Posner further argues that in society, people will abide by the law if they predict that they will thereby reap greater economic benefits than they would get from the spoils of breaking such law. They will break the law if the opposite is true. People will take their disputes to court if the financial or economic benefits of such litigation will be greater than the economic burdens which will accrue.

In the same vein, judges adjudicate in disputes in the most economically efficient way possible. They punish the most economically destructive behaviour. They determine questions of liability, damages and compensation in ways which allocate resources to those who are most capable of putting them to efficient economic use, and they allocate rights to those who would be prepared to pay the most for them on the free market.

Posner makes favourable reference to the formula set out by Justice Learned Hand as a test for negligence in the case of *United States v Carroll Towing Company* [1947]:

> The defendant is guilty of negligence if the loss caused by the accident, multiplied by the probability of the accident's occurring, exceeds the burden of the precautions that the defendant might have taken to avert it.

For Posner, the common law has numerous examples of economic considerations being overtly taken into account in the operation of the law and the dispensing of justice. This can only be a sign that, even when it is couched in legal language, the question of justice is in fact an economic, rather than a legal or moral, standard.

You should now be confident that you would be able to tick all the boxes on the checklist at the beginning of this chapter. To check your knowledge of Utilitarianism why not visit the companion website and take the Multiple Choice Question test. Check your understanding of the terms and vocabulary used in this chapter with the flashcard glossary.

6

Rights

HOHFELD'S ANALYSIS OF RIGHTS

The question of what constitutes a right is a problematic one, since the word 'right' itself may mean a number of different things in different contexts, be they moral, political, economic or legal. The vocabulary of propositions and arguments about rights makes it difficult in many cases to distinguish between the specific connotations of the term, and this tends to obscure the meaning and value of rights as basic building blocks of law, as well as essential elements of the idea of justice. Wesley Newcomb Hohfeld (1879–1918), an American jurist, introduced theoretical elements in analytic thought in his analysis of rights – which he called 'the lowest common denominators of the law' – in several articles published posthumously in *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1919).

HOHFELD'S BASIC RIGHTS

Hohfeld's solution to the problem of defining rights was to clearly identify the basic legal conceptions which are usually described by the use of the term right, and then to distinguish between these conceptions by using very specific terms to express them. This resulted in what is up to this day probably the most rigorous analysis of jural relations ever attempted. This analysis is of value in clarifying the implications of the term 'right' in various situations.

Hohfeld approached the problem through the process of defining these basic conceptions and then arranging them in pairs of opposites and correlatives, in order to distinguish between them. He identified eight different such conceptions, to which he attributed specific terms of description, and which he then rigorously defined. These were as follows:

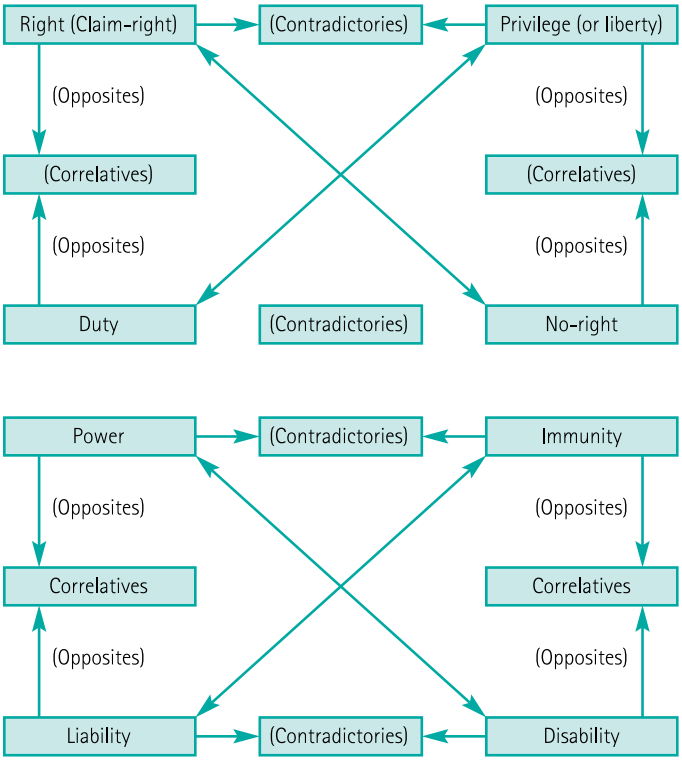
1. *Right*: 'An enforceable claim to performance, action or forbearance by another.'
2. *Duty*: 'The legal relation of a person who is commanded by society to act or forbear for the benefit of another person either immediately or in the future, and who will be penalized by society for disobedience.'
3. *Privilege*: 'The legal relation of A to B when A (with respect to B) is free or at liberty to conduct himself in a certain manner as he pleases; when his conduct is not regulated for the benefit of B by the command of society, and when he is not threatened with any penalty for disobedience.'

4 *No-right*: 'The legal relation of a person in whose behalf society is not commanding some particular conduct or another.'
5 *Power*: 'The legal relation of A to B when A's own voluntary act will cause new legal relations either between B and A or between A and a third party.'
6 *Liability*: 'The relation of A to B when A may be brought into new legal relations by the voluntary act of B.'
7 *Immunity*: 'The relation of A to B when B has no legal power to affect one or more of the existing legal relations of A.'
8 *Disability*: 'The relation of A to B when by no voluntary act of his own can A extinguish one or more of the existing legal relations of B.'

Hohfeld proceeded to arrange these conceptions in terms of opposites and correlatives in order to illustrate clearly how they differed in terms of their legal implications and how in some cases they specifically contradicted each other. This arrangement may be represented in diagrammatic form as shown in the figure on the following page.

Hohfeld's analysis is based on a number of assumptions about the legal concepts and the relations which they describe:

- There are four basic *rights*, that is:
  - rights in the strict sense, which may also be called claim-rights;
  - rights which are in fact liberties, or as Hohfeld calls them, privileges;
  - rights which describe power, in the sense of the ability of one person to create or change legal relations with other persons; and, finally
  - immunities, which are rights that protect a person from interference in a specific way by another person.
- These basic rights are the lowest common denominator in all legal relationships, and any other rights which a person may claim to have can ultimately be reduced to a category of one of these four.
- The Hohfeldian basic rights must be thought of as rights against a specific person, and they are distinguished from one another by reference to what they imply about the other party to a legal relationship. Each type of right represents one aspect of a legal relationship between at least two persons.



- It is important to note that, although Hohfeld's analysis refers specifically to legal rights, the scheme of analysis can also be applied effectively to the investigation of moral rights.

The relationships between the basic rights and their counterparts can be explained as follows:

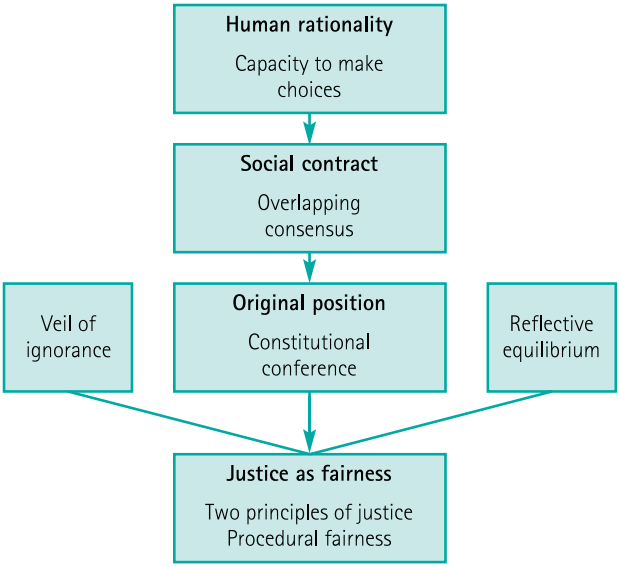
- *Jural correlatives*: connected by vertical lines in the diagram – always exist together, so that where one person has, for example, a claim right, then another person must have a duty. Similarly, where one person has a power, another person must have a liability.

- *Jural opposites*: connected by diagonal arrows in the diagram – can never be held by one person at the same time. So, a person who has an immunity in respect of certain subject matter cannot at the same time have a liability in respect of the same subject matter. In the same way, a person who holds a privilege or liberty with respect to a certain subject matter cannot simultaneously be the subject of a duty.
- *Jural contradictories*: connected by horizontal arrows in the diagram – always imply that where one is held by one person, then another person lacks its contradictory. So, for example, the fact that A has a right to something, necessarily means that B does not have a privilege in respect of the same thing. Where B has a power in respect of the same subject matter, then C cannot at the same time have an immunity in respect of that particular subject matter.

JOHN RAWLS AND THE PRIORITY OF LIBERTY

'JUSTICE AS FAIRNESS'

Whereas the focus of John Rawls' work lies more on the idea of justice than on the notion of rights, still the introduction of Rawls' theory is relevant here, given the strict conceptual connection existing between justice and rights (at least in the dominant view). Rawls (1921–2002) set out most of his main ideas on justice in the text *A Theory of Justice* (1971), although he elaborated on these in subsequent other writings. In particular a restatement of his argument is presented in *Political Liberalism* (1993). His theory can be described as contractarian and libertarian, in that it regards society as being based on a social contract and in that it emphasises the liberty of the individual. Rawls regards the status and interests of the individual as being more important than the goals which a society may have and seek to achieve. It is for this reason that he is generally very critical of utilitarianism and other approaches to the question of justice which emphasise social goals at the expense of individual rights. Indeed, in *A Theory of Justice* (1971), Rawls sets out to articulate a set of principles of justice which, he argues, are superior to both classical and average utilitarianism in that they will accord better with both our intuitive and our considered moral judgments about what is just and what is not in respect of our position vis-à-vis social structures and their operation.



WHY JUSTICE AS FAIRNESS?

In his approach, Rawls emphasises the need for consent amongst the people who make up society to the principles which determine what is just and what is not in that society. He promotes the notion that society should be regarded as being based upon some sort of social contract or agreement, which then means that the individual is important in his/her own right, since it is by the choice of individuals that society comes into existence. It is the choice of the individual to join and remain in society, because of the benefits which can be derived from living together with other human beings. It is also the choice of the individuals to accept the burdens which become necessary in order for the community to be stable and viable.

At the same time, each person in society has an interest in ensuring that what they get out of this association, in terms of benefits and burdens, is their fair share. Because of this, it becomes necessary to ensure that the basic institutions of society – that is, those institutions which are responsible for distributing primary goods, such as material wealth, opportunities and other resources – must be structured in such a way that they are procedurally just.

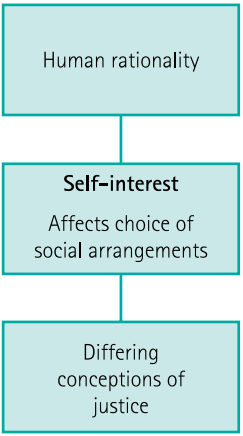
In other words, such institutions must operate in a manner which accords to each person what is probably their most important basic right in society – *the right to equal concern and respect*. The distribution of social benefits and burdens must be fair and must be seen to be fair in this sense – hence 'justice as fairness'.

THE PRIMARY SUBJECT OF JUSTICE

According to Rawls, the primary subject of justice – that is, the element which should concern us most when we consider issues relating to the creation of a just and well-ordered society – must be the basic structure of society. This is because the basic structure of society influences the existence of people in a fundamental way throughout their lives. The basic structure is made up of the main institutions which are involved in the distribution of the benefits and burdens of life in society. Such institutions include the entire set of major social, political, legal and economic institutions, such as, for example, the monogamous family, the constitution, the courts, private ownership of the means of production and competitive markets. The benefits of social life as made possible by social co-operation include the means of sustenance such as food and shelter. They also include other goods such as wealth and income, authority and power, as well as rights and liberties. These are what Rawls calls primary goods. The burdens of social life comprise certain liabilities, duties and obligations, such as, for example, the obligation to pay taxes.

Given the focus of questions of justice on the basic structure of society, Rawls argues that the main problem of justice, and the task facing those who would recommend ways of creating a just society or of redressing existing injustices, is one of articulating a set of principles which would ensure an accurate and concrete determination of what is just and unjust, as well as helping the development of policies which would assist in the correction of such injustices. Linked to this is the problem of ensuring that such principles are generally acceptable to the majority of people in society, so that there is consensus in the resolution of problems of injustice. Such principles would then become the basis for the creation of what Rawls refers to as a well-ordered society.

THE PROBLEM OF ESTABLISHING STANDARDS OF JUSTICE



THE NATURE OF HUMAN BEINGS

Bentham and human sentience

Rawls disagrees with Bentham when, in setting out the theory of classical utilitarianism, the latter argued that the most important quality of human beings is their sentience, that is, the capacity to experience pain and pleasure. It was on this basis that Bentham argued for the pursuit and maximisation of pleasure and the reduction of pain for the greatest number of people in society. For Bentham and other utilitarians, the satisfaction of the desires of the majority in society takes precedence over the individual interests of particular people. Total or average utility is the goal, and, even if certain measures or arrangements may be painful for some, this is regarded as being necessary and appropriate, as long as the degree of happiness generated is greater than the misery caused. The goal of maximum social utility takes precedence over the rights and interests of individuals. The individual may be sacrificed for the greater good, for he or she is only a part of a bigger entity – society – and the satisfaction of his or her individual needs and preferences is only a means to an end.

Rawls and human rationality

For Rawls, the most important quality of human beings is not their sentience, but rather their rationality, that is, their ability to make choices. Humans have the ability to decide upon the goals which they want to pursue in life as individuals. They have the capacity to formulate coherent plans by which to achieve those goals, and they have the capability to utilise available resources in the most efficient manner to attain their chosen ends. Because of their rationality, human beings are characterised by self-interest, in the simple sense that, given a choice and all things being equal, a rational person would rather have more of a good thing than less.

The importance of choice

It is the capacity to make choices which makes the individual, as opposed to the community, so important in Rawls' view. Indeed, in thinking about society as being based upon a social contract, it would be difficult to see how societies could come into existence and continue to exist unless individual people choose to live in community with other persons. That choice would presumably be made on the basis that greater benefits might accrue from living within society than from living in isolation. This ability to choose must therefore be given a central place in any social arrangements, since it will ensure the continued stability of society.

The requirements for a well ordered society

A well ordered society must, for Rawls, be characterised by structures and institutions which permit maximum scope for the individual to make choices, to decide upon the goals which he or she wishes to pursue in life as an individual, and to formulate plans for the pursuit of such goals. The basic institutions of a well ordered society must also be structured in such a way that due consideration is given to the interests of individuals, and that the distribution of resources and opportunities is such that all persons in society get a fair allocation. Where resources are to be distributed unequally, then a well ordered society must ensure that those who are most disadvantaged are in a position ultimately to benefit from the overall distribution.

Utilitarianism v choice

For Rawls, it is only in a situation where individuals are capable of improving themselves under conditions of equality of opportunity that the rational person

may flourish. Utilitarianism creates conditions where the individual has little choice and has to accept what may be the arbitrary and unfair decisions of some central authority as to what should be done with scant resources. Whatever goals an individual may have for him/herself are ignored in the pursuit of overall utility. The rights and liberties which the person may have can be taken away or restricted in order to satisfy the preferences of some other persons or group of persons.

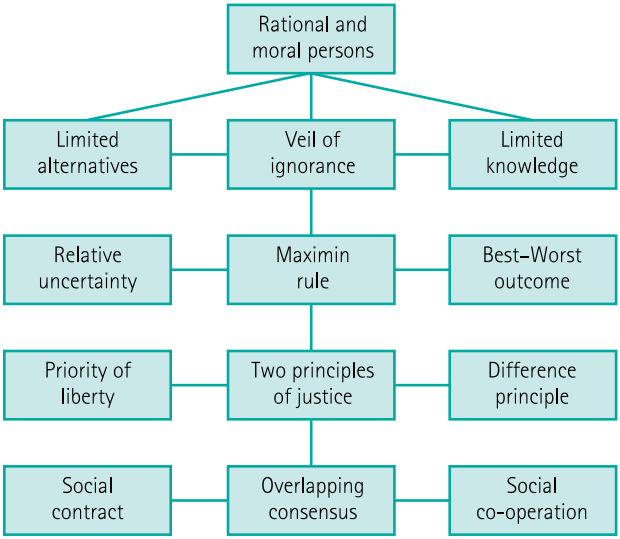
ESTABLISHING PRINCIPLES OF JUSTICE

The need for an overlapping consensus

One problem in the search for principles of justice is, according to Rawls, the problem of getting people to agree on the actual principles without being influenced by improper motives and considerations. This problem arises mainly because human beings are rational beings and are therefore self-interested. This self-interest tends to interfere with the making of impartial judgments as to what is acceptable and what is not. A person who is aware of his or her abilities or his or her social status will naturally tend to think in terms of what would be most beneficial to him or her given his or her advantages or disadvantages compared to the other members of society. Thus, a fairly well off person, economically, may not accept principles of justice which might require him or her to part with some of his or her wealth in order to improve the economic status of other, less well off persons. At the same time, these other persons may favour such principles, and yet they might find any arrangements which might further improve the position of the well off unacceptable. One requirement for consensus in the choice of principles of justice is, therefore, according to Rawls, the neutralisation of such negative self-interest. On the other hand, however, Rawls notes that human beings are not just rational, but they are also moral persons. In other words, they do have a sense of justice. People have an intuitive sense of what is just and what is not, and at the same time they are also capable of making considered moral judgments of what would constitute a just or unjust situation. This fact means that given the right conditions people are capable of making impartial decisions about principles of justice and this makes it possible to have what he calls an overlapping consensus regarding such principles.

The original position and the veil of ignorance

For Rawls, the right conditions for choosing principles of justice can be created by envisaging what he calls an 'original position'. This is a hypothetical construction which is similar to the situation which might have existed at the beginning of society, from the social contract point of view, when the founding fathers of society may have come together to decide what form their society was going to take and what structures were going to govern their community. Rawls invites us to imagine a similar sort of situation, which is, however, formally different in a number of respects, which are intended to ensure procedural fairness. Under such circumstances, one must then make a choice of principles of justice from a limited set of alternatives, working from one's intuitive sense of justice as well as one's considered moral judgments as to what is just.



The main feature of the original position is the idea of the *veil of ignorance*. In this case, we imagine that the people who are to choose the principles of justice do not know anything about themselves or their situation other than that which is absolutely necessary to enable them to distinguish and to make a

choice between the alternative sets of principles. The purpose of the veil of ignorance is to ensure that, in making their choice, the parties are not influenced by self-interest and that they make their decisions solely on the basis of general considerations.

The veil of ignorance makes it possible to have a consensus amongst people who may otherwise disagree with each other in the choice of principles purely for reasons of self-interest or selfishness. Given that the persons in the original position are moral, they will have a general sense of what is just and what is not. And, given that the same persons are rational, they will want to advance their own interests as much as possible. However, because they are generally ignorant of their particular circumstances, such people will not know which choice of principles will advance their interests in the best way. Under conditions of relative uncertainty, and all things being equal, a rational person will tend to choose an arrangement which will assure him or her of the best possible outcome. If an outcome is going to land him or her in the worst position, then the rational person will want that to be the most favourable worst position possible. This is what is called the *maximin rule*. Given the veil of ignorance, the rational and moral persons in the original position will be more likely than not to choose the same principles of justice. This is because they will know intuitively what is just, and because they will be aware that if they choose principles which might lead to, or perpetuate injustice then they themselves might end up suffering under an unjust arrangement. To choose anything other than principles which would ensure them the best worst position would be irrational. The veil of ignorance is therefore a most effective way of ensuring consensus.

Rawls' two principles of justice

Rawls proposes two principles of justice which he believes that people in the original position would choose and agree on. He argues that these principles accord with our most basic intuitions about justice and he contends that they should form the basis of any well ordered society. This means that these principles should govern the creation and operation of the institutions which make up the basic structure of society. In their operation, the principles therefore govern the distribution of primary goods in society. Rawls says that these principles should be lexically ordered, and that the first principle should be lexically prior to the second. What this means is that in every case, the

requirements of the first principle should always be met to the fullest extent possible before any attempt is made to fulfil the requirements of the second principle.

The first principle: the principle of greatest equal liberty

Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.

This principle is concerned with the distribution of individual liberties as a subset of the total primary goods available in society. These liberties include:

- political liberty – that is, the right to vote and to be eligible for public office;
- freedom of speech and assembly;
- liberty of conscience and freedom of thought;
- freedom of the person along with the right to hold (personal) property;
- freedom from arbitrary arrest and seizure as defined by the concept of the rule of law.

The liberties should be enjoyed equally by all the citizens of a just society, since justice requires them to have the same basic rights.

The second principle

This principle regulates the distribution of other primary goods in society, including material wealth and social, economic and political opportunities. It determines the justice of such distribution in two different ways and is given as follows:

Social and economic inequalities are to be arranged so that they are both:

- to the greatest advantage of the least advantaged (that is, the representative worst-off person) – *the difference principle*;
- attached to offices and positions open to all under considerations of fair equality of opportunity – *the principle of fair equality of opportunity.*

Rawls' first lexical priority rule means that people in a just society must always be assured of their liberties before consideration is made of the distribution of material and other primary goods. Ultimately, this is to ensure that the element

of choice, which enables people to define their own goals, to make up their own plans of life and to pursue such plans utilising the resources available to them without undue interference from society, is guaranteed. The priority of the first principle also requires that the basic liberty of citizens must not be restricted for the sake of greater material benefits for all, or even for the benefit of those least advantaged. There can be no trade-offs between liberty and material goods. This is what is referred to as the priority of liberty, for Rawls. Liberty may only be restricted for the sake of a greater liberty for all. Whenever a basic liberty is restricted, the effect of such restriction must be to create a more extensive system of liberty for everyone.

NOZICK AND THE THEORY OF ENTITLEMENTS

Robert Nozick (1938–2002) provides what is probably the most devastating attack on John Rawls' theory of justice as fairness, whilst setting out his own theory of justice. Nozick criticises Rawls' principles of justice for being based on what he regards as indefensible assumptions:

- that people's abilities are a common asset to be utilised for the good of all;
- that people are necessarily altruistic and that individuals will accept social arrangements and a system of distribution which will take from them some goods and redistribute those for the sake of providing the worst off members of society with certain advantages.

A further problem with Rawls' approach, for Nozick, is that the arrangements which will result from Rawls' two principles of justice would require unjustified and continuing interference with people's lives by a central authority intent on maintaining a particular pattern of distribution of goods.

Basically, Nozick is against all 'end state' theories of justice. For Nozick, theories of justice should not provide for the redistribution of social goods for the simple sake of achieving some centrally concocted conception of justice. What people have is a result of processes of acquisition which pre-date the stage at which any assessment of the justice or injustice of distribution is made. Approaches which simply have regard to the end state of these processes are therefore liable to be unjust because they do not take into account the history of present holdings of social goods.

Nozick puts forward a theory of entitlements, in which he argues that however unequal a distribution might be, it is to be regarded as just if the distribution came about through just steps from a previous distribution which was itself just.

A person is entitled to the social goods he holds if he came by such goods in a just manner, and such goods should not be taken away from him without justification. His notion of justice is that:

> A distribution is just if it arises from another just distribution by legitimate means . . . Whatever arises from a just situation by just steps is itself just.

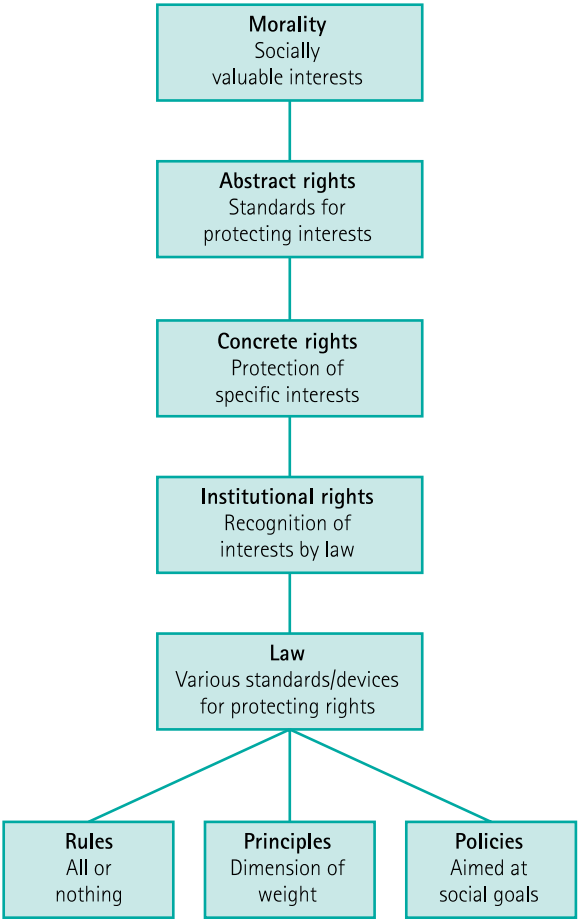
Nozick articulates three principles which he says would define the justice of holdings if the world were 'wholly just':

1. *The principle of justice in acquisition*: A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding.
2. *The principle of justice in transfer*: A person who acquires a holding in accordance with the principle of justice in transfer from someone else entitled to the holding is entitled to that holding.
3. *The principle of justice in rectification*: No one is entitled to a holding except by (repeated) applications of (1) and (2).

For Nozick, there is no justification for an extensive State mechanism whose operations may impinge upon individual entitlements and violate people's rights. Taxation and other coercive measures are justified only when they are instituted to uphold the minimal State. The taxation of some in order to meet the needs of others is equivalent to forced labour.

DWORKIN'S RIGHTS THESIS

THE RIGHTS THESIS



THE SOCIAL ORIGIN OF RIGHTS

Like Rawls, Dworkin believes that the specification and guaranteeing of the rights of individuals is a fundamental requirement for justice in society. Each

person has an equal basic right to equal concern and respect. People are entitled to be accorded dignity and self-respect as individuals, since it is by their collective consent that social institutions come into existence and for their sake that those institutions operate in a certain way. For Dworkin, the rights of individuals arise, not from some metaphysical source, but from the social, political and legal institutions of the society in which they live. These rights express and protect certain interests which the majority of people in such a society commonly regard as valuable.

Society, for Dworkin, is generally a co-operative venture of individual persons whose outlook on the world is basically complementary. All persons have individual values and conceptions of the good. The reason why many individuals can live together in community is because such persons have a generally common world view, in that the interests and values which they hold as important are the same. When the members of a society generally agree on the value of certain interests, they tend to articulate such interests in the form of abstract rights, which they will then seek to protect by creating various institutions and the implementation of certain processes. In many societies, for instance, life, liberty, private property and human dignity are regarded as being valuable interests by individuals and by the majority of the members of such societies collectively. In those societies, then, you may find general or abstract rights to life, liberty, (private) property and certain rights pertaining to the protection and maintenance of self-respect, such as, for instance, a right to the protection of personal privacy. In most cases these rights are then institutionalised so that they become concrete rights, which the institutions of that society will be geared to protect. Certain standards are put in place to safeguard these rights. Such standards include rules of law and legal principles. Social policies may also be developed which tend to advance the welfare of the society's members generally and these may govern the processes of legislation and government. Legal rules and principles are used by judges during the adjudication of disputes to determine the rights of individuals and to determine the extent of individual liberty. These standards make up the 'moral fabric' of the society in question, since they are used to judge and to evaluate the justice or injustice of the social institutions in their operation.

THE LEGAL PROTECTION OF RIGHTS

The courts, for Dworkin, are extremely important vehicles for the articulation and safeguarding of the rights of individuals against undue interference by other social institutions in the pursuit of the wider goals of general welfare. The legislature in a particular society, for example, will have regard to matters of policy in creating arrangements for the general good. The implementation of these policies may have the effect of restricting the enjoyment of individual rights by certain members of society. Where such interference occurs, there is usually a dispute between the individual and the State or other groups of individuals regarding the extent of the individual's rights and the limits of social goals. In such a situation, it is then the role of the judge to determine what rights a person has and to ensure the institutional protection of such rights. Sometimes, these rights are clearly specified by clear rules of law, in which case the judge merely applies the rule to the facts and comes up with an answer. However, in some cases no rule of law will clearly apply, and the judge has to rely on principles in determining the disputed rights.

Principles and policies

Dworkin believes that, in making decisions on the basis of standards other than rules, judges should, and in fact do normally, rely on principles rather than on policies. He defines the distinction between principles and policies in the following way:

- *Principle*: He calls a 'principle' a standard that is to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.
- *Policy*: He calls a 'policy' that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community.
- *General distinction*: Principles are propositions that describe rights; policies are propositions that describe goals.
- *Distinction between a principle-based and a policy-based approach to justice*: Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a

whole. The argument in favour of a subsidy for aircraft manufacturers, that the subsidy will protect national defence, is an argument of policy. Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right. The argument in favour of anti-discrimination statutes, that a minority has a right to equal respect and concern, is an argument of principle.

Rights as 'trumps'

For Dworkin, rights, as described by principles, are 'trumps' which serve to protect the individual against the encroachment of measures which seek to advance collective goals. To this extent, a right is a claim which an individual person can make that their interests be not sacrificed for the sake of the advancement of some social goal. The requirements of pragmatism and utilitarian considerations may sometimes mean that legislators will make decisions based on policies which are intended to secure some benefit, substantial or otherwise, for society generally. Such policies may require the sacrifice or at least a limitation of certain individual rights, including the general right to equal concern and respect. Justice requires that the courts should protect these rights and so principles must become the basis for judicial decisions in relevant situations.

For Dworkin, once a right has come into existence as a genuine right, then it can never be extinguished. In every case where there is a conflict between rights and social goals, the rights of individuals must take precedence. In this regard, Dworkin makes a distinction between 'strong rights', which cannot ever be extinguished or restricted, and other, weaker rights whose operation may in exceptional circumstances be restricted for the sake of some overwhelmingly beneficial goal which is in the general interest.

The example of reverse discrimination

Dworkin commented the case of *The Regents of the University of California v. Allan Bakke* [1978] in a series of three essays on reverse discrimination published in *A Matter of Principle* (1985). The *Bakke* case is a landmark case in America; it bars quota systems in college admissions but affirms the constitutionality of affirmative action programs. In this case a university set aside 16 places for disadvantaged minorities. Bakke, a white applicant, argued that had these 16 places not been kept open for minorities, he would have had a good chance of being admitted as his test scores were quite good. Bakke won his

case and was admitted yet, on appeal, the constitutionality of affirmative action was affirmed by the U.S. Supreme Court.

Dworkin objected to Bakke gaining admission. For him, even if affirmative action rests on the use of 'racially explicit criteria', the long-term goal of affirmative action is to reduce the 'degree to which American society is overall a racially conscious society'. And 'no one in our society should suffer because he is a member of a group thought less worthy of respect than other groups.' Individuals have no right to prevent 'the most effective measures of securing [racial] justice from being used.' In other words, 'weak' individual rights, such as that of being admitted to a particular university, do not function as trumps in the face of compelling social goals such as achieving a society that would be less racially conscious.

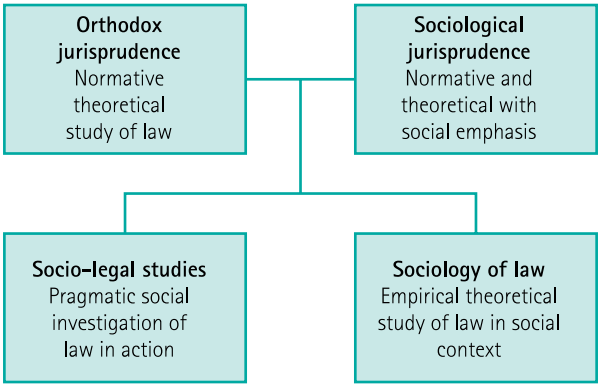
You should now be confident that you would be able to tick all the boxes on the checklist at the beginning of this chapter. To check your knowledge of Rights why not visit the companion website and take the Multiple Choice Question test. Check your understanding of the terms and vocabulary used in this chapter with the flashcard glossary.

7

Theories of law and society

- Difference between sociological jurisprudence, sociology of law and socio-legal studies
- Central assumptions of sociological jurisprudence
- Weber's three ideal stages of development
- Durkheim and social solidarity
- How does functionalism differ from utilitarianism?
- What are socio-legal studies?
- Sociology of law
- Marx's six stages of development
- Historical/dialectical materialism
- What is Pashukanis' conception of law?
- Marxism today

SOCIOLOGICAL JURISPRUDENCE, SOCIO-LEGAL STUDIES AND THE SOCIOLOGY OF LAW



The contention here is that the pure, systematic analyses of law as a closed system carried out by most branches of jurisprudence can never produce a full understanding of the law because they do not take account of the social environment within which legal institutions exist. The fields of sociological jurisprudence, socio-legal studies and the sociology of law are distinct, though related, approaches to the investigation of the relationship between law and other social phenomena. The main link between them is to be found in the belief of scholars working within these schools of thought, in the role that a study of the workings of the various elements of society as a whole or specific combinations of them under certain circumstances has to play in the understanding of the more specific operations of the law as a distinct social phenomenon. The particular differences between these schools of thought are to be found in an analysis of the main social issues which they seek to investigate, and the approaches which they take in relating studies on the law to these issues.

SOCIOLOGICAL JURISPRUDENCE

Sociological jurisprudence is a juristic perspective that seeks to base legal arguments on sociological insights. It is an intrinsically *theoretical* approach to the study of the law and it specifically seeks to understand law as a particular

social phenomenon, in terms of how it comes into existence, how it operates and the effects that it has on those to whom it applies. To this extent, this school of law is very similar in its approach to the other, analytical schools of thought in jurisprudence, such as positivism. Its subject matter is the law proper. However, what distinguishes it from the other schools of jurisprudence is its methodology. Sociological jurisprudence seeks to examine closely the workings of society in general, in order to find therein the factors which determine the nature of law. In this regard, historically it has relied on the findings of social sciences such as sociology, as well as other social disciplines, including historical, political and economic studies, to help explain the nature of law.

Sociological jurisprudence has a long history, and can be said to have emerged with the realisation that a study of the various aspects of social life could assist in understanding the nature and workings of the law. Thus, its place in jurisprudential literature can be traced as far back as the writings of Hume who, in *A Treatise on Human Nature* (1740), argued that law owed its origin not to some quirk of human nature, but to social convention, and who described law as a developing social institution. Montesquieu, in *The Spirit of Laws* (1748), put forward the view that law originated in custom, local manners and the physical environment. He asserted that good laws were those which were in accordance with the *spirit of society*. Through the years, writers on the nature of society, such as Comte, Marx, Weber and Durkheim, have contributed to sociological jurisprudence, putting forward views on how various social phenomena influence the nature of law.

The close link between the theoretical study of the law on the one hand and the independent study of society on the other, has meant that sociological jurisprudence has been closely influenced by developments in the other social sciences, and its views on the nature of law have been progressively transformed. For this reason, it is difficult to point to any one proposition as being the central approach of this school of thought. However, there are certain assumptions which can be identified as characterising the thinking of almost all sociological jurists. The following are some of them:

- Generally, there is a belief amongst sociological jurists that law is only one of a number of methods of social control. To this extent it is not unique in its function and place in society.

- There is a general rejection of the notion that law is somehow a closed system of concepts, standards and structures and that it can stand on its own in its operation. Because there are certain problems which the law cannot resolve, it must therefore be seen as being open to modification through the influence of certain social factors. To this extent, sociological jurists reject what has been called a 'jurisprudence of concepts'.
- Sociological jurists tend to place more emphasis on the actual operation of the law – 'the law in action' – arguing that this is where the real nature of the law manifests itself, rather than in textbooks and other elementary sources.
- In discovering the building blocks of the law, sociological jurists disagree with the approach of the Natural Law school of thought, which proposes that there are certain sets of principles which describe absolute values and which then become or should be the basis of all law. Instead they take a relativistic approach, which regards law as being the product of a socially constructed reality. The basis of the law is to be found in the ways in which people in society regard their situation and their place in it and how society in general reacts to the problems confronting it.
- There is a general interest in utilising the findings of the sociological sciences in understanding the nature of law and thus to make law a more effective tool for social justice.

Views differ, however, as to what constitutes social justice and how best this may be achieved.

The following are some examples of thinkers who have contributed to sociological jurisprudence.

RUDOLF VON JHERING (1818–92): GERMAN LEGAL SCHOLAR

Generally credited with being the father of sociological jurisprudence, Jhering defined law as:

> . . . the sum of the conditions of social life in the widest sense of the term, as secured by the power of the State through the means of external compulsion.

Jhering took up the utilitarian principles of Jeremy Bentham and used them as a basis for the argument that law existed to serve the social interest. The law was to be seen as a coercive instrument which existed to resolve conflicts which might arise between the interests of individuals and the interests of society as a whole. In these circumstances, the common interests of all members of society took precedence over the interests of particular members. The law could not be applied mechanically because it had to operate effectively to ensure social utility.

MAX WEBER (1864–1920): GERMAN SOCIOLOGIST AND ECONOMIST

Max Weber regarded the sociology of law as being central to general sociological theory. He was the first to try to provide a systematic sociology of law, and in doing this he sought to understand the development and workings of Western capitalist society. Weber engaged in historical and comparative studies of the major civilisations in the world as he tried to understand two main features of Western society, that is, capitalism as an institution and rationalism in the legal order. He saw law as going through three 'ideal' stages of development:

- *Charismatic*: where legality arises from charismatic revelation – that is, as a gift of grace – through 'law prophets', who are rulers believed to have extraordinary personal qualities. The law which they propound is supported by an administrative apparatus of close aides or 'disciples'.
- *Traditional*: where charisma may be institutionalised through descent and the law-making powers pass to a successor. Law is then supported by tradition and inherited status, as in the case of new monarchies.
- *Rational*: where there is a 'systematic elaboration of law and professionalised administration of justice by persons who have received their legal training in a learned and formally logical manner'. In this case, the authority of law is based on the accepted legitimacy of the law givers, rather than on charisma. There is a rationalised legal order which dominates in an impersonal fashion.

According to Weber, the rationality of law in Western societies is a result of the rationalism of Western culture. This legal rationalism is the product of a number of factors. Economic forces have played a significant but not necessarily a

pivotal role. Capitalism provided the conditions under which rational legal techniques, once developed, could spread. Institutions of the capitalist system are predicated upon calculation and to this extent they require a 'calculable legal system' which can be rationally predicted. The growth of bureaucracy established a foundation for the systematisation of the administration of rational law. Legal professionals have also contributed to rationalisation. Indeed, Weber regarded English lawyers, with their vested interest in the retention of the anachronistic formalism of the English legal system, as a major impediment to rationalisation of the law in this country.

ÉMILE DURKHEIM (1858–1917): FRENCH SOCIOLOGIST

Durkheim wrote on legal issues ranging from the criminal process to the law of contract. Methodologically, Durkheim was a functionalist, which means that he analysed social facts in terms of the function they fulfilled for the survival of society as a whole. As such, the main function of law is to generate social solidarity.

He made a distinction between two types of such social solidarity or cohesion:

- *Mechanical solidarity*: which he said was to be found in small scale homogeneous societies. Here, he believed, most law would be of a penal and repressive nature, since the entirety of society would take an interest in criminal activity and would seek to repress and deter it.
- *Organic solidarity*: to be found in more heterogeneous and differentiated societies where there is a greater division of labour. In such societies there is less of a common societal reaction to crime and the law becomes less repressive and more restitutive.

Durkheim also believed that crime was a normal occurrence in any society. He even thought that crime fulfilled useful functions as the collective expression of outrage reinforces the social reality of the moral order, and this strengthens the solidarity of the collective. Violation of norms weakens the social bond by undermining the universality of the norms that bind a society. Punishment reaffirms the universal character of the norms. So the social function of punishment is to reinforce the norm. Crime and punishment work together: crime violates norms which are reinforced by punishment, which reasserts the sacred moral order.

ROSCOE POUND (1870–1964): AMERICAN JURIST

Pound set out what may be described as an intrinsically American sociological jurisprudence, in which he treated jurisprudence as an instrument of social technology to be utilised in resolving problems of the satisfaction of competing social claims and the resolution of conflicts in the distribution of social goods. Pound interpreted legal doctrines and institutions in functional terms, with the function of law being to secure social cohesion and orderly social change by balancing the competing interests of individuals, the social and the State. The various claims and interests can be discovered through an analysis of social data, including the incidence of legal proceedings and legal proposals. Such claims and interests exist independently of the law and it is the function of the law to serve and reconcile them for the good of society as a whole. In this regard, Pound saw society as being static, cohesive and wholly homogeneous, with its members sharing traditions and values. In this case, the operation of law would be within an atmosphere of general consensus.

SOCIO-LEGAL STUDIES

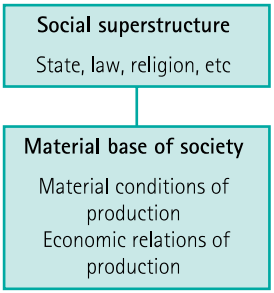
This is an approach to the question of law and society which has in recent years almost completely overwhelmed the field which has traditionally been occupied by sociological jurisprudence. Socio-legal studies, as a discipline, differs from sociological jurisprudence in that it does not have any specifically theoretical underpinning. Unlike the latter, which seeks to provide an analytical conception of the idea of law by looking at other social phenomena, the field of socio-legal studies is more concerned with pragmatic issues of how best to make the law, in its various aspects, work more effectively to achieve specific goals, usually identified with the idea of the rule of law or some notion of justice.

Scholars in socio-legal studies are generally not concerned with explaining the nature of law or its place in society or in relation to the State. There is a general acceptance of the legal system in its essence as being a central element of social life whose position in regard to other social institutions and the State is essentially unproblematic. They instead advocate the recognition of law in its accepted social context, emphasising an empirical approach to the problems raised by the operation of the legal system and reform-orientated research which looks more to the 'law in action' than the 'law in the books'.

THE SOCIOLOGY OF LAW

This field of legal study has gained precedence particularly in the last 35 years. It is different from sociological jurisprudence in its approach to the question of law and society, both in terms of its ideology and its methodology. Whereas sociological jurisprudence sought to provide an understanding of the *nature of law* through certain social phenomena, the sociology of law seeks to explain the *nature of society* from an investigation of the law as a form of social control. For example, on the basis of recent developments in criminal law involving today intensive surveillance mechanisms, many scholars argue that we live in a culture of control. The nature of our laws allows us to diagnose the kind of society we live in.

THE MARXIST ACCOUNT OF LAW AND SOCIETY



The initial proponents of Marxist theory were Karl Marx (1818–83), Friedrich Engels (1820–95) and Vladimir Lenin (1870–1924). The Marxist school of thought is a comprehensive system of thought, covering, among other things, the areas of sociology, history, politics and economics. Specific Marxian writings on law have generally been rather sparse. This is because of the secondary place that law and other elements of what Marxists regard as the social superstructure have been allocated in Marxist theory.

Materialism – base and superstructure

Marxist theory is materialist, which means that the material conditions of life – economic, physical, environmental – are the most important factors in society. Marx and Engels use the base-superstructure metaphor. The base consists of the relations of production – work conditions, the division of labour, and ownership of means of production – which people enter into to produce the necessary commodities of life. These relations fundamentally determine society's other relationships and ideas, and condition the superstructure. Yet, their relation is *not* strictly causal, because the superstructure often influences the base; however the role of the base in determining the superstructure is dominant. For example, the shift away from agriculture to mass industrialisation leads to a change in political models of government.

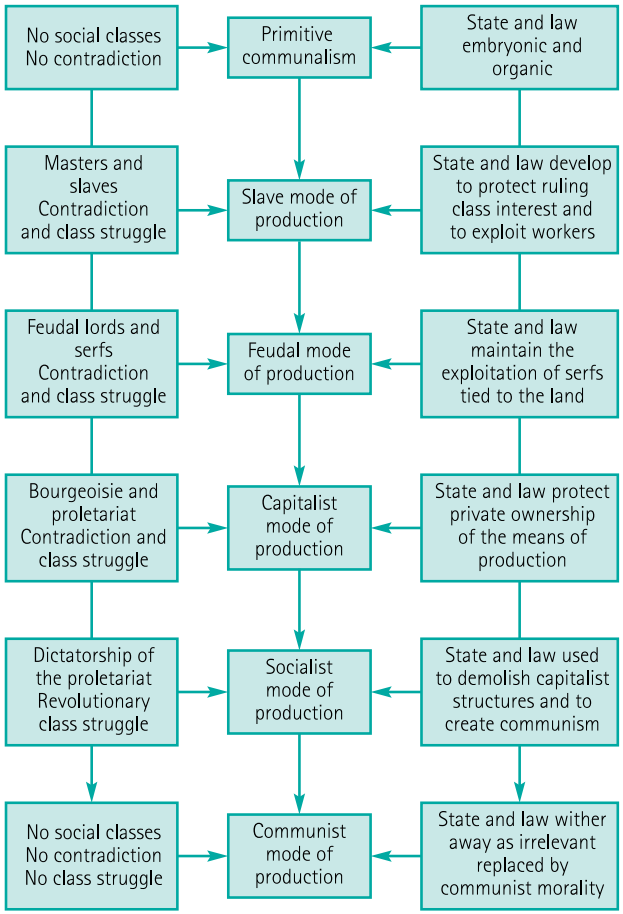
MARXIST HISTORICAL MATERIALISM – THE HISTORICAL DEVELOPMENT OF ECONOMIC RELATIONS OF PRODUCTION

See diagram overleaf (p 118).

Marxist thought is also characterised by *economic determinism*, since it argues that the development of society from one stage to the next is inevitable, and that it is the changes in the economic environment, with changes in the relations of production, which dictate the rate of social development. Marxist ideas on social development thus place much emphasis on the historical stages through which human society has gone, seeking to demonstrate that the transition from one stage to another is inevitable, and that such transition is directly linked to a transformation of the material base of society. This is what constitutes the historical materialist conception of society and law within the Marxist school of thought. There are supposed to be six main stages of development – or modes of production – through which societies are supposed to go.

1 Primitive communalism

This is the earliest stage of society, when people have just come together to live in specific communities. The mode of production is characterised by a communal effort in the production of the means of sustenance, since technology is relatively rudimentary and there is no distinctive division of labour. The *means of production* – that is, the main natural and other resources from



which something of value may be extracted, for example, land – are communally owned, if at all, and everybody gets the full value of the labour which they put into production, since there are no employers and employees. At this stage, there is little need for centralised regulation of social or economic activity, and so specific administrative institutions, such as the State or law, do not exist. Social control is through communal morality and social pressure.

However, at some stage, certain contradictions start to occur within this society. These contradictions arise primarily as a result of the accumulation of personal property. With the development of the *forces of production*, such as, for instance, the technological improvement of the *instruments of labour*, it becomes possible to produce more, and in this situation some persons begin to acquire a surplus of the wealth extracted from the basic means of production. Inequalities between individuals and groups begin to appear. There is a division of labour as people diversify in the search for more rewarding occupations. People who have acquired wealth will seek to acquire even more through employing the labour of others. This is the beginning of the division of society into classes which are primarily antagonistic towards each other. A section of the community will gradually and inevitably acquire control of the means of production, whilst the rest are made to work with little or no reward for their labour. The State arises under these conditions as an instrument by which the owners of the means of production will seek to maintain their exploitation of the dispossessed who are then kept in a state of subservience through the use of law and other social institutions which arise or are created specifically to protect the interests of the owners of the means of production, who then become the ruling class. The State and law are thus the direct products of the economic relations of production, where there is a division of labour, the demarcation of society into classes with contradictory interests, and inequalities in the benefits which people get from the fruits of their labour.

2 Slave mode of production

The contradictions which arise in primitive communalist society due to changes in the economic relations of production will inevitably come to a head when the State and law are strengthened to the extent where the ruling classes can control, not just the labour of the oppressed classes, but their very lives. It becomes necessary in this case to institute social arrangements which have the ultimate effect of denying the oppressed classes their very individuality and humanity, turning them into chattels at the disposal of the owners of the means of production. This heralds the advent of the slave mode of production, where social, political and legal institutions are used directly to confirm and protect the *status quo*. Laws in this mode of production have the specific function of keeping the slaves under control, protecting the interests of the slave masters, and ensuring the continuation of the relations of production.

The State also exists primarily for this purpose. However, it is inevitable that there will be a *class struggle*. The chained masses cannot remain subservient forever, and slave riots, etc., will begin to affect production. Eventually, it will become counterproductive for the ruling classes to maintain the economic relations of production which underpin the slave mode of production. The contradictions characterising this mode will eventually resolve themselves in a loosening of the control which the ruling classes have over their slaves and this paves the way to a newer and qualitatively different mode of production.

3 Feudal mode of production

In this mode of production, the oppressed classes are still exploited, but they cease to be the direct property of the ruling classes. They are given relative freedom, and some access to the means of production, through being allowed certain property; for example, they are given portions of land to farm. However, they are still tied to the feudal lords, who are still the ruling class and who still control the means of production. Serfs are attached to the land, and have to hand over a portion of what they produce to the feudal lord. The lord thus gains the surplus value of the labour of the serfs. There is still a class division in society, and the class struggle continues. The State and law of the feudal mode of production reflect the existing economic relations of production and are geared towards protecting the interests of the ruling classes. There are still contradictions which will push society to move on to another mode of production.

4 Capitalist mode of production

In the capitalist mode of production, the serfs are unshackled from the land and from their social and political masters. They have relative freedom of movement and are capable of owning some personal property. However, this freedom serves simply to enable the oppressed classes to be at liberty to sell their labour for a wage, which is of less value than the actual value of the labour which they put in. The ruling classes, now capitalists, have no responsibility for the welfare of the working classes since the latter are at *liberty* to roam around and sell their labour on the market. Yet, the capitalist class still own the means of production and they appropriate the surplus value, which is the difference between the actual value of the labour which the working classes put into production, and the value of the wage which they receive for

working. Under these circumstances, the working classes – *the proletariat* – are naturally antagonistic towards the capitalist class – *the bourgeoisie* – and the class struggle continues. As before, the State and law are instruments by which the ruling classes keep the oppressed classes under control. The existing exploitative economic relations of production are maintained and protected through a number of social, economic, political and legal devices. The fallacy is perpetuated, and the working class is persuaded by various means to accept it, that all individuals in society are actually free, that the political system is liberal and democratic and therefore one which looks after the interests of all, and that private property is the highest and most appropriate expression of each person's humanity and individuality. Laws are promulgated which protect personal property, and the courts are supposed to protect individual rights and liberties. However, the only people who have property, rights and liberties worth protecting are members of the ruling class. The law and State are again merely the instruments of exploitation, expressing, securing and maintaining the economic relations of production. Contradictions are at their deepest in capitalist society and the class struggle reaches a stage where it has to be resolved in some sort of revolutionary upheaval.

5 Socialist mode of production

The socialist mode of production is brought about through a revolution of the proletariat, in which they overthrow the bourgeoisie ruling class and establish a dictatorship of the proletariat. This is a transitional stage in which the working class, who are now the ruling class, use the power and institutions of the bourgeoisie State to transform the capitalist economic relations of production. Private property is abolished, the means of production are placed under communal ownership and capitalist institutions are demolished. In the socialist mode of production, the State and law are fairly strong, since these are the weapons by which the proletariat will dismantle the bourgeoisie superstructure and create new relations of production, where those who work get the appropriate value of their labour.

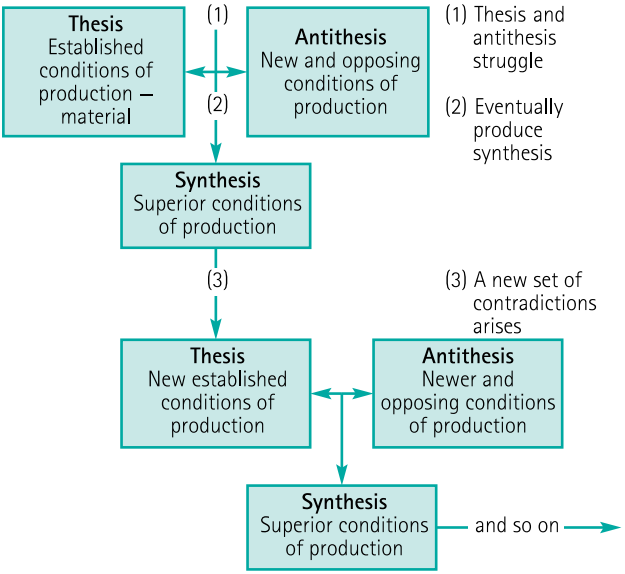
6 Communist mode of production

The ultimate goal of the dictatorship of the proletariat is to create a classless society, where there are no inequities in access to the means of production. Such a classless society is described by the Communist mode of production.

Because there are no classes, there will be no class struggle. Because most people are relatively satisfied there will be no criminal or other antisocial activities which characterise the capitalist mode of production. Because the economic relations of production are not exploitative, there are no contradictions in society. Under these circumstances, there will neither be a need of the State nor of law. Such institutions will therefore wither away. Conflicts between individuals, which will inevitably arise, will subsequently be resolved through the operation of an emerging public Communist morality.

MARXIST DIALECTICAL MATERIALISM

(See also p. 8). The historical development of society, described above, is regarded by Marxist theory as inevitable. Marxists regard irreconcilable contradictions as inherent in all modes of production prior to the establishment of Communist society. These contradictions are a result of the division of society into classes and exploitative relations of production. The contradictions are reflected in the ongoing class struggle.



The idea of contradictions in the material base of society and their inevitable resolution through transition to a newer and 'higher' mode of production with different relations of production is the linchpin of Marxist social and legal theory. It is based on the notion of the dialectic, first established by the German philosopher, Hegel, and later adopted by Marx. Hegel believed that the basis of all social development was the contradiction between ideas – between a thesis (established idea) and an antithesis (opposing idea) – whose resolution would lead to the establishment of a newer and higher idea – the synthesis – which in turn would be challenged by a different antithesis.

Marx adopted the Hegelian dialectic and, as he said, 'turned it on its head'. Instead of being the motor of social development, ideas simply became the expression or reflection of such development. The development itself was based on changes within the material conditions of social life – particularly the economic relations of production. This material base underwent changes arising from contradictions within itself, and these had little to do with ideas. In each mode of production was to be found a thesis, consisting of the established relations of production. This would be challenged by an antithesis, comprised of elements of the class struggle. The result would be a different set of relations of production, which would herald the dawn of a new mode of production. In all this, the State, law and other institutions have little influence except as instruments in the hands of the ruling class to be used to protect their own interests. These institutions are neither self-supporting nor autonomous. They are merely part of a superstructure – a flimsy covering for the actual factors determining social development.

EVGENY PASHUKANIS' MARXIST INTERPRETATION OF LAW (1891–1937)

The Soviet jurist Pashukanis applied Marx's ideas to legal theory. *Law and Marxism* was written shortly after the October Revolution, still in the heyday of communism. It contains fairly revolutionary ideals.

Pashukanis' account is more ideologically informed than economically oriented: our law is bourgeois law centred on a mythical, free-willing individual, and in fact is an instrument of class domination (by protecting the property rights of the dominant class as well as the social and moral structures which support them). The supposed neutrality of law is a myth, for the

very form of law in capitalist societies reflects the fact that legal subjects are primarily conceived as property owners.

Pashukanis argues, after Marx, that all creative processes are seen in terms of commodities (i.e. can be bought and sold and so have a value as commodity, including labour). Therefore, individuals relate to each other as property owners (of labour, means of production etc.) and the law reflects that because it protects primarily the freedom of market transactions. Further, legal subjects are seen in terms of individual rights and duties, as equals. Real differences in the material conditions of existence of different people are glossed over as irrelevant to law.

In the same way, criminal law is primarily designed to protect class interests.

> The would-be theories of criminal law which derive the principles of penal policy from the interests of society as a whole are conscious or unconscious distortions of reality. 'Society as a whole' does not exist, except in the fantasies of jurists. In reality we are faced only with classes, with contradictory, conflicting interests.

For Pashukanis, law is thus an ideological instrument in the hands of the dominant classes. And a successful legal system is a system where people do not notice that its primary function is to perpetuate class domination.

MARXISM TODAY

Marx's vision of the end of the private ownership of the means of production – and so of capitalism – as the natural outcome of human history, which was to be achieved after a necessary period of dictatorship by the proletariat, started losing credit in most Western countries when the reality of communist regimes started to seep through to the West. By the time Mao's Cultural Revolution peaked in China in 1968, leading to the verbal and physical abuse of the 'bourgeoisie' and resulting in many deaths, most European intellectuals and activists had severed their connections with communism-inspired politics. In the UK the final blow to the credibility of Marx's political economy came with the collective movements of the 1980s (such as the miners' strike), movements whose ultimate failure highlighted the weakness of organised labour and so the vacuity of the Marxist promise of a classless society.

Yet, if socialism ceased to incarnate a plausible future for mankind some time in the 1980s, Marxist thought retains its importance as a critical tool to this day. Thus in the UK, by the mid-1970s Marx's conceptualisation of society in terms of power-relations provided the theoretical framework for all critical inquiries into the nature of law, power and authority, with narratives of oppression and domination proliferating as means of problematising the status quo (e.g. feminism, anti-psychiatry, discourses on race, colonisation, criminality, poverty and so on). And even today, though there are few bona fide Marxists left, there certainly lingers, in most left-leaning theoretical work, a tendency to interpret 'reality' in terms of oppressed/oppressor dichotomies.

In fact Marx's theoretical influence in the 1970s and 1980s was matched only by that of Sigmund Freud, probably because of the fundamental challenge embodied by both thinkers to the idea of society as a benevolent and progressive edifice. Indeed for Marx, human societies are structured by relations of exploitation and oppression, with the State cast as the primary instrument of domination. For Freud, the repression of desire is both a precondition to, and an effect of, civilisation (*Civilisation and its Discontents*, 1929). It is perhaps only with the work of Michel Foucault (see Chapter 9) that these – admittedly over-simplistic – interpretations of the Marxist and Freudian theories started to be themselves truly problematised.

You should now be confident that you would be able to tick all the boxes on the checklist at the beginning of this chapter. To check your knowledge of Theories of law and society why not visit the companion website and take the Multiple Choice Question test. Check your understanding of the terms and vocabulary used in this chapter with the flashcard glossary.

8

Feminist legal theory

- Do we still live in a patriarchal mode of social organisation?
- Feminism as political activism
- The equality/difference debate
- The public/private divide
- Feminism and power
- The feminist challenge to the reasonable man test
- The question of freedom
- How does feminist legal theory relate to legal practice?
- Feminism and political philosophy
- Key figures in feminist theory

ORIGINS AND AIMS OF FEMINIST LEGAL THEORY

The basic starting point of feminist legal theory is the belief that law essentially reflects the view of men, who have made the law to suit their representation of reality. Thus it is often said that law is 'patriarchal', favouring masculine values and concerns.

Patriarchy

- Refers to the structuring of families around the figure of the father.
- The father is endowed with primary authority over other family members.
- By extension, patriarchy refers to a model of social organisation in which men take primary responsibility for all functions of authority.
- In such models men are the dominant figures in all fields of decision-making: social, economic, political, legal.

Most forms of feminism challenge patriarchy as an unjust social system that is oppressive to women.

One of the consequences of law being man-made is that the concerns of women are often overlooked or trivialised. The low conviction rate in rape cases and the question of domestic violence are cases in point.

Feminist legal theory explores the theoretical issues arising from the relationship between women and law, with the aim of moving towards a system in which women (as well as men) are treated fairly in society. Feminist legal theory is therefore subversive: it aims to change society. As a result of some bad PR, the term 'feminism' seems to conjure up an image of 'manhaters' rather than women (and men) who merely object to the treatment of women as second-class citizens.

- Feminists want justice rather than the domination of one sex over the other.
- Unlike jurisprudence, feminist legal theory is therefore rooted in political activism.
- The feminist movement has struggled for women's equality and freedom at different points in history, whenever women have refused to be downtrodden.
- For this reason, the feminist movement has much in common with anti-racist movements.

The law has historically played a role in women's oppression. For example, under the 'doctrine of coverture' married women were not even viewed as 'persons' in law and therefore could not own property or sue or be sued in the courts. It was legal for husbands to beat their wives. There were a number of cases in which women challenged their position in the courts, culminating in the Persons Case: *Edwards v Attorney General* [1929] AC 124, in which it was finally conceded that women were to be classified as persons. Afterwards, the press congratulated women on the progress they were making.

This is a useful lesson about the common law. Rather than recognising that the court was forced to overturn a legal precedent (that women were not to be classified as 'persons') as a result of the political achievements of the suffragettes, the papers pretended that the law had always been correct! Women were treated as if they had just been transformed into 'persons', instead of simply overturning oppressive laws. Similarly, women fought to be accepted as lawyers and judges, not only to be able to vote but to be in Parliament and to be respected in daily life. Note that this raises theoretical issues about what it means to be a 'person', the law's claim to define us and how the common law operates (for an accessible introduction to this history, see the classic: A Sachs and JH Wilson, *Sexism and the Law: A Study of Male Beliefs and Judicial Bias,* Oxford: Martin Robertson, 1978).

Today in the West, women's position has vastly improved from the days of the doctrine of coverture. However, feminists point out that there are still inequalities in the UK. Women's pay continues to be lower than men's despite the Equal Pay Act 1970. Women still end up working a 'double day': taking on more work within the home than men, alongside paid employment. They end up with more menial roles, both in the workplace and the home, and are subject to more negative stereotypes: for example, there are still some sexual double standards, with women treated more harshly than men for enjoying sex.

Feminists claim both freedom and equality for women. Feminist legal theorists are interested in how these terms can be understood. They are also concerned as to how the subordination of women overlaps with other forms of subordination, for example on the grounds of race, sexuality or disability. What perpetuates different inequalities? No feminist legal theorist is likely to argue that sexism is the only area of subordination. They see the struggle for a fairer society as including other areas in which people are positioned as second class

or exploited. There are a number of central theoretical problems that have been raised by feminist legal theory. The most important debates will be discussed in turn.

SUMMARY: ORIGINS AND AIMS OF FEMINIST LEGAL THEORY

- Feminist legal theory explores the theoretical issues arising from the relationship between women and law, with the aim of moving towards a system in which women (as well as men) are treated fairly in society.
- Feminists claim both freedom and equality for women. Feminist legal theorists are interested in how these terms can be understood. They are also concerned as to how the subordination of women overlaps with other forms of subordination, for example on the grounds of race, sexuality or disability.

EQUALITY/DIFFERENCE DEBATE

There has been much discussion of this problem within feminist legal theory. The problem is historical and expresses a dilemma faced by feminists. Societies have often tried to justify treating women as second class on the grounds that they are *different* from men. The ways in which they have been viewed as different have changed historically – showing how inconsistent sexist arguments against women can be. So, for example, when the ability to think (or to use reason) became viewed as important then women were stereotyped as being irrational. However, when, at a different time, sentiment was prioritised women were viewed as too rational!

How have women responded? They have often argued that they should have *the same* legal rights as men because they are basically *the same* as men, that they are equally rational, for example. This is the 'equality' argument. This seems fair enough, but there are some areas in which women and men do differ. The extent to which this is the case is contentious, but it is clear that the experience of pregnancy is at least one example. If women are to be treated exactly the same as men, then how should pregnant women be treated?

A practical legal example can illustrate this argument. Initially, employers argued that to sack a woman on the grounds that she was pregnant could not be classed as sex discrimination because there could be no pregnant male to

compare a woman's situation with. Later the courts compared the employer's treatment of pregnant women with that of sick men. It was only later that the sacking of a woman on the grounds that she was pregnant became classed as sex discrimination *per se*. Some feminist legal theorists argue that women should not have to ground their claim for justice on having to prove that they are exactly the same as men. This is the 'difference' argument.

The problem for the 'difference' argument is that it can be seen as playing into the hands of those who want to see women's freedom restricted on the grounds of their sex. Just as arguments about racial difference have been used to try to justify racism, so an emphasis upon sexual difference has been used to try to excuse sexism.

There have been different ways of dealing with the equality/difference problem. For example, Drucilla Cornell has argued that, instead of claiming equality with men (which involves comparing women with men), women should base their claims upon the freedom to define themselves as persons. She suggests a broad legal test that derives from philosophical principles: that when judges decide a case they should consider whether 'free and equal persons would agree'.

SUMMARY: EQUALITY/DIFFERENCE DEBATE

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- How have women responded? They have often argued that they should have the same legal rights as men because they are basically the same as men in the areas that are relevant (that they are equally rational, for example). This is the 'equality' argument.
- Some feminist legal theorists argue that women should not have to ground their claim for justice on having to prove that they are exactly the same as men. This is the 'difference' argument.
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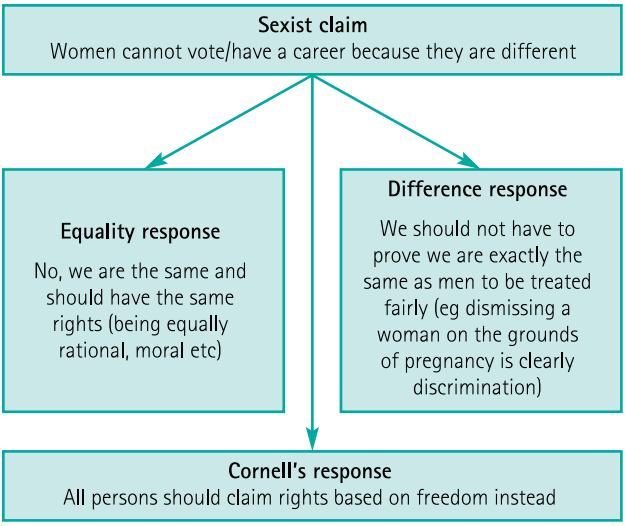

PUBLIC/PRIVATE DIVIDE

Care must be taken not to confuse this distinction with the relationship between public law (involving the State) and private law (in which the litigants are individuals or companies). When feminists talk about the 'private realm', in this context, they mean 'the household', and 'public' refers to everything else, including what happens in the workplace and in government.

Why is the public/private divide important for feminist legal theory? Some societies, at different times, have tried to restrict women to work within the home and to view them as outside of public life, hence stopping them from having a voice in democratic decisions or even a career. Some political/legal theorists have therefore ignored women's subordination and exploitation, viewing it as something 'private' that should not be the concern of the law. This has been linked with a similar view that what happens to women in the home is somehow 'natural' rather than a political issue. This is analogous to the way racists have tried to justify racial discrimination by claiming that ethnic minority people are somehow 'naturally' inferior, hence better suited to certain jobs. Here, sexists try to argue that women's position in the family is 'natural' despite the fact that the 'family' has taken different forms in different cultures.

The public/private divide has been detrimental to women because it has allowed behaviour that would usually be viewed as a crime, such as domestic violence, to go unpunished. In other words, by viewing wife-beating as 'private' it was not subject to regulation by law. It is only because of protests from feminists that the police are now expected to treat domestic violence as a serious issue. One of the important slogans of the 1960s' feminist movement, 'the personal is political', captures this important point. Feminists argued that 'politics' is not simply about what happens in government but concerns all acts of power, including the way in which women are treated in everyday life. In this way feminist legal theorists recognised that women were not demeaned or constrained because of some personal or natural characteristics but because of the way in which society was organised. It was therefore possible to change it.

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- The public/private divide has been detrimental to women because it has allowed behaviour that would usually be viewed as a crime, such as domestic violence, to go unpunished, i.e. to be viewed as 'private' and hence outside of the protection of the law.
- One of the most important slogans of the 1960s' feminist movement, 'the personal is political', captures an important point linked with this: feminists argued that 'politics' is not simply about what happens in government but concerns all acts of power, including the way in which women are treated in everyday life.
- Feminist legal theorists recognised that women were not demeaned or constrained because of some personal or natural characteristics but because of the way in which society was organised. It was therefore possible to change it.

POWER

Just as feminist legal theorists have argued that the treatment of women in the home is political, they have also examined the meaning of 'power'. In this area, feminist concerns have dovetailed with contemporary continental philosophy. It is necessary to think carefully about this point. A traditional view of politics was that 'politics' described acts performed by government: the passing of laws, the workings of the institutions of State. Power was viewed as being held by the government. Feminists have argued that the term 'political' applies to all areas of life in which some people have power over others and in which there are struggles for freedom from oppression. (It is worth noting that the recognition that husbands have traditionally had power over wives is not new. Historically, if a wife killed her husband it was legally classed as a type of treason!)

Recently, some feminist legal theorists have built on the work of the influential philosopher, Michel Foucault (1926–84). Foucault traced the operation of 'micro-processes of power' (mundane operations of power in everyday life) in ways that fitted with feminist analyses of power which also focused upon everyday power struggles (see Critical Legal Studies).

SUMMARY: POWER

- Feminist legal theorists have analysed power in a way that is attentive to everyday operations of power, particularly of men over women. This is a more subtle view of power than the view that it operates in a top-down manner from the State, through law to the citizen.

THE 'REASONABLE MAN/PERSON'

In tort law, the test for breach of duty in negligence is that the defendant has fallen below the standard of the 'reasonable man'. This has been updated to refer to the 'reasonable person' but this change of vocabulary does not address a problem raised by feminist legal theorists. They have pointed out that the 'reasonable person' test assumes that there is only one view in society as to what should be classed as reasonable behaviour. Most of the time we may all agree. The problem arises in situations when views as to what amounts to reasonable behaviour differ according to whether one is a man or a woman. For

example, there was a time when men viewed some behaviour as 'just a joke' which most people would now classify as sexual harassment. There has been a cultural change as to what is acceptable behaviour. Before this change in attitudes, men and women would have different views as to what was reasonable behaviour. This may still be the case, because women are conscious that some sexual behaviour by men may escalate and they may feel threatened by a man's sexual comments, whereas the man may not have intended to be threatening. If there is no universal standard of behaviour then the 'reasonable person' test is impossible to apply. Whose judgment should apply?

Feminist legal theorists, like critical legal theorists, have also pointed out that, irrespective of the label of a test, it is the judge's views that will prevail. This raises a different practical problem about the way in which judges are appointed. Given that there are so few women judges then it is likely that a male view of what is 'reasonable' will prevail.

SUMMARY: THE 'REASONABLE MAN/PERSON'

- Feminist legal theorists have pointed out that the 'reasonable person' test in tort law assumes that there is only one view in society as to what should be classed as 'reasonable behaviour'. Most of the time we may all agree. The problem arises in situations when views as to what amounts to reasonable behaviour differ according to whether one is a man or a woman, for example in some cases of sexual harassment.
- This problem will occur whenever there is a universal test about a matter that is subject to disagreement by groups in society.
- This problem also highlights a different feminist concern: that the vast majority of judges are men because of earlier unfair selection procedures, such as an old boys' network. Although there have been discussions about how to make the selection procedure fairer in recent years, the judiciary is still male dominated.

FREEDOM

Feminist legal theorists have often been more concerned to discuss the problem of how to define 'equality' (and the problem of the equality/difference debate) than to think about freedom. However, there are some

recent, interesting analyses of freedom from a feminist perspective. Feminists have focused on the practical constraints on women's lives, for example, under which circumstances are women able to leave violent men? The law tends to look at individuals outside of their social context and therefore assumes that someone makes a choice out of their own individual 'free will'. Feminist legal theory, in common with critical legal theory, highlights the importance of the social context within which decisions are made. For example, a battered woman may decide to stay because she has children and is economically dependent upon a man. Were she given better options and more support, she would be able to move to safety with her children. Whilst many philosophical arguments on free will are abstract, feminist legal theory tends to draw from concrete examples of problems arising in an unequal society as the starting point for their theoretical analyses.

It is generally accepted that feminism promotes freedom for women, irrespective of the choices they make. The concern is that they may find it difficult to challenge certain assumptions. The consciousness-raising movement in the 1960s was based upon the idea that the existing norms of behaviour in society were so pervasive and difficult to challenge that women accepted a degree of subordination without questioning it. This raises questions about the extent to which our choices can be viewed as 'free'. In 'consciousness-raising' meetings women could informally compare their experiences with other women. This was particularly important because some women had been beaten up at home (or were sexually harassed at work) but felt either that it was their fault or that such behaviour had to be put up with as part of women's lot; shame could also prevent them from talking about it. If you compare your experiences with those of others, it is possible to discover that you are exposed to similar problems that arise from social attitudes which, for example, routinely treat women as available sex objects for men.

The 1960s also saw the rise of other social movements such as struggles against racism and homophobia. Black women and gay women made it clear that the feminist movement should represent all women and not simply be a tool of white middle class women who wanted greater freedom to access the professions.

SUMMARY: FREEDOM

- Feminists support greater freedom for women and focus upon the practical implications of freedom in everyday life.
- Feminist legal theory, in common with critical legal theory, highlights the importance of the social context within which decisions are made. For example, a battered woman may decide to stay with her violent partner because she has children and is economically dependent upon him. Were she given better options and more support, she would be able to move to safety with her children.
- Whilst many philosophical arguments on free will are abstract, feminist legal theory tends to draw from concrete examples of problems arising in an unequal society as the starting point for its theoretical analyses.

RELATIONSHIP BETWEEN FEMINIST LEGAL THEORY AND PRACTICE IN LAW

Recently there have been a number of debates in the journal *Feminist Legal Studies* about the relationship between feminist legal theory and feminist legal practice. Feminist legal practice includes the work of solicitors and barristers who are concerned with practising law in a way that changes the law and so has a practical impact upon women's lives. Importantly, as the Norwegian legal feminist Tove Dahl has pointed out, this need not be about issues that are necessarily classed as 'women's issues' such as discrimination law; welfare law affects more women than discrimination law for example. Her argument was that, when it comes to law reform, feminists should concentrate on trying to improve the laws that actually affect women in practice.

Feminist legal theory is not simply concerned with improving the law. Its reach is broader in terms of the subjects analysed, and jurisprudence and philosophy are drawn upon to problematise theoretical issues arising out of the relationship between women and law (e.g. what do terms like 'freedom' and 'equality' mean?). Feminist legal theory is also critical of the ways in which legal and political philosophers have made sexist assumptions about women and so it considers how (and whether) this has affected their work. Often the position of women is revealed to be a 'blind spot' for traditional writers. By focusing upon the view of women in these theorists' work, feminist legal theorists have