INTRODUCTION TO THE CANADIAN LEGAL SYSTEM

SASHA BAGLAY

Introduction to the Canadian Legal System

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Preface

This book was inspired by my experience of teaching a first-year Introduction to the Canadian Legal System course at the University of Ontario Institute of Technology (UOIT). The course needed the right balance between substantive law and theory, sophistication and accessibility, and breadth of coverage and depth of analysis, so I wrote the book with these considerations in mind. On the one hand, it is an introductory text intended primarily for first-year university students in disciplines such as law and society, political science, and legal studies. It may also be a useful resource for some second-year university courses as well as college students in law-related programs. On the other hand, the book goes beyond a mere outline of the basics and seeks to help students challenge and question legal rules. It includes a variety of case studies that exemplify the workings of the law and show students the connections between the discussed rules and real life. The writing of this book was an enjoyable learning experience, and I hope the final product will offer a similarly accessible and exciting learning opportunity for you, the reader.

The book is divided into two parts. Part 1 represents a general introduction, covering the systems and sources of law, structure of Canadian government, Canada's courts, theoretical perspectives on the law, and the *Constitution* and the *Charter of Rights and Freedoms*. Part 2 examines six selected areas of law: administrative law, criminal law, contract law, tort law, family law, and human rights in Canada. Each chapter in this part provides not only an outline of substantive law, but also a critical analysis of its selected issues, utilizing theoretical perspectives discussed in Part 1.

In addition to the printed book, the Pearson Custom Library contains two more chapters that can be accessed electronically on the Companion Website; they deal with alternative dispute resolution (ADR) and international law. The ADR chapter describes three main mechanisms of resolving disputes outside of traditional court litigation processes (negotiation, mediation, and arbitration) as well as provides an overview of typologies of conflicts and responses to conflicts—information that helps us to better understand underlying tensions between parties to a dispute and to find more effective ways to address them. The chapter on international law outlines main characteristics of public international law and its difference from domestic law, provides an overview of the United Nations as the main international organization that helps promote peace and interstate cooperation, and briefly reviews three selected areas of international law: the responsibility to protect, prohibition on the use of force in interstate relations, and international criminal law.

Two major themes resonate throughout the book:

1. Principles of liberty, justice, and limited government as guiding values of our legal system. They are reflected and engaged in one way or another in all areas of law. The constitutional structure of our government protects individual liberties and provides

for a range of mechanisms that serve as a check against arbitrary and abusive use of power. The ideas of justice are promoted through the rules of various areas of law: for example, in tort law, through the obligation of wrongdoers to compensate victims for the harm inflicted; in criminal law, through imposition of punishment on offenders; and in administrative law, through the requirements of fairness in government decision making.

2. Pluralism of perspectives and critical analysis. The book emphasizes that there are multiple ways of understanding and analyzing the law: law can be defined in different ways and there may be a variety of views on its underlying values and functions. The book offers students a range of perspectives that can be used for the analysis of legal phenomena. It emphasizes that understanding of the law cannot be separated from its critical analysis: it is not enough to know the content of legal rules; it is necessary to question their underlying rationales, evaluate their perceived objectivity and neutrality, as well as explore the potentially differential impacts of those rules on various groups in society.

As you read the book, you will discover that law does not always provide clear or satisfactory answers; it is a process that evolves under the influence of many factors, including our everyday practices in applying the law, behaving according to it, or challenging rules that we consider unfair or illegitimate. Learning the law is a constant quest, but this is what makes it so exciting. Enjoy the journey!

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Sasha Baglay

Chapter 1

What Is Law?

Learning Objectives

After reading this chapter, you should be able to:

- Describe at least five approaches to the definition of law.
- Explain three main functions of law.
- Name three main characteristics of legal rules.
- Describe three main reasons why people obey legal rules.
- Explain the notion of the rule of law.
- Name four ways to classify legal rules.

Chapter Outline

Introduction

What is law? At first blush, it seems to be an easy question: everyone intuitively knows what law is. Yet, on further contemplation, you may discover that there is no one simple answer to it. For centuries, scholars have debated the issue and come up with a variety of responses. In fact, in order to answer "What is law?", we need to examine at least five sub-questions:

- How is law developed and expressed? That is, what form does it take: oral narrations? written documents? ceremonies?
- What are the functions of law in society?
- What values does law reflect and what values should it reflect?
- What are the characteristics of legal rules?
- Why do people obey legal rules?

In this chapter, we will discuss each of the above questions and familiarize ourselves with the concept of the rule of law and various ways to classify legal rules. The ultimate objective of this chapter is to introduce you to various approaches to understanding the law and its forms, functions, and characteristics.

1. HOW IS LAW DEVELOPED AND EXPRESSED?

Read the two descriptions that follow. In your opinion, which one more accurately reflects how law is developed and expressed?

Description 1: Law is a system of rules that are created by a government authority and supported by the enforcement powers of the state. The rules appear in a written form as statutes, regulations, and judicial decisions. Rules are created according to formal, centralized, and strictly prescribed processes. While the general population may have some input into the formation of legal rules, for the most part, it is delegated to specialized bodies: statutes are passed by legislatures; regulations, rules, and policies are developed by various executive departments; and common law rules are developed by courts. Legal rules are arranged in a hierarchy, with the *Constitution* being the supreme law with which all other laws must comply.

Description 2: Law is "the expression of the way to live a good life."[1] It derives from multiple sources: customs; codes and regulations made by chiefs and clan elders; creation stories; and observation of the physical world.[2] Rules are produced in a decentralized manner, often through deliberation and discussion by community members. Such meetings can be formal or informal, ad hoc or highly structured.[3] Law is interrelated with spiritual, political, and other practices of a community. While some rules are written, others are passed through oral narration from generation to generation. Spiritual connection to the land is of great significance to the community. The law's role is to help maintain good relations within the community, with other communities, and with the land and its inhabitants.[4]

Which of the two descriptions provides an accurate characterization of the development and expression of the law? Actually, both of them do. Roughly speaking, description 1 is closer to the system established by the dominant European settler society in Canada—something that many of us are more familiar with. It reflects a state-centred approach to law: law is produced and enforced by government authorities in a highly structured and hierarchical way. Description 2 more closely reflects Aboriginal legal tradition, which represents a deliberative, nonhierarchical, and community-driven process of law creation. Both of these forms of law (descriptions 1 and 2) are present in Canada.

These examples show us that law may be expressed in a variety of ways and should not be understood merely as a system of government-pronounced rules. In fact, in every jurisdiction, various legal regimes exist at the same time: there are centralized rules produced by the state; local customs that developed through habitual long-term practices of a given community; legal traditions of indigenous communities; and rules developed by other nonstate actors such as professional associations, corporate groups, and international bodies. The idea of **legal pluralism** reflects precisely this multiplicity of legal regimes developed by various actors (state and nonstate) and at different sites (local, national, international). (For more on legal pluralism, see Chapter 5.) The Canadian legal system may be better understood through the lens of legal pluralism.

Law is not a mysterious domain reserved exclusively for lawyers and government officials. Each and every one of us can contribute to the development of the law, but in order to do this, we first need to gain a better understanding of its main structure and characteristics—the issues that this book helps to illuminate. Box 1.1 gives some examples of how some writers have described law.

Box 1.1

Examples of Various Definitions of Law

Thomas Aquinas, *Summa Theologica* (1265–1274): "Law . . . is nothing else than an ordinance of reasons for the common good, made by him who has care of the community, and promulgated."

Sir William Blackstone, *Commentaries on the Laws of England* (1765–1769): "Law, in its most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action. . . . And it is that rule of action, which is prescribed by some superior, and which the inferior is bound to obey."

Black's Law Dictionary (7th edition, 1999): "Law is the regime that orders human activities and relations through systematic application of the force of politically organized society, or through social pressure, backed by force, in such a society."

Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (2012) at 56: Law is "what people view as law. This formulation turns the what-is-law question into a descriptive inquiry concerning which social norms are recognized as authoritative sources of obligation and by whom."

There is no single definition of law. As you can see from the examples in Box 1.1, there are as many definitions as there are theorists. For the purpose of our discussion, it is useful to highlight two ways of characterizing law: a narrow and a broad approach. A narrow approach understands law as a system of prescribed rules. It reflects a more practical orientation of the study of law: we need to know what the rules are in order to identify our rights and obligations, and to know the consequences of our actions and the ways to protect our interests. Much of the discussion in this book is dedicated to this practical information and focuses primarily on the rules created by state authorities.

A broader perspective characterizes law as a process of searching for and formulating principles by which society should operate. It can be viewed as ". . . a social experience that requires us to associate with one another and communicate about how we should best conduct our affairs."[5] Law is not static; it changes and evolves as a result of deliberation and engagement of various actors with the law, including individuals in their everyday activities. Law reflects a particular worldview of a given society and changes along with it. This perspective will be useful for our critical analysis of the law: what objectives does law serve? What should be its objectives? Does it always reflect perspectives of all diverse groups in society? How does it help to ensure legitimacy and accountability of the state and other powerful actors?

2. WHAT ARE THE FUNCTIONS OF THE LAW?

Law performs multiple functions, but we will focus only on the following three:

- establishment and maintenance of order in society;
- promotion of justice and fairness; and
- response to and promotion of social change.

2.1 Order and Regulation

Law establishes rules and parameters of behaviour for individuals, corporations, and the state. It can create incentives to encourage desirable behaviour and impose sanctions to discourage undesirable conduct. Law helps classify human social activities and create rules governing each particular area of those activities.[6] It sets out the scope and limits of state authority. It helps prevent and settle disputes by delineating actors' rights and responsibilities. Law allows us to "speak the same language" in the sense that it creates certain predictable patterns of behaviour: we know what to expect from one another.

The content and underlying rationales of the rules are defined by the nature and worldview of a given society. At a high level of abstraction, we can distinguish two prominent perspectives on society: conflict and consensual. The conflict model relies on the ideas of such philosophers as Thomas Hobbes (1588–1679) and Karl Marx (1818–1883), while the consensual perspective can be identified with the ideas of John Locke (1632–1704), for example.

Hobbes viewed people as selfish and violent. In the "state of nature," an individual's life would be "solitary, poor, nasty, brutish and short."[7] Hence, the purpose of public institutions

and the law would be largely coercive in order to restrict the violent nature of human beings. ***Marx*** also highlighted the oppressive nature of the law, although from a different perspective. He viewed society as consisting of two opposing classes: the bourgeoisie and the proletariat. The bourgeoisie is in the position of power: it holds wealth, controls the means of production, and has political influence. In contrast, the proletariat is in an oppressed position, which the bourgeoisie seeks to exploit in order to gain more from the workers' labour at the lowest cost. In this system, law defined by class division is a tool of oppression in the hands of the rich and powerful bourgeoisie. A Marxist perspective can be applied more broadly to highlight power imbalances and divisions between different groups in society.

In contrast to the conflict perspective, ***Locke*** viewed society as largely peaceful and cooperative. While individuals do agree to cede some of their freedoms to a central authority, such authority does not take a strongly coercive nature.[8] Law is focused on promoting individual rights and interactions rather than stringently controlling human behaviour.

Of course, the conflict and consensus perspectives reflect two ideal types. Hardly any contemporary society can be viewed as reflecting a model based exclusively on conflict or on consensus. Rather, they are located somewhere on the spectrum between the two extremes, often combining both conflict and consensus dynamics. For example, a large part of the history of interactions between the First Nations and settler communities in Canada can be characterized by conflict and oppression. European settlers employed law, among other means, in order to limit the rights of the First Nations communities and suppress their culture, practices, and traditions (see more on this in Chapters 2 and 3). The lack of consideration of the First Nations' interests provoked challenges and resistance from those communities, which periodically erupted in physical standoffs such as those at Oka and Ipperwash. Since the 1990s, government policy has signalled a shift toward a more consensual approach, emphasizing negotiation and reconciliation. For example, negotiation (as opposed to litigation) is considered a preferred approach to resolving land claims (for more on this, see Chapter 3 and the chapter on alternative dispute resolution and restorative justice on the Companion Website). However, conflicts and tensions still exist for a variety of reasons, including protracted and ineffective land claim resolution processes. Thus, current interactions between the First Nations and settler communities can be characterized by both conflict and cooperation.

2.2 Justice

Law is usually considered instrumental in promoting a just society. However, just as there is no single definition of law, there is no single definition of justice. Justice can be viewed as one of the principles used to regulate human interactions and address conflicts. It can take several forms. Here, we will discuss four forms of justice: distributive, corrective, retributive, and restorative.

Distributive justice refers to rules prescribing how resources and entitlements are to be allocated in a given society. The allocation can be made according to various criteria: equality (each citizen gets an equal share), merit, needs, proportion of one's contribution,

or other considerations. The principles of distributive justice can be found in many aspects of law. For example, rules of taxation form part of a system of redistribution of wealth in society. Eligibility criteria for social assistance reflect allocation of supports on the basis of need. Certain rules of contract law (e.g., those that help protect weaker parties from being taken advantage of by more powerful parties) can also be said to help ensure more equal distribution of wealth in society (see Chapter 9).[9]

Corrective justice focuses on remedying inequality that results from wrongdoings or unfair dealings between individual parties. Unlike distributive justice, which deals with issues in society at large, corrective justice is focused on individual interactions. For example, if an individual's property is damaged, the initial equality between the wrongdoer and the victim is lost. A corrective justice approach seeks to restore equality and return the victim to their original position. Corrective justice principles can be found, for example, in tort law (see Chapter 10) and certain aspects of criminal law (e.g., wrongdoers being ordered to pay reparations to victims).

Retributive justice provides a different perspective on how to respond to wrongdoings. It reflects an idea that a wrongdoer should be subject to punishment proportionate to the degree of blameworthiness. The suffering imposed on the wrongdoer is intended to punish and to deter, as well as to advance social objectives such as order, safety, and crime reduction. The ideas of retributive justice are most commonly found in criminal law.

Restorative justice offers yet another approach to addressing wrongdoings. It views an offence as an event that ruins the relationship between a wrongdoer and a victim as well as the relationships within a community. Correspondingly, restorative justice focuses on re-establishing the harmony in these relations through problem solving, dialogue, reconciliation, and forgiveness. The direct communication between the wrongdoer, the victim, and the community is key to the process. Restorative justice is employed in various contexts, including criminal law (e.g., victim–offender mediation, sentencing circles (see the chapter on alternative dispute resolution and restorative justice on the Companion Website)), and national reconciliation in the aftermath of civil wars and widespread human rights abuses.

2.3 Social Change

Law shapes our understanding of what is acceptable, reasonable, and "natural." It influences how we conceive of our rights and interests and ways of pursuing them; how we think of justice and fairness; and where we draw the line between public and private activity.[10] Law is a powerful force that not only establishes parameters for our conduct but also creates a frame of reference for our thinking. Correspondingly, law can play an important role in promoting **social change** (that is, modifications in how individuals interact with each other and the state, how they govern themselves, what values they consider important, and how they organize various activities in public and private spheres).[11]

There is a complex interplay between law and social change. On the one hand, law has to follow changes in society: it reflects society's values and responds to new developments that need a regulatory framework. For example, the expansion of Internet use necessitated

legal regulation of various related issues such as privacy, freedom of speech, electronic commerce, and protection from cybercrimes. On the other hand, law can also help promote changes in society. For example, the adoption of federal and provincial human rights codes can be said to contribute to the strengthening of the overall culture of equality and nondiscrimination. In most cases, however, law can be seen as both a result and a cause of social change. For instance, the recognition of same-sex marriage in Canada can be considered to reflect the growing acceptance of same-sex relationships in society. At the same time, such official recognition can also be seen as strengthening the protection of gay rights and promoting further acceptance of same-sex marriage by the wider public.

3. WHAT VALUES DOES LAW REFLECT AND WHAT VALUES SHOULD IT REFLECT?

This issue has been the subject of extensive and ongoing debate. Chapter 5 provides a more detailed overview of various theoretical approaches to understanding the law. In this section, we will only commence the discussion by raising a few questions: how do we determine what values laws should reflect? Are laws neutral and objective?

Natural law and positivism were among the early theoretical approaches to grapple with some of the above issues. **Natural law** theorists argue that there exist objective, identifiable, "natural values" and that it is these values that must be reflected in man-made laws. If laws are inconsistent with natural law principles, such laws are invalid. For example, criminal laws punishing murder can be seen as reflecting a natural law principle that protects the sanctity of human life. We can expect to find natural law principles universally across all societies, cultures, and historic periods. Now, pause for a moment and think: can you identify any values that can be considered natural values?

You may have named such values as liberty, dignity, or inviolability of the individual person and property. Although we can find the reflection and protection of these values in laws of various societies, the understanding of other natural values may vary from society to society. For example, is adultery a crime? Should gay couples be allowed to marry? Is the death penalty permissible? Even within the same society there may be disagreements as to what constitutes a natural value in these cases. For instance, in relation to assisted suicide, what is the core natural value that should be protected: the sanctity of human life (even where the person does not wish to continue living in extreme pain), or the individual right to choose when and how to die?

Positivism provides a different perspective on law. It focuses on what laws actually say as opposed to their consistency with moral or natural law principles. The validity of the law is not tied to morality, but rather depends on whether it was enacted by a legitimate authority according to a prescribed procedure. Thus, a positivist approach to the issue of assisted suicide would be to examine what laws are in place and how they have been enacted.

The twentieth century (particularly, its second half) saw the development of critical scholarship that started to question the neutrality and objectivity of laws. Among these critical approaches are legal realism, critical legal studies, critical race theory, and feminist

Box 1.2

Law and Its Underlying Values: Examples

Different societies may prioritize different values. For example, Western tradition places paramount importance on individualism, autonomy, and equality. Correspondingly, legal rules focus on protecting individual freedoms and creating preconditions for persons to freely pursue their choices in life.[12] The responsibility for bettering oneself rests with the individual. The law does not define what a good life is and is not intended to ensure that everyone has a good life;[13] it only creates preconditions for individuals to pursue their visions of a good life. We can find these principles reflected in many areas of law: individual rights and freedoms in constitutional law, freedom of contract in contract law, various remedies to protect individual interests and property, and the like.

However, not all cultures place the same emphasis on autonomy, equality, and individualism. For instance, the First Nations legal tradition is more community oriented. Law interwoven with cultural and spiritual practices is seen as a guide for how to live a good life, in harmony with the community and the land. Land itself is considered not merely a resource, but a source of spirituality. It is a part of an interconnected system that is necessary for a community's survival.[14] Control over land is framed not in terms of ownership but rather of trusteeship where the current generation is taking care of the land on behalf of future generations. From this comes the importance of protecting the land from being taken away or being subject to extensive development that can alter a community's way of life. This view often contrasts with Western tradition, which usually views land merely as a resource that can be owned and used for the owner's benefit or general economic development.

studies. The detailed discussion of these approaches is contained in Chapter 5, so here it will suffice to briefly mention only two points. First, these approaches highlight that law must be understood in its broader social context and with the consideration of economic, political, and other factors that influence its content and application. Second, the unequal position of various groups in society impacts their ability to shape the law. Groups that have more power or are more vocal in society have a better chance to have their perspective reflected in legal rules. For example, feminist and critical race theories expose that laws tended to reflect the views and interests of white, middle-class men who dominated legislatures and courts. Thus, in order to identify what values a law reflects, we need to find out how that law came about and what its actual effect on various groups in society is. Box 1.2 gives some examples of law and its underlying values.

4. WHAT ARE THE CHARACTERISTICS OF LEGAL RULES?

In contemporary societies, a variety of rules regulate our conduct but not all of them are legal rules. For example, the rules of etiquette and good manners are not officially prescribed, yet we often feel compelled to follow them. So, what distinguishes legal rules from social norms?

As in relation to other questions discussed in this chapter, there is no universal agreement on characteristics of legal rules. Various theories of law would define somewhat differently what makes a rule legal. For the purpose of our discussion, we will take note of three factors that can help us determine whether a rule is a legal one: how a rule is created; whether it is backed up by a particular authority; and what the "virtues" of legal rules should be.

First, legal rules are created in a particular manner, following a certain process having more or less formality. What process specifically is to be followed depends on a given community and its legal tradition. For example, in Western tradition, norms are created through legislative enactment as well as judicial decision making. In the First Nations communities, they are created through various formal and informal processes, which often involve broad community participation and cultural practices.

Second, legal rules are usually identified with appeal to a particular authority and official recognition of that rule. Some consider that it is the enforcement authority of the state that makes a rule legal. If a legal rule is violated, the offender may be subject to sanctions and/or the victim may turn to authorities to affirm or restore violated rights. In contrast, this is not the case for social norms, for example. However, not everyone agrees that backing by a state authority is an essential element of a legal rule. As briefly mentioned in section 1, legal pluralism recognizes that law may come from both state and nonstate authorities. For example, rules of First Nations communities are not technically backed up by the authority of the state, but they still constitute law and rely on community enforcement.

Third, some theorists identified virtues that legal rules should possess. For example:

- Legal rules should be prospective rather than retroactive. As a matter of fairness, individuals should know the rules in advance in order to be able to make informed decisions about compliance.
- Legal rules should be reasonably constant. On the one hand, laws should not be changed too frequently, but, on the other, they need to be amended from time to time in order to respond to changes in society.
- Legal rules should be intelligible. Individuals should have a reasonably clear idea about what the rule is and what the consequences of a given course of action are.
- Legal rules should be accessible. Individuals should know where to find them and whom to speak to if they have a question about those rules.[15]

5. WHY DO PEOPLE OBEY LEGAL RULES?

Most of the time, people follow legal rules. Why is this so? Is it because they are afraid of being caught and punished? Or because they believe that disobeying the law is morally wrong? Or do they do it out of habit?

All of the above-mentioned reasons may partially explain why people obey legal rules. The threat of sanctions can be a powerful motivator to follow the rules. In fact, the whole of criminal law is based on this presumption. It is often argued that the more severe and