "no-rights" of "third parties".' (Hohfeld 2001, 17) Hohfeld was correct on this question. However, in the real world of social life, many liberties exist only because they are protected by a perimeter of legal rights. It is the experience of humankind that where there is lawlessness there are no rights and duties and where there are no rights and duties liberties are at best precarious.

Is liberty divisible?

We have already noted that the conceptions in Box 1 (in Figure 11.5) can be expressed in a positive or negative form.

- When we speak of right we include both the right that another person *do an act* and the right that another person *not do an act*. I have a *right to* be paid my wages. I have a *right not to* be assaulted. These rights correlate to the *duty to* pay my wages and the *duty not* to assault me.
- When we speak of liberty we include both *liberty to* and *liberty not to*. I have a *liberty to* walk in my yard and a *liberty not to* walk in my yard. These liberties correlate to the *no-right* that I not walk and *no-right* that I walk.

In the Hohfeldian scheme, liberty and duty are opposites. Either I have a liberty to walk in the park or I have a duty not to walk in the park. Since liberty is the absence of duty, it cannot be both. Here, though, is a puzzle.

- X has *liberty to* give money to a charity. X also has *liberty not to* give money. In other words X has neither a *duty to* give nor a *duty not to* give. He has a choice.
- X has a *duty to* pay tax. Does X also have a *liberty to* pay tax?

There are two possible answers. One is to follow Williams and say that X has a liberty to pay tax even when he is duty bound to pay tax. Williams' argument is that the term *liberty* as used by Hohfeld refers to two distinct conceptions: (1) *liberty to* and (2) *liberty not to*. Then the opposites are as follows:

Liberty to $\longleftrightarrow$ Duty not to
Liberty not to $\longleftrightarrow$ Duty to

This shows that there is no opposition between *liberty to* do something and a *duty to* do it. Thus X will have liberty to pay tax and duty to pay tax (Williams 1956, 1138–40).

The second possible answer is that if X has a duty to pay tax it makes little sense to say that he has a liberty to pay tax. This view regards choice as an essential feature of liberty. As Williams himself noted, a philosopher would regard the idea of liberty to do one's duty as 'a poor kind of joke' (1956, 1139). A's liberty to walk in the park necessarily implies A's liberty not to walk in the park. Professor Gray's liberty to eat the shrimp salad implies that he has a liberty not to eat it. When the law imposes a duty, this choice is taken away. One must do what the law demands – like pay tax. X of course needs certain other liberties in order to be able to pay tax, such as the liberty to write a cheque and the liberty to travel to the post office to mail the cheque. These are not liberties to pay tax but general freedoms that allow us get through daily life.

I prefer the second answer, because it reflects the conventional and philosophical understanding of the conception of liberty and because it retains the simplicity of Hohfeld's system without practical harm.

Value of Hohfeld's system

Hohfeld's aim was to show that many common errors and misconceptions about law could be eliminated if lawyers understood the fundamental legal conceptions and gained precise understanding of the nature of jural relations. In particular, he hoped that his analysis would expose the problems posed by artificial constructs such as the idea of the right *in rem*. Hohfeld did not claim originality for his insights, but argued that he was presenting systematically the ideas that the abler minds in the judiciary and the academy were already applying to the law. He showed through citations that the essentially interpersonal nature of rights *in rem* was keenly appreciated by John Austin, Sir William Markby, Oliver Wendell Holmes, Lord Chancellor Viscount Haldane, Lord Summer, and Justice

Brandeis of the US Supreme Court (Hohfeld 2001, 60–4). Hohfeld devoted the second instalment of his work (published in 1917 in *The Yale Law Journal*) to an extended survey of judgments and commentaries that showed how some judges and jurists got it conceptually wrong and how others got it right.

As previously discussed, the recurrent errors concerning the term 'rights *in rem*' flow from its association with a thing. If A owns Blackacre he has a right against each and every individual that each does not commit trespass. The critical point that tends to get lost is that, although the subject of the right is Blackacre, the right exists in relation to every separate individual in the world. If A sells Blackacre to B, B will have the same (or similar) rights *in rem* against every separate individual. Hohfeld proposed a new dichotomy to replace the categories of rights *in rem* and rights *in personam* and, to this end, coined the terms 'multital right' and 'paucital right' (2001, 52–3). *Paucital* rights are those that a person has in relation to one individual or a group of identifiable individuals. A has a right that B pays her $10 under the contract. This is a paucital relation between A and B. Company director C owes duties to the shareholders of the company. This too is a paucital relation, because it exists between C and each individual member of a finite and known group of individuals. In contrast, D, as the owner of Whiteacre, has multital relations with every other individual in the world severally. Here D has rights against an indeterminate group of persons.

This analysis enables us to see that multital rights need not relate to physical things. X, when driving on the motorway, has a right that every other person shows care not to cause an accident. Y, who is the holder of a patent, has a right that no other person shall manufacture articles using the patented design. Z has a right that no person publishes a libel against him.

Hohfeld's system is an unambiguous help in thinking clearly about the law. His terminology has not gained the currency that he hoped. This is mainly because lawyers and legal scholars are too wedded to the terms 'right' and 'duty'. Yet, as Hohfeld himself demonstrated, the better lawyers intuitively grasp and apply the Hohfeldian analysis without necessarily embracing his lexicon. When a lawyer submits that her client has a *right* to grow cabbages in her garden and that her neighbour has *no right* to let his goat eat them, she will usually mean that the client has a Hohfeldian liberty to grow cabbages and that the neighbour has a Hohfeldian duty not to let his goat eat the cabbages. Good lawyers and good academics will get it right even if they do not know that Hohfeld ever lived or wrote! Yet, as Hohfeld and, later, Williams showed, even great legal minds are prone to error when they depart from the Hohfeldian system, knowingly or unknowingly. The study of the Hohfeldian analysis has dropped out of the curricula of many law schools, as has analytical jurisprudence generally. This is an unmitigated misfortune for legal education.

12

Justice

Justice is a universal aspiration, and the sense of injustice is a powerful human emotion. It is strongest when a person's own interests are harmed, but is also aroused in civilised people when they witness wrongs done to others. Widespread and unrequited injustice inevitably leads to conflict. A society that does not have justice as a governing principle is an unstable society that will be held together, if at all, by force. Justice is also a perennially controversial idea in human affairs. People are united in their belief in justice as an ideal, but are divided on what justice means or requires. Many conflicting claims for material goods are made in the name of justice because of its emotive power. Justice has no universally valid definition. It means different things to different people and its requirements may change over time. Different kinds of justice are not always in harmony. One person's claim for legal justice may conflict with another person's demand for distributive justice. The legal requirements of procedural justice may constrain the pursuit of substantive justice, as explained further below.

Justice is not exclusively a jurist's concern. It is at the centre of moral and social philosophy. I will not attempt the futile task of surveying, within a book chapter, the vast body of legal and philosophical literature on justice from the time of Plato to the present day. My aim is to explore the main connections between law and justice. Some of these connections were examined in Chapters 5 and 6, in relation to natural law theory and the question of separating law and morality. In Chapter 5, I discussed the jurisprudential tradition that proposes that law must meet certain moral criteria to warrant the obedience of citizens. In Chapter 6, I addressed the idea that the law by its nature is a moral institution – that it has what Fuller called an inner morality and what Dworkin termed integrity. This chapter will consider a broader range of relations between law and justice.

Justice according to law and justice of the law

Most of the time people look to the law for justice. Sometimes, though, people appeal to justice against the law. The demand for justice is made in the form of a legal or moral claim. In one sense every legal claim is a claim of justice. A person accused of a crime claims the right to a fair trial or procedural justice. People's demand for punishment of a criminal act is a demand for justice. The claim of a craftsman to be paid the agreed price for an artefact fashioned for a customer is a demand for justice. A pedestrian's claim for damages for personal injury caused by a road accident is a claim for justice. A citizen's claim to equality before the law (in a country that has a constitutional assurance of equality) is a claim of justice. In fact, every claim of right based on existing law is a demand for justice according to law, or simply legal justice. Legal justice requires that every person and every authority act according to established law. Legal justice, in this sense, has little to do with the moral justness of the law. A court that enforces a morally unjust law upholds legal justice, though not moral justice. As presently explained, legal justice has two dimensions – substantive and procedural.

There is a core body of legal rules that most societies expect persons to observe as a matter of basic justice. The rules in the criminal law against murder, assault and other wilful acts harming person and property belong to this class, and so do the fundamental rules of private law that impose obligations to perform contracts and make reparations for damage caused by negligent acts. These are what Adam Smith called rules of justice and FA Hayek termed *nomoi*, or the rules of just conduct. They are abstract and impersonal rules and are not directed to the achievement of specific ends such as the distribution of wealth. In the ancient and medieval societies, the law did not do much more than lay down the rules of just conduct. Rules of just conduct are so called because they are indispensable to social life, have generally grown with the society and are recognised by most people as rules that ought to be followed.

In the past, the law generally reflected the rules of social life as they had evolved. The notion that the law is a means of changing society is relatively modern. (See discussions in Chapter 4 and Chapter 10.) The law of our age is very different. In addition to its ancient function of stating the rules of just conduct, law has become the means for making various types of material allocations to different groups, often at the expense of other groups. Income extracted by taxes on the rich pays for the welfare of the poor. Subsidy schemes favour some industries as against others. Consumer protection laws are designed to favour consumers at the expense of sellers and manufacturers. In contrast, import controls favour local manufacturers at the expense of consumers. The claims for wealth transfers are presented almost invariably as pleas for justice in the moral sense, although in reality some claims may simply reflect the bargaining power of the claiming group. The law does not recognise every moral claim for justice. Hence, persons who make moral claims naturally wish to have

their claims converted to legal rights so that they become matters of legal justice. Moral claims are transformed into legal claims by legislative acts of parliaments or judicial decisions. The kind of justice that is sought in this manner is commonly called distributive justice or social justice. It should be noted that self-interest is not the only reason why some people demand legal change. There may be moral, ideological, economic or cultural reasons for seeking legal change. The demands for stricter environmental laws, less stringent anti-terror laws and laws prohibiting cruelty to animals are a few random examples of such claims.

When we look beyond the realm of the rules of just conduct (the impersonal rules that most people accept and willingly observe), we see serious differences of opinion about the justness of particular laws. Should the law permit a trading monopoly? Should families with young children be given income support out of taxes paid by others? Should private schools be subsidised by taxpayers who can only afford to send their children to public schools? Should farm incomes be subsidised when small industries are not? Should farmers be asked to limit land use without compensation in order to combat climate change? Should a car manufacturer be protected from foreign competition so that its employees will not lose their jobs?

The major problem with distributive justice concerns how we determine what just distribution is. We may say that it is just deserts – that a person must be given what they deserve. This answer takes us nowhere, since it poses the same question in a different way. How do we decide who deserves what? Justice may be defined as fairness, but then we need to define what fairness is. In his 'Critique of the Gotha Programme', Karl Marx stated the communist principle of distribution as: 'From each according to his ability, to each according to his needs' (1965 (1875), 325). Marx thought that this principle would work in a society of ideal citizens. Even if we concede for argument's sake that it will work in an ideal society, it seems unachievable in our own. An omniscient, omnipotent and disinterested ruler will be required to determine the capacities and needs of individuals but, as history and common sense tell us, such a ruler is inconceivable. Hence, liberal philosophers have abandoned the quest for just distribution and sought to formulate the rules of a just political system.

In the following pages I will discuss different conceptions of justice and the debates that they have generated in legal philosophy. Figure 12.1 provides a 'map' of the intellectual landscape that I will explore. The graphic is offered only as a rough guide. The reader will notice that there is considerable overlap between subdivisions.

Justice as virtue

The concept of justice has a central place in moral philosophy. In its widest and most profound sense it means righteousness, or living in harmony with the

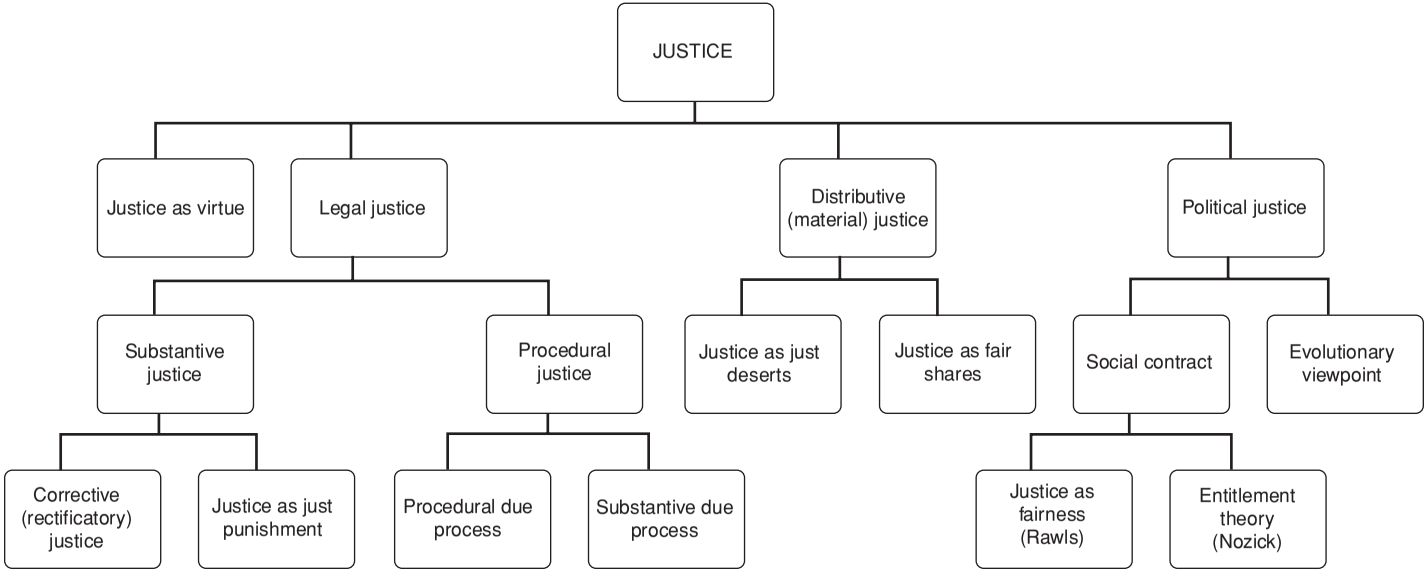

Figure 12.1 Kinds of justice

higher cosmic laws. Justice in this sense corresponds to the *Dharma* in Hindu and Buddhist philosophy and to *Jen* in Confucian thought.

Platonic justice

In his book *The Republic*, the Greek philosopher Plato (c. 427–348 BC) developed a detailed theory of the just person and the just state. In Book I of *The Republic* Plato set up a debate between Socrates and Thrasymachus the Sophist. Socrates argued that injustice only leads to conflict and disharmony, whereas justice promotes harmony (Plato 1974 (360 BC), 97). Similarly, he argued that injustice produces conflict within the individual so that 'it renders him incapable of action because of internal conflicts and division of purpose, and sets him at variance with himself and with all who are just' (1974, 97).

Plato took the teleological view that everything and everyone has an appointed purpose within the scheme of the universe and therefore each has a peculiar excellence. Justice means to serve that purpose and strive for that excellence. A horse has a purpose, so has a man. There is an ideal horse that represents the excellence of being a horse. It is better to be a good horse than a bad horse. The eye and the ear each has its purpose and its peculiar excellence. An excellent eye provides better vision than a defective eye. An excellent ear provides better sound than a flawed ear. Likewise, Plato argued that the human mind has a purpose and its peculiar excellence. The mind's function is to provide control, attention and deliberation, which are essential to rational living: 'It follows therefore that a good mind will perform the functions of control and attention well, a bad mind badly' (1974, 100). Plato concluded that justice is the peculiar excellence of the mind and injustice its defect (1974, 100). The excellence of the mind consists in balancing and harmonising its three different tendencies: reason, appetite and spirit. In later parts of *The Republic* Plato developed his theory of the just state, which was a state that consisted of different classes performing different functions, making up an efficient system in harmony with the cosmic law. There were three major classes in his ideal state, representing reason, appetite and spirit. The entrepreneurs, who produced goods and traded them, symbolised appetite; the auxiliaries, or the military, who provided security, represented spirit; and the guardians, who were philosophers, provided reason. The guardians guided the state and ensured the justice of the system. (See discussions and references in Chapter 5.)

Aristotle's theory of justice as virtue

Aristotle (384–322 BC) regarded justice as inseparable from virtue. Aristotle's theory of justice as virtue is set out in detail in his master work, *Nicomachean Ethics*, thought to have been published in 350 BC. Aristotle understood virtue in the teleological sense as right conduct in accordance with universal law. He divided virtue into moral virtues and intellectual virtues. Moral virtue is to

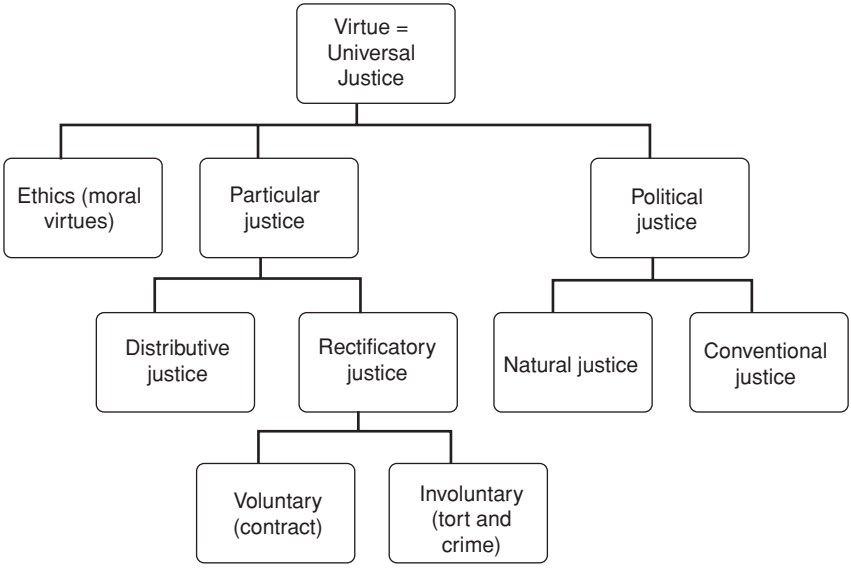

Figure 12.2 Aristotle and justice

'act according to the right principle' (Aristotle 1976 (350 BC), 93). Intellectual virtue, in particular the virtue of prudence, enables a person to determine the right principle (1976, 101–2). The right principle, according to the prudent person, turns out to be the mean between two extremes (1976, 101–2). For example, the virtue of courage is the mean between the vices of rashness and cowardice. The virtue of modesty is the mean between the vices of boastfulness and shamefulness. The virtue of temperance is the mean between the vices of profligacy and insensitivity. Like Socrates and Plato before him, Aristotle believed that all things and all beings have a purpose and a rightful place in the universal scheme of things. A virtuous person performs their role, and gives others their due place. Aristotle's scheme of justice is set out in Figure 12.2.

Universal and particular justice

Aristotle also divided virtue from another angle. Virtue consists of ethics and justice in the general or universal sense. Ethics, according to Aristotle, is moral virtue (1976, 91). Moral virtue can be practised within oneself and need not be practised in relation to others. A person can be courageous, temperate and modest without affecting others. Justice, on the contrary, is virtue as practised in relation to others. Aristotle wrote: 'there are plenty of people who can behave uprightly in their own affairs, but are incapable of doing so in relation to somebody else' (1976, 174; Miller 1995, 69). A person who practises virtue privately as well as towards others is just in the universal sense. Universal justice is the whole of virtue (Aristotle 1976, 174). Apart from universal justice, there is also particular justice, which is not the whole of virtue but a part of it. Injustice in the particular

sense is injustice that causes harm to others. A person can be unjust in the universal sense without being unjust in the particular sense (Aristotle 1976, 174–5). A man who refuses financial help to another is unjust in the universal sense but not in the particular sense, for he commits no positive harm (Aristotle 1976, 175). However, a person who is guilty of particular injustice is also guilty of universal injustice, because the former is part of the latter. The following examples illustrate the point.

1. A is prone to excessive beer drinking. Yet he performs his duties by his family, friends and his employer and causes no harm to anyone. He lacks the virtue of temperance, which is part of universal justice, but is not guilty of injustice in the particular sense.
2. B displays all the ethical virtues in her private life. She is temperate, courageous, modest, is not over-ambitious, and so forth. She has one fault, which is that she neglects to repay her debts on time. B causes harm to the creditor and commits a particular injustice. Since particular injustice is part of universal injustice, she is also guilty of the latter.

Distributive and rectificatory justice

Aristotle divided particular justice into two kinds: distributive and rectificatory. Distributive justice is the just 'distribution of honour or money or such other assets as are divisible among the members of the community (for in these cases it is possible for one person to have either an equal or unequal share with another)' (1976, 177). It should be remembered that in Aristotle's teleological scheme all persons were not equal. Each person and class of persons had a particular station in life and a particular function. Women and slaves had very inferior positions in this scheme of things (see discussion in Chapter 5). Aristotle said that just distribution is equal distribution, but by 'equal' he really meant 'proportional'. Thus, if A is worth 2 and B is worth 1 in the scheme of society, in distributing 6 apples A should be given 4 and B only 2. Virtuous, wise and courageous persons should receive more than immoral, ignorant or cowardly persons. The rationale of distributive justice is that 'if the distribution is made from common funds it will be in the same ratio as the corresponding contributions [to the funds] bear to one another' (Aristotle 1976, 179). In other words, persons who contribute more to the production of the common wealth get more from it in return.

The trouble with this argument is that in Athenian society not everyone had an equal chance to contribute to the common stock, and some persons' contributions (such as the work of slaves) did not count at all. In practice, the patterns of distribution were established by persons who held political power. As discussed presently, contemporary notions of distributive justice are based more on the needs of persons than on the contributions they make to the social wealth. However, traces of Aristotelian distribution remain in the modern age. The Queen of the United Kingdom grants peerages and honours to her subjects on the basis of merit determined by the government. The Governor-General of Australia awards

honours to Australian citizens. In many Commonwealth jurisdictions, selected senior lawyers are appointed as Queen's Counsel or Senior Counsel.

Rectificatory justice, according to Aristotle, operates in relation to private transactions. It is not about shares of the public goods but about wrongs done by one person against another. There are two branches of rectificatory justice, which correspond to voluntary and involuntary transactions. Voluntary transactions refer to contracts for the sale of property, letting and hiring, pledging, lending money with or without interest, and so forth (Aristotle 1976, 177). Involuntary transactions are those that constitute crimes and torts in present day legal language. Here the parties are treated as equal and the question is not about distribution but about rectifying wrongs. 'For, it makes no difference whether a good man has defrauded a bad man or vice versa, nor whether a good or a bad man has committed adultery; all that the law considers is the difference caused by the injury; and it treats the parties as equals, only asking whether one has committed and the other suffered an injustice, or whether one has inflicted and the other suffered a hurt' (Aristotle 1976, 180).

Political justice

Political justice is achieved through a just constitution and rules of justice. There are two kinds of rules of justice: (1) natural and universal, and (2) legal or conventional (Aristotle 1976, 189). Universal rules of justice are common to all societies and to all times, because they are just by nature. The laws against murder, assault, theft and rape, for example, are found in every civilised society and they represent universal rules of justice. Apart from these, there are laws that are peculiar to particular societies and circumstances. The punishment for a crime, for example, may differ from society to society. These laws represent conventional rules of justice.

One of the puzzles in Aristotle's treatment of justice is his equation of legislation with justice. It is clear that, by legislation, Aristotle meant just law. He wrote: 'Since the lawless man is, as we saw, unjust, and the law-abiding man just, it is clear that all lawful things are in some sense just; because what is prescribed by legislation is lawful, and we hold that every such ordinance is just' (1976, 173), This statement can be understood only in the context of Aristotle's theory of the just constitution (*politeia*). Aristotle was the first philosopher to recognise explicitly the superiority of the rule of virtuous law as against the rule of virtuous men. His experience of the politics of the Greek city states convinced him that all rulers ultimately are corrupted by self-interest. In his other great work, *The Politics*, Aristotle posed his famous question: 'Is it more advantageous to be ruled by the best man or by the best laws?' He was countering the monarchist argument that a government bound by general laws is not the most efficient. Aristotle concluded:

> Yet surely the ruler cannot dispense with the general principle which exists in law; and he is a better ruler who is free from passion than who is passionate. Whereas the law is passionless, passion must ever sway the heart of man. (1905, 136)

Aristotle argued that 'even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law' (1905, 139). He was speaking of just law, and not the law that bends to the private will of rulers:

> He who bids [that] the law rule, may be deemed to bid God and Reason alone rule, but he who bids [that] man rule adds an element of the beast; for desire is a wild beast, and passions pervert the minds of rulers, even when they are the best of men. The law is reason unaffected by desire. (1905, 140)

Thus, for Aristotle, law in its true sense is law that is just.

Monarchists were not the only opponents of the rule of law. Whereas monarchists thought that the rule of a wise person is better than the rule of impersonal law, the believers in extreme democracy argued that a system where every decision is taken by popular assemblies unfettered by law is best. Aristotle observed that in the Greek city states that practised extreme democracy, the rule of law was displaced by the rule of momentary majorities. There were two serious problems with such a system. First, in this type of democracy personal or group interest may prevail over the general interest of the community, and hence lead to political injustice. Second, there will be no certainty of the law, as every right and duty is determined by the unpredictable whims of a transient majority, which in practice becomes the rule of demagogues who happen to dominate the assemblies. Aristotle argued that these kinds of systems lack a constitution, 'for where the laws have no authority, there is no constitution' (1905, 157).

Political justice, then, is governance under just or virtuous law. How does a just political order ensure governance under just law? It is achieved through constitutional arrangements that separate the legislative function from the executive function. The constitution has a supreme place in Aristotle's political justice. It is different from, and superior to, the laws that legislators make. It sets out the principles that guide the making of law, and governance according to law. In *The Politics*, Aristotle described the just constitution thus:

> A constitution (*politeia*) is the organisation of offices in a state, and determines what is to be the governing body, and what is the end of each community. But laws are not to be confounded with the principles of the constitution: they are the rules according to which the magistrates [officials and judges] should administer the state and proceed against offenders. (1905, 147)

The distinction between law making and the administration of the state is spelt out in Book VI of *Nicomachean Ethics*. Law making is the subject of legislative science, and the administration of the state is the province of political science (Aristotle 1976, 213–14). Aristotle used political science in both a broad sense and a narrow sense. Political science in the broad sense encompasses both legislative science and political science in the narrow sense. Legislative science concerns the making of rules of justice. Political science in the narrower sense is concerned with the details of administering the law. Aristotle further divided political science into deliberative science and judicial science (1976, 214). Deliberative science is the science of routine politics. Judicial science is the science

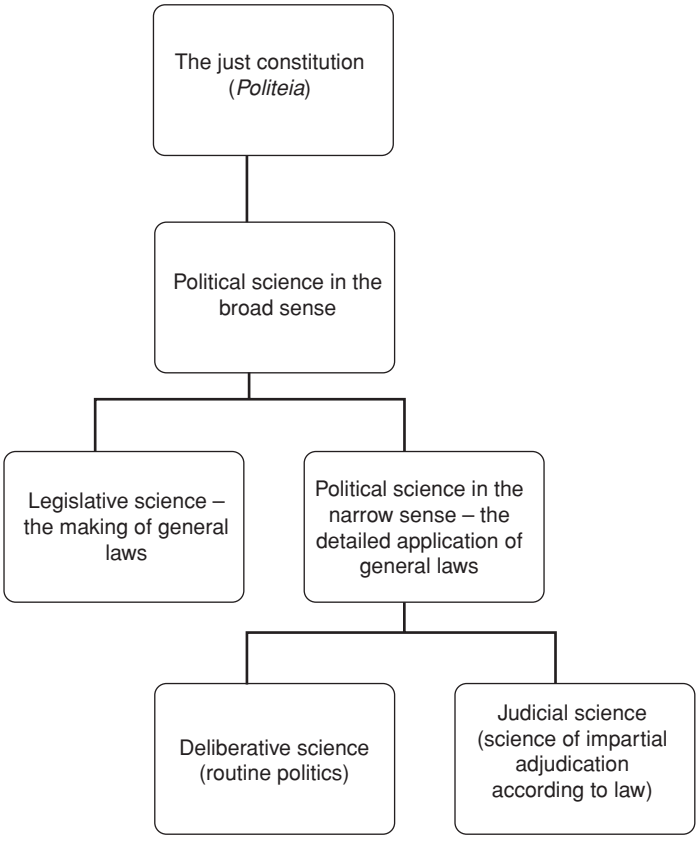

Figure 12.3 Aristotle's just constitution

of impartial adjudication according to law. Both legislative science and political science are based on prudence or practical wisdom (*phronesis*). Prudence is one of the cardinal intellectual virtues.

Let us take a contemporary situation. Parliament, in its practical wisdom, makes a law that prohibits citizens from bribing a public official. This is an exercise in legislative science. The investigation and prosecution of a person who gives or receives a bribe is left to the law enforcing agencies of the government, such as the police. In Aristotle's terminology, this is within the province of political science in the narrower sense. The actual trial of the accused person and the imposition of punishment, if found guilty, is done according to judicial science. Thus, Aristotle's just constitution (*politeia*), illustrated in Figure 12.3, was one that recognised the distinction between legislative, executive and judicial functions of the state (cf. Aristotle 1905, 175).

When Aristotle equated legislation with justice he did not mean that every human enactment is just, for he knew that this was often not the case. Legislators

can make mistakes and, even under a just constitution, there may be corrupt law makers. What he meant was that in the just constitution laws will be generally just, whereas a deviant constitution will generally produce unjust laws (Aristotle 1905, 127; Miller 1995, 81). A just constitution is one that serves the community's good, therefore the rules of justice will serve the community's good. Rules of justice must possess the qualities of generality and clarity and certainty in order to serve the public interest (Aristotle 1976, 190, 282, 338; Miller 1995, 81). These are the qualities that enable the state to perform the function of organising or structuring the polis and of instructing and habituating the citizens (Miller 1995, 81–2).

Aristotelian justice in contemporary democracy

Political justice, in one respect, has improved remarkably since the time of Aristotle. Political justice did not extend to slaves and children in Athenian society. It must be remembered that Aristotle shared the teleological worldview of his times, which regarded different classes of persons as serving different purposes in an overall scheme of nature. Slaves, in this scheme, were property. Children were extensions of the parent:

> Justice on the part of a master or father [towards a slave or child respectively] is not the same as, although analogous to, the forms already discussed. There cannot be injustice in an unqualified sense towards that which is one's own; and a chattel, or a child until it is of a certain age and has attained independence, is as it were a part of oneself; and nobody chooses to injure himself (hence there can be no injustice towards oneself); and so neither can there be any conduct towards them that is politically just or unjust. (Aristotle 1976, 189)

Slavery has been abolished in most parts of the world today, and children enjoy legal rights under domestic and international law. Liberal democracies, in theory, regard all persons as equal before the law and entitled to equal justice.

Political justice has changed in other ways in liberal democracies. Aristotle's legislative science has been eclipsed by the realities of electoral politics. Parliaments carry out a certain amount of careful law making, often on the recommendations of national law reform commissions or in response to treaty obligations flowing from the work of international agencies such as the International Law Association (ILA) or the United Nations Commission on International Trade Law (UNCITRAL). However, a great deal of legislation is shaped by the pressures of electoral politics, which advance short-term and sectarian goals at the expense of the long-term public interest. In parliamentary systems based on the Westminster model, the executive government generally controls the legislature, with the result that parliament has lost its deliberative and prudential role in the making of law. The legislative program is set and executed by the prime minister and cabinet, who control the majority faction within parliament. So-called 'conscience votes' are rarely allowed in this system. Members of the

United States Congress are not subject to this degree of party discipline but, as I discussed in Chapter 9, the practice of vote trading or 'logrolling' subordinates legislative science to political expediency.

I will discuss modern theories of political justice later in this chapter.

Legal justice

Legal justice is justice *according to law*. It is not about the justice *of the law*. I may regard a tax law that forfeits half my income to the state as morally unjust, but legal justice demands that I pay it. An employee might think that her wages are too low for the work she does, but legal justice will not compel the employer to pay her more than the agreed wage or the statutory wage. As illustrated in Figure 12.4, legal justice has two branches: (1) substantive legal justice, and (2) procedural legal justice. These two kinds of legal justice are interdependent and derive from the same basic value – the duty to obey valid law. Procedural legal justice is again divisible into procedural due process and substantive due process.

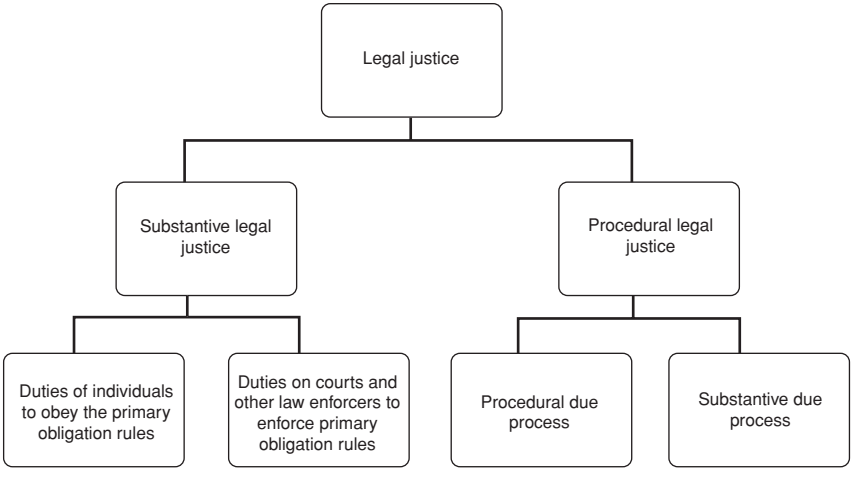

Figure 12.4 Legal justice

Substantive legal justice

Substantive legal justice demands that persons do as the law commands. It is primarily concerned with the conduct of individuals, but also places obligations on judges and other officials responsible for the enforcement of the law of the land.

Substantive legal justice is mainly related to private law, criminal law and the rights conferred by statutes or the constitution. Private law, in this context,

includes the laws of contract, tort and restitution as well as substantive statutory entitlements. Crimes are punishable acts but – except for the category of crimes against the state (treason, sedition, rioting, counterfeiting, bribery etc) – they concern wrongs done to individuals. Torts and crimes committed against persons or their property, breaches of contract and the failure to return what belongs to another give rise to legal injustice in the substantive sense. Substantive legal justice represents not only what Hart called primary obligation rules but also his secondary obligation rules (or rules of recognition) placed on officials to enforce the primary obligation rules.

A state that is committed to legal justice provides remedies for injustices under substantive law. Aggrieved persons usually are entitled to ask a court or other competent tribunal to adjudicate their claims for legal justice and to enforce their legal rights. These tribunals have the duty to determine claims according to the substantive law and thereby uphold legal justice. Thus, substantive legal justice concerns rights and duties of individual citizens in relation to each other and the state, and the duties of authorities to enforce primary legal relations.

Procedural legal justice

There is another branch of legal justice, best described as procedural legal justice. It is better known in American jurisprudence as due process of the law. Procedural legal justice reinforces substantive legal justice. The existence of substantive legal justice depends to a large extent on procedural legal justice. Procedural legal justice also has two aspects: (1) procedural due process and (2) substantive due process.

Procedural due process

Substantive legal justice requires persons to respect each other's substantive legal rights. In a harmonious and stable society people largely respect rights and perform their duties. However, from time to time there is a need to resolve disputes. These disputes may arise from wilful or negligent acts or omissions that violate rights, or from disagreements about what the law requires. The courts, as a rule, conduct criminal trials. Civil disputes may be resolved through private negotiations or arbitration, but the state usually provides recourse to the courts for the ultimate adjudication and enforcement of rights. The judicial process provides means of clarifying the law and of vindicating rights when they are violated. This is an essential condition for the practical prevalence of substantive legal justice.

Procedural due process requires that a person's rights and duties under the law are determined according to fair procedures. A person who is accused of a crime should be given a fair trial. An administrative decision that affects the rights and obligations of a citizen should not be taken without the concerned citizen being given a fair hearing by an impartial arbiter. Thus, a holder of a trading licence must be given reasons and a fair hearing before the licence is

taken away, and an applicant for a building permit should be heard fairly if the permit is to be refused. The entire body of law governing procedure and evidence in courts is designed to ensure procedural justice.

In the sphere of administrative action, the common law rules concerning natural justice, procedural fairness and jurisdictional error are designed to secure procedural justice in the making of decisions that affect the rights and duties of citizens. There is no better short summary of this jurisprudence than that offered by Professor Stanley de Smith in his classic work *Judicial Review of Administrative Action*:

> The relevant principles formulated by the courts may be broadly summarised as follows. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised by the authority to which it is committed. That authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in the individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorised to do. It must act in good faith, must have regard to all relevant considerations, and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. Nor where a judgment must be made that certain facts exist can a discretion be validly exercised on the basis of an erroneous assumption about those facts. These several principles can conveniently be grouped in two main categories: failure to exercise a discretion, and excess or abuse of discretionary power. (1980, 285–6)

Substantive due process

Procedural due process, as we have seen, is about the defence and vindication of rights that exist. Substantive due process is about the way in which existing rights and liberties can be lawfully abolished or altered.

Substantive due process is said to be the very foundation of the law in the English legal tradition. It flows from the fundamental doctrine of the law: that a person may do anything that the law does not forbid and may refrain from anything that the law does not require. Chief Justice Camden's memorable exposition of this doctrine in *Entick v Carrington* (1765) 19 Howell's State Trials 1030 was set out in the previous chapter (see 'Immunity–disability correlation'). As Camden explained, the important corollary of this rule is that an official who wishes to deny citizens their right or liberty must find the authority of a substantive law. This ancient doctrine remains at the heart of English jurisprudence to this day. It was reiterated by Justice Laws in *R v Somerset County Council; ex parte Fewings and Others* [1995] 1 All ER 513, 524:

> For private persons, the rule is that you may do anything that you choose that the law does not prohibit . . . but for public bodies the rule is opposite, and so of another character altogether. It is that any action to be taken must be justified by positive law . . . the rule is necessary in order to protect the people from arbitrary interference by those in power over them.

Substantive due process in the United Kingdom simply means that a person's rights must not be violated except under the authority of the common law or an Act of Parliament. The Parliament of the United Kingdom is said to be sovereign, and it may, in theory, take away the most basic rights and liberties of a person by an ordinary Act of Parliament, or even authorise a delegate do so. This is because the UK Parliament is unrestrained by a written constitution that guarantees basic rights to citizens. (The UK adopted much of the *European Convention on Human Rights* by enacting the *Human Rights Act 1998*, but Parliament may overturn the mandates of that Act if it so wishes.) In contrast, substantive due process imposes many more restrictions in countries where legislatures are not sovereign but subject to constitutional limitations.

In countries where the power of the legislature is limited by a constitution of superior force, substantive due process has greater importance. Congress and the state legislatures in the United States have limited powers under the US Constitution. The position is similar in Australia. The US Constitution makes the due process of law an explicit requirement. The due process clause of the Fifth Amendment (ratified in 1791) commands that no person shall 'be deprived of life, liberty, or property, without due process of law'. This clause is directed to the actions of officials of the federal government. However, the due process clause of the Fourteenth Amendment (ratified in 1868) declares: '[N]or shall any State deprive any person of life, liberty, or property, without due process of law'. This clause limits the powers of the state legislatures, as well as their governments.

The requirements of the 'due process of law' in the Fifth and Fourteenth Amendments dictate not only how the law *is enforced* but also how the law *is made* and what sort of law *can be made*. The central idea of substantive due process is that a person's rights and liberties must not be impinged upon, except by an enactment that is law not just in name and form but also in substance. The classic formulation of the doctrine of substantive due process is found in the US Supreme Court's judgment in *Hurtado v California*:

> Law is something more than mere will exerted as an act of power. It must not be a special rule for a particular person or a particular case . . . but the general law . . . so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society, and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation . . . and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or an impersonal multitude. (110 US 516, 535–6 (1884))

The Australian Constitution does not have an express guarantee of substantive due process. However, several constitutional provisions – such as the just terms clause that requires compensation to be paid for property taking (s 51(xxxi)), the establishment clause prohibiting religious discrimination (s 116), the clause guaranteeing freedom of interstate trade (s 92) and the requirement of a trial by jury on indictment (s 119) – promote substantive due process. The High

Court of Australia has drawn several substantive due process implications from the separation of judicial powers from other powers. The chief among these is the recognition of a constitutional ban on bills of attainder (*Polyukhovich v Commonwealth* (1991) 172 CLR 501, 539, 631, 686).

Distributive justice as social justice

The aim of distributive justice is to bring about and maintain a just distribution of benefits and burdens in society. Campbell, for example, said that 'it remains illuminating to say that justice has to do with the distribution amongst persons of benefits and burdens, these being loosely defined so as to cover any desirable or undesirable thing or experience' (1988, 19). Barry said: 'When we ask about the justice of an institution we are inquiring into the way in which it distributes benefits and burdens' (1989, 355). The means of determining what amounts to just distribution, and the means of achieving and maintaining such a distribution, are the burden of theorists who define justice in this way. Distributive justice is also known as social justice, because the duty of bringing about just distribution is thought to be a social obligation. Many thinkers outside the law consider justice purely in the distributive sense. As Campbell noted, 'most modern theories of justice have little to say about justice in law despite the fact that justice might appear to be *the* legal virtue' (1988, 23).

Distributive justice and legal justice

Legal justice and distributive justice, as already noted, differ in a number of ways. The most important difference is that distributive justice is concerned with outcomes or end states, whereas legal justice is about the observance of rules of conduct. A person is legally just whose conduct is lawful and a person is unjust whose conduct is unlawful. Legal injustice always arises from the conduct of a person. A person who suffers harm suffers no *legal injustice* unless another person is responsible for the harm. Consider the case of a person who gambles at the casino and loses most of their savings. Their situation is *unfortunate* but not *unjust*. This is because their loss is not caused by the illegal act of a person but by a combination of factors for which no individual is responsible. If, however, they lose money because of fraud or theft, they are clearly the victim of legal injustice.

Distributive justice is not a legal proposition but a moral, philosophical or political ideal. The word 'justice' can be used in different senses. Whichever way the term is defined, it suggests the idea of a claim or right. A person seeks justice not as charity but as entitlement. The question is whether the entitlement is legal or moral. The modern welfare state has converted many moral claims into legal rights. Minimum wages, pensions and health care are examples of legalised moral claims. However, there is no state – outside the small number

that remain organised on Marxist-Leninist principles – that recognises a general legal obligation to establish and maintain a particular pattern of distribution within society. Distributive justice remains in the moral sphere, except to the extent of piecemeal incorporation of some of its claims into the formal legal system.

Distributive justice and equality

The starting point of most social justice theories is the proposition that all persons should share equally the benefits and burdens in society. Any departure from the principle of material equality has to be justified. The question of whether inequalities can be defended was, for Barry, the inescapable issue of justice (1989, 4). Honore saw only two reasons to depart from the standard of equal shares: (a) a person's own choice, and (b) a person's conduct (1970, 63). Campbell said that 'every theory of justice must seek to explain or justify the basic presumption of the equality of persons as well as demonstrate legitimate grounds for differential treatment' (1988, 32). Rawls stated the general conception of justice this way:

> All social values – 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. (1999, 54)

There are two meanings of equality we must consider. One is abstract equality, which is a feature of legal justice. It does not matter whether the driver of a speeding car is the prime minister or an errant schoolboy. They are equally liable under the offence of speeding. It does not matter that one party to the contract is a millionaire and the other party is a pensioner. The party in breach is liable in damages. The law, to the extent that it is abstract and impersonal, does not recognise personal circumstances. This is legal justice. The other kind of equality is the equal sharing of benefits and burdens. This is the basis of social, or distributive, justice theories.

Distributive justice and social security

It is important to distinguish the aim of distributive justice from what is known as social security. Social security safety nets usually comprise unemployment insurance, age and disability pensions, health care and education subsidies and such like. Some of the most prominent critics of the idea of distributive justice, among them FA Hayek and Milton Friedman, accepted the need for social security as a safety net. Friedman was well known for his advocacy of safety nets, including state provided education vouchers for children and state insurance against catastrophic illness (Friedman 1962, 85–98). Hayek wrote:

> There is no reason why in a free society government should not assure to all protection against severe deprivation in the form of a minimum income, or a floor below which nobody need to descend. To enter into such an insurance against extreme misfortune